



FWCC

Fiji Women's Crisis Centre

**FIJI WOMEN'S CRISIS
CENTRE SUBMISSION:
ONLINE SAFETY BILL NO.7
OF 2018**

Acronyms

Bill – refers to the Online Safety Bill No. 7 of 2018

Constitution – refers to the Constitution of the Republic of Fiji 2013

FWCC – refers to the Fiji Women's Crisis Centre

UDHR – refers to the Universal Declaration of Human Rights

Unit- refers to the Cyber Crime Unit.

1. BRIEF ON FIJI WOMEN'S CRISIS CENTRE

The Fiji Women's Crisis Centre (**FWCC**) is a human rights organisation, based on the principles as set out in the *Universal Declaration on Human Rights (UDHR)*.

The goal of the Fiji Women's Crisis Centre (FWCC) is to eliminate violence against women in Fiji and the Pacific. FWCC implements this vision through an integrated and comprehensive program designed to prevent and respond to violence, by reducing individual and institutional tolerance of violence against women, and increasing available and appropriate services for survivors.

FWCC addresses the problem of violence against women using a human rights and development framework. This focus on human rights includes a gender and social analysis of the problem and permeates all aspects of FWCC's work, recognising that the root causes of violence against women are unequal gender power relations, and the lack of knowledge and belief in human rights¹.

2. INTRODUCTION

The *Online Safety Bill no.7 of 2018* was drafted to address the issue of cyberbullying². The problem with this Bill is it was rushed with no consultations made prior to the drafting of this Bill and a very short time was given for submissions. We acknowledge that cyberbullying is a real problem in Fiji,³ however existing laws can adequately address this issue if

¹ Fiji National Service Delivery Protocol for Responding to Cases of Gender Based Violence *Standard Operating Procedures for Interagency Response among Social Services, Police, Health and Legal/Justice providers* June 2017, p.5

² Jyoti Pratibha, Thumbs Up for Online Safety Bill, Fiji Sun Online, 16th of March, 2018, <http://fijisun.com.fj/2018/03/16/thumbs-up-for-online-safety-bill/>

"Last night, Mr Sayed-Khaiyum, in a passionate address, implored all Members of Parliament to support the Bill which, once passed, will form an Online Safety Commission. He explained to Parliament that the Bill was a commitment to ensure harmful online behaviour such as cyber bullying, cyber stalking, internet trolling and exposure to offensive or harmful content, particularly in respect of children was clamped."

³ Vijay Narayan, *Investigation underway regarding alleged rape and trafficking photos of 14yr-old student*, Fiji Village.com, 25th of April, 2018. <http://fijivillage.com/news/Investigation-underway-regarding-alleged-rape-and-trafficking-photos-of-14yr-old-student-2rsk59/> (Accessed 26/04/18) and Sheldon Chanel, *Report: Police Investigate Student Sex Video*, Fiji Sun Online, 20th of October, 2017 <http://fijisun.com.fj/2017/10/20/report-police-investigate-student-sex-video/>

the gaps that exists are addressed. This can be done by strengthening the laws to address harms caused by the use of internet technologies.

In Fiji the existing laws are the *Crimes Act 2009*, *Child Welfare Act* and the *Defamation Act*. These legislations can be used to counter the issues of cyberbullying. However, gaps do exist in the legislation especially where postings, emails or texts that involve taunting or teasing or bullying do not fall under any offence. Furthermore the issue with filing cases under the *Defamation Act* is the ongoing and costly legal battles. If we look at Europe, the United Kingdom, Canada and Australia there has been a definitive trend towards relying on and upgrading the existing laws to address cyberbullying.

Cyberbullying should not be used to justify drafting a new legislation. A new Legislation that creates a fear of censorship. It is important that the restrictions are justified. Human rights should apply as much online as offline, and that freedom of expression and privacy should be no exception.

The right to privacy is a fundamental human right and one that underpins human dignity with other key values such as freedom of speech and association. This is recognised under Article 12 of the Universal Declaration of Human Rights (UDHR)⁴, Article 17 of the International Covenant on Civil and Political Rights (ICCPR)⁵ and under section 24(1)⁶ of Fiji's Constitution.

Just like the right to privacy, "Freedom of Speech" is also a fundamental human right. The UDHR provides in Article 19 the right to freedom of opinion and expression. This right includes the use of any form of media of communication that expresses opinions, receive and impart information and ideas without interference⁷. This right supports the freedom of the public to express their opinions and ideas without fear of government retaliation, censorship, or sanction.

As human rights defenders we advocate to promote human rights. We need legislations that are transparent, aligns with good governance, fair

⁴ Universal Declaration of Human Rights <http://www.un.org/en/universal-declaration-human-rights/> (Accessed 25/04/18)

⁵ International Covenant on Civil and Political Rights <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (Accessed 30/04/18)

⁶ Constitution of the Republic of Fiji, <http://www.pacii.org/fj/Fiji-Constitution-English-2013.pdf>

⁷ Ibid4

and does not entertain corruption and the abuse of power. We strive to ensure that the restrictions placed on our rights are justified.

Fiji Women's Crisis Centre submits that the existing laws can be strengthened to address the harm created by cyberbullying. There is no need to introduce a new legislation. However, since this Bill will be passed regardless of our stance on this issue, we wish to submit our proposal on improving this legislation.

This submission outlines our analysis of the Online Safety Bill. Furthermore, it outlines our proposal that ensures our freedoms and rights that are enshrined in Fiji's Constitution is upheld.

3. ANALYSIS OF THE ONLINE SAFETY BILL NO. 7 OF 2018

3.01. GENDER NEUTRAL LEGISLATION

- The Bill is gender neutral and does not specifically address the fact that the victims of cyberbullying are mostly women/girls⁸.
- A gender-neutral approach assumes women and men have the same needs and concerns. However, experience shows that women and men can have different needs and priorities. Therefore, it is prudent that the Bill be drafted in a manner that pays special attention to women, girls and children.
- "Gender-neutral" approaches may be responding more to male priorities than addressing women's needs.
- FWCC acknowledges that victims of cyberbullying are both sexes however most victims are female⁹. This is the reason that we are recommending that the Bill should not be gender neutral and that provisions of the Bill needs to pay special considerations to women and children.

⁸ Ibid2 "Mr Sayed-Khalyum explained that the Bill refers to intimate video recordings especially of women which are later used to bully them. Fiji Sun had ran a series of articles last September where a number of women reached out to us that their naked pictures had been posted on a DropBox and was being circulated online by ex-boyfriends who were out to seek revenge."

⁹ Ibid8

3.02. INTERPRETATION OF THE DEFINITION OF HARM.

- **Section 2.** In this Act, unless the context otherwise requires—
"harm" means serious emotional distress;¹⁰
- There must be a clear, precise and defined meaning of what is harm in the Bill.
- Even though this Bill is designed to target vicious cyberbullying, the definition of "harm" is so broad and vague as it risks limiting our freedom of expression and the important role of the media in our democracy. It can open floodgates in which something that can be legal offline can also be illegal online.
- For instance, a public interest story reveals a dishonest behavior of a politician would be perfectly legal if published in a newspaper, but could be found in breach of the law if posted on that media organisation's website if the politician complains he suffered "harm".
- Furthermore, under this definition our concerns are that victims can be further victimized. For instance if a woman that has fled a violent relationship sends a text to the husband that states she cannot return to a man that behaves like an "**animal**". Then under the current definition of harm the husband can state that the text caused him harm however if she had sent it through a letter then no offence is created.
- We recommend that the Bill provides a clear and precise definition of "harm" by inserting the following:
"Harm means feelings of:
 - a. Fear; or
 - b. panic attacks; or
 - c. Distress; or
 - d. Anxiety; or
 - e. suicidal tendencies; or
 - f. depression;
 - g. cohesive control
 - h. Trauma
 - i. Shame."

¹⁰ Online Safety Bill <http://www.parliament.gov.fj/wp-content/uploads/2018/03/Bill-7-Online-Safety-.pdf>
(Accessed 28/03/18)

3.03. DELAYS IN REDRESS/PROMPT INVESTIGATION

➤ *Section 3(c)*¹¹

- It is important that "**quick**" also be included in this section. Speedy and effective redress may give individuals the confidence to lodge complaints.
- The court system may seem quite complex and may take some time to reach a conclusion. This would dishearten most people to pursue their matter further. Therefore, inserting "quick" creates an obligation on the Courts to conclude cyberbullying cases within a reasonable time.
- Furthermore section 14(2) (g) of the Constitution states that every Accused person has a right to "**have the trial begin and conclude without unreasonable delay**"¹² therefore having quick inserted in the section would ensure due process for Accused persons.
- We recommend that the term "quick" be inserted into the section.

3.04. ONLINE SAFETY COMMISSION

➤ *Section 6*¹³

- The composition of the Online Safety Commission is not clear in the Bill. It is also noted that the hiring and dismissal of the Commissioner is also not underlined in the Bill.
- In addition the legislation gives criminal immunity to the Commission and has no civil remedy for actions taken by the Commission.
- Furthermore, the broad powers of the Commission also creates concerns such as:
 - Censorship over free speech.
 - Invasion of privacy as the Bill gives the power to the Commission to "*do all things necessary for the performance of its functions*"¹⁴. This section allows the

¹¹ Ibid10

¹² Ibid5

¹³ Ibid10

¹⁴ Ibid10

Commission to have access to private emails or messages online from individuals or organisations if they believe it is to be useful for investigations.

- FWCC suggests that instead of creating a Commission, the State just needs to invest and improve on the available institutions that already exists such as the Police force and the Ministry of Education. The process would be more cost effective as well as quicker than compared to setting up a new Commission.
- The Police Force of Fiji has a Cyber Crime Unit that can be tasked with dealing with all cyberbullying reports when lodged with them. This Unit already exists and with proper training they can effectively combat cyberbullying. In addition the Unit can work closely with other institutions such as schools by encouraging them to have prevention education programs on Cyber Bullying.
- In addition Schools should also have obligations under the Bill to address the issues of cyberbullying. The Bill should outline the procedure that the Schools should undertake when a case of Cyberbullying occurs. These procedures should range from reporting to the actions that they can undertake in schools for both the Perpetrator and the Victims.
- Furthermore, instead of having a Commission to decide on cyberbullying cases, FWCC suggests that the Courts are sufficiently equipped to decide on these cases.
- FWCC suggest that the provisions regarding the Commission should be scraped altogether and new provisions be inserted for the strengthening of the Cyber Crime Unit as well as creating responsibilities on Schools on the handling and preventable measures for Cyber bullying. Furthermore the Bill should make provisions for the Courts to hear cyberbullying cases.

3.05. COMMUNICATION PRINCIPLES AND BILL OF RIGHTS

- The legislators in Fiji took a copy and paste approach when drafting this Bill. The Bill almost mirrors that of the New Zealand Harmful Digital Communications Act.

- However the noticeable difference is that the drafters in Fiji left out two key provisions of the New Zealand legislation which were the Communication principles and the obligations on all involved under the Act to have the freedoms and rights enshrined in the Constitution be upheld.
- These communication principles acts a bench mark in determining if a case falls under cyberbullying or not. This would assist the public to distinguish the cases that will fall under this Bill.
- Furthermore, it is vital that when the Courts, police or other institutions performing any function under this legislation that they act consistently with the Bill of rights that is enshrined in our Constitution.
- FWCC recommends that the communication principles be included in the Bill. In addition it must also include that any performance of the functions under this Bill must comply with the rights and freedoms contained in the Constitution of Fiji.

3.06. MANDATORY REPORTING WHEN A CHILD IS A VICTIM

- **Section 13(2)(a)¹⁵**
- The Section limits the parties that can lodge complaints with the Commission when the victim is a child.
- Assuming that our suggestion of scraping the Commission is taken into consideration then it is vital that this section states that the mandatory reporting are to be done to the Cyber Crime Unit in the Police Force.
- In addition, these mandatory reporting obligations should be imposed on those professionals who are listed in the *Child Welfare Act 2010*. These are the police, teachers, doctors, lawyers and social welfare officers.

¹⁵ Ibid10

- These professionals are those that are likely to come across child abuse or child harm in their line of work. Consent should not be required when there is significant concern for a child's wellbeing or a reasonable belief that the child is in need of protection. This aligns with the essence of Section 41 of the *Constitution of the Republic of Fiji* which deals with the rights of a child.
- We recommend that this section be amended to not require a child's consent when it concerns a child victim.
- We also recommend that this section reflects the same mandatory reporting duties by professionals under the *Child Welfare Act 2010*.

3.07. INCLUSION OF GENDER AND SOCIETY

- Section 24(3)¹⁶
- In Section 24(3), it is recommended that gender and society should also be considered as a relevant factor which the court should also consider when determining whether posting an electronic communication would cause harm.
- Another recommendation is that those institutions that are involved with dealing with cyberBullying cases should be gender sensitised and trained by experts. This would ensure that the Commission would be able to respond to victims in a proper manner.

3.12. DUPLICATE CLAUSE

- Section 25¹⁷
- We recommend that this section should be deleted as the definition of 'posts an electronic communication' is inclusive of 'intimate visual recording'. The penalties are the same as in section 24.
- In addition, subsection 3 and 4 must be added on to section 24.

¹⁶ Ibid10

¹⁷ Ibid10

3.13. OBLIGATIONS: ELECTRONIC COMMUNICATION HOST SITES AND SERVICE PROVIDERS

- The Bill is silent on the obligations of electronic communication host sites.
- Fake accounts make it difficult to track the person behind the computer therefore FWCC recommends that these host sites have obligations under the Bill to bring down electronic communications that are causing harm to an individual when ordered by the Court.
- It is also suggested that the Bill make it compulsory for electronic service providers to assist the cybercrime unit by providing can be forced to hand over the name, surname, identity number and address of the person or perpetrator to whom the IP address, email or cell phone number belongs.

PROPOSALS

1. Our first proposal would be to scrape the Online Safety Bill and improve our Crimes Act by :
 - i. Section 4: insert the definition of electronic Communication that is in the Online Safety Bill.
 - ii. Before section 377 insert the following:

Any person who sends to another person—

(a) a letter or electronic communication or article of any description which conveys—

(i) a message which is indecent or grossly offensive;

(ii) a threat; or

(iii) Information which is false and known or believed to be false by the sender; or

(b) any article or electronic communication which is, in whole or part, of an indecent or grossly offensive nature,

is guilty of an offence if the person's purpose, or one of the person's purposes, in sending it is that it should, so far as falling within paragraph (a) or (b) above, cause harm to the recipient or to any other person to whom it intends that it or its contents or nature should be communicated.

