

**SUBMISSION TO THE SECTOR
STANDING COMMITTEE ON SOCIAL
SERVICES REGARDING THE
EMPLOYMENT RELATIONS BILL
2006**



CITIZENS' CONSTITUTIONAL FORUM LIMITED

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INTRODUCTION

The Citizens' Constitutional Forum ('the CCF') has pleasure in presenting this submission on the Employment Relations Bill 2006 (Bill No. 8 of 2006) to the Sector Standing Committee on Social Services. We have agreed, at the Committee's request, to forgo an oral presentation.

As members of the Committee may be aware, the CCF is a non-government organisation based in Suva, with over ten years' experience in community education and advocacy on Fiji's Constitution, democracy, human rights and multiculturalism.

The CCF has followed the development and progress of the Employment Relations Bill 2006 with interest, because of its implications for human rights. **We are pleased to record that we support the underlying purpose of this Bill, which is to update and improve the law of employment in Fiji, and we also support, in substance, the objects stated in the long title of the Bill,** including:

- the setting of fair labour standards;
- the prevention and elimination of unfair discrimination in employment;
- the encouragement of collective bargaining in good faith between trade unions and employers; and
- the establishment of mechanisms to resolve employment-related disputes.

However, the CCF also believes that there are a large number of drafting errors, ambiguities and other problems of a minor nature that should be resolved before the Bill is passed into law. We have not had time to identify all of these problems in this submission. Many of them will be quickly and easily resolved through careful revision of the Bill by the draftsman. Our Legal Officer, Mr Piccolo Willoughby, has volunteered to assist the draftsman and the Ministry of Labour in this regard, and the CCF is pleased to offer his services in the revision of the Bill, if desired.

We have identified below a small number of what we regard as relatively major problems in the Bill – relevant to the CCF's work – that would be likely to have practical implications if the Bill were passed into law in its present form.

DEFINITION OF EMPLOYMENT RELATIONSHIP

One of the foundational legal distinctions in modern business is that between a "contract of service", by which an employer engages an employee, and a "contract for services", by which a person engages an independent contractor. This distinction is important because a business person or enterprise owes a range of legal obligations to its employees that it does not owe to independent contractors. For example, a business that employs an in-house finance officer is obliged to deduct income tax from the officer's salary and make payments to the Fiji National Provident Fund ('FNPF') on his or her behalf. If the finance officer is injured at work, the business may be obliged to pay workmen's compensation to him or her. By contrast, an accountant contracted

externally by the business is generally responsible for his or her own tax and FNPF contributions, and does not have recourse to workmen's compensation if injured.

Despite the importance of the distinction between a contract of service and a contract for services, it is difficult to precisely define the difference between the two. There is a large body of case law developed by courts across the common law world that essentially seeks to define this difference by examining the characteristics of the relationship between the parties to the contract. One characteristic is the intention expressed by the parties in the contract itself: Does the contract state that it is a contract of service or a contract for services? However, it is settled law that an intention expressed in the contract is not necessarily conclusive, as other characteristics of the relationship between the parties may indicate that what they intended was not what they achieved.

The Employment Relations Bill 2006 necessarily uses the distinction between a contract of service and a contract for services to define the scope of its own application. Clause 3(1) of the Bill provides that it will apply to "all employers and workers in workplaces in the Fiji Islands ...". Clause 4(1) defines an "employer" to mean "a corporation, company, body of persons or individual by whom a worker is employed under a contract of service ...", and a "worker" to mean "a person who is employed under a contract of service ...". Clause 4(1) also defines a "contract of service" to mean:

"a written or oral contract, whether expressed or implied, to employ or to serve as a worker whether for a fixed or indefinite period, and includes task or piecework or contract for service determined by the Tribunal as contract of service".

This definition is complemented by clause 211(1)(c) of the Bill, which provides that the Employment Relations Tribunal has jurisdiction "to adjudicate on whether a contract for service is a contract of service".

If the definition of a "contract of service" in clause 4(1) of the Bill, and clause 211(1)(c) of the Bill, are read literally, they entail a contradiction in law, which is that a contract for services can at the same time be, or can become, by determination of the Employment Relations Tribunal, a contract of service. This contradiction cannot be intended by the draftsman. What must be intended, consistent with the common law, is that the Employment Relations Tribunal has the power to adjudicate on whether a written or oral contract that is expressed to be a "contract for services" is, in reality, a contract of service, having regard to all the characteristics of the relationship between the parties to the contract.

It is therefore suggested that clauses 4(1) and 211(1)(c) of the Bill should be amended. The definition of a "contract of service" in clause 4(1) could read:

"a written or oral contract, whether expressed or implied, to employ or to serve as a worker whether for a fixed or indefinite period, and includes task

or piecework or a contract that is expressed to be a contract for services but which the Tribunal has determined to be a contract of service”.

Clause 211(1)(c) could similarly read: ““to adjudicate on whether a contract that is expressed to be a contract for services is in reality a contract of service”.”

These suggested amendments would avoid confusion and ensure that the test developed by the courts to distinguish a contract of service from a contract for services is clearly maintained in the law of Fiji.

