

ONLINE SAFETY BILL 2018
(BILL NO. 7 OF 2018)

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BILL NO. 7 OF 2018

A BILL

FOR AN ACT TO ESTABLISH THE ONLINE SAFETY COMMISSION FOR
THE PROMOTION OF ONLINE SAFETY, DETERRENCE OF HARMFUL
ELECTRONIC COMMUNICATION AND FOR RELATED MATTERS

ENACTED by the Parliament of the Republic of Fiji—

PART 1—PRELIMINARY

Short title and commencement

1.—(1) This Act may be cited as the Online Safety Act 2018.

(2) This Act comes into force on a date or dates appointed by the Minister by notice in the Gazette.

Interpretation

2. In this Act, unless the context otherwise requires—

“adult” means an individual who is 18 years of age or older;

“child” means an individual who has not reached 18 years of age;

“Commission” means the Online Safety Commission established under section 6;

“Commissioner” means the commissioner of the Online Safety Commission appointed under section 6;

“court” means the High Court of Fiji;

“electronic communication” means any form of communication transmitted or communicated electronically and includes any text message, writing, photograph, picture, recording or other matter that is communicated electronically;

“harm” means serious emotional distress;

“individual” means a natural person;

“intimate visual recording” —

(a) means a visual recording including a photograph, video or digital image that is made in any medium using any device with or without the knowledge or consent of the individual who is the subject of the recording, and that is of—

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

(A) naked or has his or her genitals, pubic area, buttocks or female breasts exposed, partially exposed, or clad solely in undergarments;

(B) engaged in sexual activity; or

(C) engaged in showering, toileting or other personal bodily activity that involves dressing or undressing; or

(ii) an individual’s naked or undergarment-clad genitals, pubic area, buttocks, or female breasts which is made—

(A) from beneath or under an individual’s clothing; or

(B) through an individual’s outer clothing in circumstances where it is improper to do so; and

(b) includes an intimate visual recording that is made and transmitted in real time without retention or storage in—

(i) a physical form; or

(ii) an electronic form from which the recording is capable of being reproduced with or without the aid of any device or thing;

“Minister” means the Minister responsible for communications; and

“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.

Objectives

3. The objectives of this Act are to—

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

Application

4. This Act applies to—

- (a) the whole of Fiji and, except as otherwise provided, to any acts, omissions, matters or things outside Fiji; and
- (b) an electronic communication posted on or after the commencement of this Act.

Act to bind the State

5. This Act binds the State.

PART 2—ONLINE SAFETY COMMISSION

Online Safety Commission

6.—(1) This section establishes the Online Safety Commission.

(2) The Commission is—

- (a) a body corporate with perpetual succession and a common seal;
- (b) capable of holding real and personal property;
- (c) capable of suing and being sued; and
- (d) capable of doing and suffering all such other acts and things that a body corporate may lawfully do and suffer.

(3) The Commission consists of the Commissioner and such other staff appointed by the Commission as necessary for the performance of the Commission’s functions under this Act.

(4) The Commissioner is appointed by the Minister and may hold office for a term not exceeding 3 years, and is eligible for reappointment.

(5) The Commissioner is entitled to such remuneration and allowance as determined by the Minister.

Funding

7.—(1) 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.

Functions of the Commission

8. The Commission has the following functions—

- (a) to promote online safety;
- (b) to organise awareness and education programmes, including the provision of online safety material;
- (c) to receive complaints in relation to electronic communication that causes or intends to cause harm;
- (d) to assess and provide advice in relation to any query or complaint submitted to the Commission;
- (e) to investigate complaints and seek to resolve such complaints, as appropriate;
- (f) to consult and work with relevant agencies, organisations or governments for the purposes of this Act;
- (g) to advise the Minister on any issue or matter pertaining to online safety;
- (h) to comply with any reporting requirement prescribed under this Act; and
- (i) such other functions conferred upon it or prescribed by this Act.

Powers of the Commission

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.

Disclosure of interest

10.—(1) The Commissioner, any staff of the Commission and any agent, consultant or person engaged by the Commission having any interest in any matter under discussion or investigation by the Commission must disclose to the Commission the fact and nature of his or her interest as soon as practicable once he or she becomes aware of such interest.

(2) The Commissioner, any staff of the Commission, agent, consultant or person engaged by the Commission is deemed to have an interest referred to under subsection (1) if his or her spouse, *de facto* partner, parent, child or other immediate family member as may be prescribed by regulations, has an interest in the matter under discussion or investigation, as the case may be.

(3) A person who is required to provide his or her interest under subsection (1) must do so in writing and must not take part in or be present at any deliberation, decision making process or investigation carried out by the Commission upon disclosing such interest.