2. It is proposed that the following amendments be made;
 - i. The Bill should not be gender neutral and that provisions of the Bill needs to pay special considerations to women and children
 - ii. The Bill provides a clear and precise definition of "harm" by inserting the following:

"Harm means feelings of:

 - a. Fear; or***
 - b. panic attacks; or***
 - c. Distress; or***
 - d. Anxiety; or***
 - e. suicidal tendencies; or***
 - f. depression;***
 - g. cohesive control***
 - h. trauma; or***
 - i. Shame."***

- iii. The term "quick" be inserted into section 3(c).
- iv. FWCC suggest that the provisions on the Commission should be scraped altogether and new provisions improving the Cyber Unit in the Police Force and creating responsibilities on Schools on handling and avoiding cyberbullying. Furthermore have the courts to decide on cases of cyberbullying.
- v. Section 13(2) be amended to not require a child's consent when it concerns a child victim.
- vi. Section 13(2) reflects the same mandatory reporting duties by professionals under the *Child Welfare Act 2010*.
- vii. The legislation clearly outlines what it deems as "responsible online behavior".
- viii. In section 24(3), gender and society should also be considered as a relevant factor which a court ought to consider when determining whether posting an electronic communication would cause harm.
- ix. FWCC recommends that the communication principles be included in the Bill. In addition it must be included that performance of the functions under this Bill must comply with the rights and freedoms contained in the Constitution of Fiji.
- x. Those institutions that are involved with dealing with cyberbullying cases should be gender sensitised and trained by experts. This would ensure that the Commission would be able to respond to a female complaint in the right manner.
- xi. In addition the gender sensitive training should not be done just by anyone. We recommend that FWCC conduct these trainings as we are one of the pioneering organisations and are the experts on gender and gender based violence and human rights in Fiji and the Pacific.
- xii. The defenses listed in section 25 (3) and (4) be added as defences to section 24.
- xiii. Section 25 should be deleted as the definition of "posts an electronic communication" is inclusive of "intimate visual recording". The penalties are the same as in section 24.
- xiv. The electronic communication host sites have responsibilities that can pull down offending posts when the court orders.
- xv. The Bill make it compulsory for electronic service providers to assist the cybercrime unit by providing can be forced to hand over the name, surname, identity number and

address of the person or perpetrator to whom the IP
address, email or cell phone number belongs.

BIBLIOGRAPHY

- Constitution of the Republic of Fiji, <http://www.paclii.org/fj/Fiji-Constitution-English-2013.pdf>
- Fiji National Service Delivery Protocol for Responding to Cases of Gender Based Violence *Standard Operating Procedures for Interagency Response among Social Services, Police, Health and Legal/Justice providers* June 2017, p.5
- *HARMFUL DIGITAL COMMUNICATION ACT 2015*
<http://www.legislation.govt.nz/act/public/2015/0063/latest/DLM5711810.html?src=qs>
- INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS
<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>
(Accessed 30/04/18)
- Jyoti Pratibha, Thumbs Up for Online Safety Bill, Fiji Sun Online, 16th of March, 2018, <http://fijisun.com.fj/2018/03/16/thumbs-up-for-online-safety-bill/>
- ONLINE SAFETY BILL No. 7 of 2018 <http://www.parliament.gov.fj/wp-content/uploads/2018/03/Bill-7-Online-Safety-.pdf>
- Sheldon Chanel, **Report: Police Investigate Student Sex Video**, Fiji Sun Online, 20th of October, 2017 <http://fijisun.com.fj/2017/10/20/report-police-investigate-student-sex-video/>
- Universal Declaration of Human Rights <http://www.un.org/en/universal-declaration-human-rights/> (Accessed 25/04/18)
- Vijay Narayan, **Investigation underway regarding alleged rape and trafficking photos of 14yr-old student**, Fiji Village.com, 25th of April, 2018, <http://fijivillage.com/news/Investigation-underway-regarding-alleged-rape-and-trafficking-photos-of-14yr-old-student-2rsk59/> (Accessed 26/04/18)



Save the Children

SAVE THE CHILDREN FIJI SUBMISSION- ONLINE SAFETY BILL 2018

Introduction

Save the Children Fiji (SC Fiji) is a child rights organisation, established in Fiji in 1972, with a core focus on advancing children's rights in accordance with the United Nations Convention on the Rights of the Child (UNCRC). We are a non-political organisation that continues to be dedicated to driving positive change for children across the region.

SC Fiji acknowledges the special mention with regards to Children in the Online Safety Bill 2018 (Bill No. 7 of 2018), it shows commitment to the access of appropriate information and taking pro-active steps to protect children from harmful materials, Background 1.0 (1.1)

SC Fiji takes this opportunity to submit herein our analysis and recommendations in response to the proposed Online Safety Bill 2018 ((Bill No. 7 of 2018), (hereafter "the Bill") with emphasis to sections Section 2 (harm), Section 3 (a, b, c), Section 4, Section 9 (2), Section 17 (a), Section 23 (a) (b), Section 24 (Offences).

Issues of Concern

1. Section 2 ("harm") means serious emotional distress;

SC Fiji highlights its concern with the definition of 'harm' and requests for the definition to be extended to more than just emotional distress, taking into consideration e-communication to cause physical, verbal, psychological, sexual harm, possible grooming and sexual exploitation. This will ensure that 'harm' is clearly defined in educational and awareness raising materials in addressing responsible online behavior and online safety in relation to children. The harm should also be verified by a registered psychologist (child) or specialist in their field. It cannot be left to general feelings for fear of abuse.

2. Section 3 (Objectives) (a, b, c)

Objectives; (a) promote responsible online behaviour and online safety;

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

(c) providing an efficient means for redress for such individuals

SC Fiji is concerned that the structure and implication of the Online Safety Bill 2018 seems to be more focused to "(c) providing an efficient means for redress for such individuals" as opposed to preventative measures as stated in (a) and (b).

SC Fiji recommends that to ensure same priority is given to objectives (a) and (b), there should be an inclusion of compulsory educational programs and mandatory safeguarding training in schools for teachers and students. Article 3 of the Convention on the Rights of the Child, requires that the "Best Interest of the Child" be of outmost consideration in all actions concerning children. It is therefore in the best interest of the Child for (a) and (b) to be given the same careful consideration and attention in this Bill as (c) is. This is to ensure that the voice of children is not subsumed by processes, rather there is a genuine intention within this law to better safeguard and protect children from online vices.

SC Fiji wishes to highlight that the Ministry of Education's, National Substance Abuse, Advisory Council (NSAAC) are already conducting such awareness in schools and therefore would be better placed to be further supported for the promotion and education rather than a separate commission responsible for this role.

SC Fiji suggests that as the target for responsible online behaviour is children, as stated in the background note 1.1, that the current systems within the Ministry of Education and the law enforcement agencies that already have established structures would benefit with more resourcing in strengthening current promotion initiatives on responsible online behaviour. This also includes the Sexual Offences Unit within the Fiji Police Force who have been identifying and assisting in the investigation of crimes against children, including the Cyber Crime Unit.

This new Bill will need proper education of Children and therefore should be included in the Ministry of Education's curriculum to ensure compulsory education within the systems already in place. Cyberbullying within schools can be more effectively addressed if teachers are supported better.

3. Part 2: Section 6 (1) This section establishes the Online Safety Commission

SC Fiji is concerned that appointment of the Online Safety Commission may overlap with other line ministries including the Ministry of Women, Children and Poverty Alleviation and the Fiji Police Force. SC Fiji understands that under the Crimes Decree 2010, the Fiji Police Force have legal functions and powers in conducting investigations and incriminating individuals, therefore, having a separate commission overlaps with established systems already in place. In our work on promoting child's rights and responsibilities in schools, we need to ensure that teachers and other Child Protection actors are supported to ensure that children and adults are aware of alignment to the local legislative protective systems for children within line ministries such as the Constitution 2013 (41), Child Welfare Decree 2010, Domestic Violence Decree 2009 and other Child Protection legislation. Therefore, existing ministries and bodies battling for limited resources to promote and protect child rights can utilise the already scarce resources of the state that would otherwise be spent establishing an Online Safety Commission.

4. Section 9 (2) Regulation of its own procedures

SC Fiji recommends for these procedures to be clearly defined, this should not be overreaching and wide. Rather should be clearly defined to avoid abuse of powers.

Section 14 (1): The Commission may investigate a complaint lodged under section 13.

SC Fiji recommends one of the options for the Commission should be to file a criminal complaint with the police.

5. Section 17 (a) an individual who alleges that he or she has suffered or may suffer harm as a result of an electronic communication.

SC Fiji is concerned that 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 by the individual. For children, this may imply that any allegations that an individual may deem 'that he or she has suffered or may suffer harm' is upon their own interpretation.

Additionally, the rights and responsibilities of children:

- In its current draft, this Bill does not consider Children's rights to an opinion and for the opinion to be seriously considered in laws that affect them (Article 14 of the UNCRC);

- Also, Article 12 of the UNCRC provides that a child may bring legal proceedings. This should also be considered in light of this section 17 of the Bill.
- In addition, should a child be convicted of a crime, the Bill does not provide any consideration for Rehabilitation.

SC Fiji recommends that there is a need for interagency collaboration for the implementation of this Bill rather than a separate Commission. SC Fiji also recommends for the definition of "harm" to be defined and children's right to an opinion be considered in the Online Safety Bill 2018.

6. Section 23, Non-compliance with court order

SC Fiji is concerned that in the case the person convicted is a child who does not have earning capacity, the Bill needs to specify who will be liable for the actions of the child – that is, are the parents liable to pay?

SC Fiji urges the Commission under the Bill to consider any other safeguards or measures such as community work or other rehabilitation for a child found guilty of offences under this Bill. This would be in accordance with Article 40 of the UNCRC.

7. Section 6, (24) Part 4 Offences

(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

SC Fiji is concerned that the above clauses are very generalised and may almost allow for any interpretation including that any negative opinions of someone (including a child) or institution may be deemed as harmful and may be liable for conviction of persons. SC Fiji recommends that the above clauses have explicit definitions.

As a Child Rights Organisation, SC Fiji is of the view that Children and young people use the media as a strong advocacy tool. Therefore, the Bill must ensure that participation and freedom of expression for children under the United Nations Convention on the Rights of the Child (UNCRC) is still upheld and promoted and not suppressed in the endorsement of the Online Safety Bill 2018.

Our concerns also are on child offenders. The bill is almost silent when a child is the offending party. Yet it requires a fine not exceeding \$20k etc. See Section 24 (2). Therefore, SC Fiji is of the view that this provision is not child friendly and that appropriate recourse and redress should be within this provision to cater for child offenders.

In conclusion, SC Fiji recommends that Powers and Monies relegated to the establishment of the Online Safety Commission may be diverted to the current systems that are already established with regards to children for instance, the Child Welfare Decree 2010 which includes mandatory reporting. The review of the law under Section 26 and the composition of the Commission if established should include key child- rights stakeholders. Alternatively, an advisory body composing of key child rights stakeholders should be able to provide advices to the Commission on all matters relating to children under this new law.

Consumer Council of Fiji

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18 April 2018

The Chairperson
Parliament Standing Committee on Justice, Law and Human Rights.
P.O Box 2352,
Government Buildings
Suva.

Dear Chairperson,

RE: A Submission to the Standing Committee on Justice, Law and Human Rights of the Parliament of the Republic of Fiji on the Online Safety Bill 2018.

Greetings from the Consumer Council of Fiji.

Please find attached the Council's submission on the Standing Committee on Justice, Law and Human Rights of the Parliament of the Republic of Fiji on the *Online Safety Bill 2018*.

We sincerely hope the issues raised in the submission will be given a favourable response.

We would be happy to provide further clarifications should this be required.

Yours Sincerely,

.....
Premila Kumar
Chief Executive Officer
Consumer Council of Fiji

A Submission to the
Standing Committee on Justice, Law and Human Rights
Of the Parliament of the Republic of Fiji on
the *Online Safety Bill 2018*

April 2018

1.0 Role of Consumer Council of Fiji

The Council has statutory obligations under the Consumer Council of Fiji Act 1976 to “to do all such acts and things which it may consider necessary or expedient to ensure that the interests of consumers of goods and services are promoted and protected.” The Council is also obliged to advise and make recommendations to the Minister responsible for consumer affairs in Fiji or any other Minister on issues affecting the interests of consumers. The Council is a key stakeholder in the formulation of policies, legislations and standards in the country. The Council being the frontline or first point of contact for consumer grievances, has a strong mandate from consumers to express their viewpoints on issues affecting them.

The Council wishes to make a submission to the Parliament Standing Committee on Justice, Law and Human Rights on the *Online Safety Bill 2018* (Bill No. 7 of 2018). The Council sincerely hopes that the issues raised are given due consideration in the interest of justice and fairness for consumers.

2.0 Background

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 – this means the number of people accessing the internet will have grown by a third in just five years.

Apart from being a convenient and instantaneous medium for the communication and exchange of important personal and 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.

Despite being a small nation, Fijian consumers now have access to modern communications technology. Many can view the world with a click of a button on their electronic gadgets without realizing that there are risks for every click. Consumers’ personal sensitive information can be shared online if such information lands in wrong hands.

3.0 Internet usage trends

Looking at the trends, there is no dispute that we are digitally connected with the rest of the world. Based on the International World Statistics (IWS), 72 % men and 76 % women are users of social networking sites globally. (Statistics monkey, 2015)

In Fiji, the number of users increased from less than 10% in 2006 to almost half of the population (46.5%) in 2016 (see Table 1). This is a conservative figure and it may increase as the total 2017 data is yet to be finalized. So, there are more than 420,000 internet users in the country. There are also an estimated 380,000 Facebook users in Fiji. Mobile cellular subscriptions are over 116 per 100 inhabitants. It is indisputable that the majority of internet users in Fiji access websites and social media platforms through their mobile phones. And these trends will continue as 4G and 4G+ network coverage continue to expand and as the population of users increases.

Table 1: Based of the International Telecommunication Union (ITU) statistics, the table below shows the percentage of individuals using the internet in Fiji

| Year | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 |
|------|------|------|------|------|------|------|------|------|------|------|------|
| Fiji | 9.6 | 10.9 | 13.0 | 17.0 | 20.0 | 28.0 | 33.7 | 35.2 | 37.4 | 42.5 | 46.5 |

Source (Statistics monkey, 2015)

4.0 Problems with Social Media

In a *Fiji Times* report (02/04/15) an 18-year-old Lautoka student committed suicide after being a victim of cyberbullying perpetrated through a 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.

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.

Unfortunately, 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 on defamation on social media. Defamation on social media cannot be disguised as freedom of speech.

5.0 Current Online Security Laws/Policies in Fiji

There are no specific laws that cover cyberbullying and fake news in Fiji. It is equally important to note that defamation laws that govern mainstream media like print, broadcast etc. can also be used when looking at cases of defamation in social media. For example, the case of Emosi Radrodoro vs Ellen Whippy-Knight where defamatory and false statements were published on the social media platform (Facebook) was heard in the Court.

There is nothing in the *Crimes Act 2009* that covers defamation because it is a civil action and not a criminal action.

The *Defamation Act 1971* must be reviewed as a matter of urgency and the specific issues related to electronic communication or internet must be addressed. It is important to include the liability of internet service providers (ISPs); liability of website owners for the content published on their sites; social media page/group administrators; and limitation periods for liability.

6.0 Online Safety Bill

The Council supports the need to have laws to protect public whether one is online or offline. It is unacceptable and unfair that defamation online or social media is treated as freedom of speech or expression whilst for defamation in mainstream media, the law protects the victims. The Council believes that the *Online Safety Bill* when acted and implemented will address inconsistencies that exist between defamation in mainstream media and social media.

