



LAW REFORM COMMISSION

2010 Annual Report on the Activities of the Commission

(Under section 17 of the Law Reform Commission Act)

[Period 1 January to 31 December 2010]

[January 2011]

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About the Commission

The functions of the Commission are to –

- (a) keep under review in a systematic way the law of Mauritius;
- (b) make recommendations for the reform and development of the law of Mauritius;
- (c) advise the Attorney-General on ways in which the law of Mauritius can be made as understandable and accessible as is practicable.

The Commission consists of –

- (a) a Chairperson, appointed by the Attorney-General;
- (b) a representative of the Judiciary appointed by the Chief Justice;
- (c) the Solicitor-General or his representative;
- (d) the Director of Public Prosecutions or his representative;
- (e) a barrister, appointed by the Attorney-General after consultation with the Mauritius Bar Council;
- (f) an attorney, appointed by the Attorney-General after consultation with the Mauritius Law Society;
- (g) a notary, appointed by the Attorney-General after consultation with the Chambre des Notaires;
- (h) a full-time member of the Department of Law of the University of Mauritius, appointed by the Attorney-General after consultation with the Vice-Chancellor of the University of Mauritius; and
- (i) two members of the civil society, appointed by the Attorney-General.

The Chief Executive Officer has responsibility for all research to be done by the Commission in the discharge of its functions, for the drafting of all reports to be made by the Commission and, generally, for the day-to-day supervision of the staff and work of the Commission.

The Secretary to the Commission is also responsible, under the supervision of the Chief Executive Officer, for the administration of the Commission.



LAW REFORM COMMISSION

- Chairperson** : Mr. Guy OLLIVRY, QC, GOSK
- Chief Executive Officer** : Mr. Pierre Rosario DOMINGUE
- Members** : Mr. Satyajit BOOLELL, SC [Director of Public Prosecutions]
Mr. David CHAN KAN CHEONG, SC [Parliamentary Counsel]
Mrs. Rita TEELock [Master and Registrar, Supreme Court]
Mr. Rashad DAUREEAWO, SC [Barrister]
Mr. Pazhany RANGASAMY [Attorney]
Mr. Roland CONSTANTIN [Notary]
Ms. Odile LIM TUNG [Full-Time Law Academic (UoM)]
Mrs. Daisy Rani BRIGEMOHANE [Civil Society]
Mr. Navin GUNNASAYA [Civil Society]
- Secretary** : Mrs. Saroj BUNDHUN

Legal Research Cadre (other than Chief Executive Officer)

Legal Research Assistant : Mr. Sabir M. KADEL

Administrative Support Staff (other than Secretary to Commission)

Senior Officer : Mrs. Marie Roseliette SOOBRAMANIA

Officer : Mrs. Neelamani BANSRAM

Mrs. Kajal RAMDUT

Senior Office Attendant : Mr. Subhas CHUMMUN

Office Attendant-Driver : Mr. Claude Francois JEAN-PIERRE

Mr. Naraindranathsingh JANKEE

Introductory Note to this Report

1. This is the Fourth Report of the Law Reform Commission [LRC] to the Honourable Attorney-General, under section 17(1) of the Law Reform Commission Act. This Report concerns the activities of the Commission during the calendar year 2010.

The Commission: its Resources, Working Method and Law Reform Strategy

Membership of Commission

6. During the calendar year 2010, the Commission was constituted as follows:
 - (a) Mr. G. Ollivry, QC, GOSK [Chairperson]
 - (b) Mr. S. Boolell, SC [Director of Public Prosecutions]
 - (c) Mr. D. Chan Kan Cheong, SC [Parliamentary Counsel: representative of Solicitor General]
 - (d) Mrs. R. Teelock [Master & Registrar: representative of Judiciary as from 3 June 2010]
 - (e) Mr. R. Daureeawo, SC [Barrister-at-Law]
 - (f) Mr. P. Rangasamy [Attorney-at-Law]
 - (g) Mr. R. Constantin [Notary]
 - (h) Ms O. Lim Tung [Law Academic at University of Mauritius]
 - (i) Ms J. François [Civil Society Representative, until 30 June 2010]
 - (j) Dr. S. Bunwaree [Civil Society Representative, until 30 June 2010]
 - (k) Mrs. D.R. Brigemohane [Civil Society Representative, as from 1 July 2010]
 - (l) Mr. N. Gunnasaya [Civil Society Representative, as from 1 July 2010]