Commission to maintain confidentiality

11. The Commissioner, any staff of the Commission and any agent, consultant or person engaged by the Commission must not either directly or indirectly, disclose, make a record of or communicate to any other person any information relating to the affairs or performance of the Commission's functions under this Act unless it is necessary to do so—

- (a) in the performance of, or in connection with, the performance of a function under this Act;
- (b) for the purpose of producing a document or giving evidence to a court, tribunal or any other statutory entity in the course of civil or criminal proceedings under this Act or any other written law; or
- (c) for reporting a suspected offence or assisting in the investigation of a suspected offence.

Protection from liability

12.—(1) No civil or criminal proceedings lie against the Commission, the Commissioner, any staff of the Commission and any agent, consultant or person engaged by the Commission for anything done or that he, she or it may do or fail to do, in the course of the exercise or purported exercise of his or her or its powers and authority or performance of his or her or its duties, unless it is shown that he or she or it did not act in good faith or with reasonable care.

(2) No civil or criminal proceedings lie personally against any staff of the Commission or person engaged by the Commission for anything which is done in good faith, or done or intended to be done in the execution or purported exercise of his or her powers and authority or performance of his or her duties under the Act or any other written law.

Complaints lodged with the Commission

13.—(1) A person may lodge a complaint with the Commission if the person has reason to believe that the person is the subject, or targeted recipient, of electronic communication intended to cause or likely to cause harm.

(2) Pursuant to subsection (1), in the case of—

- (a) a child, the child’s parent or legal guardian, or the school principal or head teacher of a registered school if the child is a student at the school and consents, as the case may be, may lodge the complaint to the Commission on the child’s behalf; or
- (b) a person who suffers from mental incapacity, the person’s parent, legal guardian or representative, as the case may be, may lodge the complaint to the Commission on the person’s behalf.

(3) A complaint lodged under subsection (1) must be made in a form and manner as prescribed by regulations.

Investigation of complaints

14.—(1) 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.

(3) Upon investigation of a complaint, the Commission may—

- (a) seek to resolve the matter, as appropriate;
- (b) serve a notice to the relevant person requesting the removal of the electronic communication within the time stipulated in such notice; or
- (c) advise the individual making the complaint of any action that can be taken under section 17.

(4) Where a person served with a notice under subsection (3)(b) fails to remove the electronic communication, the Commission may apply to the court under section 22 for its removal.

Commission may refuse to investigate

15.—(1) The Commission may refuse to investigate any complaint, or cease an investigation under this section if the Commission considers that—

- (a) the subject matter or nature of the complaint is unlikely to cause harm to any person;
- (b) the complaint is frivolous or vexatious; or
- (c) any further action is unnecessary or inappropriate.

(2) If the Commission decides not to take any further action on a complaint, the Commission must notify the complainant of the right to apply to the court for an order under section 22.

Power of the Commission to delegate

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.

PART 3—PROCEEDINGS

Who may bring proceedings

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.

Threshold for proceedings

18.—(1) A person referred to in section 17(a), 17(b) or 17(c) must not apply to the court for an order under section 22 in respect of an electronic communication unless the Commission has first received the complaint about the electronic communication and has had a reasonable opportunity to assess the complaint.

(2) The court may, on its own motion, dismiss an application under section 17 without a hearing if it considers that the application is frivolous or vexatious.

(3) The court may, on its own motion, dismiss an application under section 17(e) from the police if the court is satisfied that, having regard to all the circumstances of the case, the application should be dismissed.

(4) An assessment of a complaint referred to in subsection (1) includes where the Commission has received and assessed a complaint and has made a decision to refuse or cease an investigation in accordance with section 15.

Court may refer matter back to the Commission

19.—(1) This section applies when the court considers an application under section 17 that arises from the subject matter of a complaint that has been received by the Commission, whether or not the complaint has been assessed under section 18(1).

(2) The court—

- (a) must consider whether an attempt has been made to resolve the complaint, through mediation or otherwise; and
- (b) may adjourn the proceedings and refer the matter back to the Commission unless the court is satisfied that attempts at resolution, or further attempts at resolution, of the matter by the parties and the Commission—
 - (i) will not contribute constructively to resolving the matter;
 - (ii) will not, in the circumstances, be in the public interest; or
 - (iii) will undermine the proceedings before the court.

Court may require the Commission to provide information

20.—(1) The court may require the Commission to provide information for the purposes of satisfying the court of any matters referred to it under section 17.

(2) The Commission must provide the information in the manner and form that the court may require.

Interim orders

21.—(1) The court may, if it considers it necessary to do so, grant an interim order pending the determination of an application under section 17.

