



PARLIAMENT OF THE REPUBLIC OF FIJI

STANDING COMMITTEE ON JUSTICE, LAW AND HUMAN RIGHTS

Review Report on the Code of Conduct Bill 2018 (Bill No. 33 of 2018)



Parliamentary Paper No. 37 of 2019

April, 2019

Published and Printed by the Department of Legislature, Parliament House, SUVA.



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Chair's Foreword

Public officials and holders of office, which are paid through public funds should be working in the best interest of all citizens; they should not in any way get involved in any corrupt practices. In order to ensure that civil servants adhere to their responsibilities to serve general public, Section 149 of the *Constitution of the Republic of Fiji* provides that a written law shall:

- (a) establish a code of conduct which shall be applicable to the President, Speaker, Deputy Speaker, Prime Minister, Ministers, members of Parliament, holders of offices established by or continued in existence under this Constitution or under any written law, members of commissions, permanent secretaries, ambassadors or other principal representatives of the State, and persons who hold statutory appointments or governing or executive positions in statutory authorities, and to such other offices (including public offices) as may be prescribed by written law;
- (b) establish rules, processes and procedures for the implementation of the code of conduct by the Accountability and Transparency Commission;
- (c) provide for the monitoring by the Accountability and Transparency Commission of compliance with the code of conduct by the officers mentioned in paragraph (a);
- (d) make provision for the investigation of alleged breaches of the code of conduct and enforcement of the code of conduct by the Accountability and Transparency Commission, including through criminal and disciplinary proceedings, and provide for the removal from office of those officers who are found to be in breach of the code of conduct;
- (e) provide for the protection of whistle-blowers, being persons who, in good faith, make disclosures that an officer mentioned in paragraph (a) has contravened any written law or has breached the code of conduct or has engaged in fraudulent or corrupt practices; and
- (f) provide for the annual declaration by the officers mentioned in paragraph (a) of the assets and liabilities and financial interests of the officer, and of such other direct relatives of the officer as may be prescribed, to the Accountability and Transparency Commission, and for such declarations to be accessible to the public.

Therefore, in order to enable these provisions of the *Constitution*, the Government of Fiji has introduced the *Code of Conduct Bill 2018*, which was then referred by Parliament to the Standing Committee on Justice, Law and Human Rights. This step taken by the Fijian Government gives recognition to the efforts and contribution by this August House in the achievement of the States National Development Plan, whereby Government aims to strengthen institutions and be fully accountable to the people of Fiji through Parliament and through the laws being enacted and passed in this August House.

The Committee in its review process, conducted extensive public consultations and relied on research support from the secretariat team. The Committee also consulted the initiating Ministry and the drafters of the Bill so as not to overlook any pertinent policy and legal ramifications on the Bill. An amendment was made to Schedule 6 of the Bill and which has been made and marked in red in the copies of the Bill provided with this report.

This Report will cover the Standing Committees' role and the process it followed in reviewing the ***Code of Conduct Bill 2018***. It was also ensured that all due process regarding the review of the Bill has been followed and that the provisions contained in the Bill would contribute to the achievement of the Bill's objectives.

Some of the pertinent areas which the Bill addresses are as follows:

- the establishment of a uniform code of conduct that applies to all public officials;
- setting out the legal framework for the establishment of codes of conduct that are applicable to the President, Speaker of Parliament, Deputy Speaker of Parliament, Prime Minister, Ministers, Members of Parliament, holders of offices established by or continued in existence under the Constitution or under any written law, members of Commissions, statutory boards and executives of statutory authorities.;
- the establishment of the rules and processes for the implementation by the Accountability and Transparency Commission (ATC);

At this juncture I would like to acknowledge the Members of the Standing Committee on Justice, Law and Human Rights of the last term of Parliament in their effort and input, which our Committee also relied on when reviewing the Bill and formulating this report. The previous Committee had reviewed a similar piece of legislation, which the provisions of the current Bill mirrors, thus my Committee utilised the salient information noted from the previous Committee to assist it in the direction for its review.

I would also like to thank the Honourable Members of the current Justice, Law and Human Rights Committee for their deliberations and input, the alternate members who made themselves available when the substantive members could not attend, the secretariat, the entities who accepted the invitation of the Committee and made themselves available to make submissions and the members of the public for taking an interest in the proceedings of the Committee and Parliament.

I as the Chairperson, on behalf of the Committee commend my first report on a Bill, which in this case is the ***Code of Conduct Bill 2018 (Bill No. 33 of 2018)*** to the Parliament and seek support of all the members of this August House for the Bill since it is designed for the greater good of all Fijians.


.....
Hon. Alvie Avhikrit Maharaj
Chairperson

Acronyms:

BAF	-	Biosecurity Authority of Fiji
CCF	-	Citizen's Constitutional Forum
FCCC	-	Fijian Competition and Consumer Commission
FCEF	-	Fiji Commerce and Employers Federation
FICAC	-	Fiji Independent Commission Against Corruption
FIU	-	Financial Intelligence Unit
FLS	-	Fiji Law Society
FNPF	-	Fiji National Provident Fund
FRCS	-	Fiji Revenue and Customs Service
FWCC	-	Fiji Women's Crises Centre
GOPAC	-	Global Organisation of Parliamentarians Against Corruption
LTA	-	Land Transport Authority
NFP	-	National Federation Party
OAG	-	Office of the Auditor-General
OHCHR	-	United Nations Office of the High Commissioner for Human Rights
PRB	-	Public Rental Board
PSC	-	Public Service Commission
PSC	-	Public Service Commission
RBF	-	Reserve of Bank of Fiji
SO	-	Standing Order
WAF	-	Water Authority of Fiji

1.0 INTRODUCTION

1.1 Background

The Standing Committee on Justice, Law and Human Rights, hereinafter referred to as the Committee, was referred the *Code of Conduct Bill 2018* for review on 30 November 2018. The Bill was referred to the Committee pursuant to SO 85(4)(a), whereby the Committee was tasked with scrutinising the Bill and to report back on the Bill in a subsequent Parliament Sitting.

1.2 Committee Remit and Composition

The Standing Committee on Justice, Law and Human Rights was established under Standing Order 109 of the Standing Orders of Parliament and is mandated to, among other things as prescribed in Standing Order 110 to examine each Bill referred to the committee by Parliament, and make amendments to the Bills, to the extent agreed by the committee and examine any subordinate legislation tabled in Parliament within its category of affairs.