7. During that period, the Commission held nine meetings.

Funding of the Commission

8. During the financial year 2010, the Commission was afforded a grant of Rs 8,900,000, appropriated by the National Assembly for meeting the operating expenses linked with the fulfillment of its mission.

Human Resources of the Commission

9. The staff of the Commission is composed as follows:
 - (a) The Chief Executive Officer;
 - (b) The Secretary to the Commission and other administrative support staff [one Senior Officer, two Officers, one Senior Office Attendant, and two Office Attendant-Drivers]; and
 - (c) One Legal Research Assistant.
10. The Chief Executive Officer, Mr. Pierre Rosario Domingue, is in office since 17 October 2006. He was initially appointed on a fixed term performance contract of one year (following public advertisement) and was appointed on LRC's permanent and pensionable establishment as from 17 October 2007.
11. During the year 2010, the Commission had recourse, on an ad hoc basis, to the services of Research Assistants for preliminary research work on those areas of the law it has been reviewing.
12. Mr. Sabir Mohamed Kadel was appointed as from 1 September 2010 as Legal Research Assistant on the permanent and pensionable establishment of LRC. He had been doing

work for the Commission on an ad hoc basis as Legal Research Associate as from May 2008, when his services were retained following public advertisement.

13. The Secretary to the Commission, Mrs. Saroj Bundhun, works for the Commission since 17 October 2006. Initially, she had been performing this function part-time, having been seconded by the Attorney General's Office. She was permanently transferred to LRC in December 2007 by the Public Service Commission, under Regulation 25(2) of PSC Regulations 1997, following appointment on the permanent and pensionable establishment of LRC.

14. Other persons employed by the Commission to perform administrative support tasks are:
 - (a) Mrs. Marie Roseliette Soobramania, Senior Officer, works at the Commission since 2007 (following secondment from Government service) and was permanently transferred to LRC by the Public Service Commission, under Regulation 25(2) of PSC Regulations 1997, following appointment on the permanent and pensionable establishment of LRC as from 1 May 2008;
 - (b) Mrs. Neelamani Bansram (born Canhye), Officer, works at the Commission since 17 October 2006 (following secondment from Government service) and was permanently transferred to LRC by the Public Service Commission, under Regulation 25(2) of PSC Regulations 1997, following appointment on the permanent and pensionable establishment of LRC as from 1 September 2008;
 - (c) Mrs. Kajal Ramdutt, Officer, works at the Commission since 2007 (following secondment from Government service) and was permanently transferred to LRC by the Public Service Commission, under Regulation 25(2) of PSC Regulations 1997, following appointment on the permanent and pensionable establishment of LRC as from 1 September 2008;
 - (d) Mr. Subhas Chummun has been recruited in 2010 as Senior Office Attendant on a contractual basis, following his early retirement from the University of Mauritius (where he had been working for almost 30 years);

- (e) Mr. Claude Francois Jean-Pierre, Office Attendant-Driver, was recruited in 2010 (following interview of qualified candidates from a list of persons in search of an employment provided by National Empowerment Foundation);
 - (f) Mr. Naraindranathsingh Jankee, Office Attendant-Driver, was recruited in 2010 (following interview of qualified candidates from a list of persons in search of an employment provided by National Empowerment Foundation).
15. Mr. Jean Nöe Emmanuel Rose, Office Attendant-Driver since December 2006, resigned in January 2010.