(2) An interim order under this section has the same legal effect as an order under section 22 and expires when the application under section 17 is determined.

Orders that court may make

22. The court may, on an application made under section 17, 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.

Non-compliance with court order

23. A person who, without reasonable excuse, fails to comply with an order issued by a court under this Act commits an offence and is liable upon conviction to—

- (a) in the case of an individual, a fine not exceeding \$5,000 or imprisonment for a term not exceeding 6 months or both; and
- (b) 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 for the time being, to a fine not exceeding \$10,000 or to a term of imprisonment not exceeding 1 year, or both.

PART 4—OFFENCES

Causing harm by posting electronic communication

24.—(1) A person who—

- (a) posts an electronic communication with the intention to cause harm to an individual;
- (b) posts an electronic communication where posting the electronic communication would cause harm to an ordinary reasonable individual in the position of the individual; and
- (c) posts an electronic communication where posting the electronic communication causes harm to the individual,

commits an offence.

(2) A person who commits an offence under subsection (1) is liable upon conviction to—

- (a) in the case of an individual, a fine not exceeding \$20,000 or imprisonment for a term not exceeding 5 years or both; and
- (b) 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 for the time being, to a fine not exceeding \$50,000 or to a term of imprisonment not exceeding 7 years, or both.

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

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

Posting an intimate visual recording

25.—(1) Subject to subsection (3), a person must not post or threaten to post an intimate visual recording of an individual.

(2) Any person who contravenes subsection (1) commits an offence and is liable upon conviction to—

- (a) in the case of an individual, a fine not exceeding \$20,000 or imprisonment for a term not exceeding 5 years or both; and
- (b) 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 for the time being, to a fine not exceeding \$50,000 or to a term of imprisonment not exceeding 7 years, or both.

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

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

PART 5—MISCELLANEOUS

Review of this Act

26.—(1) The Commission must conduct a review in relation to the following at least once every 2 years—

- (a) the operation of this Act and any regulations made under this Act; and
- (b) whether this Act should be amended.

(2) The Commission must prepare a report of the review under subsection (1) and submit the report to the Minister.

Annual report

27. The Commission must, after the end of each financial year, prepare and submit to the Minister for presentation to Parliament, an annual report on the operations of the Commission during that financial year.

Regulations

28. The Minister may make regulations to prescribe matters that are required or permitted by this Act to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to this Act and generally for achieving the purposes of this Act.

March 2018

ONLINE SAFETY BILL 2018

EXPLANATORY NOTE

(This note is not part of the Bill and is only intended to indicate its general effect)

1.0 BACKGROUND

- 1.1 The Fijian Government in its commitment to ensure access to connectivity for all Fijians, has embarked on promoting a safe online culture and environment in hindsight of the recent increase of reports on harmful online behaviour such as cyberbullying, cyber stalking, Internet trolling and exposure to offensive or harmful content, particularly in respect of children.
- 1.2 The Online Safety Bill 2018 (**'Bill'**) therefore seeks to promote online safety to increase awareness and education on responsible online behaviour and the use and provision of personal information.
- 1.3 The Bill provides a specific avenue which individuals, parents, legal guardians or representatives of such individuals can take to have their concerns dealt with. It also creates new offences to deter irresponsible and harmful online behaviour.

2.0 CLAUSES

- 2.1 Clause 1 of the Bill provides for the short title and commencement. If passed by Parliament, the new legislation will come into force on a date or dates appointed by the Minister by notice in the Gazette.
- 2.2 Clause 2 of the Bill provides for the interpretation of certain terms used throughout the new legislation.
- 2.3 Clause 3 of the Bill provides the objectives of the new legislation.
- 2.4 Clause 4 of the Bill provides the application of the new legislation to the whole of Fiji and to any offence or contravention of the new legislation committed outside Fiji. It further provides that the Bill applies to an electronic communication made on or after the commencement of the new legislation.
- 2.5 Clause 5 of the Bill stipulates that the new legislation will bind the State.