The Committee is made up of Members of both the Government and Opposition Members. Members of the Standing Committee on Justice, Law and Human Rights are as follows:

- i. Hon. Alvick A. Maharaj (Chairperson)
- ii. Hon. Rohit Sharma (Deputy Chairperson)
- iii. Hon. Ratu Suliano Matanitobua (Member)
- iv. Hon. Salik Govind (Member)
- v. Hon. Mosese Bulitavu (Member)

During the duration of the deliberation on the Bill, the following Hon. Members assisted the Committee as alternate members, pursuant to Standing Order 115 (5):

- vi. Hon. Niko Nawaikula (Alternate Member for Hon. Ratu Suliano Matanitobua); and
- vii. Hon. Tevita Navurevure (Alternate Member for Hon. Mosese Bulitavu).

It would also be appropriate to make mention of the members of the previous Standing Committee on Justice, Law and Human Rights and the Members were as follows:

- i. Hon. Ashneel Sudhakar (Chairman)
- ii. Hon. Mataiasi Niumataiwalu (Deputy Chairman)
- iii. Hon. Lorna Eden (Member)
- iv. Hon. Semesa Karavaki (Member)
- v. Hon. Mikaele Leawere Alternate Member for Hon. Niko Nawaikula (Member)
- vi. Hon. Brij Lal replaced Hon. Lorna Eden as a substantive member

1.3 Procedure and Program

The Committee read through the Bill and did its own deliberation of the Clauses in the Bill. The Committee called for submissions from the public and other interested stakeholders by placing advertisements through the local newspapers (Fiji Times and Fiji Sun) on 11 January 2019. The Committee also invited certain entities to make submissions on the Bill.

Details of the Committees deliberations on the submissions received are provided in this Report.

It is also only fair to highlight the tremendous work that the previous Committee had undertaken when it reviewed the previous piece of legislation. This work by the previous Committee had laid the foundation for the current Committee in its review process. The previous Committee was also assisted with the deliberations by an independent expert on Code of Conduct laws, Mr. Akaash Maharaj. Mr. Maharaj is the Chief Executive Officer for the Global Secretariat of the Global Organisation of Parliamentarians Against Corruption (GOPAC). GOPAC is unique since it is the only international network of parliamentarians focused solely on combating corruption. Its members represent more than 50 countries in all regions of the world. They are current or former legislators or legislators who have been denied their right to take office. Their collaboration is non-partisan.

The input by Mr. Maharaj was reviewed by the Committee and this assisted in the review of the Clauses of the Bill.

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

The Committee as part of its deliberation received numerous submissions on the Bill from relevant stakeholders, on various dates falling between and including 14 January 2019 and 30 January 2019. Organisations and individuals that made submissions to the Committee included:

- i. Biosecurity Authority of Fiji (BAF);
- ii. Biosecurity Authority of Fiji (BAF);
- iii. Citizen's Constitutional Forum (CCF);
- iv. Department of Legislature - Parliament;
- v. FICAC;
- vi. Fiji Commerce and Employers Federation (FCEF);
- vii. Fiji Law Society (FLS);
- viii. Fiji Women's Crisis Centre (FWCC);
- ix. Fiji Revenue and Customs Services;
- x. Fijian Competition and Consumer Commission (FCCC);
- xi. Financial Intelligence Unit (FIU);
- xii. Hope Party;
- xiii. LTA;

- xiv. National Federation Party (NFP);
- xv. Office of the Auditor-General (OAG);
- xvi. Public Rental Board (PRB);
- xvii. Public Services Commission (PSC);
- xviii. Republic of Fiji Military Forces (RFMF);
- xix. Reserve Bank of Fiji (RBF);
- xx. Retired Policeman Association;
- xxi. United Nations Office of the High Commissioner for Human Rights (OHCHR);
- xxii. Various individuals that submitted during public consultation outside the Parliament Complex, in their capacity of being members of the public;
- xxiii. Water Authority of Fiji (WAF);

The Committee took into consideration the submissions made by the above mentioned organisations and individuals.

The submissions of the above-mentioned organisations are summarised and provided in heading 3.4 of this report. Written copies of the submissions are will be uploaded with this report onto the parliament website (www.parliament.gov.fj).

2.0 CODE OF CONDUCT BILL 2018 (BILL NO. 33 OF 2018)

2.1 Introduction

The *Code of Conduct Bill 2018 (Bill No. 33 of 2018)* (“**Bill**”) is a result of the Fijian Government putting into effect the constitutional requirement of having a legislation that provides for a uniform code of conduct for all public officials and holders of public office.

2.2 Objectives of the Bill

The objectives of the Bill are derived from Section 149 of the *Constitution*, which are;

- a) to establish a code of conduct which shall be applicable to the President, Speaker, Deputy Speaker, Prime Minister, Ministers, members of Parliament, holders of offices established by or continued in existence under this Constitution or under any written law, members of commissions, permanent secretaries, ambassadors or other principal representatives of the State, and persons who hold statutory appointments or governing or executive positions in statutory authorities, and to such other offices (including public offices) as may be prescribed by written law;
- b) to establish rules, processes and procedures for the implementation of the code of conduct by the Accountability and Transparency Commission;

- c) to provide for the monitoring by the Accountability and Transparency Commission of compliance with the code of conduct by the officers mentioned in paragraph (a);
- d) to make provision for the investigation of alleged breaches of the code of conduct and enforcement of the code of conduct by the Accountability and Transparency Commission, including through criminal and disciplinary proceedings, and provide for the removal from office of those officers who are found to be in breach of the code of conduct;
- e) to provide for the protection of whistle-blowers, being persons who, in good faith, make disclosures that an officer mentioned in paragraph (a) has contravened any written law or has breached the code of conduct or has engaged in fraudulent or corrupt practices; and
- f) to provide for the annual declaration by the officers mentioned in paragraph (a) of the assets and liabilities and financial interests of the officer, and of such other direct relatives of the officer as may be prescribed, to the Accountability and Transparency Commission, and for such declarations to be accessible to the public.

