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 Kameleon 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

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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 harmed.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.

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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 the 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.  

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.” 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
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.