7.0 Strengths of the *Online Safety Bill 2018*

- The fact that we now have a specific law that deals with harassing/intimidation/trolling/and exposure to offensive and harmful content shared via the internet and other electronic media is a positive development. This will assure protection for internet users against online defamation, harassment, invasion of privacy and other harmful actions. Through this law, harmful content that causes mental anxiety, shame, suicidal and hopelessness, will be dealt with by providing redress for victims and creating awareness on the subject. It also has the potential of empowering users to use the internet responsibly and for productive purposes. . It will also be a deterrent to the public exchange and spreading of harmful online information, images and other content.
- A strength of the Bill is that it is not only confined to children as per Clause 13 and Clause 17.
- The Bill allows for a monetary compensation to be awarded to the victims of harmful online behaviour, as stipulated in Clause 22.
- Offences have reasonable penalties that corresponds with the severity of the offence. For example, Clause 24 (2) (a) states that a person who commits an offence under subsection (1) is liable upon conviction to pay fine up to \$20,000 or imprisonment for a term up to 5 years or both.

8.0 Problems with *Online Safety Bill 2018*

- The *Online Safety Bill 2018* is trying to address the problems but not the root cause of the problem? How will this Bill address the use of fake profiles to defame individuals?
- The processes must clearly articulate the nature of proceedings, whether it is Civil or Criminal. This should also be able to demarcate the circumstances where the proceedings will be at the disposal of the Commission or the Court. For instance, Clause 24 stipulates imprisonment as a Penalty, which is an outcome of a criminal proceedings.

The law should be able to define what actions will be considered in criminal proceedings, and what would be considered in civil proceedings. Also, it should clearly outline if the Commission has any powers to prosecute a criminal action in the Courts.

- The Bill defines the Functions of the Commission in Clause 8 (e). It states that the Commission is *to investigate complaints and seek to resolve such complaints, as appropriate*; it however does not state or specify how the Commission is to resolve those complaints. The use of the phrase '*as appropriate*' is **too broad and vague**.

9.0 Current Practice in New Zealand

The Bill is similar to the law enacted in New Zealand known as the *Harmful Digital Communications Act 2015*. However, there are some differences in the Fiji version that need to be reviewed to avoid confusion in the future.

- The New Zealand law clearly outlines in Section 16 the **mode of hearing and evidence**.
- The NZ law specifically states how complaints will be resolved, that is, *to use advice, negotiation, mediation, and persuasion (as appropriate) to resolve complaints*.
- Section 15 of the NZ law establishes the procedures of an application for an order. Subsection 3 clearly states that *No filing fee is payable for an application*. This is absent in the proposed Fiji law. Any form of fees should be discouraged in the Fiji set-up to ensure that breaches against online safety principles are brought to light and dealt with accordingly.
- Part 2 of the NZ law state the Amendments to the existing laws as part of the introduction of the online safety laws. This is to ensure that rules are aligned for better synchronicity and harmony in the laws.

Several laws amended in this regard are the *Crimes Act of 1961*, *Harassment Act 1997*, *Human Rights Act of 1993*, and the *Privacy Act 1993*.

10.0 Current Practice in Australia

The structure of the law currently practiced in Australia is quite different, as it is more comprehensive.

- The *Enhancing Online Safety Act 2015* begins by clearly **defining the parameters of what online safety means in the context of the law in Part 1**, sets out the role of the **Safety Commissioner in Part 2**, and then outlines the **procedures of dealing with issues arising out of online safety complaints in Parts 3, 4, and 5**.
- Part 4 of the Australian law defines Social media services and gives powers to the Commissioner to receive applications for **Registration and declaration** of a particular social media service as a Tier One or Tier Two categories, and in it defining the category requirements. It also outlines the basic requirements that need to be satisfied by social media services in order to protect and maintain safe online practices. For example, *Section 21 (1) (a) the service's terms of use must contain: (i) a provision that prohibits end-users from posting cyber-bullying material on the service;*
- Part 5 and 6 of the Australia law highlights the instruments and enforcement, and it clearly outlines the instruments of enforcement at the discretion or disposal of the Commission.

The Australian law is clear that **proceedings are Civil in nature** as the instruments available are *social media service notice, end-user notice, formal warning, civil penalty, enforceable undertakings, and Injunctions*.

- The Australian law clearly outlines Terms and Conditions of Appointment, Resignation, and Termination of the Commissioner in Part 7. This ensures transparency and independence of the Commissioner.
- Specific mention is Part 8 of this law that stipulates the operation of an Online Safety Special Account for the administering of funds that promotes and enhances online safety in Australia.

A similar set-up should be considered in the Fiji context to ensure that funds derived from proceedings are actually channeled into activities that help further enhance the work in this field.

11.0 Recommendations

The Council submits the following recommendations based on the discussions in the preceding Sections:

1. The Law must specify how the Commission will resolve complaints and matters. In its current form, the Bill only states *as appropriate*.
2. The complete process of Commission's complaints handling should be clearly outlined.
3. Education and awareness about online media literacy, privacy issues and responsible online behaviour should begin in schools. Policymakers should consider how this could be effectively incorporated into the school curriculum so that children and youths are trained to responsibly deal with fake news and harmful online content.
4. ISPs, social media site owners and social media page/groups administration should exercise corporate social responsibility to ensure safer and fairer digital platforms. They could do this by advising consumers and also incorporating strong responsibility clauses in customer contracts (i.e. both for end-users and businesses). The same goes for owners and operators of websites and social media sites. Social media page/group administrators need to be transparent, moderate their pages/group effectively and able to filter out harmful content. ISPs should also be involved in any national or community effort to address cyberbullying. For example, internet providers can sponsor messages about cyberbullying and fake news, or put messages on their own websites, in their advertisements, etc.
5. It is to be noted that children who are below 18 can be mischievous and careless and they can be both victims and perpetrators. In such situation children need appropriate counselling and parental guidance.
6. It is important to develop Regulations where different type of offence have different type of punishment based on the nature of offence such as counselling; corrective measures; categories of fines; categories of compensation and ultimately imprisonment.

PART 2

1.0 Introduction

The Consumer Council of Fiji, after a comprehensive review of the *Online Safety Bill 2018* submits the following concerns:

1.1 Clause 7:

“The funds of the Commission comprise—

- (a) all monies lawfully received by the Commission under this Act or any other written law;*
 - (b) all monies appropriated by Parliament for the purposes of the Commission; and*
 - (c) all other monies lawfully received by the Commission.*
- (2) The financial year of the Commission is aligned to the Government financial year.”*

Concern: The provisions in Clause 7(1) (a) and (c) are repetitive in nature.

Recommendation: It would be viable to remove Clause 7(1) (c) to avoid any confusion.

1.2 Clause 8 (e):

“The Commission has the following functions...

- (e) to investigate complaints and seek to resolve such complaints, as appropriate...”*

Concern: The above provision does not contain the process involved in resolving the complaints.

Recommendation: The complaints may be resolved by way of mediation and/or negotiation by the Online Safety Commission.

1.3 Clause 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.*

(2) Subject to the provisions of this Act, the Commission may regulate its own procedures.”

Concern: The above clause does not provide the redress that would be provided by the Commission to the aggrieved parties.

Recommendation: Specific provisions on the types of redress provided by the Commission must be provided for clarity purposes.

1.4 Clause 14 (1) and (2):

“The Commission may investigate a complaint lodged under section 13.

- (2) An investigation under this section is to be conducted as the Commissioner thinks fit.”*

Concern: There is no indication on the requirements for the investigation to be carried out. This does not set out the criteria that will be used to conduct investigations objectively

Recommendation: The provision should contain a set of criteria or rules within which the investigations need to be carried out to prevent subjective decisions.

1.5 Clause 14 (3) (a):

“Upon investigation of a complaint, the Commission may seek to resolve the matter, as appropriate...”

Concern: The provision does not contain the specific mechanism that will be used to resolve the matters or disputes.

Recommendation: The section needs to be clear on the systems and processes used to resolve disputes and/or complaints.

1.6 Clause 16:

“16. (1) Subject to the approval of the Minister, the Commission may delegate to any person any of its functions or powers except this power of delegation.

(2) Before delegating any function or power, the Commission must be satisfied that the delegate has the appropriate knowledge, skills and experience to carry out those functions or powers.

(3) A delegation—

(a) must be in writing;

(b) is subject to any restriction or condition specified by the Commission;

(c) is revocable in writing at any time; and

(d) does not prevent the performance of a function or exercise of a power by the Commission.

(4) A person performing any delegated function or exercising any delegated power may perform and exercise them in the same manner and with the same effect as if the function or power had been conferred directly by this Act and not by delegation.

(5) A person who acts under a delegation given under this section is presumed to be acting in accordance with its terms in the absence of evidence to the contrary.”

Concern: There is no specific grounds on which the powers can be delegated and which institutions or persons can the powers be delegated to.

Recommendation: The provision should contain the basis on which the powers could be delegated.

1.7 Clause 17:

“Any of the following may apply to the court to issue an order under section 22—

- a) an individual who alleges that he or she has suffered or may suffer harm as a result of an electronic communication;*
- b) a parent, legal guardian or representative on behalf of an individual if the individual is a child or a person suffering from mental incapacity, as the case may be;*
- c) the school principal or head teacher of a registered school, or his or her delegate, if the individual is a student of that school who consents;*

- d) *the Commission on behalf, and with the consent, of an individual if the individual has lodged a complaint under this Act; or*
- e) *the police, if the electronic communication constitutes a threat to the safety of an individual.”*

Concern: The section does not contain the circumstances under which the persons can apply for a court order. The steps to matters at the Online Safety Commission and court proceedings are not clear.

Recommendation: There should be clear steps on the matters handled by the Commission and the court proceedings.

1.8 Clause 22:

The court may, on an application made under section 17, make the following orders...

- (b) an order that a correction be published;*
- (c) an order that an apology be published...”*

Concern: The above provision does not include the modes for the publishing the correction or ‘apology’.

Recommendation: Correction and apology must be published in the same mode as the electronic communication was initially made by the offenders.

.....The End.....

NGO Coalition on Human Rights

Towards a Fiji that respects and protects human rights

NGOCHR Online Safety Bill (2018) Submission

Introduction

The NGO Coalition on Human Rights ("**the Coalition**") is a coalition of civil society organisations that works towards a Fiji that respects and protects human rights and fundamental freedoms within the framework of the rule of law.¹

The Coalition acknowledges the State's proposed Online Safety Bill 2018 (Bill No. 7 of 2018) ("**Bill**") and welcomes the opportunity provided by the Justice, Law & Human Rights Standing Committee to present a submission. While the Coalition recognises the need for such legislation, we submit herein suggestions for the improvement of the principle act highlighting issues and recommendations for both the proposed Bill and the Principle Act.

The Coalition takes this opportunity to submit herein our analysis and recommendations in response to the proposed Bill.

Issues of Concern

1. Guiding Principles

The Coalition notes efforts by government to promote the responsible use of online platforms to ensure online safety and deter harm to individuals through electronic communications with the proposed Online Safety Bill 2018. The Coalition also notes the establishment of the Online Safety Commission ("**Commission**") set up to receive and investigate complaints and provide the means of redress.

Despite these efforts, the Coalition is strongly concerned with the lack of guiding principles in the Bill to define and determine the scope of powers and discretion of the Commission when receiving, assessing and investigating complaints. The Coalition understands that the provisions of the Bill is the direct reflection of New Zealand's Harmful Digital Communications Act 2015 however a few provisions have been removed. A key provision in the New Zealand Act that has been removed in the proposed Bill is the ten Communication principles ("**principles**"). These principles establish that the digital communication should not:-

- a) disclose sensitive personal facts about an individual;

¹ The Fiji Women's Crisis Centre, Fiji Women's Rights Movement, Citizen's Constitutional Forum, FemLink Pacific, Ecumenical Centre for Research and Advocacy, Drodrolagi Movement are members of the NGOCHR. Pacific Network on Globalization, Social Empowerment and Education Program, Haus of Khameleon and Diverse Voices and Action for Equality are observers.

- b) be threatening, intimidating, or menacing;
- c) be grossly offensive to a reasonable person in the position of the affected individual;
- d) be indecent or obscene;
- e) be used to harass an individual;
- f) make a false allegation;
- g) contain a matter that is published in breach of confidence;
- h) incite or encourage anyone to send a message to an individual for the purpose of causing harm to the individual;
- i) incite or encourage an individual to commit suicide; or
- j) denigrate an individual by reason of his or her colour, race, ethnic or national origins, religion, gender, sexual orientation or disability.²

The purpose of these principles is to set the tone and be the underlining guide for the Commission to consider when exercising their powers under the Act.

The functionality of the Commission will greatly be affected by not having the stated principles. It is firstly needed to ensure that the public would be able to understand which type of complaints the Commission will consider otherwise the Commission will become inundated with complaints. If there isn't a description of types of complaints then the public would post possibly offensive electronic posts without knowledge that they have committed harm. Hence if there are no specific terms to what may constitute an offensive electronic post both the Commission as an investigative body and public would be disadvantaged. Furthermore since there are no principles establishing what specifically constitutes harmful digital communication there are no specific limitations created for free speech.

The Coalition notes Section 24(3) of the Bill states factors **the Court** would use to determine whether an electronic communication would cause harm. However **the Commission cannot** use the same factors to investigate if persons intended to cause harm.³ The Commission should have its own set of principles as the investigating body. The factors set in Section 24(3) of the Bill are for the Court specifically to establish a burden of proof to find guilt based on evidence.⁴ If the Commission would use the factors from Section 24(3) of the Bill then it would liken itself to an adjudicating body which would render the need for Court redundant.⁵

² Harmful Digital Communications Act 2015, Section 6(1)

³ Harmful Digital Communications Act 2015, Section 24(3)

⁴ Ibid

⁵ Ibid

Having said this it is commendable that the Bill has incorporated factors that would help a Court establish guilt. This decision must be made by a judge who must apply the principles of natural justice and consider a range of sensible contextual factors under Section 24(3), including whether the communication was true, the conduct of the parties and the vulnerability of the victim.⁶

Secondly the Commission will function successfully knowing the type of complaints which it would have to investigate. These principles would allow the Commission to investigate more accurately which would make it more efficient in its public service. Hence it is practically needed to allow the Commission to function well.

Lastly without these principles we can foresee legal challenges for the Commission. For instance if there are charges to be brought pursuant to Section 24 of the Bill, the Commission cannot bring these charges properly without knowing how the individual has caused harm.⁷ The perimeters set by the principles would justify if the individual intended to cause harm. The Commission's sole discretion should not be used to determine harm as this is too broad and furthermore could change with time. Hence there needs to be certainty and consistency within the law.