3.0 COMMITTEE'S DELIBERATION AND ANALYSIS OF THE BILL

3.1 Impact of the Bill

The Committee noted that the Bill aims to provide for a uniform Code of Conduct that applies to all public officials. The Code of Conduct will apply with the necessary modifications to each category of public officials as set out in the Schedules to the Bill.

The Bill will ensure that there is proper demarcation and clarification as to how a category of public official will be held accountable.

3.2 Committee's Initial Reading and Findings

The Committee began its analysis of the Bill by reading through it Clause by Clause and noted numerous issues pertaining to the Bill and noted a few issues, which can be summarised as follows:

- application of the Bill to all holders of a public office – this is a new concept, especially with regards to having a uniform code of conduct and whether there will be issues concerning its practicality;
- whether certain offices should be exempted and have its own legislation that specifies its code of conduct;
- how existing internal mechanisms within public offices will be affected;

The Committee noted that these issues needed clarification thus questions were formulated pertaining to these and sent to the Office of the Solicitor General, as drafters of the Bill for clarification.

The representatives from the Office of Solicitor-General, responded and advised the Committee accordingly. The response assisted the Committee in its deliberation and observation of the Bill and this forms part of the outcome of the Committee's deliberation.

3.3 Oral and Written Evidence Received

The Committee was mindful of the impact of the Bill on the public, therefore, as part of its review, it conducted public consultations on the Bill in key areas around Fiji. Some of the submissions focused on the need to have a legislative framework that specifies the legal enforceability of codes of conduct and welcomed the introduction of the proposed law.

However despite its apparent benefits, there were also concerns raised from the public and the public offices regarding the Bill and these can be categorised as follows:

- drafting and interpretation concerns;
- concerns regarding its application and/or lack thereof ;
- practicality concerns – including, how the proposed uniform Code of Conduct will be assimilated with existing internal mechanisms for public offices; and
- its possible inconsistency with the objectives of the proposed law as provided in the *Constitution*.

A summarised explanation of the main categories of concerns noted from the evidence received is provided below.

Submissions received noted concerns regarding the drafting of the provisions of the Bill, which ultimately led to the possible ramifications on how the Bill will be interpreted. Evidence received by the Committee pointed to certain definitions and phrases provided in the Bill and its possible impact on the Bill and there were suggestions for amendments to these.

The evidence received also relate to concerns on the application of the Bill. Some submitters have noted that the Bill applies to only certain offices and this could be a concern. Clarification was also sought on the Accountability and Transparency Commission's (ATC) powers and its limitations.

Clarification was also sought on how broad certain provisions of the Bill were drafted, which had the potential of being used to gain information simply by paying a fee.

There were also concerns over the practicality aspect of implementing the provisions of the Bill. It was noted that the Bill was unclear with regards to certain actions that the ATC could perform since there were no clear and concise criteria of actions provided for. Concerns were also raised about the being no appeal process provided for in the Bill.

The Committee also noted from the evidence received that there were concerns regarding already existing internal Codes of Conduct and policies and how these will assimilate the provisions of the proposed law.

Furthermore, it was noted that certain provisions would impede on the purpose of the Bill; there was potential for;

- complaints being disqualified due to the fact that the complaint was disclosed by the complainant to any other person or entity apart from the ATC;
- the complainant not having true immunity; and
- the impact that the disclosure of interest would have on public officials holding public office.

3.4 Research into other jurisdictions

Apart from the written evidence received, the Committee also thought it prudent to have a jurisdictional comparison of the proposed law with laws similar to it of other jurisdictions. The Committee noted that the Bill aims to provide for a sole legislative framework for which the codes of conduct for all public officials or holders of a public office are provided for. The Committee therefore resolved to research other jurisdictions to see the type of legislative frameworks, pertaining to codes of conduct that exist in such jurisdictions and how these have impacted the people.

Some of the jurisdictions that the Committee took note of were New South Wales (Australia), Canada, New Zealand, the UK and the USA. The pertinent points noted by the Committee with regards to these countries were as follows:

The research shows that while some of these jurisdictions have a code of conduct that is provided for by sole legislative framework and has been applied to all public officials and other officers holding an office with the capacity of being funded by the public, it was noted that in other jurisdictions, the codes of conduct applicable to all public servants were provided in a sole legislation but this did not encompass other public office holders such as Minister and Members of Parliament.

The following provides a concise description of the various legislative frameworks that exist in the above-mentioned jurisdictions.

Australia:

The Committee noted that a Code of Conduct is provided for in the *Public Service Act* 1999 (“Act”) covering all members of the Australia Public Service (APS). The APS Values and Code of Conduct in Practice covers civil servants’:

- Relationships with – the Government and the Parliament; the public and; in the work place,
- Responsibilities for – managing information; managing conflict of interest; employees as citizens; using Commonwealth resources; working overseas and; reporting suspected misconduct.

The Act prescribes penalties for violations of the code which range from a reprimand to termination of employment. The Australian Public Service Commission administers and enforces the code and it reports annually to Parliament.

Violation of some of the codes in the APS Values and Code of Conduct in Practice, are punishable under the Section 70 of the *Crimes Act*. For example unauthorised disclosure of information attracts a maximum penalty of two years imprisonment

The code does not cover the Australian Parliament. The Commonwealth has a guide to ministerial conduct but no code of conduct covering senators and members. Some state legislatures have established their own set of codes for their members. For example, the Western Australia Legislative Assembly has its *Code of Conduct for Members of the Legislative Assembly* adopted by the House in 2003.¹

Canada:

The public sector is covered by a code of conduct titled the *Values and Ethics Code for the Public Sector* which was created under the requirement of the *Public Servants Disclosure Protection Act*.²

Ministerial code of conduct □ The Canadian Privy Council Office publishes *Accountable government: a guide for ministers and ministers of state 2011* which 'sets out the duties and responsibilities of the Prime Minister, Ministers and Ministers of State, and outlines key principles of responsible government in Canada'. The Guide operates in conjunction with the codes of conduct contained in the *Federal Accountability Act 2006*. These codes, now enshrined in legislation, are the Conflict of Interest Code for Public Office Holders and the Post-Employment Code for Public Office Holders. They cover ministers' behaviour in the areas of conflict of interest, post-separation employment and lobbying.