- 2.6 Clause 6 of the Bill establishes the Online Safety Commission (**‘Commission’**), consisting of the Commissioner who is appointed by the Minister for a period not exceeding 3 years, and such other staff as necessary and as appointed by the Commission. Clause 6 of the Bill also provides that the Commissioner is remunerated according to rates determined by the Minister.
- 2.7 Clause 7 of the Bill provides for the sources of funds for the Commission.
- 2.8 Clause 8 of the Bill outlines the functions of the Commission which includes the promotion of online safety, cooperation with other key agencies and organisations and the receipt, assessment and investigation of complaints lodged by individuals in relation to electronic communication causing harm or intended to cause harm.
- 2.9 Clause 9 of the Bill outlines the powers of the Commission which includes the power to request for information or expert advice for the purposes of assessing or investigating a complaint. Clause 9 also enables the Commission to regulate its own procedures subject to the new legislation.
- 2.10 Clause 10 of the Bill requires the Commissioner, any staff member of the Commission, and any agent, consultant or person engaged by the Commission to disclose any interest in any matter that the Commission may be deliberating on or investigating. Upon disclosure of interest, that person is not allowed to take part in any discussion or investigation by the Commission, in so far as his or her disclosed interest is concerned. Clause 10 of the Bill also expands on a person’s interest to include instances where an immediate family member of that person has an interest in the matters mentioned.
- 2.11 Clause 11 of the Bill requires the Commissioner, any staff member of the Commission and any agent, consultant or person engaged by the Commission, to maintain confidentiality with regards to any matter relating to the affairs or performance of the functions of the Commission with exception to instances where disclosure is necessary for the performance of a function under the new legislation producing evidence in civil or criminal proceedings or for the reporting or assisting in the investigation of a suspected offence.
- 2.12 Clause 12 of the Bill provides the Commission, the Commissioner, any staff of the Commission and any agent, consultant or person engaged by the Commission protection from liability for the performance of duties or exercise of powers carried out in good faith or in accordance with powers and functions provided under the new legislation.
- 2.13 Clause 13 of the Bill allows a person to lodge a complaint with the Commission where the person believes that the person is the subject or targeted recipient of an electronic communication intended or likely to cause harm. Clause 13 also allows a parent or legal guardian, or representative to lodge a complaint on behalf of the child or a person suffering from mental incapacity.

- 2.14 Clause 14 of the Bill provides specific powers for the Commission to investigate a complaint and seek to resolve, as appropriate, the matter raised in the complaint, request the removal of the electronic communication or advise of further action under clause 17.
- 2.15 Clause 15 of the Bill allows the Commission to refuse to investigate or cease an investigation under this new legislation where the Commission considers that the complaint is unlikely to cause harm, is frivolous or vexatious or where further action is unnecessary or inappropriate.
- 2.16 Clause 16 of the Bill provides the Commission the power to delegate in writing, its functions and powers under the new legislation to any person provided the Commission is satisfied that the person has the appropriate skills, knowledge and experience required for the purposes of the new legislation.
- 2.17 Clause 17 of the Bill provides for who may apply to the court for the issuance of an order under clause 22.
- 2.18 Clause 18 of the Bill provides the threshold for proceedings where an applicant under clause 17(a), (b) or (c) must first lodge a complaint with the Commission before proceeding to make an application to the court. Clause 18 of the Bill also allows the court to dismiss an application on its own motion where it finds an application to be frivolous, vexatious or, having regard to all the circumstances where the police have made an application, that it should be dismissed.
- 2.19 Clause 19 of the Bill provides that the court may, in its consideration of an application made under clause 17, refer the matter back to the Commission.
- 2.20 Clause 20 of the Bill stipulates that the court may request the Commission for information which must be provided to the court in the required manner and form that the court may require.
- 2.21 Clause 21 of the Bill provides for interim orders that the court may issue before determining an application made under clause 17. The interim order under clause 21 expires upon the determination of an application under clause 17.
- 2.22 Clause 22 of the Bill provides for orders that a court may issue in relation to an application made under clause 17.
- 2.23 Clause 23 of the Bill provides the penalty provision for non-compliance with an order issued by the court in accordance with the new legislation.
- 2.24 Clause 24 of the Bill provides for the offence of causing harm by posting an electronic communication. Clause 24 further provides factors that the court may consider in determining whether harm was or would be caused.

- 2.25 Clause 25 of the Bill prohibits a person from posting or threatening to post an intimate visual recording without the consent of the person who is the subject of the intimate visual recording. Under clause 25, consent is taken to be consent to a specific posting of such intimate visual recording and does not include the consent of a child.
- 2.26 Clause 26 of the Bill provides that the Commission must review the legislation at least once every 2 years and then provide a report of the review to the Minister. With the pace in improvements made to technology, the law on online safety must be updated to provide current and relevant provisions to modern day circumstances.
- 2.27 Clause 27 of the Bill requires the Commission to provide the Minister a report at the end of a financial year, of its operations for that year, for presentation to Parliament.
- 2.28 Clause 28 of the Bill authorises the Minister to make regulations pursuant to the new legislation prescribing matters that are required or permitted by the new legislation to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to the new legislation and generally for achieving the objectives of the new legislation.

3.0 MINISTERIAL RESPONSIBILITY

- 3.1 The Act comes under the responsibility of the Minister responsible for communications.

A. SAYED-KHAIYUM
Attorney-General