2. The Bill's effect on Constitutional Rights

Under the Bill, the key offences prescribed are; causing harm by posting electronic communication and posting an intimate visual recording. The coalition acknowledges the efforts of the State to deter the posting of intimate visual recordings by members of the public and to take the offenders to task under the proposed Bill. Having said this, the coalition is concerned in relation to the offence of causing harm by posting electronic communication. Taking into consideration that harm is only defined as causing serious emotional distress and is subjective to the complainant. The coalition strongly feels that section 24 of the Bill will create an atmosphere of censorship amongst the people of Fiji.⁸ There will be fear amongst the people in terms of the content they post. Section 17 of the Constitution guarantees the citizens of Fiji with freedom of speech, expression and publication and as stakeholders we must ensure that the freedoms under the Constitution are upheld.⁹

As such having the guiding principles explain "what is a harmful electronic communication" is necessary. As stated earlier due to the lack of guidelines the powers of the Commission to entertain a complaint are very broad. As such there are not sufficient protections in the Act to stop any unjustified uses of the law to attack legitimate speech. The strongest of the Commission's powers is to issue notices pursuant to Section 14(3) (b) of the Bill. This is concerning as the Commission has its own discretion to issue such notices to remove speech published electronically. As such the issuing of notices should be based on sufficient explanation that can be derived from legislation, which the Bill currently lacks. Therefore it is imperative to incorporate the stated principles to form part of the Bill.

⁶ Online Safety Bill 2018 (Bill No. 7 of 2018), Section 24

⁷ Harmful Digital Communications Act 2015, Section 24

⁸ Online Safety Bill 2018 (Bill No. 7 of 2018), Section 24

⁹ Constitution 2013, Section 17

The Bill also does not mention the need to protect content that is newsworthy or in the public interest. This is necessary to scrutinize public and private institutions. This should be considered as an additional factor for consideration by the Commission and the Courts.

Furthermore, the Bill would provide limitations to the right of privacy. The Commission pursuant to Section 9 of Bill:

- (a) would have powers to request for information from accused individuals to assist in any assessment or investigation of a complaint;
- (b) invite experts for assessment and investigation of the complaint; and
- (c) to do all thing necessary for the performance of its functions.¹⁰

These are very specific powers the Commission has to acquire an individual's private digital information. Additionally the Commission upon receiving such information may invite experts for the assessment of the complaint. As such third parties could also be privy to an accused's private information. The right of privacy maybe breached to conduct appropriate investigations however the **same must be shown to be acceptable in a free and democratic society, and to be proportionate to the public interest aim**. This has been thoroughly discussed by the Judiciary in the cases of Attorney General v Yaya [2009] FJCA 60; ABU0037.2007 (9 April 2009) and Ambaram Narsey Properties Limited v Khan [2000] FJLawRp 5; [2000] 2 FLR 69 (2 November 2000).

As such any investigation by the Commission must bear the said principles in mind.

3. Issues with interpretation

The Coalition notes that the Bill is based on the New Zealand legislation Harmful Digital Communications Act 2015. Although the legislation has proven to be somewhat successful in enforcement whereby the New Zealand law society noted that by the end of 2016, 89 charges were laid under the legislation and 7 people were jailed, there has been controversy in terms of interpreting the meaning of harm. In the case of Police v B [2017] NZHC 526 a man posted pictures of his former partner in her underwear, the case against him was dismissed because the Court held that the Complainant had not met the threshold of establishing harm she had suffered. The case was subsequently appealed and the decision of the District Court was quashed and a retrial was ordered. The appellant High Court Judge made the following comment "...the District Court approached the issue by isolating the various descriptions of how the complainant felt, rather than—as required—assessing the evidence in its totality."¹¹ As such the Coalition is concerned as to how the element of "harm" would be interpreted within our context and how it would affect the outcome of the cases.

¹⁰ Online Safety Bill 2018 (Bill No. 7 of 2018), Section 9

¹¹ Cyber Law two years on, not without controversy, 2017 <https://www.lawsociety.org.nz/news-and-communications/latest-news/news/cyber-law-two-years-on,-not-without-controversy>

Recommendations

4. The Coalition strongly recommends that the proposed Bill include the ten Communication principles in the Harmful Digital Communications Act 2015 of New Zealand. To have the set of principles included in the proposed Bill would assist the Commission and the Court to exercise caution when handling cases and safeguarding the right to freedom of expression.
5. The Commission's right to request for private information may be needed for investigations. However investigations must be done with caution, in particular the investigations **must be acceptable in a free and democratic society, and to be proportionate to the public interest aim**. The commission cannot simply request for all or any private information without sufficient cause. Hence there needs to be strong ethical standards set for the Commission's investigations.
6. The case of Police v B [2017] NZHC 526 should act as a reminder that there would be "teething problems" whilst the Judiciary interprets new legislation. In particular the Judiciary would need time to reach consensus on the correct interpretation of harm. Having said this it would be prudent that judicial officers be provided workshops to highlight the correct interpretations of harm.
7. The State will have to invest funds into establishing a Commission whereas there already exists a Cybercrime Unit which is part of the Police force. They have personnel who can investigate harmful electronic posts and bring appropriate charges. The Cybercrime Unit should receive the investment that the State will give to establishing a Commission. Hence instead of a separate commission there should be an increase in resources and support for the Cybercrime Unit of the police force.



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11 April 2018

Dear Honourable Ashneel Sudhakar,

Re: Submission on the Online Safety Bill (Bill No. 7 of 2018)

Please find attached the submission from the Office of the United Nations High Commissioner for Human Rights (OHCHR) on the *Online Safety Bill (Bill No. 7 2018)*

OHCHR would be available for any future engagement regarding the submission and would like to thank the Standing Committee on Justice, Law and Human Rights, Parliament of Fiji for the opportunity.

For further information, please contact on Phone: 3310 465.

Yours sincerely,

Chitralekha Massey
Regional Representative for the High Commissioner in the Pacific

Honourable Ashneel Sudhakar
The Chairperson
Standing Committee on Justice, Law and Human Rights
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**SUBMISSION TO
STANDING COMMITTEE ON JUSTICE, LAW & HUMAN RIGHTS,
PARLIAMENT OF FIJI
ON
THE ONLINE SAFETY BILL 2018 (BILL NO.7 OF 2018)**

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

I. INTRODUCTION

The Office of the United Nations High Commissioner for Human Rights (OHCHR) presents its submission on the Online Safety Bill 2018 (Bill No.7 of 2018), referred to hereinafter as “the Bill”.

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

II. BACKGROUND

On 15 March 2018 a motion was put forward in Parliament to refer the Online Safety Bill to the Standing Committee on Justice, Law and Human Rights before it is tabled in Parliament’s next sitting. The Bill seeks to promote online safety to cater to the increase of reports on harmful online behaviours such as cyberbullying, cyberstalking, Internet trolling and exposure, particularly in the case of children, to offensive or harmful content.

III. LEGAL FRAMEWORK

Article 19 of the Universal Declaration on Human Rights (UDHR) as well as Article 13 of the Convention on the Rights of the Child (CRC), ratified by Fiji in 1993, protects everyone’s right to seek, receive and impart information and ideas of all kinds, irrespective of national boundaries and via any form of media.

The Human Rights Committee, commenting on the almost identical Article 19 of the International Covenant on Civil and Political Rights (ICCPR) has stated that “(11) ... This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20. It includes political discourse, commentary on one’s own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. It may also include commercial advertising. The scope of paragraph 2 embraces even expression that may be regarded as deeply



offensive, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.

(12) Paragraph 2 protects all forms of expression and the means of their dissemination. ... They include all forms of audio-visual as well as electronic and Internet-based modes of expression.”¹

Under international law, restrictions on the right to freedom of expression must generally be provided by law and be necessary for “the rights or reputations of others” or “for the protection of national security or of public order (ordre public), or of public health and morals”. Permissible restrictions on the Internet are the same as those imposed on offline media.² To satisfy legal requirements, it is insufficient for restrictions on freedom of expression to be formally enacted as domestic laws or regulations; such restrictions must be sufficiently clear, accessible and predictable.³

Furthermore, as has been noted by the Human Rights Committee, “[r]estrictions must be ‘necessary’ for a legitimate purpose. ... Restrictions must not be overbroad” and “must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected...”⁴ “[T]he value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.”⁵

In the present context, it is also important to recall the observations of the Human Rights Committee concerning defamation laws: “Defamation laws must be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of expression. All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification. At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice. In any event, a public interest in the subject matter of the criticism should be recognized as a defence. Care should be taken by States parties to avoid excessively punitive measures and penalties. ... States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.”⁶

IV. MAIN CONCERNS

1. The central term of the Bill is “harm”, which is defined as “serious emotional distress” (Clause 2). Considering the fact that serious legal implications—ranging from investigations by a public Online Safety Commission to content restriction

¹ CCPR/C/GC/34.

² A/HRC/17/27.

³ CCPR/C/GC/34.

⁴ CCPR/C/GC/34 and CCPR/C/21/Rev.1/Add.9.

⁵ CCPR/C/GC/34.

⁶ Ibid.



orders and even criminal prosecution (see below for further details)-- are linked to this term, the definition is **too vague and broad**. For example, news reporting about corruption could clearly cause emotional distress to persons whose acts are being revealed by the reporting. Strong public criticism of public officials could potentially be seen as liable to causing serious emotional distress. Similarly, minority opinions and expressions concerning religious beliefs may have a strong emotional effect on certain people. Prohibiting and even criminalising such legitimate expression does not pursue a legitimate goal as required by international human rights law.

The Bill must define more clearly what is considered to be emotional distress and the point at which serious emotional distress is reached. The current definition **may thus be considered as not being in compliance with the principle of legality**.

2. **Clauses 6 through 16 establish an Online Safety Commission** (hereinafter: Commission) and specify its functions, powers and applicable procedures. The Commission may, among other things, investigate and resolve complaints in relation to electronic communication that causes or intends to cause "harm" (Clause 8(c) and (e)). **"Electronic communication" is defined very broadly** and encompasses a wide range of communicative acts using electronic means from private emails and text messages to public messages in social media.

The Commission has the power to do all things necessary for the performance of its functions (Clause 9(1)(c)). In particular, the Commission may request the **removal of the electronic communication** and may apply to the Court for further action to be taken.

This gives rise to concern:

- 2.1 As removal would be based on the **vaguely defined term "harm"**, calling into question conformance with the principle of **legality**.
- 2.2 **No barriers are in place to shield certain communications** from being subject to removal requests. In particular, the Bill fails to provide for any measures to protect truthful communications, the public interest, news reporting, artistic expression, expressions of honest opinions based on facts, or untrue statements about public figures that have been posted in error but without malice. This renders the Commission's powers **disproportionate**.
3. **Clause 17 through 23 specify court proceedings in relation to electronic communications that cause or may cause "harm"**.
 - 3.1 **Clause 17 stipulates who may initiate proceedings under the Bill**. However, the provision is poorly drafted. **Clause 17(b) and (c) fail to make reference to any harmful act of which individuals may be the victim**, thus leaving the door open to potential complaints on behalf of a broad range of individuals.
 - 3.2 **Clause 22 stipulates that the Court may order to (a) remove or disable "the relevant communication", (b) publish a correction, (c) publish an apology, (d) refrain from sending similar communications, (e) not engage in any conduct which is the subject of the complaint, and (f) pay monetary compensation or damages**.
 - 3.3 **This raises the same concerns as outlined above under 2.**

4. **Clause 24 (1) stipulates that the posting of an electronic communication constitutes a criminal offence if: (a) done with the intention to cause “harm” to another individual, (b) would cause “harm” to an ordinary reasonable person in the position of the individual concerned, or (c) it causes “harm” to another individual. The offences under Clause 24 are punishable by up to 5 years’ imprisonment and/or a fine of up to USD 20,000 if the offender was an individual, or up to USD 100,000 if the offence was committed by a body corporate. Moreover, a director, chief executive officer, manager or officer in charge may be punished by a fine of up to USD 50,000 and/or imprisonment of a term of up to 7 years (Art. 24(2)).**

Clause 24 of the Bill gives rise to several concerns.

- 4.1 First of all, it may criminalise legitimate expression based on the **subjective element of “harm”**, defined as “serious emotional distress” (see above).
- 4.2 Clause 24 potentially covers **defamatory** acts. It is to be recalled that the Human Rights Committee, the Human Rights Council, and Special procedures of the Human Rights Council have urged States to consider the decriminalisation of defamation and underscored that the application of criminal law should be reserved only for the most serious of cases and imprisonment is never an appropriate penalty, and disproportionate fines should be totally excluded for offences such as defamation.
- 4.3 While the enumeration of factors that may be taken into consideration to determine if an electronic communication would cause “harm”, includes the context and the truthfulness or falsehood of the communication (Clause 24(3)), truthfulness as such does not seem to be an absolute defence. Moreover, the **Bill fails to contain any protections for communications** that are in the public interest, news reporting, artistic expression, expressions of honest opinions based on facts, or untrue statements about public figures that have been posted in error but without malice. This renders Clause 24 **disproportionate**.
- 4.4 Furthermore, **Clause 24(1)(a)** is problematic insofar as it criminalises the posting of electronic communication with the intention of causing “harm”, even when no actual harm is caused. The combination of the vague term “harm” or “serious emotional distress” with the subjective element of “intention” renders this clause quite **unclear** and its actual field of application **unpredictable**. Its compliance with the legality requirement is therefore questionable.
- 4.5 **Clause 24(1)(b)** goes a step further, enabling enables the criminalisation of acts that **neither cause actual “harm” nor are undertaken with the intention to cause “harm”**. It is likely that this clause would fail to pass the proportionality test.
- 4.6 According to **Clause 24(1)(c)**, a person posting an electronic communication commits an offence merely by causing “harm” to another person, **irrespective of the former’s intentions or any breach of a duty of care**. The person posting the communication thus runs the risk of particularly sensitive persons’ being affected by their communication. For



example, posting evidence of violence might lead to the exposure of children to such evidence, thus causing them emotional distress, even if the person posting the communication happens to use an age-restricted platform. As a consequence, the formulation of Clause 24(1)(c) may have a dampening effect on legitimate expression, rendering the clause disproportionate.

- 4.7 In order to ensure compliance with international human rights law, it would be preferable if Clause 24(1) required both actual harm and an element of fault on the part of the perpetrator.
- 4.8 Moreover, it should be verified to determine whether punishments prescribed in Clause 24 are more severe than those for **comparable offline offences**. There are no grounds to support stricter punishment of particular acts simply because they happen to be carried out via electronic means.
- 4.9 Finally, the Bill fails to differentiate between **acts committed by children** and those committed by adults. Thus, it is possible for children to face the same severe punishment as adults. This may be in conflict with Art. 3 of the CRC, according to which "in all actions concerning children, whether undertaken by ... courts of law, ... or legislative bodies, the best interests of the child shall be a primary consideration." Moreover, it is another indication of disproportionate limitation on the right to freedom of expression.

- 5. Pursuant to **Clause 4**, the Bill applies to the whole of Fiji and any acts, omissions, or matters outside Fiji. There seems to be no requirement that there be a connection between acts covered by the Bill and Fiji, in particular there are no limitations as to the nationality or location of either the perpetrator or victim of acts covered by the Bill. Irrespective of the the practical challenges this would pose to a Fiji authority or judge, the degree of seriousness of the acts addressed by the Bill does not justify such broad **extraterritorial jurisdiction**.

V. CONCLUSIONS

The Bill does not seem to comply with the State's obligation to promote and protect the right to freedom of expression. The lack of a clear definition of "harm" coupled with the power of the Commission and the Court to order content removals and the threat of harsh criminal sanctions result in the danger that the Bill could be used to suppress the sort of criticism and dissent which are essential to a democratic society. At the very least, the Bill may produce a dampening effect on freedom of expression, including criticism of the Government, on news reporting, and on the expression of unpopular, controversial or minority opinions.