Office Premises and Facilities of the Commission

16. The Office of the Commission is located on the 4th Floor of Cerné House and occupies an office space of about 250 square meters. The Commission has a conference room and a documentation centre.

Working Method & Law Reform Strategy

17. The Commission considers our laws should reflect best international practices, meet the exigencies of globalization, and be adapted to the changing needs of the people. The Commission is thus committed to comparative legal research in order to evaluate the merits and demerits of our law in the light of the experience of other jurisdictions. The Commission also holds the view that, where possible, any proposed solution must be tested against empirical evidence.
18. Consultations with all the relevant stakeholders are regarded as crucial for the performance of the Commission's functions and have invariably been resorted to in order

to develop greater awareness of legal issues and contribute to capacity building of those called upon to apply the law.

19. The Commission has links with other law reform agencies. It is a member of the Commonwealth Association of Law Reform Agencies [CALRAs] and the Association of Law Reform Agencies of Eastern and Southern Africa [ALRAESA].

The Work of the Commission and Its Achievements

20. In accordance with its 2010-2012 Strategic Plan, the Commission has reviewed aspects of the laws of Mauritius as it had indicated in its 2010 Annual Program of Review, Reform and Development of the Law.
21. During the year 2010, the Hon. Attorney-General has requested the Commission, under section 6(1) of the Law Reform Commission Act, to
- (a) Review and translate into English the Code Civil Mauricien, the Code de Procédure Civile and the Code de Commerce;
 - (b) Review the Law as to publicity for the appointment and revocation of agent and proxy;
 - (c) Review proposals regarding reform to the legal education system and the provision of legal services (including legal aid/assistance and the liberalization of the profession of court ushers), the structure and functioning of the Supreme Court (including the Family Court) and the Judicial and Legal Service Commission, the law on asset recovery, the law on criminal investigation and proceedings (including award of costs against the prosecution), and the law on sexual offences.

22. The Commission has received, during the year 2010, representations from the public regarding the law on change of name, the law on corporate social responsibility, the law relating to the treatment of detainees, the possible functions of a duty barrister at police station and/or place of custody, the law on custody of children, the law on equality/freedom from discrimination, the law on road traffic, the law on acquisition of immovable property, and the law on copyright.
23. The Commission has examined, of its own initiative, the manner in which fundamental rights and freedoms can be further entrenched in the Constitution. An **Issue Paper on Constitutional Protection of Human Rights** was submitted to Hon. Attorney-General in October 2010.

In the Paper, the Commission considered there is a need to better safeguard existing rights, to afford constitutional protection to economic, social and cultural rights, and also to guarantee the rights of vulnerable persons.

The protection afforded to the Right to Equality by sections 3 and 16 of the Constitution have been regarded as insufficient. Sections 3 and 16 are *self-contained* provisions; they prohibit discrimination on specific grounds and are not in line with best international practices in the field. The Commission has been of the view that our international obligation under articles 2 and 26 CCPR [International Covenant on Civil and Political Rights] requires of us that we enact *open-ended* provisions [whereby discrimination is prohibited on the basis of an indeterminate number of grounds, the grounds mentioned being merely instances of discrimination].

Section 9 of the Constitution affords protection merely to privacy of home and premises. The Commission has considered that its ambit should be expanded so as to include respect for private and family life.

The Commission has also been of the view that the system of freedom of expression, as currently guaranteed by section 12, should be strengthened by also recognizing the right of access to information.

Protection of the Law (section 10) should be better secured by protecting rights to just administrative action and by prescribing as a constitutional norm that slavery (and other related practices) is a crime against humanity.

The Commission has considered that the following socio-economic rights could be afforded constitutional protection:

- (a) Right to education;
- (b) Right to language and culture;
- (c) Right to housing;
- (d) Right to basic amenities;
- (e) Right to a healthy and sustainable environment; and
- (f) Right to freedom of trade, occupation and profession.