Members of parliament code of conduct □ Members are subject to the *Conflict of Interest Code for Members of the House of Commons* (MP Code). The MP Code is administered by the *Conflict of Interest and Ethics Commissioner* under the direction of the Standing Committee on Procedure and House Affairs. The Code has been in operation since 2004 and the current version is dated June 2011. It is an appendix to the Standing Orders of the House of Commons.

New Zealand:

Ministerial code of conduct – Information on the conduct of ministers is contained in the New Zealand Government's Cabinet Manual in the sections: Conduct; public duty and private interests of ministers and parliamentary

¹ Research Brief Prepared by Josua Namoce (Manager Research and Library); Email: josua.namoce@parliament.gov.fj

² Government of Canada, *Employment and Social Development Canada Code of Conduct*. Available at: <https://www.canada.ca/en/employment-social-development/corporate/code-conduct.html> [Accessed 11/05/2018]

under-secretaries; Gifts and Fees; endorsements and outside activities (paragraphs 2.52-2.96). On the question of determining acceptable conduct, paragraph 2.53 states that '[u]ltimately, Ministers are accountable to the Prime Minister for their behaviour'. The manual includes guidance on conflict of interest and at paragraph 2.57 notes that '[m]inisters are responsible for ensuring that no conflict exists or appears to exist between their personal interests and their public duty'.

The current edition of New Zealand Parliamentary Practice states that:

As occasion requires, ministerial guidelines may be issued by the Cabinet or the Prime Minister to deal with particular circumstances that have arisen (such as the conduct to be observed by Ministers involved in mayoral election campaigns). However, these ministerial codes of conduct are political guidelines adopted by Governments to guide their own conduct. They have no statutory origin and are not regarded as being legally enforceable. Their significance depends upon the sense of commitment to public office held by Ministers and on their political responsibility to Parliament and public opinion.

Members of parliament code of conduct □ There is currently no code of conduct covering members of parliament. On 12 July 2007 the Speaker of the House of Representatives addressed the 38th Presiding Officers and Clerks Conference and referred to an announcement in June 2007 by four minor parties— the Green Party, Maori Party, United Future and ACT New Zealand. The representatives of these parties had announced their intention to sign a code of conduct. The code was 'voluntary but the intention was that if enough Members signed, then the Code of Conduct could be adopted by the Parliament and included in the Standing Orders.' The Speaker noted 'I have agreed to be the repository of the minor parties' Code but I have no authority to enforce it'. He also said that it was unlikely that the code would attract the support of the major parties.

In August 2008 the Speaker noted that the minor parties' proposed code of conduct was being considered by the Standing Orders Committee. The Committee reported on 27 August 2008. The Committee received a number of submissions on the need for a code of conduct covering members of parliament. On this issue the report stated:

We have asked members whether they would support a voluntary code in the form of guidelines set out in the report of the Standing Orders Committee, but there is insufficient support for the development of such a code. Members' behaviour in the Chamber is covered by Standing Orders and Speakers' rulings and is a matter for the authority and judgment of the Speaker and other presiding officers. If members choose to make further public statements or commitments as to their behaviour, that is their right.

We note that a number of Parliaments in other countries have adopted codes or guidelines to help members make judgments about conflicts of interest, and we have considered such examples. Not all of the matters covered in overseas codes would be necessary or appropriate in the New Zealand environment. The registration of members' pecuniary

interests is the backbone of almost all parliamentary codes of conduct. The New Zealand Parliament already has an effective regime for the disclosure of members' interests."

New Zealand Parliamentary Practice notes that:

Except in the case of financial interests, the House has not adopted any detailed ethical guidelines for its members, taking the view that advice about appropriate behaviour is primarily a matter for induction training and internal party discipline. Ethical rules that apply to members tend to be ad hoc or indirect. Thus, a member who accepts or solicits a bribe commits a crime and the House's contempt powers (for example, the rule concerning bribery) do set some rules for members that have an ethical content.

Register of interests □ All members of parliament are required to disclose certain assets and interests in an annual Register of Pecuniary Interests of Members of Parliament. This register is administered by the Registrar of Pecuniary Interests of Members of Parliament who publishes an annual summary of registered interests. The pecuniary interests' requirements are set out in appendix B of the Standing Orders of the House of Representatives. This appendix describes the Registrar as 'the Deputy Clerk or a person appointed by the Clerk, with the agreement of the Speaker, to act as registrar'.

Lobbying code of conduct and lobbyist register □ On 5 April 2012 Ms Holly Walker, a member of the Green Party, introduced the Lobbying Disclosure Bill 2012. The purpose of the Bill is to:

- increase the transparency of decision making by executive government by:
- establishing a Register of Lobbyists, which is administered by the Auditor-General
- the development of a Lobbyists' Code of Conduct and providing powers to the Auditor-General to investigate breaches of the Code.³

The United Kingdom (UK):

A Ministerial Code covers ministerial conduct. A Code of Conduct for Members of Parliament was passed in 1994. In 2009, a Code of Conduct was agreed on for the House of Lords. According to Transparency International, "as a common law state with few written laws, the codes of conduct in the United Kingdom have exceptional value for the MPs." The Code guides MPs and outlines general principles of conduct: selflessness, integrity, objectivity, accountability, openness, honesty, and leadership. These same principles form the basis of the code of conduct for the House of Lords.

The Code is administered and implemented by a Parliamentary Commissioner for Standards. There is a Commissioner for each of the House of Commons and House of Lords. In 2009, the Independent Parliamentary Standards Authority (IPSA) was established to oversee and control MPs'

³ Ibid 1.

expenses. For violations, sanctions include suspension or expulsion from Parliament and public reprimands.

A Civil Service Code was passed in 2010 as official legislation, governing the conduct of civil servants or officials answerable to the Ministers⁴.

The United States of America (USA):

According to Transparency International, the US “...has one of the oldest and most comprehensive codes of conduct. Adopted in 1958, it applies to all government officials and covers a range of issues: conflicts of interest, the acceptance of gifts, and secondary and revolving door employment. These ethics standards, however, are not legally binding because they were adopted through a resolution and not through a public law.” The code outlines the “ethical boundaries for public officials” and calls on government officials to “put loyalty to the highest moral principles and to country above loyalty to Government persons, party, or department.”

Both the House of Representatives and the Senate have their own respective codes of conduct.