ONLINE SAFETY BILL 2018

(BILL No.7 of 2018)

A SUBMISSION BY THE PACIFIC CENTRE FOR PEACEBUILDING

The Pacific Centre for Peacebuilding (PCP) takes this opportunity to firstly commend the Fijian Government for their effort in devising a method to attempt to deal with a difficult online legal subject. Nevertheless, the Online Safety Bill, to say the least, is a controversial law which has received its fair share of criticism in the past weeks since its introduction in Parliament in March. We highlight below some pros and cons of the Online Safety Bill.

INTRODUCTION

Internet Users in Fiji were reported at 380,125 as of November 2015, so the Online Safety Bill seeks to promote online safety for 41.8% of the population.¹ It seeks to promote online safety to cater to the increase of reports on harmful online behaviors such as cyber bullying, cyber stalking, internet trolling and exposure to offensive or harmful content, particularly with respect to children.

The Bill according to the Parliament of Fiji website seeks to increase awareness of and education on responsible online behavior and the use/sharing of personal information. It also provides an avenue that individuals, parents, legal guardians or representatives of individuals adversely affected by the on-line content can take, to have their concerns dealt with. Furthermore it will deter irresponsible and harmful online behavior.²

ADVANTAGES OF THE ONLINE SAFETY BILL 2018

Protection of women, children and disadvantaged groups from acts of violation and online abuse.

As well as the protection of both individuals and businesses from defamatory activities that have the tendency to "spread like wildfire" throughout the internet. Defamatory activities that may not cause actual physical harm but can cause significant emotional and psychological harm, which in turn may impact on issues such as mobility, employment and public participation which are equally important factors to address.

Provides a definition of the criminal offence that is not covered under section 336 of the Crimes Act 2009 that looks specifically at computer offences. This is particularly

¹ <https://internetworldstats.com/sp/fi.htm> : accessed 17/04/18: 12.15pm

² www.parliament.gov.fj/wp-content/uploads/2018/03/Ad-Call-for-Submissions-Online-Safety-Bill-2018.pdf



important as far as criminal law is concerned for it is based on proving elements of an offence beyond a reasonable doubt.³

Generally the bill makes up for the deficiencies of the Crimes Decree pertaining to the prosecutorial and procedural requirements to name a few.⁴

DISADVANTAGES OF THE ONLINE SAFETY BILL 2018

Freedom of Speech- that the Bill is widely drafted is indeed evident through the interpretation of what constitutes as "*posts an electronic communication*"— (a) *means 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.

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. As Fijians are just months away from national elections, this Bill will remove a safe space where open communications could occur. People will no longer be able to confidently enjoy the freedom of exchanging information and it would also suppress people from being communicative and expressive; changing the way information is dealt with especially during this crucial time. The absence of a platform for this 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 titled- Objectives 3. The objectives of this Act are to— (a) promote responsible online behavior and online safety; (b) deter harm caused to individuals by electronic communications; and (c) provide an efficient means of redress for such individuals. 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.

Funding and Functions of the Commission- 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 as we know it is already under-resourced, so why not divert funds to an

³ https://www.diplomacy.edu/sites/default/files/IGCBP2010_2011_Tamanikalwalmart.pdf: Accessed: 18/04/18:12.30am

⁴ Ibid



already existing unit that already has a wealth of experience in dealing with online matters that have a criminal element.

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. We encourage the establishment of a working group 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.⁵

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.

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

ONLINE SAFETY BILL

(Bill No.7 of 2018)

Submission to the Parliamentary Standing Committee on Justice, Law and Human Rights

1st May 2018

Freedom of speech, expression and publication is not an absolute right and consistent with international human rights law (Articles 19 and 20(2) of International Covenant on Civil and Political Rights), the state has a constitutional obligation to authorize justifiable limitations in the interests of the protection and maintenance of the right to reputation, privacy, dignity, the right to be protected against advocacy of hatred including hate speech on any of the prohibited grounds of discrimination prescribed under section 26 of the Fijian Constitution, the rights of persons injured by inaccurate or offensive media reports to have a correction published on reasonable conditions established by law and the responsibility of preventing attacks on the dignity of individuals, groups of individuals, or respected offices or individuals in a manner likely to promote ethnic or religious ill will or oppression of or discrimination against any persons or groups of persons.

Infraction of the right to privacy through the disclosure and abuse of personal data, cyber bullying and circulation of intimate visual recordings including images of victims of violence and unforeseen tragedies and calamities including those of children, the surge in advocacy of hatred through speech acts that are unabashedly misogynist, homophobic, racist and exploit communal differences cannot under any circumstances be justified as legitimate democratic dissent through the exercise of freedom of expression. **They all constitute 'harm' well beyond the narrow definition of "serious emotional distress". It constitutes an assault on human dignity and the deprivation of the right to reputation and privacy and the right to be free from hatred.**

Given the speed and scope of the social media, criminally punishable content is not being deleted in a timely manner or not deleted at all, let alone the possibility of a retraction. In a fundamental sense, we are failing in our constitutional responsibility of preventing attacks on human dignity regardless of race, religion, sexual orientation and other prohibited grounds of discrimination, privacy and the right to

reputation. Therefore, a legislative action that strikes a careful balance between the legitimate interests of freedom of expression and the protection of reputation including the prevention from attacks on dignity and hate speeches with minimum legal ambiguity is necessary. Minimum legal ambiguity is critical in drawing distinctions between expressions that clearly constitute a criminal offense, expressions that may not be criminally punishable but may justify civil proceedings and expressions that may not attract criminal, civil or administrative sanctions but still raises concerns about the rights of others and legislation must be weighed against the following safeguards: (1) Is the limitation prescribed by law? (2) Does the limitation pursue a legitimate aim? (3) Is the limitation necessary in a democratic society? (4) Are the limitations proportionate to the aim pursued?

The Online Safety Bill, through the establishment of an Online Safety Commission, sets out a transparent redress mechanism for those that are most vulnerable and susceptible to abuse and violence on the social media including children and those who suffer from mental incapacity. Under section 17 of the Bill, the following can apply to the court for an order:

- a) an individual who alleges that he or she has suffered or may suffer harm as a result of an electronic communication;
- b) a parent, legal guardian or representative on behalf of an individual if the individual is a child or a person suffering from mental incapacity, as the case maybe;
- c) the school principal or head teacher of a registered school, or his or her delegate, if the individual is a student of that school who consents;
- d) the Commission on behalf, and with the consent, of an individual if the individual has lodged a complaint under the Act; or
- e) the police, if the electronic communication constitutes a threat to the safety of an individual.

Once in receipt of a complaint, the Online Safety Commission after carefully considering the threshold for proceedings pursuant to section 18 of the Bill may refer matters to the court for proceedings and under section 22 of the Bill, the courts can make the following orders:

- a) an order to remove or disable the relevant electronic communication;
- b) an order that a correction be published;
- c) an order that an apology be published;
- d) an order that the respondent not send similar communications to the applicant or encourage any other person to send similar communications to the applicant;
- e) an order that the respondent not engage in any conduct which is the subject of the complaint; or
- f) such other orders, including payment for monetary compensation or damages as the court deems just and appropriate in the circumstances.

The Commission under section 15 of the Bill may refuse to investigate or cease an investigation if the Commission considers that the subject matter or the nature of complaint is unlikely to cause harm to any person or that the complaint is frivolous or vexatious or that any further action is unnecessary or inappropriate. Section 18 (2) also confers powers to the court to dismiss applications made under section 17 on its own motion if it considers the application to be frivolous or vexatious or may dismiss an application made by the police on its own motion under section 18 (3) if the court is satisfied, having regard to all the circumstances of the case, that the application should be dismissed.

Non-compliance with a court order is an offence under the Bill and an individual can be fined up to \$5,000 or imprisonment for a term not exceeding 6 months or both and in the case of a body corporate a fine not exceeding \$20,000 and for a director, chief executive officer, manager or officer in charge to a fine not exceeding \$10,000 or to a term of imprisonment not exceeding 1 year or both.

The offence of causing harm by posting electronic communication is liable upon conviction in the case of an individual to a fine not exceeding \$20,000 or imprisonment for a term not exceeding 5 years or both and in the case of a body corporate, a fine not exceeding \$100,000 and for a director, chief executive officer, manager or officer in charge to a fine not exceeding \$50,000 or to a term of imprisonment not exceeding 7 years or both.

Section 24 (3) of the Bill establishes very clear criteria for the court to consider in determining whether posting an electronic communication would cause harm:

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

Posting of intimate visual recording

Section 25 (1) of the Bill provides that a person must not post or threaten to post an intimate visual recording of an individual. An individual who commits an offence by contravening the provisions of this subsection can be fined up to \$20,000 or imprisonment for a term not exceeding 5 years or both and in the case of a body corporate a fine not exceeding \$100,000 and for a director, chief executive officer, manager or officer in charge a fine of not exceeding \$50,000 or to a term of imprisonment not exceeding 7 years or both.

It is imperative to note that section 25 (3) provides that subsection (1) does not apply if the individual who is the subject of the electronic communications concerned consents to the specific post of the intimate visual recording but consent as articulated under 25 (4) must be “voluntary, expressed, and informed and does not include the consent of a child”. **A further distinction must be made between consent to record and consent to post those recordings.**

So is Fiji an exception or have other constitutional jurisdictions considered the regulation of social media?

Germany and the regulation of social media

On 7 July 2017, the German Parliament passed an Act¹ establishing an intermediary liability regime that not only requires the removal and blocking of what its criminal code defines as “clearly violating content” and “violating content” within time periods of 24 hours and 7 days respectively but also imposes penalties of up to 5 million Euros

¹ NetzDG

for these transgressions attracting criticism from human rights groups such as Article 19.

Responding to the criticism that legislation is tantamount to the 'privatization of censorship', the Federal Government has argued that the States' duty to protect victims of hate speech and criminal attacks on the internet and the obligations of platform operators to remove illegal content is consistent with international law and that legislation enforcing the respect for the law with regard to privacy, anti-discrimination and protection against crime should not be equated with censorship.

The Act, which regulates the obligation of platform operators in relation to the complaints against illegal content, is premised on the argument that the same rationale must apply to social networks and that the proportionality of the fines does not hold much ground considering that fines are not applied to individual posts but only where a provider fails to properly organize a compliance system or to fulfill the reporting or supervising obligations. Fines are determined according to individual cases and subject to judicial review, which includes a proportionality test. Alluding to the fact that platform operators make serious profits, the Federal Government has also argued that fines must also consider the economic potential of the offender.

While recognizing the importance of anonymity for freedom of expression, the Federal Government has argued that states have the right to put limitations on the right to anonymous expression where necessary to achieve legitimate objectives combating hate speech and holding those who post criminal content to account. They have cited the case laws from the European Court of Human Rights that has made it abundantly clear that hate speech is intolerable in a democratic society.

The primary opposition to the Act emanates from concerns that the German Criminal Code uses broad concepts of hate speech, criminal defamation, insult and prohibitions in relation to "defamation of religion". The other apprehension emanates from the deputizing of private companies to engage in censorship based on the Criminal Code on the grounds that the obligation to remove or block content without any determination of the legality of the content by a court and the failure on the part of companies and social networks to

understand the complex jurisprudence on freedom of expression. The other criticism of the Act by human rights groups was that the Act provides no recourse to users whose content has been blocked or deleted unfairly.

Similarly, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression in his 2011 recommendation on intermediary liability recommended that:

“To avoid infringing the right to freedom of expression and the right to privacy of internet users, the Special Rapporteur recommends intermediaries to: only implement restrictions to these rights after judicial intervention; be transparent to the user about measures taken, and where applicable to the wider public; provide, if possible, forwarding to users before the implementation of restrictive measures; and minimize the impact of restrictions strictly to the content involved. Finally, there must be effective remedies for affected users, including the possibility of appeal through the procedures provided by the intermediary and by a competent judicial authority”.

Should intermediaries or platform providers enter the protocols of the Bill to ensure greater online safety, the Online Safety Commission must use its mandate under section 8 (b) of the Bill to “organize awareness and education programmes, including the provision of online safety material”. The Human Rights and Anti-Discrimination Commission can also assist the Online Safety Commission with this particular mandate by drawing on international best practices as articulated in the Camden Principles on Freedom of Expression and Equality and the Rabat Plan of Action.

Jurisdiction

The ubiquitous nature of cyber space and the blurring of territorial, geo-political and societal boundaries often raises jurisdictional questions when it comes to the regulation of social media. In other words, is it possible to institute legal proceedings and hold individuals to account if they have posted damaging materials about you but operate in another country?

The recent case of *Dow Jones v. Joseph Gutnick* in which Australia's high court has ruled that the financial publishers Dow Jones can be

sued in the Australian state of Victoria over an article that appeared on their website in United States sets an important precedent.

The primary judge held that the Australian Court had jurisdiction to try the matter. The case was appealed in the court of appeal of victoria and to the High Court of Australia and the subject of debate before the High court of Australia was where the alleged defamatory material was published? Was it published in Victoria? Dow Jones argued that the article was published in New Jersey because the server is maintained in the US and therefore an Australian Court could not assume jurisdiction over the matter.

The High Court of Australia held that the Australian Court had the jurisdiction to try an action for defamation concerning an article, hosted at the servers of Dow Jones in the United States. The Court held that the law of defamation seeks to strike a balance between, on the one hand, the society's interest in freedom of speech and the free exchange of information and ideas and on the other hand, an individual's interest in maintaining his or her reputation in society, free from unwarranted slur or damage.

The majority judgment further held that those who post information on the social media do so knowing that the information is available to all, without geographical restrictions. The Court further held that defamation is to be located at the place where the damage to the reputation occurs. It was in the place where any person downloaded the defamatory material that the damage to reputation could be done. Following this principle, the court held that an action for damages for defamation could be continued in Australia against a US web site.

Conclusion:

The clamor for civil and political rights through freedom of expression must be balanced with the imperative to protect our constitutional right to dignity, privacy and reputation, including the right to be free from the advocacy of hatred. It is time that Fiji considers a legislation that promotes online safety.

Ashwin Raj

Director, Human Rights and Anti-Discrimination Commission

ONLINE SAFETY BILL

Media Watch Group submission to the Parliamentary Standing Committee on Justice, Law & Human Rights

Media Watch Group stands by the right to responsible free speech for Fiji's citizens and all efforts must be made to safeguard this.

This is a fundamental component of a truly democratic society and is a must for a developing island nation as ours in this growing digital age.

This issue is at the heart of the work of Media Watch Group and we strongly oppose any attempt that threatens to undermine responsible free speech in any way.

Responsible free speech allows a democratic society to voice opposition against any government plan that may be detrimental to taxpayers in any form.

It is the cornerstone of a democratic society

We have seen the power of responsible free speech in recent months.

When government announced plans for a celebration party after COP23, a petition launched on social media opposing a party while victims of Cyclone Winston were still living in tents influenced the decision not to spend money on celebrations.

In the recent case of a foreign ship spilling oil into the harbour, it was on social media that a concerned citizen, Alex Campbell, who witnessed what happened, posted about it and started a chain of events that led to the ship owner being fined.