The Commission has also been of the opinion that the rights of the following vulnerable persons should be afforded constitutional protection:

- (a) The Child;
- (b) The Elderly Person;
- (c) The Person with Disabilities; and
- (d) The Witness in Court Proceedings.

Consideration could also be given as to whether the rights of the consumer should be guaranteed in the Constitution.

24. At the request of the Hon. Attorney-General, the Commission has considered Government proposals for the amendment of the Constitution [draft Constitution (Amendment) Bill 2010], in accordance with the recommendations of the Presidential Commission chaired by Lord Mackay of Clashfern regarding, inter alia, the structure of the Supreme Court and the composition of the Judicial and Legal Service Commission.

The majority of Members have been of the view that

- (1) There must be a change in the Membership of the Judicial and Legal Service Commission [JLSC];
- (2) Should a barrister be appointed as Member, an attorney-at-law also would have to be appointed;
- (3) Should the Solicitor-General be appointed as Member of the JLSC, the Director of Public Prosecutions also should be appointed, in view of the fact that the latter now has a separate Office with his own staff;
- (4) It is not necessary to have a representative of the private sector appointed as Member of the JLSC in order for it to adopt new methods of human resource management;
- (5) The Chairperson of the Public Service Commission need not be a Member of the JLSC [indeed the Presidential Commission chaired by Lord Mackay of Clashfern did not recommend that he be a Member];
- (6) More important than a change in the composition of the JLSC is the need for it to evolve new and transparent working methods:
 - (a) Candidates for a judicial post should undergo a psychological test and their writing skills assessed;
 - (b) An appraisal/reward system should be put in place to monitor the quality of work performed by law/judicial officers;
 - (c) Before promoting a magistrate or a law officer, the JLSC should give due consideration to the recommendations of his/her ‘supervising officer’, viz. the Master and Registrar, the Solicitor-General and the Director of Public Prosecutions;

- (7) In the proposed amendment to section 72, there is no need to spell out who are the officers who shall form part of the Office of the Director of Public Prosecutions; these are listed in Part II of the Second Schedule;
- (8) There is no need to establish a High Court; the Judges of the Supreme Court should retain the jurisdiction which they now possess (save that they should no longer hear appeals from decisions of their brother or sister Judges);
- (9) The Court of Civil Appeal and the Court of Criminal Appeal should cease to be divisions of the Supreme Court; a separate Court of Appeal should be established to hear appeals from decisions of the Supreme Court (be it by one or two Judges);
- (10) The Supreme Court should act both as a court of first instance, and as a court of appeal from decisions of subordinate courts; the Supreme Court should thus be made up of six divisions: (a) Criminal Division, (b) a family Division; (c) a Commercial Division; (d) a Civil Division; (e) a Pre-Trial (Mediation) Division; and (f) an Appellate Jurisdiction;
- (11) The new Section 81, even if it appears to follow "à la lettre" Lord Mackay's recommendations appears to completely overlook the decided cases before the Judicial Committee of the Privy Council and principles such as those in *Badry* and *Buxoo* wherein the Judicial Committee has repeated "ad nauseam" that it will not sit as the ultimate court of criminal appeal; the current requirement of issues of "great, general or public importance or otherwise" should be retained;
- (12) Section 82, which deals with the supervisory jurisdiction of the Supreme Court over subordinate courts should not be repealed.

25. The Commission has examined, of its own initiative, the law on the evidence of reluctant/intimidated witnesses in criminal proceedings given that in some areas of criminality, such as organized crime, there is an increasing risk that witnesses will be subjected to intimidation, and it is unacceptable that the criminal justice system might fail to bring defendants to trial and obtain a judgment because witnesses are effectively discouraged from testifying freely and truthfully. An **Issue Paper on Evidence of Reluctant/Intimidated Witness in Criminal Proceedings: Proposal for Reform of the Law** was submitted to the Hon. Attorney-General in May 2010. In the Paper, the Commission expressed the view that there is no constitutional impediment to the previous statement of a witness, given on oath or affirmation, being used in certain circumstances and with the leave of the court as evidence of any fact mentioned in it. The Commission therefore recommended that section 173 of the Courts Act be amended by adding the following new subsections (3) to (5)-