Following the Watergate scandal of 1978, the US Congress heightened ethical standards with the Ethics in Government Act of 1978, setting requirements for financial disclosure of all government officials. Today, the United States has one of the strictest policies on the acceptance of gifts: no gift valued more than US\$50 can be accepted, and gifts from one source cannot exceed cumulative value of US\$100⁵.

3.5 Gender Analysis

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

During its deliberation the Committee noted that the Bill will apply equally to every Fijian irrespective of gender. The Code of Conduct provided for in the Bill will apply uniformly to all civil servants – public officials and all other officers serving in the capacity of an office that is paid by public funds.

The Bill follows the principle in other laws that the law will apply equally to all Fijians.

3.6 Outcome of Deliberation

After extensive deliberation, the Committee noted the following issues which were then considered with the assistance of the initiating Ministry and the

⁴ Ibid 1.

⁵ Ibid 1.

drafting team. This ensured that all relevant issues raised before the Committee was appropriately addressed. The following are the issues noted and the committee's deliberation on the issue.

1. *What are the ramifications of amending clause 2 of the Bill to provide definitions for the terms "direct relatives" and "statutory authorities"?*

The purpose of defining a word, term or an expression in a law is to give that word, term or an expression that is often used in that law a particular meaning. It is noted that the term "direct relatives" appears only once in the explanatory notes to the Code of Conduct Bill 2018 ('Bill') which is not a substantive part of the Bill. Therefore, it is advisable that the term "direct relatives" need not be defined given that it does not appear anywhere in the substantive part of the Bill.

With respect to the term "statutory authority", it is noted that this term in its plural and singular form appears 7 times throughout the substantive part of the Bill. Although this is the case, we are of the view that the term is self-explanatory and as such we advise that the term not be defined.

It should be noted that the term "statutory authority" is used in many other laws in Fiji and that those particular laws do not define the term. As such, we are of the view that the Bill is reflective of the approaches with which other laws have taken and therefore advise that there is no need to define the term.

2. *What are the ramifications of amending clause 2 of the Bill to extend the definition of "public officials" to also cover employees of officials listed in Schedule 6, including municipal and provincial councils?*

It should be noted that the definition of "public official" does cover employees of certain offices listed in Schedule 6. For example, employees of the Prime Minister or Attorney-General fall under the definition of "public official" and as such they would have to adhere to the code of conduct stipulated in Schedule 5.

If the definition were to extend to include employees of statutory authorities listed in Schedule 6, this may create confusion as to which code of conduct an employee of a statutory authority would have to follow. For example, if a public official were to include employees of the Biosecurity Authority of Fiji ('BAF') then confusion may arise as to which code of conduct the employees of BAF would be required to follow. The question that would then arise would be whether BAF employees follow the code of conduct in Schedule 4 or Schedule 5.

Therefore, to avoid confusion as to which code of conduct would be applicable to such categories of persons, we recommend that the definition of "public official" remain as is.

3. *The Committee felt that certain officials needed to be included in Schedule 6; and clarification was sought on the ramifications of amending Schedule 6 to include other officials such as:*

- The Deputy Auditor-General;

- Directors of Audit; and
- The Director Financial Intelligence Unit.

It is noted that Schedule 6 may be amended by way of regulations in accordance with clause 25(2) of the Bill. However for the purposes of clarity it is recommended that the following officials be included in Schedule 6:

- (a) Deputy Auditor-General;
- (b) Directors of the office of the Audit-General;
- (c) Director Financial Intelligence Unit;
- (d) Chief executive officer of the Accident Compensation Commission;
- (e) Commissioner for the Online Safety Commission; and
- (f) Deputy Solicitor-General.

4. *Clarification was sought on why the members of the Accountability and Transparency Commission ("ATC") are not included in the list provided in Schedule 6 of the Bill?*

To include members of ATC in Schedule 6 would place the members of the ATC in a position of a conflict of interest i.e. members of ATC would have to declare their assets to themselves.

Given the direct conflict of interest, members of ATC are not included. Furthermore, we submit that clause 10 of the Bill provides that where a complaint is made against a member of ATC, such a complaint is to be made to the Chief Justice.

5. *Clarification was sought on why there is no penalty if required declarations of conflict of interest are not made to the appointing authority by all employees of an entity and if such declarations are not complete?*

If declarations of conflict of interest are not made to the appointing authority then clause 18 of the Bill would apply. Clause 18 of the Bill provides that after an investigation into a complaint ATC must refer the complaint to either the appointing authority for disciplinary action or the prosecuting authority for legal action.

6. *Clarification was sought on why there is no provision in the Bill that provides for appealing decisions of the ATC either upon investigation or rejection of complaints?*

ATC is independent under the Constitution and as such no specific appeals mechanism is needed however, should a decision of ATC be challenged, this may be done by way of judicial review. A judicial review is an avenue of redress under the court mechanism whereby the process of reaching a decision can be challenged. This avenue of redress is often exercised by members of the public against commissions like this one, statutory authorities, quasi-judicial bodies etc.

7. *What are the ramifications of amending the definition of child by removing the age restriction or dependency?*

Under clause 26 of the Bill, a person must provide a statement of income, assets, other interests and liabilities including those of his or her spouse and child. As such, there is a need to retain the age and dependency of any issue

that the person may have in order to accurately reflect his or her financial position and interests for the purposes of transparency.

This is also alluded to in Schedule 1 to the Bill which requires a person, upon assuming office, to take reasonable steps to deal with financial and other interests of himself or herself or his or her spouse or child which could create the impression of a material conflict with his or her public duties.

We submit that a similar requirement for the declaration of statement of assets and liabilities is provided for under other laws such as the Political Parties (Registration, Conduct, Funding and Disclosures) Act 2013. We therefore advise that the definition of "child" in the Bill remains as is to give full effect to the provisions which refer to the term.

8. *Clarification was sought on why clause 12 of the Bill does not provide an explanation as to what qualifies a complaint to be "trivial, frivolous, vexatious and lacking in substance". The Committee is of the opinion that clear definitions or explanations of the suggested qualifications is vital for the implementation of the Bill.*

The words "trivial", "frivolous", "vexatious" and "lacking in substance" are used in other legislation in Fiji such as:

- (a) section 110(1)(b) of the Legal Practitioners Act 2009 which allows the Chief Registrar to summarily dismiss a complaint if the complaint is "vexatious, misconceived, frivolous or lacking in substance"; and
- (b) section 61(1)(b) of the Media Industry Development Act 2010 also has a similar provision which allows the Media Industry Development Authority to also summarily dismiss a complaint if the complaint is "vexatious, misconceived, frivolous or lacking in substance".