MWG advocates for communication rights and media literacy and we believe changes need to be made to the Online Safety Bill before it is returned to parliament,

We believe that in its current form the Bill is very unclear and murky and that the parliamentary standing committee should be given more time to have thorough and wider consultations.

The Bill does not define responsible online behaviour and as we head to the polls this year, it is absolutely justified for any political party or voter to be jittery that free speech online is at risk.

The fine line of balance is a grey area and that grey area is determined by the State.

The Bill must properly define emotional distress or the process of determining the seriousness or not of the distress.

Untruthful information is where responsible media rights is required.

Prohibiting the posting of truthful information is a denial of communication rights as it is the denial of the people's right to freedom of responsible expression and an impingement of the people's right to accessing responsible communication

MWG reiterates earlier submissions before this committee that this Online Safety Bill adopts the communication principles from the New Zealand Harmful Digital Communications Act 2015 to strengthen what responsible online behaviour means in the Bill.

While this Bill purports to protect minors, there will be situations, as has been very recently highlighted in New Zealand media where minors can also commit online offences.

MWG, in its role to educate and advocate for media literacy and the right to responsible communication, works closely with the Cyber Crime Investigations Unit under the Fiji Police Force to ensure the message gets across loud and clear.

We do school visitations together

Now this bill proposes a commission whose functions seem to duplicate the roles and functions administered by the Cyber Crime Investigations Unit, which already receives and investigates complaints on online crimes.

Instead of another such commission, the Government should bolster this unit with more resources. It has the experience, technical resource and staff and has registered more than 100 cases since its inception.

There should be wider public consultations across the country on this proposed bill as more and more citizens across all walks and ages from rural to urban communities are engaged in digital media communities online.

Online safety will be guaranteed if the recommendations put before this committee is adopted.

And it will ensure one of the cornerstones of our democracy continues to thrive into the future for the next generations to learn from and live their lives.

Vinaka

MWG

On what basis can we seek resolution when the perceived rights of two individuals or groups violate one another?

“Strengthening rights is dependent on strengthening the connections, conceptually and behaviorally, between rights and responsibilities.”

ARTHUR J. DYCK, *RETHINKING RIGHTS AND RESPONSIBILITIES: THE MORAL BONDS OF COMMUNITY* (2005)

Fiji Media Watch Group work is based on two important visions; one ‘MEDIA LITERATE SOCIETY’ and two ‘A RESPONSIBLE MEDIA ENVIRONMENT’. Accordingly, FMWG supports the introduction of such laws and the underlying objectives under section 3.

A Responsible Fiji Media Environment

We propose that a **Communication Principles** is inserted in the law such as those contained in the New Zealand Harmful Digital Communications Act 2015. Such principles include:

- (1) Principle 1 A digital communication should not disclose sensitive personal facts about an individual.
- (2) Principle 2 A digital communication should not be threatening, intimidating, or menacing.
- (3) Principle 3 A digital communication should not be grossly offensive to a reasonable person in the position of the affected individual. Reprinted as at 1 March 2017 Harmful Digital Communications Act 2015 Part 1 s 6 5
- (4) Principle 4 A digital communication should not be indecent or obscene.
- (5) Principle 5 A digital communication should not be used to harass an individual.
- (6) Principle 6 A digital communication should not make a false allegation.
- (7) Principle 7 A digital communication should not contain a matter that is published in breach of confidence.
- (8) Principle 8 A digital communication should not incite or encourage anyone to send a message to an individual for the purpose of causing harm to the individual.
- (9) Principle 9 A digital communication should not incite or encourage an individual to commit suicide.
- (10) Principle 10 A digital communication should not denigrate an individual by reason of his or her colour, race, ethnic or national origins, religion, gender, sexual orientation, or disability.

FMWG strongly advocates for the insertion of these important communication principles as it clearly articulates how a media passive user should act responsibly. These principles if considered must be consistent with the rights and freedoms contained in the 2013 Constitution Bill of Rights.

At its present for, the Bill is more like a **master** whose dictatorial commands undermines any chances of creating a harmonious relationship deemed a necessary ingredient for fostering **progress** and **development**. Leaving aside questions of “substance” of the purported law – customary rules, principles, remedies – attention diverts to how *these* can be framed and expressed in terms giving comprehensiveness and effective workability in a culturally diverse society such as ours.

On the promotion of Media Literate Society-

Fiji Media Watch Group has been conducting media literacy to various organization and groups in Fiji through Religious Organization, Women and Youth Groups and noted that people are passive users of the Media. Hence we support clause 8 in the draft Bill however to include Approved Agency in the substance of the Act so that Courts or the Commission may delegate its functions on literacy programs, independent investigations which is further explained under paragraphs 2.8 – 2.11 and 2.12 in the Explanatory Notes.

Offences – Part 4

The inclusion of the various Communication Principles above would rightly justify holding a person responsible for breach of such laws.

Clause 24 (2) provides punitive measures for corporate bodies however there seems to be some disconnections in the substance of the draft Bill and the punitive measures being meted out. There is no mention of Corporate Bodies in the main Bill and how their involvement in such breach is defined unless they are considered an ‘on-line content host’.

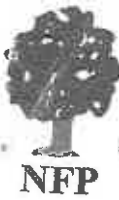
COMMENTS ON THE ON- LINE SAFETY BILL

| Sec | Comments | Recommendation |
|------------|---|--|
| Clause 15 | Part 1 Preliminary <i>Commission may refuse to Investigate</i> <ul style="list-style-type: none"> The name of the Bill is a positive one in 'on-line safety' (even though the body does not contain the positivism) and this clause goes against the name of the Bill | Complaints the Commission can not investigate? |
| 1(2) | Part 1 Preliminary <ul style="list-style-type: none"> <i>The Act comes into force on dates appointed by the Minister by notice in the Gazette</i> | |
| 2 | The concept of <i>agent</i> is introduced in the body of the Bill (section 10) but the term <i>agent</i> is not defined | |
| 2 | <i>Definition</i> <i>Harm means serious emotional distress</i> <ul style="list-style-type: none"> What is the test for emotional distress How is serious classified differently from not serious or not so serious | The test for seriousness of the distress is in 23 (3) (a) to (g) Emotional distress has to be defined or the process of determining the seriousness or not of the distress should be made known – the personal characteristics, beliefs and character? |
| 2 | <i>'Intimate visual recording(a)(i)(A) female breasts exposed'</i> <ul style="list-style-type: none"> The Constitution provides for non-discrimination on the grounds of sex and sexual orientation Is the exposure of transgender breast also protected? | Rephrase and expand the meaning of exposure |
| 2 | <i>'Posts and electronic communication' (a)(i)any information, whether truthful or untruthful, about an individual</i> <ul style="list-style-type: none"> The right to privacy is well established in the Constitution at section 24(1) with the exceptions and limitations at section 24(2) There is no need to protect privacy again Nevertheless, defamation charges are revoked when the defendant can prove truth in the alleged subject of defamation In the case of HIV and AIDS, PLWHIV are placed under special protection because of the effect of discrimination and stigma on the PLHIV owing to the characteristics of the virus A lot of what happens in Fiji (Government, public officers, people of high caliber, etc) would have not been known to the public if it was not because of social media | Untruthful information is where responsible media rights is required. Prohibiting the posting of truthful information is a denial of communication rights as it is the denial of the people right to freedom of responsible expression and an impingement of the people's right to accessing responsible communication |

| | | |
|-------|--|--|
| | <ul style="list-style-type: none"> • The watchdog role is to conduct investigative media reporting as the 4th arm of Government • Putting everyone under protection is another form of media gag in the electronic arena and is an addition to the gag in the mainstream print, audio and visual media | |
| 3 | <p>(a) <i>Promote responsible online behavior and on line safety</i></p> <ul style="list-style-type: none"> • An examination of the body of the Bill shows not much sign of the promotion of responsible behavior • Punishing bad behavior can be the promotion of good behavior as they are 2 totally different concepts. Punishing bad behavior is a deterrent that has had is effectiveness and efficiency questioned in many aspects • Despite the name, the body of this Bills is only comprised of deterrent and punitive provisions | There has to be specific acts mentioned that are rewarded that promote responsible and safe behavior together with the deterrent and punitive provisions |
| 6(5) | <p><i>The Commissioner is entitled to such remunerations and allowance as determined by the Minister</i></p> <ul style="list-style-type: none"> • The reason why there is a democracy and the rule of law is to have one rule for all and all for one rule and the process is that discretion is reduced to a bare minimum • This Minister is giving him/or herself the rights to hire and fire and also how much to pay • There is a great likelihood of the absence of independence of the Commissioner from the Minister | |
| 9(1)© | <p><i>To do all things necessary for the performance of its functions</i></p> <ul style="list-style-type: none"> • The reason for legislating laws comes under the principle of the rule of law where every citizen is able to access the laws of the land that are written in simple clear terms • This Bill lacks this as it tends to bring a custom from court proceedings where there is judicial notice of unspoken subjects. • To grant the Commission to do all things necessary without the qualification of 'according to law' is a dangerous and wrong precedence that has been a subject of many allegations | The doing of all things necessary has to be qualified according to law |
| 11 | <p><i>con.Adentiality</i></p> <ul style="list-style-type: none"> • The word that has been used is confidentiality • The use of such new and big word like | Is this a typo? Otherwise, confidentiality suffices |

| | | |
|-------------|--|-----------|
| | 'adentiality' is unnecessary and irresponsible for it is the purpose of legislation to make the law simple | |
| 12 | <i>Protection from liability</i> <ul style="list-style-type: none"> • Indemnity | Indemnity |
| 13 | <i>Complaints lodged with the Commission</i> <ul style="list-style-type: none"> • The harm to be complained about is in the future • The terms used are intended to cause or likely to cause • Is there a provision to cater for complaints that has caused harm? • When it has caused, is the harm caused only once or otherwise? • It is inconsistent with section 17 (a) | |
| 15 | <i>Commission may refuse to investigate</i> <ol style="list-style-type: none"> Unlikely to cause harm <ul style="list-style-type: none"> ○ Define unlikelihood? ○ Note that harm not fully defined as to its seriousness? ○ What is the test? Similar arrangements where discretion is granted to public officers have resulted in the common people not being considered fairly <ul style="list-style-type: none"> ○ The publicized parliamentary proceedings is littered with questionable decisions and considerations Appeal <ul style="list-style-type: none"> ○ The redress or appeal is a huge step for the common citizen to move from a complaint to the Commissioner to filing an action at the High Court? | |
| 17 (a) | <i>an individual who alleges that he is she has suffered or may suffer harm as the result of the electronic communication</i> <ul style="list-style-type: none"> • | |
| 18(2) – (4) | <i>Threshold for proceedings</i> <ul style="list-style-type: none"> • Are these provisions prejudice to the Court? | |
| 19 | Court to the Commission for mediation <ul style="list-style-type: none"> • In a free democracy, this is an opportunity where otherwise, it is prejudicial | |
| 22 | Court Orders <ul style="list-style-type: none"> • Is there any order for a positive finding where responsible behavior is rewarded or even declared? | |
| 23 | <i>Non-compliance with Court Order</i> <ul style="list-style-type: none"> • The promotion of responsible behavior? | |

| | | |
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| | <ul style="list-style-type: none"> • How about those who personally delete irresponsible postings? | |
| 24 | <p><i>Offences - Causing harm by posting</i></p> <p>24(1)(a) – If 'harm' was not defined, this provision could catch advertisement and misrepresentation</p> <p><i>Mensrea component</i></p> <ul style="list-style-type: none"> • Intent • would cause • causes • had/have caused? | |
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NATIONAL FEDERATION PARTY

Our People's Future



ORAL SUBMISSION TO STANDING COMMITTEE ON JUSTICE & HUMAN RIGHTS ON THE ONLINE SAFETY BILL 2018

Seni Nabou, Vice President of the NFP
27 March 2018

(Please Check Against Delivery)

Honourable Chair and Hon Members of the Committee,

Good Afternoon. Thank you for the opportunity to be able to present NFP's thoughts on the proposed Bill before you.

Who We Are: The National Federation Party

The National Federation Party (NFP) is the political party with the longest record of service to Fiji and we will be proudly 55 years old this year.

We were born before Fiji became Independent and we have been part of the journey of modernizing Fiji since then. During this time, the NFP has always been the champion of principled policies and change for the betterment of all.

If you could indulge me Hon Chair and Hon Members of the Committee, please allow me to add some context for the benefit of those who are not aware of our political footprint in Fiji, of NFP's proud 55 year history, and some of the major achievements that we proudly boast to this day:

- (1) Establishment of the Fiji National Provident Fund (FNPF);
- (2) The successful and peaceful negotiation of the independence of Fiji and the 1970 Constitution;
- (3) The proposal of the idea of a local university that led to the establishment of the University of the South Pacific;
- (4) Brought about the ALTO in 1966 and ALTA in 1976 in partnership with the landowners, providing mechanisms and a basis for the resolution of future land tenure challenges in Fiji.
- (5) Played a key role in the sugar industry by negotiating the Denning Award, the purchase of CSR, the South Pacific Sugar Mills (SPSM) and the establishment of FSC and the 1984 restructuring of the sugar industry allowing farmers a greater say in the industry.
- (6) The establishment of the Housing Authority of Fiji.
- (7) The establishment of the Reeves Commission to review the 1990 Constitution and the successful passage of the 1997 Constitution.
- (8) The negotiation of Diwali and Prophet Muhammed's birthday as public holidays.

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Hon Chair and Hon Committee members, allow me to also raise some concerns. We are deeply cognizant of your heavy workloads but NFP is aware that you have some Bills before you that are vitally important, namely the Information and the Code of Conduct for all Members of Parliament, which has been with the select committee for almost two years, and NFP would consider these Bills are more of a priority.

The NFP is also eagerly awaiting the Committee report to Parliament on your recommendations on the MOG (Multinational Observer Group) and Electoral Commission Annual Reports of 2014 general elections, as both Reports had recommended major changes that if enacted would result in electoral integrity and truly credible elections. We note that the Reports have been before the Committee for almost 22 months.

General elections are around the corner and reports on these have yet to be tabled in Parliament.

At the same time we note the Honourable Chair's comments when the Online Safety Bill was tabled in Parliament on 15th March 2017 and I quote:

HON. A. SUDEKAR: Madam Speaker, I was not going to speak but then I have been provoked. First of all, I will let you know that my Committee who had been given the responsibility and we will return a report within two months, we can do that and we can guarantee that. There is no need for six months, the people of this country need protection and the Honourable Bhadranger has rightfully pointed out, some people are actually in the verge of suicide because of cyberbullying and some people on the other side are scared of it.

With all due respect, we believe the same priority should have been accorded to the legislation that we mentioned. Freedom of Information, Conduct of Members of Parliament and Reports that contain pertinent recommendations for electoral integrity should have been treated with the same urgency and priority that is being given to this Bill.

The Online Safety Bill 2018

Honourable Chair and Members of the Committee, allow me to say very clearly at the outset, that the NFP has great difficulty in accepting this Bill in its current form as the intention of what this law is intended to achieve, is very unclear and murky.

Our Party Leader, Hon Prof Biman Prasad, had, in his response to the motion when this Bill was fast-tracked through Standing Order 51, stressed that a law of this nature, needed at least 6 months time of public consultation because of the possible far-reaching implications.