- (3) *Notwithstanding subsection (2), in any criminal proceeding, a previous statement made by a witness may, with the leave of the court, be admitted in accordance with subsections (4) and (5) as evidence of any fact mentioned in it if the witness, although available for cross-examination—*
 - (a) *refuses to give evidence,*
 - (b) *denies making the statement, or*
 - (c) *gives evidence which is materially inconsistent with it.*
- (4) *The statement may be so admitted under subsection (3) if—*
 - (a) *the witness confirms, or it is proved, that he made it,*
 - (b) *the court is satisfied—*
 - (i) *that direct oral evidence of the fact concerned would be admissible in the proceedings,*
 - (ii) *that it was made voluntarily, and*
 - (iii) *that it is reliable, and*
 - (c) *the statement was given on oath or affirmation and was video-recorded.*
- (5) *The statement shall not be admitted in evidence under subsection (3) if the court is of opinion—*
 - (a) *having had regard to all the circumstances, including any risk that its admission would be unfair to the accused or, if there are more than one accused, to any of them, that in the interests of justice it ought not to be so admitted, or*
 - (b) *that its admission is unnecessary, having regard to other evidence given in the proceedings.*

26. In January 2010, the Commission, in its 2009 Report to Hon. Attorney-General on its activities, informed the Government that it is against the putting in place of a system of ‘juge d’instruction’, that the adoption of legislation and Codes of Practice for police and other law enforcement officers, on same line as the 1984 UK PACE [Police and Criminal Evidence Act], is the way forward for greater professionalism and transparency in the conduct of criminal investigations, and that it shall release an Issue Paper on this aspect of the law.

In July 2010, the Commission submitted to the Hon. Attorney-General an **Issue Paper on Criminal Investigation: Reform of Police Procedures & Practices**. In the Paper, the background to UK PACE and its evolution were first considered. This was followed by an examination of police powers and procedures under PACE and their relevance to Reform of the Law of Mauritius in respect of:

- (a) Police Powers to Stop and Search Persons and Vehicles & to Search Premises;
- (b) Arrest and Detention; and
- (c) Access to Legal Advice & Police Interviewing.

The Commission has expressed the view that before the adoption of any new legislative scheme, training needs would have to be assessed so as to minimize resistance, due to unfamiliarity with the new legislation, on the part of the police and other stakeholders. It was also considered that empirical research should be carried out to assess the current situation and later on evaluate the impact of the new legislation and its Codes of practice in relation to practices at the different stages of the criminal investigation process.

27. In October 2010, the Commission has submitted to the Hon. Attorney-General a **Background Paper to the Reform of the Codes**. In the paper, the Commission has reviewed the context in which the Codes have evolved over more than two centuries and has indicated that the review would be carried out from a historical and comparative perspective. Our Codes would be compared with those in France, and in mixed legal systems, such as that of Quebec, Louisiana, and Seychelles. Approaches taken in other

jurisdictions on issues covered by our Codes may also be examined the more so as comparative lawyers no longer put emphasis on the differences between the civil law and common law systems, but rather on their commonality and how they are complementary. The historical context in which the Codes in this country have evolved since their promulgation more than two centuries ago, which have lead to the development of the Mauritius legal system as a mixed or hybrid legal system, would also have to be borne in mind. The reform options to meet the contemporary challenges would have to be examined in the light of the socio-economic exigencies of our society in the context of globalization. The Commission would also bear in mind that our legislature, even though borrowing rules from a variety of material sources, has always pursued ‘*une finalité mauricienne*’ thereby developing a distinct corpus of Mauritian law.