APPLICATION OF ACT TO PUBLIC OFFICES

Clause 3(1) of the Bill provides that it will apply to “all employers and workers in workplaces in the Fiji Islands, including the Government, other Government entities, local authorities, statutory authorities and the Sugar Industry.”

The terms “Government entities”, “statutory authorities” and “the Sugar Industry” do not appear in the Constitution and it is suggested that consideration should be given to defining them in the Bill.

UNFAIR DISCRIMINATION IN EMPLOYMENT

The language used in the long title, clauses 4 and 6, and Part 9 of the Bill, in relation to discrimination, differs from that used in section 38 of the Constitution, which guarantees the freedom from unfair discrimination on certain prohibited grounds. This does not necessarily mean that the relevant clauses of the Bill will be unconstitutional; however, it raises the question of why different language has been used.

Two issues that need to be considered here are the grounds of discrimination that are to be prohibited and the test for discrimination on any prohibited ground. In relation to the grounds of discrimination, clause 75 of the Bill would appear to prohibit discrimination on all the grounds identified in section 38(2) of the Constitution, and to add some grounds that are not in the Constitution.

The CCF’s legal advice is that the introduction of new grounds on which discrimination is to be prohibited, in addition to those identified in section 38(2) of the Constitution, is consistent with the Constitution. This is because it would extend the constitutional provision rather than purporting to limit or restrict it. In other words, no clause of the Bill purports to permit discrimination in employment on a ground that is prohibited by section 38(2). If there were any such clause, it would be inconsistent with the Constitution and therefore invalid to the extent of the inconsistency.

The CCF notes, however, that paragraph (B) of the long title of the Bill, clauses 6(2) and 75 of the Bill do not all identify the same prohibited grounds of discrimination. In order to avoid confusion, it is suggested that these three

provisions should all identify the same grounds. As already mentioned, these should include all the grounds in section 38(2) of the Constitution.

Turning to the test for discrimination, the Bill recognises two different forms of discrimination: direct discrimination and indirect discrimination. Both of these forms are also recognised in Fiji's Constitution and international human rights law. Clause 4(1) of the Bill would define "discrimination" to mean "any distinction, exclusion or preference based on the grounds set out in sections 6(2) and 75", and "indirect discrimination" to mean:

"any apparently neutral situation, regulation or practice which in fact results in unequal treatment of persons with certain characteristics that occurs when the same condition, treatment or criterion is applied to everyone, but results in a disproportionately harsh impact on some persons on the basis set out in section 79 [sic] and is not closely related to any inherent requirement of the job".

The CCF's legal advice is that the definition of "discrimination" in clause 4(1) is reasonably consistent with the widely understood concept of direct discrimination – which is essentially *differential treatment* of individuals on a prohibited ground. However, the definition of "indirect discrimination" in clause 4(1) is not consistent with the wider understanding of indirect discrimination. Essentially, indirect discrimination is similar treatment of individuals that results in a *differential impact* on a prohibited ground.

So, for example, the decision of a company executive to employ only a personal assistant who is female would constitute direct discrimination on the ground of gender against male applicants for the position. If the company executive instead decided to employ only a personal assistant who wears skirts, this would constitute indirect discrimination against male applicants on the ground of gender, because there are likely to be far fewer males who wear skirts. The same treatment – imposing a condition that the personal assistant must wear skirts – has a differential impact on applicants depending on whether they are male or female.

The problem with the definition of "indirect discrimination" in clause 4(1) of the Bill is that it incorporates elements that are unnecessary (such as the requirement for the situation, regulation or practice to be "apparently neutral"), and includes the exception that the differential impact is not "closely related to any inherent requirement of the job".

The Constitution, by contrast with the Bill, does not expressly define either the term "discrimination" or "indirect discrimination". The absence of these definitions from the Constitution is not a problem, however, because, as already mentioned, the meaning of these terms is widely understood.

It is therefore suggested that the definitions of "discrimination" and "indirect discrimination" in clause 4(1) of the Bill should be either deleted or amended. If they are to be retained in an amended form, it is suggested that the definition of

“indirect discrimination” should be simplified and should not include the exception that the differential impact is not “closely related to any inherent requirement of the job”. This exception should be deleted, because it substantially overlaps with the exceptions to the prohibition on discrimination that are set out in clauses 77 to 89 of the Bill.

In addition, it should be noted that section 38(2) of the Constitution uses the term “unfairly discriminated”, instead of simply “discriminated”. This again contrasts with the Bill. The inclusion of the word “unfairly” arguably incorporates an additional limitation on the constitutional guarantee, which is that discrimination on a prohibited ground may be permissible in a given case, if it is fair or justified in all the circumstances.