Other provisions to note include:

- (a) section 29(1)(b) of the Human Rights and Anti-Discrimination Act 2009;
- (b) section 37(b) of the Fijian Competition and Consumer Commission Act 2010;
- (c) section 17(2)(a) of the Medical Imaging Technologists Act 2009; and
- (d) section 70(3)(a) of the Allied Health Practitioners Act 2011.

The above legislation amongst others do not define these words so as to empower the regulating person or body to determine what is "vexatious, misconceived, frivolous or lacking in substance" on a case by case basis given that the terms are subjective.

Furthermore it is advisable that ATC may issue guidelines and directions regarding such matters in accordance with clause 4 of the Bill. Accordingly, it is recommended that definitions are not necessary for this purpose and therefore need not be included.

9. *The Bill seems unclear since it does not provide clear and concise criteria of actions which would allow the ATC to decide on whether to investigate or summary dismissal. It was also noted that there is no clear and concise provisions in terms of steps which need to be carried out in the event of a conflict of interest. Clarification was sought on this.*

It is submitted that clause 12(1)(a)—(h) of the Bill provides the circumstances in which a complaint may be summarily dismissed. The Bill further provides that if a complaint is not summarily dismissed, it is investigated.

10. *What are the ramifications of amending clause 9 of the Bill to provide that the ATC is able to initiate its own investigations and own accord and not only after a complaint has been lodged?*

Clause 10(1) of the Bill provides that any person may make a complaint to ATC. Any person includes members of ATC. One must note though that clause 10(2) and (3) of the Bill provides that the complaint must be made in writing and not from an anonymous person. For that reason, if a member of ATC has a complaint he or she must follow the same process. We therefore recommend that the provision remains as is.

11. *The Committee notes that clause 27(1) is quite broad that it could allow anyone to access information from the ATC as long as the required fee is paid. Therefore, clarification is sought on why clause 27(1) is drafted in a manner that makes its application quite broad? It is also suggested that a list of plausible situations be listed as grounds for making such a request to be allowed under the said provision.*

Section 149(f) of the Constitution of the Republic of Fiji ('Constitution') states:

"A written law shall—

(f) provide for the annual declaration by the officers mentioned in paragraph (a) of the assets and liabilities and financial interests of the officer, and of such other direct relatives of the officer as may be prescribed, to the Accountability and Transparency Commission, and for such declarations to be accessible to the public."

The intention behind clause 27 of the Bill is to ensure that such declarations made under Part 6 are accessible to the public in accordance with section 149(f) of the Constitution. For that reason, we recommend that it remains as is.

12. *What are the ramifications of amending Part 6 of the Bill by providing that information about spouses and children to be disclosed only for ATC purpose and not to be subject to clause 27(1)?*

Section 149(f) of the Constitution of the Republic of Fiji ('Constitution') states:

"A written law shall—

...

(f) provide for the annual declaration by the officers mentioned in paragraph (a) of the assets and liabilities and financial interests of the officer, and of such other direct relatives of the officer as may be prescribed, to the Accountability and Transparency Commission, and for such declarations to be accessible to the public."

The intention behind clause 27 of the Bill is to ensure that such declarations of the "officer and of such other direct relatives" are made and that such declarations are accessible to the public. We therefore recommend that the provision remains as is.

13. Clarification was sought on the term "members" and whether it should be defined as it is used throughout the Bill.

The term "members" are used in different contexts throughout the Bill. For example, it is used in the context of referring to "members of Parliament", "members of a commission", "members of a statutory authority or a board of a statutory authority" and "members of the legal profession" etc.

Defining the term "members" would be problematic given that it is used in different contexts throughout the Bill. Therefore, it is recommended that the term "members" not be defined.

14. What are the ramifications of amending the Bill to also cover agents or consultants of public offices?

The purpose of the Bill is to *inter alia* establish codes of conduct for persons stipulated under section 149(a) of the Constitution of the Republic of Fiji ('Constitution'). The list of persons stipulated under section 149(a) of the Constitution includes members of the public sector and not members of the private sector. The reason why it captures only members of the public sector is to increase public confidence and accountability in the public sector. Agents or consultants of public offices are mostly members of the private sector. If agents or consultants were to be included, we would be going outside the purpose of the Bill.

15. It was noted that government and statutory offices have their own internal Code of Conduct policies which includes investigations and disciplinary processes in relation to complaints received on issues of conduct by public officials of such offices. Therefore, the questions that arise are:

- *If a complaint is received simultaneously by a government/statutory office and the ATC, who does the investigation?*

According to clause 12 of the Bill, if a complaint is received by ATC and the complaint does not get summarily dismissed by ATC then ATC must investigate the complaint regardless of whether the government/statutory office is carrying out the same investigation.

- *Clarification is sought on whether such internal Code of Conduct policies will be null and void when the powers will be vested to the ATC to investigate the complaints reported to it (ATC)?*

The hierarchy of legislation must be noted in this case. That is, when the Bill is enacted it will have superiority over any internal code of conduct policy. In other words, if a complaint is received and investigated simultaneously by a government/statutory office then the outcome under the Bill would take precedence over the outcome of the internal code of conduct.

However, that does not mean that a government/statutory office not have a code of conduct policy. The government/statutory office can still have an

internal code of conduct policy however, it is advised that it be aligned to what is prescribed in the Bill.

16. Clarification is sought on whether the ATC will provide full disclosure of all evidence and findings to the appointing authority to enable a fair disciplinary proceeding by the appointing authority?

ATC's duty is to provide full disclosure of all evidence and findings to the appointing authority. If ATC does not provide full disclosure then this would amount to abuse of office and ATC could then be subject to criminal investigations.

Furthermore, it is submitted that in any event, any independent prosecuting authority must disclose evidence in order to prosecute.