If, however, Hon Chair and Members of the Committee, this Bill could be

strengthened for clarity through some of the approaches suggested through this submission, than Fiji might be all the better for it.

If we recall the motion in the House that brought this Bill through, there were a number of issues highlighted that were stressed as justification. They are:

(1) recent increase in reports of harmful or irresponsible online behaviour reflects changing attitudes in behaviour of people and more importantly highlights to need to address social issues associated with such behaviour.

(2) every single child's movement is actually photographed. Photographs are taken, people are innocently being photographed or photographs are taken innocently but used in other means.

(3) People who may be seeing each other, young teenagers or couples at universities seeing each other may be taking some intimate photographs with each other and suddenly when there is a breakup, one of them gets annoyed, generally it is the male, as males' egos tend to get bruised very quickly, as you have seen from the other side, and then Madam Speaker, they actually post it online when this female is about to go with some other personal relationship.

These three issues that have led to the justification are, in modern day parlance, known as cyber bullying, online pedophilia, revenge porn and artificial intelligence (AI)-generated pornography (otherwise known as deepfakes).

Where the Bill falls short is right there in the beginning. If you refer to section 3, it states that the objective of this Act are to:

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

In sub-section (a) where this law states that it intends to promote "**responsible online behaviour**", nowhere else in the law does it expand on, or define what "responsible" means in an online setting. Such a wide, unilateral, remit as is, cannot be responsible in itself!

Furthermore, as Fiji heads to the polls this year, it is absolutely justified for any political party to be anxious that the chilling of free speech online is at risk. Of course, the fine line of "balance", is a grey area but in this Bill, we could come to the point where the grey area is determined by the State.

Given that the motion promoting this Bill made reference to purportedly similar legislation in Australia and New Zealand, the main objective of the New Zealand "equivalent" is well captured in section 3 which details the purpose of the law, that is:

"The purpose of this Act is to-

- (a) deter, prevent, and mitigate harm caused to individuals by digital communications; and*
- (b) provide victims of harmful digital communications with a quick and*

efficient means of redress".

Reference to the Australian "equivalent" was also made during the debate on the motion, but the "Enhancing Online Safety Act 2015" of Australia had the express purpose of cyber-bullying material targeted at Australian children.

It is our understanding that at this present time the Australian "equivalent" law was introduced in the House of Representatives on 7 February 2017, to amend the Enhancing Online safety for Children Act 2015 by broadening the functions of the Children's eSafety Commissioner (changed to simply the "eSafety Commissioner") and emphasising, in particular, that the functions of the Commissioner in fact go beyond the online safety of children and embrace assistance to adults who are victims of illegal or offensive online content or "revenge porn", or who simply seek general advice about managing technology risks and online safety.

The Australian amendment is now intending to make it clear to the public that the Commissioner can be a source of assistance and advice in relation to a range of online safety issues, irrespective of the age of the enquirer.

The Second Reading Speech emphasised the government's commitment to "bridging the digital divide" and ensuring older Australians have the skills and confidence to participate in the modern digital economy.

In our Bill, the purpose of the law really is a wide, open, door and that is an open invitation to frivolous, vexatious claims. This calls into question whether any appropriation to be directed towards Fiji's proposed Online Safety Commission, would be a good use of public funds, if its mandate is so wide as it is, in its present form.

We propose that the Fiji bill adopt the 10 Communication Principles from the New Zealand "**Harmful Digital Communications Act 2015**", so as to strengthen what "responsible online behaviour" means in the Bill. Because as well all know, unless it is defined, it becomes subjective.

Hon Chair and Committee members, allow me to read out these 10 Principles that are set out in section 6 of New Zealand's "Harmful Digital Communications Act 2015":

Principle 1: A digital communication should not disclose sensitive personal facts about an individual.

Principle 2: A digital communication should not be threatening, intimidating, or menacing.

Principle 3: A digital communication should not be grossly offensive to a reasonable person in the position of the affected individual.

Principle 4: A digital communication should not be indecent or obscene.

Principle 5: A digital communication should not be used to harass an

individual.

Principle 6: A digital communication should not make a false allegation.

Principle 7: A digital communication should not contain a matter that is published in breach of confidence.

Principle 8: A digital communication should not incite or encourage anyone to send a message to an individual for the purpose of causing harm to the individual.

Principle 9: A digital communication should not incite or encourage an individual to commit suicide.

Principle 10: A digital communication should not denigrate an individual by reason of his or her colour, race, ethnic or national origins, religion, gender, sexual orientation, or disability.

While the NFP is very concerned about the online safety of our children, unlike the Australian "equivalent" Enhancing Online Safety Act 2015, there is nothing in this Bill that binds the State to these concerns, specifically in relation to our children in online spaces, and the UN Convention on the Rights of the Child (CRC), that Fiji ratified in 1993.

Section 1(2) details that "*this Act comes into force on a date or dates appointed by the Minister by notice in the Gazette*". It would be comforting to get CLEAR guidance on whether such a date or dates is retrospective in nature or not.

Section 6 establishes the Online Safety Commission but falls short of defining the requisite experience and skills that firstly the Commissioner should meet in order to bring credibility to the agency.

Neither does the Bill define what the Commission's remuneration should be pegged against, and leaves this to the discretion of the Minister. This surely cannot be transparent.

The Australian "equivalent" law in its present form states that:

"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."*

General Observations

On a general observation, the other very pertinent concern that we raise, Hon Chair and Hon Committee members, in relation to our citing of the UN CRC is that fundamental rights and freedoms, and for Fiji expressly - the freedom of expression are already laid out in section 17 of the 2013 Constitution. Therefore this Bill should derive its philosophy from those rights and privileges, and not seek to overtake them.

In fact, the House of Lords Select Committee on Communications, had in 2014 concluded that for the UK who were considering similar laws, "there is a need for better education and more of it, there is no need for specific legislation".

An interesting conclusion stated in response to whether there should actually be special 'social media' or 'electronic communication' offences, a response from one of the Committee members was as follows: *"Why should the criminal law threat an electronic communication differently from a non-electronic communication, all other things being equal?"*

We also raise for the Committee's information that while this Bill purports to protect minors - there will be situations, as has been very recently highlighted in New Zealand media where minors can also commit online offences, such as at Christchurch Boys' High School where a student took a photo up a teacher's skirt and another uploaded a video of a teacher onto a porn website.

This is a converse situation, where it is incumbent on the Committee to also consider why this Bill needs extensive and more thorough consultations with the public.

Additionally, in this Bill, there is no such responsibility placed upon service providers, such as social media service that can compel instant redress or removal of offensive material.

Furthermore, the issue of online trolls or fake accounts was also mentioned during the debate on the motion pertaining to this Bill. There is nothing in this Bill that attempts to clamp down on that manner of harmful online activity -- some troll names were cited in Parliament, and we all know their political leanings, which therefore leaves some major homework for this Committee to look into particularly, if there are overlaps with this Bill and the Political Parties laws.

Honourable Members, We Thank You.

"Leadership that listens"

Youth Forum

SUVA CONSTITUENCY YOUTH

SUBMISSION

TO THE PARLIAMENTARY STANDING COMMITTEE ON JUSTICE, LAW
& HUMAN RIGHTS

ON THE ONLINE SAFETY BILL: NO. 7 OF 2018

BY THE SOCIAL DEMOCRATIC LIBERAL PARTY OF FIJI YOUTH
FORUM

03 May, 2018

**SOCIAL DEMOCRATIC LIBERAL PARTY SUVA YOUTH
FORUM SUBMISSION**

**ON THE
ONLINE SAFETY BILL NO. 7 OF 2018
STRUCTURE OF SUBMISSION**

Introduction

Recommendations

Conclusion

SUBMISSION ON THE
ONLINE SAFETY BILL, BILL NO. 7 OF 2018
BY THE SOCIAL DEMOCRATIC LIBERAL PARTY SUVA YOUTH

The Chairman and Members of the Parliamentary Standing Committee on Justice, Law & Human Rights. Bula Vinaka, Namaste and Salam Waalekum. Today is a very important day for the Suva Constituency SODELPA Youth Council, it is the 3rd of May, and also today is the World Press Freedom Day. This submission is made by the Social Democratic Liberal Party Suva Constituency Youth Forum. We are grateful that we have this opportunity to voice our concerns and recommendations for this Bill.

Introduction

The submission made here today highlight some of the advantages of Bill #7 of 2018 with respect to safeguarding the interest of minors, protecting their identities, privacy and like our Party Leader says the need to future proof our society to avoid sociological and psychological catastrophes from happening. It will then look into some of the drawbacks of the Bill with regards to human rights, censorship and individual exploitation. We, on behalf of the Social Democratic Liberal Party Youth Forum, have put together this paper and have carefully diagnosed the 28 clauses that bind this Bill.

It is important that we realize the extent of the drawbacks that this Bill presents for society. After the careful diagnosis of the clauses that bind this Bill, we have come to the realization of the threats it imposes are in terms of social problems, political exploitation, and most importantly the violation of human rights.

Yes, we agree that certain intimate images and videos should not be available online. The problem lies with the individuals who may get these and misuse it to degrade and defame the subjects of the material. By prohibiting certain pieces of information to be published online the people will look at illegal means of procuring this information, images, videos etc thus increasing the cyber-crime activity and unimaginable corruption within society adding to the overall criminal activities that we are already experiencing.

The SODELPA Youth does not agree with the Online Safety Bill and is of the view that at times this kind of disagreement can escalate and cause discord among the citizen. In the Kingdom of Bahrain in the Arab world when internet users do not comply with their censorship laws they're jailed then convicted at unfair trials.

The Online Bill gives rise to political exploitation, in the form of misuse of powerful positions and suppression of government criticism. It is a fact that many powerful leaders in the world have used such laws for purely selfish reasons. Leaders should never decide how information is to be disseminated to the people, nor should they control media outlets. The

Washington post reports that in North Korea the media is strictly monitored hence stifling criticism against the ruling government through freedom of speech (*Washington Post*, 2012).

Finally, the Online Bill can be used to criminalize and prosecute people who fight for freedom of expression, information and free speech. An informed public makes better decisions, but this Bill will prohibit information distribution to the extent of prosecution. The US drone strikes have resulted in loss of lives, crops and homes, but US press releases censor the damage done to undeserving people (*Aljazeera* 2013). Thus this Bill No.7 of 2018 will make it illegal to be honest to one's own citizens.

We agree that there is a need to be extra vigilant on Social Media and the Internet with the high number of users out to scam, troll, defame and victimise others.

These risks are well known to individuals involved in any form of online activity but, they are not to blame for when they are caught up in unfortunate circumstances of cyber bullying, at the hands of people that have misused and abused the marvellous invention that is the internet.

It is up to those that care enough and have the power, to ensure that Fijians are free, safe and secure online, knowing that their rights, protection and action against cyber bullying is guaranteed under the law.

Most of the Clauses in this Bill we agree with, especially when the interest of the Minors are taken into account to avoid cyber-bullying, and to safeguard the interest of these young citizens which we are thankful for and yes ought to be monitored.

Recommendations:

- I. The Suva Constituency SODELPA Youth Council is of the view that there is no need to set up a new Commission to monitor the online activities. We should just use the Human Rights commission to set up an office within its Department to handle this duty.
- II. The Suva Constituency SODELPA Youth Council requests that the public be given more time to review this Bill and it should not be rushed, as we have stated before that the sociological impacts of such Bill can be detrimental in the long run.
- III. The Suva Constituency SODELPA Youth recommend that the Drafting Committee can be more specific as to the objectives of the Bill
- IV. The SODELPA Youth strongly recommend that this Bill be repealed.
- V. SODELPA is passionate about upholding children's rights, as it was our Party Leader's SVT Government that ratified CEDAW and the Child's Rights Convention. The SODELPA Youth respectfully recommends that subsection (1) of Clause 6 be repealed. Police Spokesperson Ana Naisoro 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. Children are the most vulnerable to cyber bullying and are the common victims as we have seen, in recent years: the circulation of Child porn videos and suicide being committed because of the content of phone messages. Rather than establishing an Online Commission, we recommend that, since Fiji has an existing Human Rights Commission, the Government should just create a

Department comprising only of the Special Commissioner for Children, with a Personal Assistant and a Deputy Special Commissioner. The role of this department will receive and investigate complaints of cyber bullying against children, create awareness on cyber safety and the rights of a child, regarding this.

- VI. We strongly recommend that offences, relating to the compromise of a person's online safety be legislated in its own section in an Act to amend the 2009 Crimes Decree. Child and revenge Porn has been around for, well, over a decade and is widely circulated today online.
- VII. The SODELPA Youth recommend that this clause be repealed.

Conclusion

This year will be a memorable year for everyone in Fiji, in the region and around the globe. It is the 70th year in which the Universal Declaration of Human Rights was proclaimed and adopted by the United Nations General Assembly. The UDHR is still relevant to this day as it was back in 1948, with its 30 Articles that binds us all together, and today the SODELPA Youth places emphasis on Article 19 of the UDHR which clearly states the everyone has the right to freedom of opinion and expression, the freedom to seek, receive and impart information regardless of frontiers. With that said we hope that the submission we have made and other consultations will be taken into consideration and actioned by the government.

To conclude, we are sincerely grateful to the Parliamentary Standing Committee on Justice, Law & Human Rights for, dutifully, listening to this submission.

WWW inventor Tim Berners-Lee said, "The goal of the web is to serve humanity. Those that come to it later will be able to create things that we, cannot, ourselves imagine."

It is for this reason that we hope Fijians will be able to continue to use the internet freely and without fear of unfair legislation.

We hope that the submissions from this hearing and other consultations will be taken into consideration and actioned by the Government. Otherwise, we rest in the hope that SODELPA will repeal and replace this Bill with one that is in line with the principles of democracy and freedom and that ensures effective online safety for all Fijians.

We are happy to answer any questions you may have regarding this submission.

Vinaka vakalevu,

APPENDIX

Clause 1 – Short Title and Commencement

It is too early for the Bill to be passed. The direct implications that this Bill will cause for all Fijians calls for a consultation period, more than the prescribed one month, with respective stakeholders because the voices of the people need to be truly heard and implemented

Clause 3

The objective of the Bill is ambiguous; it does not make specifications on what kind of online offences it will cover. This type of ambiguity can cause confusion as the drafter may have a different interpretation as compared to the reader.

Clauses 6, 7 and 8 Online Safety Commission

These 4 Clauses deals with the setting up of the Commission. The financial resources could be put to good use in other areas instead of setting up a new commission, looking for the human resource and the necessary equipment to help run the Commission. The SODELPA Youth is of the view that there is no need to establish the proposed Online Safety Commission. Fiji possesses a national debt of about \$5 billion dollars and establishing this proposed Commission will incur unnecessary costs.

Clause 4

This clause covers the whole of Fiji, likewise those living outside of Fiji who, upon, returning to this country will be held accountable for their online behaviour. The clause infringes the sovereignty of other countries as one has to be subject to the laws of whichever country they're in.

Clause 12

The SODELPA National Youth Council is of the view that this Clause is unfair and unjust, If the Government is going to set up a commission then by all means they have to be responsible for the actions they do, whether it be in relation to handling a complaint or be it the complaint is against them. It should be up to the Courts to decide on whether their actions were in good faith.