28. A preliminary comparative review of aspects of the Code Civil Mauricien [CCM], with what obtains in France and Quebec, has been carried out:
- (a) «Publication, Effets et Application des lois en général» [Articles 1 to 6 CCM], “Personnalité juridique” [Articles 7 to 22 CCM], “Nom” [Articles 23 to 48 CCM], “Domicile” [Articles 102 to 111 CCM] and “Absence” [Articles 112 to 142 CCM];
 - (b) «Mariage» [Articles 144 to 228-10 CCM], «Divorce et Séparation de Corps» [Articles 229 to 279 CCM], «Filiation» [Articles 312 to 370-5 CCM], «Autorité Parentale» [Articles 371 to 387 CCM]; «Minorité, Tutelle et Emancipation des Mineurs par mariage » [Articles 388 to 478 CCM], and «Protection des Majeurs en Tutelle ou Curatelle» [Articles 488 to 515 CCM];
 - (c) «Biens, Propriété, Usufruit, Usage et Habitation, Servitudes (incl. Copropriété)» [Articles 578 to 710 CCM];
 - (d) «Successions et Libéralités» [Articles 718 to 1100 CCM] and «Régimes Matrimoniaux» [Articles 1387 to 1480 CCM];
 - (e) «Fiducie» [Articles 1100-1 to 1100-6 CCM], «Contrats et Obligations conventionnelles; Engagements qui se forment sans convention» [Articles 1101 to 1386 CCM], «Vente» [Articles 1582 to 1701 CCM], «Echange» [Articles 1702 to 1707 CCM], «Louage» [Articles 1708 to 1831 CCM], « Société et Association»

- [Articles 1832 to 1873-32 CCM], «Prêt» [Articles 1874 to 1914 CCM], «Dépôt et Séquestre» [Articles 1915 to 1963 CCM], «Contrats Aléatoires (incl. Assurances)» [Articles 1964 to 1983-92 CCM], «Mandat» [Articles 1984 to 2010 CCM]; «Transactions» [Articles 2044 to 2058 CCM], «Compromis» [Articles 2059 to 2061 CCM], «Expropriation Forcée et Ordres entre Créanciers» [Articles 2204 to 2218 CCM] ;
- (f) «Cautionnement» (Articles 2011 a 2043 CCM), «Nantissement» [Articles 2071 to 2136 CCM], «Privilèges, Hypothèques et Suretés Fixes ou Flottantes» (Art 2137 à 2203-7 CCM), and «Prescription» [Art 2219 to 2283 CCM].
29. The Commission has submitted in November 2010 to the Hon. Attorney-General an **Issue Paper on the Law as to publicity for the appointment and revocation of agent and proxy.**

It was brought to the attention of the Commission that the notary in charge of the drafting of the deed for the appointment of the power of attorney has to file a copy in the Registry of the Supreme Court but that seemingly when revocation is drawn up, no one is made aware. It was suggested to us that the law should be amended so that the notary who prepares the deed for the appointment and revocation of an agent and proxy be required to transcribe same at the Mortgage Office.

The Commission has been of the view that:

- (a) The Transcription and Mortgage Act deals with transactions related to immovable property. It would not be appropriate therefore to have the appointment and revocation of an agent and proxy transcribed at the Mortgage Office;
- (b) Under section 2(1) of the Deposit of Powers of Attorney Act, it is a legal requirement – where any person who has left or leaves Mauritius has appointed or appoints an attorney or agent in Mauritius to represent him in any capacity in any proceedings before a Court - to file in the Registry of the Supreme Court, within 15 days of the

