

INNOVATIVE FEATURES & CHALLENGES OF FAMILY LAW ACT

It is a pleasure to contribute to this conference.

The Family Law Act in my view is one of the social piece of legislations that the SDL government has enacted which have far-reaching implications for the people of Fiji. It attracted a lot of public interest in its formulation by the Fiji Law Reform Commission and Parliament. It is noted that the Law Reform Commission Records indicated that it met 161 organizations (NGO's, civil societies and churches), and have 52 expert consultations in preparing the legislation. Now that we in the implementation phase of the legislation, it is more important to remember to highlight some of the reasons for enacting the Family Law Act. This is done, to ensure that steps are taken to fulfill the expectations behind the legislation. Appreciation to Ms Patricia Jalal for her effort in putting the legislation together.

Would like to highlight some of the reasons why Reform in Family Law were necessary:

The 9 Acts (Marriage Act, Matrimonial Causes Act, Maintenance and Affiliation Act, Maintenance (Prevention of Desertion and miscellaneous Provisions) Act, Juvenile Act, Legitimacy Act, Adoption of Infant Act, Married Women Property Act, Maintenance Act (facilities for enforcement) Act and Maintenance orders (reciprocal enforcement) Act have become out of date and irrelevant;

- Courts cannot identify those marriages that can be saved from those that cannot;
- Inadequately reconciliation facilities in the Courts;
- Limitations in powers of the Courts;
- Lack of resources to stop neglectful parents;
- Laws do not recognize the important linkages between poverty and those women and children who cannot enforce maintenance orders, etc. of the Courts;
- International obligations;

- Need to treat family as a legal, cultural, social, spiritual and economic unit;
- Current process is expensive, unjust and discriminates against man, women and children; or
- Lack of resources and skills in solving problems of family in crisis.

REMOVAL OF FAULT PRINCIPLE

Within the time allowed, it maybe useful to highlight a few salient features of the new legislation. Firstly, is the removal of the **fault** principle as a ground for divorce. Understand that prior to the Family Law Act being enacted, there were 21 grounds upon which dissolution of marriage can be granted. Section 30 of the Act provides that a party to a marriage may apply for an order for dissolution for his or her marriage on the ground that such marriage has irretrievably broken down. Section 30 (2) provides that such proceedings can only be instituted after the parties have lived apart and separately for a period of not less 12 months and that there is no likelihood of cohabitation being resumed. The new legislation emphasizes the promotion of reconciliation when compared to litigation. Under this ground however, we are moving into unknown territory and believe that the Family Courts will play an important role in determining the directions and development of relevant jurisprudence. Concerns were raised by some that the removal of fault principle will result in increase in divorce cases. Ministry and Judicial Department are working together in ascertaining the true statistics on matrimonial cases in Fiji as initial information may not truly reflect the extent of divorce, maintenance, affiliation or other cases brought before the Courts.

PARENTAL MAINTENANCE

Section 159 provides for parental maintenance. This is a new provision providing that a person is liable to maintain his or her parent to the extent that a person is able to do so if the parent is unable to support him or herself due to physical or mental incapacity. This provision is not only new but equally innovative. In looking at the various submissions from members of the public it is clear that the persistent level of poverty amongst the elderly continue to be a problem. It was felt that the State had a duty to provide for these people. It was also submitted that in the absence of social security system, or safety net for the unfortunates, something needs to be done in order to provide a minimum standard of living for those in need. It was suggested that such obligation is based on moral duty that exists between parents and children. It also assumes that there is on going family ties between parents and children. It is noted that the Fiji Law Society endorsed this provision as it sees the new legislation as targeting not only children but the whole family inclusive of elderly parents.

The difficulty with provision such as this will arise in regard to enforcement of such law. Should there be a duty for a child who was abandoned or deserted during childhood to his or her parents? Who should shoulder the responsibility of looking after aging parents? Is it the duty of the state or individual? Would enforcement of such provisions breach the right of an individual who does not or is not willing to provide financial assistance to his needy parents? Who should be responsible for promoting the traditional, cultural and moral family values, which appear to have been eroded so as to leave many elderly persons in need? Will the enforcement of such provision bring about more dissension than unity within the family?
Will such provision of universal application within the various ethnic communities in Fiji?

FAMILY LAW COUNCIL

Section 204 establishes the Family Law Council to assist the Attorney General in the;

- Working of the Family Law Act and related legislations;
- Working of Legal Aid in relation to Family Law; and
- And any other matter.

Members of the Council shall consist of -

- Judge of the Family Division;
- Magistrates;
- Officers of the Public Service; and
- Representative of organizations that provide pre-marriage education and child counseling services.

See role of the Council as identified in Section 204(2) of the Act, as highlighted above. In addition, section 6 allows for accreditation of organizations to be involved in marriage education, counseling services and promotion of welfare of children. Accreditation may be revoked by Council. Council to monitor the implementation of the Act and such responsibility includes making submissions to Parliament or other Commissions and provides the focal point for key players involved in the administration of Family Law Act.

CHALLENGES

Resource constraints

- Human - Securing the services of the right people to man the new Courts. Importance of capacity building programmes for Judges, Magistrates and officials of the Courts including those involved in counselling services within and outside government;
- Financial - Access to financial resources to facilitate and better implement the Act; and
- Accommodation - Having the right accommodation and facilities to provide for privacy, confidentiality, and user-friendly atmosphere for persons seeking help of the Courts.
- Networking - Getting the right support from relevant stakeholders, within and outside government in order to ensure the effective administration of Act. It is clear that government alone cannot implement the legislation. NGO's and civil societies must be involved if the legislation is to be effective.
- Can the Judiciary and Ministry of Justice fulfill the expectations of those who wanted to introduce the new Family Law Act?

S. Rabuka
CHIEF EXECUTIVE OFFICER, JUSTICE

4th December, 2004