Clause 16

Why would the Commission delegate their responsibility to another party, person or organization, this will only prove that the Commission cannot carry out its duties as they were supposed to? If the Commission already states that they can delegate their duties to another party, other than themselves, than this clearly shows that their establishment is irrelevant and the proposed Commission is unnecessary. This just goes to show that the Commission will only safeguard the interest of a selective few when compared to the others.

Clause 24

The SODELPA Youth does not agree with new offences, pertaining to what may constitute as an act of violating a person's online safety, being solely legislated in this Bill. The drafters of this Bill have used language that is imprecise. This may cause confusion in the public, and it can be interpreted in so many ways, thus dispute can arise between the Government and the public. *The potential of this clause to be taken extremely out of context may lead to the unfair prosecution and trial on an alleged offender*

References

1. Bullying Statistics – Anti-Bullying Help, Facts and More:
<http://www.bullyingstatistics.org/content/cyber-bullying-statistics.html>
2. Fiji Times: Cyber Bully Alert by Siteri Sauvakacolo (Dec 16, 2014)
<http://www.fijitimes.com/story.aspx?id=289223>

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MINISTRY OF WOMEN, CHILDREN AND POVERTY ALLEVIATION

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Ministry for Women, Children & Poverty Alleviation

Submission for Registration of Sex Offenders Bill 2018

(BILL NO. 6 OF 2018)

And

Submission for Online Safety Bill 2018

(BILL NO. 7 OF 2018)

Ministry's Profile

1. Vision

Empowering Women, Children, Senior Citizens and the Disadvantage; with the strengthening of family life.

2. Mission

Families and Communities supported through Social Welfare Initiatives and Gender Mainstreaming Programs.

3. Role and Responsibilities of the Ministry

The Ministry of Women, Children and Poverty Alleviation is the government agency that administers services and programs aligned to the:

- i. Care and protection of children;
- ii. Provision of income support to families to address poverty;
- iii. Provision of policy intervention for older persons
- iv. Provision of policy intervention for persons with disabilities; and
- v. Promotion of gender equality and the empowerment of women
- vi. Monitor, evaluate and report on the progress and impact of the INPEP;

Submission Background

All correspondence to be addressed to Permanent Secretary for Women, Children & Poverty Alleviation



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As the key arm of Government looking after the welfare of women and children as a policy advisor to Government on Women's Affairs, and with mandated authority by law to facilitate removal of children from an environment deemed unsafe for them and taking them under State care with a Care Order giving legal guardianship to the Director of Social Welfare, the Ministry for Women, Children & Poverty has some thoughts on some aspects of the Registration of Sex Offenders Bill 2018 currently before the Standing Committee on Human Rights, Justice and the Law.

The 2013 Constitution of Fiji ensures the citizens of Fiji under the Bill of Rights, a right to Personal Liberty, Freedom of Speech, expression and Publication, Freedom of Assembly, Political Rights, Access to Information, Right to Equality and Freedom from Discrimination, Right to Education, Right To Economic Participation, Right to work and a Just Minimum Wage, Rights to Reasonable Access to Transportation, Right to Housing and Sanitation, Right to Adequate Food and Water, Right to Social Security Schemes, Right to Health, Environmental Rights, Rights of Children and the Rights of Persons with Disabilities.

The Ministry for Women, Children & Poverty Alleviation asks for a consideration of its input below in the finalization of the Registration of Sex Offenders Bill and the Online Safety Bill 2018.

Submission for Online Safety Bill 2018 (BILL NO. 7 OF 2018)

Interpretations of the term 'Harm'

Generally speaking, two types of actions are criminalized under the Bill:

1. Posts that are intended to cause harm and do cause harm in fact;
2. Intimate visual recording (which is defined and definition focuses on body parts).

The term "Harm" is defined as a 'serious emotional distress'. At the same time, the Ministry maintains that a toddler or baby may not feel serious emotional distress for being the subject of posts that are not visual. The same may go for a person with mental disability in the same situation.

Offenders

A common cyber bullying technique used by high school kids is posing as somebody else online and even creating fake identities (which resemble their peers) on social media and posting things therein to discredit the persona they've assumed. We note that this is not covered in the Bill and recommend that it be included.

Also, considering the fact that most of the people who post online use fake accounts, the Ministry questions if the Bill will have an avenue for penalizing the administrator of the page where administrator becomes aware of offensive material and doesn't take the material down?

All correspondence to be addressed to Permanent Secretary for Women, Children & Poverty Alleviation



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Intimate Visual Recording

The definition of intimate visual recording focuses on body parts and the Ministry maintains that it inculcates gender stereotyping in the singling out of the female breasts as somehow improper. We recommend that better definition or method should be adopted in capturing what we are trying to capture here.

Australian law on the subject, hone in on cyber-bullying which is really the crux of the matter when it comes to children. What constitutes cyber-bullying looks at the material and if such material could be considered by a reasonable person (note not the child) to have been intended to have an impact on a child and the material is likely to have an impact of seriously harassing, humiliating, threatening, intimidating a child then cyber bullying is proved. So if such an approach was taken then there will be no need to retain the intimate visual recording provision in relation to children as it will be covered as well.

Defense of Consent

S.25(3) gives a Defense of consent for intimate visuals being posted online where adults are the subject of the visuals. Having this Article poses a question on whether we are legalizing the posting of pornography therein where we have consenting adults posting naked pictures of themselves online? The Ministry recommends that this should not be allowed.

Safety of Children

Overall, the Ministry stresses that Bill should be stronger regarding online safety from bullying when it comes to children. We recommend for provisions to be strengthened accordingly.

Freedom of Expression

The Ministry maintains that S.24 is too wide a provision and may potentially fall foul of freedom of expression provisions in the Constitution. There is room to make the provision tighter and we recommend that changes must be made with proper consultations on the section.

This submission is hereby submitted for consideration to the finalization of the Registration of Sex Offenders Bill 2018 and the Online Safety Bill 2018

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Dr. Josefa Koroivueta

Permanent Secretary of Women, Children and Poverty Alleviation

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**Submission to the Standing Committee on
Justice, Law and Human Right on
Online Safety Bill 2018
(BILL No.7 of 2018)**

4th May, 2018

MINISTRY OF DEFENCE AND NATIONAL SECURITY

ONLINE SAFETY BILL

SECTION 3

- *Should include provisions to protect and avoid exploitation of children. The reason is that most children fall prey to online users.*

ONLINE SAFETY BILL - Cont'd

SECTION 8

- *Functions of the Commission as outlined is paragraph (e), which states to investigate complaints and seek to resolve such complaints, as appropriate;*
- *The Ministry has reservations on this function because the Commission does not have expertise to investigate Online crimes. The Fiji Police Force cybercrime unit must be involved as they have the necessary tools to carry out such investigations.*

ONLINE SAFETY BILL - Cont'd

- *For the purpose of Section 13 & 14 can the Fiji Police Force play an oversight role in investigation of offences committed online as opposed to the Commission's function.*
- *The Fiji Police Force is tasked to carry out investigations of offences purported to be criminal in nature including online crimes. This is consistent with the Crimes Act 2009.*

ONLINE SAFETY BILL - Cont'd

SECTION 23, 24 & 25

- *The Ministry supports the penalties outlined under Section 23, 24 & 25.*
- *Fiji must enter into an agreement with foreign jurisdiction in order to share information pertaining to online complaints registered with the Commission if the crime is committed outside Fiji.*
- *Fiji must seek international assistance to investigate Online crimes as outlined under Section 24 (1)-(3).*

APPENDIX B

TABULATED FORMAT – KEY ISSUES – COUNTRY COMPARISON

KEY ISSUES NOTED FROM THE BILL - COUNTRY COMPARISON

| | Malaysia | NZ | Singapore | Australia | Canada (Manitoba) | Canada (Nova Scotia) |
|------------|---|---|--|--|---|---|
| Title | <i>Anti Fake News Act (2018)</i> | <i>Harmful Digital Communications Act (2015)</i> | <i>Protection from Harassment Act (2014)</i> | <i>Enhancing Online Safety Act (2015)</i> | <i>Intimate Image Protection Act (2015)</i> | <i>Cyber Safety Act (2013)</i> |
| Definition | “Fake News” is any information that is wholly or partly false | <p>“Harm” means serious emotional distress</p> <p>“Intimate visual recording”</p> | <p>Where intending to cause harassment, alarm or distress to another person, a person cannot:</p> <ul style="list-style-type: none"> • Use threatening, abusive or insulting words or behaviour; or • Make threatening, abusive or insulting communication | <p>“Cyberbullying” means material posted on social media or electronic service that</p> <ul style="list-style-type: none"> - A reasonable person would conclude was <ul style="list-style-type: none"> o intended to have an effect on a particular Australian child; o would likely have the effect=t on a particular Australian child of seriously threatening, seriously intimidating, seriously harassing or seriously humiliating the Australian child. | Definition of Intimate Image | “Cyberbullying” is any electronic communication typically repeated or with continuing effect which is intended or ought reasonably to be expected to cause fear, intimidation, humiliation, distress or other damage or harm to another person’s health, emotional well-being, self-esteem or reputation, |

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| | Duty to remove fake news once one is aware (or reasonable should be aware) that it is fake news | 10 principles of a digital communication must be taken into consideration in applying the Act | <p>No person may by any means:</p> <ul style="list-style-type: none"> • Use threatening, abusive or insulting words or behaviour; or • Make threatening, abusive or insulting communication <p>Defense to this is:</p> <ul style="list-style-type: none"> • No reason to believe communication would be received by victim; or • Conduct was reasonable <p>Other specific forms of harassment:</p> <ul style="list-style-type: none"> • Inciting violence • Insulting public servant while on duty • Stalking • Fake news <p>publication ban</p> | | <p>Ministry responsible for Act may:</p> <ul style="list-style-type: none"> • Inform or assist person in getting images back • Resolve dispute • Provide legal information with respect to remedies | |
| Process for Adjudicating | <i>Ex parte</i> application to a court to seek order that information is fake news. | Act establishes an "Approved Agency" to administer Act | <p>Victim can apply to Court for protection order</p> <p>Court must determine on a</p> | <p>Complaint must be made to the social media or electronic service provider.</p> <p>If no action to address complaint within 48 hrs</p> | <p>Authorized agency can be established to administer Act</p> <p>A person whose intimate image has been distributed (or is</p> | <p><i>Ex parte</i> request for a protection order can be made to a Justice of the Peace by:</p> <ul style="list-style-type: none"> • Victim • Parent |

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| | <p>Court order can be set aside upon application by person to which order is issued within 14 days of order being issued.</p> <p>Application to set aside does not stay the original order</p> <p>If order was relating to national security or public order and government applied for order, then order cannot be set aside</p> | <ul style="list-style-type: none"> • Receive/assess complaints • Investigate complaints • Resolve complaints • Educate public • Maintain relations with service providers • Seek & receive information • Other functions <p>Agency can delegate powers to others</p> | <p>balance of probabilities if:</p> <ol style="list-style-type: none"> 1. Specific sections contravened; 2. Contravention is likely to continue or to occur; & 3. Just & equitable in all circumstances <p>“Victim” can be any person who suffers distress, alarm or harassment</p> <p><i>Ex parte</i> expedited protection order can be given for up to 28 days by a Court</p> <p>Minister can exempt any person from having to comply with an order</p> | <p>complaint can be made to e-Commissioner for Online Safety</p> <p>Commissioner can investigate and if determines there has been:</p> <ul style="list-style-type: none"> - Cyber-bullying <p>Commissioner can order removal of material within 48 hours</p> <p>If no compliance, a fine or injunction can be sought in court</p> <p>Decision of the Commissioner can be appealed to the Administrative Appeals Tribunal</p> | <p>about to be) without consent can seek assistance from agency</p> <p>Agency may try to mediate/resolve matter at preliminary stage of complaint</p> <p>Agency can provide a notice to accused that distribution was non-consensual and that there are legal ramifications that might ensue</p> | <ul style="list-style-type: none"> • Police Officer • Other designated in regulations <p>Justice can issue order where, on a balance of probabilities, cyberbullying occurred and reasonable grounds to believe it will continue</p> <p>Order served on respondent</p> <p>Order must be submitted to Court within 2 days</p> <p>Court must review order and all accompanying evidence and either confirm or vary the order</p> <p>If Court believes there was not sufficient evidence to issue the order, a hearing must be heard</p> <p>Appeal from an order of the Court</p> |
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| | | | | | is allowed to the Court of Appeal | |
| | | Two step process: 1. Compliant to Agency 2. Application to Court for Order Who can apply? • Affected individual • Parent/Guardian • School • Administrator • Police | | Two Step Process: Complaint to social media provider Complaint to Commissioner | Act establishes a statutory tort for non-consensual distribution of intimate image Victim does not lose right to sue because consent to take image was given to another person Defense to distribution if in the public interest If Court determines there was a tort committed, then can issue order with certain conditions (damages; injunction) | Act establishes statutory tort for cyberbullying and provides provisions for determining where tort exists |
| | | Upon application Court can: • Return to Agency fir further work • Issue Interim Order | | s.100 of Act: This Act does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication. | Court may order a publication ban on proceedings | |

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| | | | <ul style="list-style-type: none"> Issue Permanent Order Not issue order | | | | | |
| | | | <p>Test for order:</p> <ul style="list-style-type: none"> Must be a serious or repeated breach of one of the 10 principles Breach causes or is likely to cause harm to an individual | | | | | |
| | | | <p>Court has broad powers as part of order against individual or service provider.</p> <p>Court must consider many variables before issuing order (s.19(5))</p> | | | | 3-year review of Act | Minister must conduct a review of Act within 5 years of its proclamation and submit report to Legislature |
| Criminal Offence | <p>Any person who maliciously creates, offers, publishes or distributes fake news can be prosecuted and fined up to 500,000 MR or 6 years in prison</p> <p>Separate offence for funding fake news</p> | <p>Failure to comply with Court order can mean prosecution and fine of \$5,000 NZD or 6 mos. In prison (Corporation - \$20,000 NZD)</p> <p>Offence to:</p> <ul style="list-style-type: none"> Post something with intention of causing harm to a victim | <p>Violation of Act can result in fine of up to \$5,000 SGD or 6 mos. In prison</p> <p>Penalties increase where subsequent offences</p> <p>Breach of court order can result in fine up to \$5,000 SGD or 6 mos. In prison</p> | <p>No criminal offence in Act</p> <p>Civil Penalty: 100 penalty units</p> <p>Injection can be issued by Court</p> <p>(Separate crime under harassment, etc.)</p> | | | | |

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| | | <ul style="list-style-type: none"> • Posting something would cause harm to a reasonable person • Posting causes harm to a victim <p>Fine up to \$50,000 NZD or up to 2 years in prison</p> <p>Corporation – up to \$200,000 NZD fine</p> <p>“Victim” means the person to whom post was directed</p> | | | | |
| Extra-territorial Application | Applies to acts committed outside of Malaysia if the information or person impacted is Malaysian | | Either the victim or the accused must have some link to Singapore for the Act to be applied, even if the act in question occurred outside of Singapore | Applies within and outside Australia, but must be related to an Australian | | Violation of a protection order can result in a fine up to \$5,000 CAD or 6 mos. In prison |