17. What are the ramifications of amending clause 11(1) by putting a time limit, such as, "no later than 21 days" for the ATC to notify the complainant of the receipt of the complaint? The Committee is of the opinion that this may remove the possibilities of delay in the process followed in attending to complaints and allow the person complained against to address the complaint.

It is submitted that to place a time limit would be problematic given that the nature of a complaint varies from case to case. Depending on the complexity of a complaint, ATC may require more or less time to investigate. It is therefore advised that a time limit may hinder the proper process and affect the thoroughness of an investigation and that a time limit need not be specified.

18. What are the ramifications of amending clause 12(1) by deleting the words "is of the opinion" and substitute it with "in its finding"? It was noted that this ensures that the ATC properly vets a complaint before deciding whether it will investigate or not.

It is advised that the proposed amendment is superfluous and as such substitution of the term is not necessary.

19. Clarification was sought on the word "malicious" and the phrase "politically motivated" as these are referenced throughout the Bill thus meaning that the ATC will be guided by the basis of what is malicious and whether political motivation is for unjust purposes. However there is no such definition for these. Therefore, what are the ramifications if the Bill is amended by defining the word and phrase "malicious" and "politically motivated"?

Guidelines regarding what constitutes "malicious" or "politically motivated" could be issued by ATC in accordance with clause 4 of the Bill therefore it is advised that definition of the terms is not necessary for this purpose.

20. It was noted that clause 12(1)(f) should be amended by inserting after the word "required" the words "in writing".

By inserting the words "in writing", the provision would read—

"Investigation by the Commission

12.—(1) The Commission must investigate any complaint received by the Commission, unless the Commission is of the opinion that—

...

(f) further information and verification as required in writing by the Commission are not provided by the complainant,..."

The proposed insertion would limit ATC's approach in obtaining further information and verification. It is therefore recommended that the words "in writing" not be included so as to allow ATC to obtain further information and verification the best way possible, be it through written correspondences or face to face interviews.

21. It was also noted that clause 12(1)(g) be amended by inserting after the words "previous complaint" the words "by the same complainant". This allows for new complainants with sufficient or new evidence pertaining to the similar complaint that was earlier dealt with to lodge the complaint.

By inserting the words "by the same complainant", the provision would read—

"Investigation by the Commission

12.—(1) The Commission must investigate any complaint received by the Commission, unless the Commission is of the opinion that—

...

(g) the subject matter of the complaint has been the subject of a previous complaint by the same complainant that has been dismissed by the Commission; or..."

It should be noted that the purpose of this provision is to dismiss complaints of similar nature that have already been dismissed by ATC. For example, if a person on 3 March 2019 ('complainant A') lodges a complaint against a public official for failing to declare his interest in the appointment of a clerical officer on 23 May 2018 and ATC found that there was no conflict of interest, ATC would dismiss the case. Then on 10 March 2019, a week later, another different person ('complainant B') lodges the same complaint concerning the same public official to ATC. The provision as stands, allows ATC to dismiss the complaint.

If the proposed amendment were to be incorporated, then that would mean that ATC would then have to investigate complaints already dismissed by ATC. This in our opinion would be a waste of time and resources. For that reason, it is recommended that the provision remains as is.

22. The Committee was of the opinion that clause 13 be amended by deleting the word "is" where it appears before the words "malicious" and "politically" and inserting the words "has been found by the Commission to be". If it is a criminal offence, it must have a finding by the ATC, subject of course if there is a definition of "malicious" and "politically motivated".

It is advised that the proposed amendment is superfluous and as such substitution of the term is not necessary.

23. Clarification was sought on the restriction provided in clause 10(2), where it is mandatory for complaints to be in writing. This provision

would impede on the whole purpose of the Bill, which is to allow the public to bring complaints against public office holders.

The intention behind having complaints made in writing is to enable ATC to identify a complainant so that investigations into the matter are done in a timely manner.

- 24.** *Clarification was sought on the effect that clause 12(1)(c) has on achieving the purpose of the Bill. This provision would impede on the purpose of the Bill by disqualifying a complaint due to it being disclosed by the complainant to any person or entity apart from the ATC.*

Clause 12(1)(c) of the Bill provides that ATC not investigate a complaint if the complainant discloses the nature, substance or details of the complaint or has disclosed the name or office of the person the subject of the complaint to any other person or entity. The intention behind this clause is to ensure confidentiality is maintained during an investigation.

- 25.** *What are the ramifications if Clause 7 of the Bill is amended to also include officials, such as Directors who are appointed by the State, of organisations that receive funding from government?*

The purpose of the Bill is to *inter alia* establish codes of conduct for persons stipulated under section 149(a) of the Constitution. The list of persons stipulated under section 149(a) of the Constitution includes members of the public sector and not members of the private sector. If officials or directors of organisations that receive funding from Government are from the private sector and if they were to be included in the Bill, we would be going outside the purpose of the Bill.

It is prudent to note that there are other avenues (civil and criminal) currently in place that deal with misuse of funds by an official or director of a private organisation who receives funding from Government.

- 26.** *What are the ramifications if Clause 15(a) is amended to give the ATC the right to access materials from state entities, which include municipal and provincial councils and entities as stated in Clauses 7(5) and (6), 25(2) and Schedule 6, which provides that employees are to adhere to the code of conduct?*

Clause 15(a) of the Bill states that ATC is authorised to have full access to all materials of any Government ministry or department that are needed for investigations. The authorisation does not extend to private entities because of confidentiality issues. These types of records can be accessed during the investigation stage by way of court warrants. For that reason, it is advised that clause 15 of the Bill remains as is.

- 27.** *Clarification was sought on why there is no definition or interpretation of what could be deemed to be politically motivated in Clause 12 or anywhere in the Bill? It was believed that this makes the Bill unclear and problematic, or is it suggested to be covered under the regulations?*

Guidelines regarding what constitutes "politically motivated" could be issued by ATC in accordance with clause 4 of the Bill therefore it is advised that definition of the term is not necessary for this purpose.

28. What are the ramifications of amending the Bill in the case where ATC finds any discrepancies in the declaration by spouses and children and is allowed to initiate investigation into this, and upon its findings refer the matter to the prosecuting authority or the appointing authority?