As already mentioned, clauses 77 to 89 of the Bill seek to identify specific circumstances in which discrimination on a prohibited ground may be considered justified, and establish exceptions to the general prohibition on discrimination for cases where these circumstances exist. It may be considered that the inclusion of these clauses makes it unnecessary to include the word “unfair” in clause 75 of the Bill, where the general prohibition is set out. **However, it is suggested that consideration should be given to whether clauses 77 to 89 of the Bill exhaust all possible circumstances in which discrimination on a prohibited ground may be justified, and also whether it is desirable in any case to maintain consistency with the Constitution in this regard.**

RELATIONSHIP WITH HUMAN RIGHTS COMMISSION ACT 1999

Another issue that needs to be considered in the context of unfair discrimination in employment is the intended relationship between the Employment Relations Bill 2006 and the *Human Rights Commission Act 1999*. Just as the language used in relevant provisions of the Bill differs from that in section 38 of the Constitution, so it also differs from the language of Part III of the *Human Rights Commission Act 1999*, which, together with other provisions of the Act, enables the Fiji Human Rights Commission to investigate complaints of unfair discrimination on a prohibited ground in employment.

Clause 110(5) of the Bill would enable a worker who is aggrieved by discrimination on a prohibited ground or sexual harassment to elect whether he or she will use the grievance procedures established by the Bill or lodge a complaint in accordance with the *Human Rights Commission Act 1999*. Given that the language of the Bill and the Act differ in relation to unfair discrimination, it is possible that a worker’s grievance may constitute a contravention of one but not the other.

The procedures and remedies proposed by the Bill are also substantially different from those available under the Act. Notably, a worker who elects to lodge a complaint with the Fiji Human Rights Commission will incur little or no expense as the Commission investigates the complaint, and the Commission may even take the matter to court on the worker’s behalf. If the worker were instead to pursue the grievance procedures set

out in the Bill, it appears that he or she would have the benefit of free mediation provided by the Mediation Services (Division 1 of Part 20), but any proceedings before the Employment Relations Tribunal (Division 2) or the Employment Relations Court (Division 3) would be at the worker's own expense.

One issue on which the Bill is silent is at what time or stage a worker would be required to make the election between the procedures established by the Bill and those provided by the *Human Rights Commission Act 1999*. This issue will be especially important if an election of one set of procedures is intended to preclude a later election of the other. For example, could a worker who refers an employment grievance to the Mediation Services but is not satisfied with the result later lodge a complaint with the Fiji Human Rights Commission? If not, the worker may have forgone the free investigation of his or her grievance by the Commission.

It is suggested that the Bill should set out very clearly the time or stage at which a worker will be required to make any irreversible election between the Bill and the *Human Rights Commission Act 1999*.

The CCF would also question the appropriateness of using mediation between the parties to deal with employment grievances concerning discrimination on a prohibited ground or sexual harassment. It is well known that mediation tends to be most effective in settling disputes between parties whose relationship involves a relatively equal balance of power. As other provisions of the Employment Relations Bill 2006 implicitly acknowledge, relationships between employers and workers usually involve a balance of power that favours the employer. This is especially so in Fiji where unemployment is high, wages are low, and the vast majority of workers fall into the "unskilled" category.

In cases where one party enjoys more power in the relationship than the other, mediation can produce settlements that favour the more powerful party. Results of this kind are undesirable and should be of especially concern where the case involves human rights issues such as discrimination and sexual harassment. The CCF would draw attention in this context to the important difference that exists between *mediation*, such as would be available under the Bill, and *conciliation*, which is provided by the Fiji Human Rights Commission.

The CCF therefore suggests that there should be detailed consultation between the draftsman, the Ministry of Labour and the Fiji Human Rights Commission on:

- **the relationship between the Employment Relations Bill 2006 and the *Human Rights Commission Act 1999*; and**
- **the appropriateness of using mediation to deal with employment grievances concerning discrimination or sexual harassment under the Bill.**

SEXUAL HARASSMENT

Besides establishing new procedures for dealing with employment grievances concerning sexual harassment in employment, the Bill would also introduce a lengthy definition of “sexual harassment”. This definition appears to be a positive development, in the CCF’s view; however it would be improved by revision to correct its grammar and clarify its meaning.

By contrast, the *Human Rights Commission Act 1999* does not include a definition of “sexual harassment”. **Given that the Bill proposes to enable a worker who is aggrieved by sexual harassment in his or her employment to elect between the Bill and the Act in seeking to have the grievance addressed, it is suggested that this would be an opportune time to consider amending the *Human Rights Commission Act 1999* to introduce a definition of “sexual harassment” that complements the Employment Relations Bill 2006.** Of course, this too should be the subject of detailed consultation with the Fiji Human Rights Commission before a decision is made.

VICTIMISATION

One notable omission from the Bill is any specific protection for a worker who is victimised by his or her employer because the worker submits an employment grievance to the employer or exercises any other right of the worker under the Bill. Again, this is in contrast to the *Human Rights Commission Act 1999*, section 22 of which provides that victimisation of a person who exercises or intends to exercise his or her rights under the Act constitutes unfair discrimination.

In the context of the Employment Relations Bill 2006, it may be appropriate to make it an offence for an employer to victimise a worker who seeks to exercise his or her rights. It may also, or alternatively, be appropriate to empower the Employment Relations Tribunal to make interim orders to prevent an employer from victimising a worker, such as by preventing or reversing any purported dismissal, discipline or withholding of payments or other benefits due to the worker.