Clause 26(4) provides ATC power to require a person to whom Part 6 applies to explain or give further details of any matter relating to the statement including discrepancies in the statement or between it and other statements or information. Clause 28 of the Bill further provides that if a person to whom Part 6 applies fails to comply with clause 26 of the Bill, then the said person commits an offence and is liable upon conviction to fine not exceeding \$10,000 or imprisonment for a term no exceeding 5 years or both.

In other words, if ATC finds any discrepancy in a declaration made, ATC may require the person to explain or give further details. If the person fails to provide such information to ATC, the person will be liable under clause 28 of the Bill.

It is therefore recommended there is no need to amend the Bill to empower ATC to investigate and refer the matter to the prosecuting authority or the appointing authority.

29. With respect to monitoring compliance and enforcement of code of conduct, the ATC has powers to obtain information from the office of the official being complained about. This poses the potential risk of release of confidential information that can only be released through a duly approved search warrant. Clarification was sought on the above.

Given that clause 15 of the Bill empowers ATC with authorisation to have full access to all materials of any Government ministry or department that are needed for investigations, it is advised that there is no potential risk of release of confidential information that can only be released through a duly approved search warrant.

30. What are the ramifications if the Bill is amended to also define and cover misconduct and gross misconduct? The Committee feels that this suggested amendment would assist making decisions on disciplinary proceedings.

It is advised that the codes of conduct provided in the schedules to the Act are sufficient enough to cater for misconduct and gross misconduct. Although the terms are not expressly used in the Bill, the codes of conduct provided in the schedules to the Act do specify rules and responsibilities to help try and avoid misconduct or gross misconduct.

31. What are the ramifications if the Bill is amended to include the Police as an investigating authority before a complainant reports to the ATC?

Section 149(c) and (d) of the Constitution states:

"A written law shall—

(d) make provision for the investigation of alleged breaches of the code of conduct and enforcement of the code of conduct by the Accountability and Transparency Commission, including through criminal and disciplinary proceedings, and provide for the removal from office of those officers who are found to be in breach of the code of conduct;..."

Section 149(d) of the Constitution specifically provides that provision be made for the investigation of alleged breaches of the code of conduct by ATC and not the police. It is therefore advised that the police not be included as an investigating authority.

32. *There were also comments from submitters that noted the following:*

(i) Inconsistency with the 2013 Constitution:

"Clause 20 of the Bill makes provisions of immunity for complainants. This Clause is however limited given that immunity is forfeited for the reasons outlined in Clause 12 and Clause 24. These provisions limiting immunity on the grounds expressly stated in the Bill do not provide for whistle-blowers, being persons who, in good faith are making disclosures that a public officer or a person having high rank in authority as covered under the Bill has breached the code of conduct or has engaged in fraudulent or corrupt practices. The limits on immunity provisions contravene Section 149 (e) of the Constitution of the Republic of Fiji ("Constitution") and has effect of creating fear in people for highlighting a complaint to the Commission or a relevant authority.

Section 149(e) of the Constitution provides that a written law shall provide for the protection of whistle blowers who in good faith disclose that an officer has contravened a written law or breached a code of conduct or engaged in fraudulent or corrupt practices.

Under clause 20 of the Bill, whistleblowers as such or a person making a complaint concerning an alleged or suspected non-compliance with a code of conduct are provided immunity which we submit does not contravene section 149(e) of the Constitution.

Clause 20 of the Bill is subject to the provisions of the Bill itself wherein other provisions such as clauses 12 and 24 of the Bill provide for instances where ATC may summarily dismiss a complaint and where protection is forfeited in certain cases respectively.

It is submitted that in the case of the former provision, protection is not limited but rather the discretion to dismiss a complaint is provided for, based on the grounds specified therein.

In the case of the latter provision, specified grounds for forfeiture of protection are given to ensure the protection afforded to a complainant under clause 20 of the Bill is not abused.

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

Clause 10(4) to (7) of the Bill provides that the Chief Justice may investigate complaints made by members of ATC. It also provides that the powers

vested in ATC under the Bill are deemed to be vested in the Chief Justice. Therefore, in cases where a member of ATC lodges a complaint to the Chief Justice, the complainant can and will be subject to the protection provided for under Part 5 of the Bill.

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

It is advised that the appointment of members of ATC pursuant to section 121(2) of the Constitution and any investigation that may involve the President under the provisions of the Bill does not invalidate or question the independence of the members of ATC. The conduct of investigations carried out by ATC are guided by provisions of the Bill and therefore the required processes would need to be carried out in a transparent manner.

Furthermore, other appointments of enforcement and prosecutorial authorities are made by the President under the Constitution however this does not jeopardize the mandate of these authorities to carry out their functions or investigations which may involve persons such as the President.

Therefore after consideration of all the issues, it was resolved that the Bill is adequate as it is, with the exception of Schedule 6, which is proposed to be amended as noted in issue number 3 above.

4.0 CONCLUSION

After adhering due process and the requirements of the Standing Orders of Parliament, the Committee in its deliberation saw that there was a need for the Bill. It also made observations on the Bill as highlighted above. These deliberations led to consultations with the drafters so as not to upset the objectives of the Bill. The Committee made an amendment to the Bill as a result of the deliberation and this is reflected in red text in the amended copy of the Bill presented with this report.

The Committee through this report commends, with the mentioned amendment, the *Code of Conduct Bill 2018 (Bill No. 33 of 2018)* to the Parliament.

SIGNATURES OF THE MEMBERS OF THE STANDING
COMMITTEE ON JUSTICE, LAW AND HUMAN RIGHTS



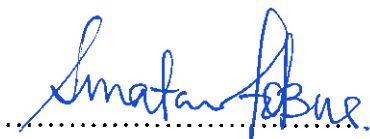
Hon. Alvick Maharaj

(Chairperson)



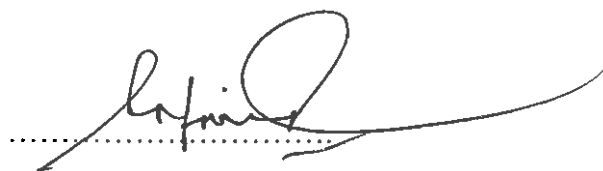
Hon. Rohit Sharma

(Deputy Chairperson)



Hon. Ratu Suliano Matanitobua

(Member)



Hon. Dr. Salik Govind

(Member)



Hon. Mosese Bulitavu

(Member)



(Date)