- date of such power of attorney, an extract from such power of attorney relative to such powers of agency and to the names of such agents;
- (c) From information gathered from the Chamber of Notaries that although the law does not provide for publicity as regards revocation of powers of attorney, most Notaries do file such revocations in the Registry of the Supreme Court within the same time limit;
- (d) Section 2(1) of Deposit of Powers of Attorney Act may be amended to include publicity in respect of revocation of power of attorney so that notaries' practice in the matter becomes a legal requirement.
30. The Review of the Code de Procédure Civile [CPC] has been carried out and the following matters addressed:
- (a) The relative importance of CPC compared with other civil procedural issues dealt with in other special laws;
- (b) The subject matter of CPC, compared with what obtains in France, Quebec and other jurisdictions;
- (c) Areas calling for reform and available options.
31. The Code de Commerce [CC] has also been reviewed from a comparative perspective (by comparison with the French Code de Commerce, the law as to commercial matters in Quebec and Morocco) and Issues calling for Reform examined. In that context, Legal Indicators used for the Annual World Bank Survey on "Ease of Doing Business" have also been considered.
32. As from October 2009, the Commission has been reviewing, at the request of the Ministry for Consumer Protection, aspects of consumer law, viz. the Consumer Protection Act; the Consumer Protection (Price and Supplies Control) Act; the Essential Commodities Act; the Fair Trading Act; the Hire Purchase and Credit Sale Act; and the Prices & Consumer Protection Advisory Committee Act.

In October 2010, the Commission has submitted its **Report on Review of Aspects of Consumer Protection Laws and Proposals for Reform.**

In the Report, the rationale for consumer laws and the key objectives of consumer policy, in the context of the UN Guidelines, were first considered. The current law and its comparison with other consumer protection regimes were then examined.

The Commission reached the conclusion that the current consumer laws present lacunas and the manner in which they are administered even give rise to constitutional problems. The current framework was regarded as inadequate. The provisions as to consumer guarantees in respect of supply of goods and services, as to unfair business practices, are insufficient. There is no provision as to unfair contract terms in consumer agreements. Safety requirements are laid down only in respect of goods. Distance selling, doorstep selling and unsolicited consumer transactions are not regulated. The enforcement framework relating to consumer transactions and agreements needs to be strengthened.

The Commission has recommended that a new Consumer Protection Regime should be put in place. The consumer law should protect both natural persons and legal entities when goods and services are supplied to them, as well as (a) any user of such goods, or (b) any beneficiary of such services. However, goods acquired or the services availed of must not have been for a commercial purpose.

The overall objectives of the new legislation should be to promote and advance the social and economic welfare of consumers by establishing a legal framework for the achievement and maintenance of a consumer market that is accessible, fair, efficient, responsible and sustainable for the benefit of consumers generally, and which provides adequate safeguards to vulnerable consumers. To that end, legislation needs to be introduced which should make provision for

- (a) Consumer rights, including the freedom of consumers to associate and form groups to advocate and promote their common interests;

- (b) Standards of consumer information so as to ensure that consumers are sufficiently well informed to benefit from and stimulate effective competition;
- (c) Consumer guarantees in respect of the supply of goods and services;
- (d) The protection of consumers from hazards to their well-being and safety, and product liability;
- (e) The prohibition of unfair terms in consumer contracts;
- (f) The prohibition of unfair business practices;
- (g) The regulation of distance selling, doorstep selling and unsolicited consumer transactions;
- (h) The regulation of consumer credit;
- (i) The establishment and operation of a National Consumer Council, which would encourage consumer participation in decision-making processes concerning the marketplace and the interests of consumers;
- (j) An effective enforcement framework relating to consumer transactions and agreements; and
- (k) An accessible, effective and efficient system of redress for consumers, including a mechanism for consensual resolution of disputes arising from consumer transactions.

The Commission also recommended that, with the establishment of a new consumer regime, the role of the Ministry will have to be re-assessed and its operational capability will have to be strengthened.

33. The Commission has reviewed the law as to restraint of vexatious litigation. A **Report on Prevention of Vexatious Litigation** was submitted to Hon. Attorney-General in October 2010.

Vexatious litigation is legal action which is brought regardless of its merits, such as the filing of a lawsuit with the knowledge that it has no legal basis (including the continuation of a lawsuit after discovery of the facts shows it has absolutely no merit),

with the purpose to bother, annoy, embarrass and cause legal expenses to the defendant(s).

Vexatious litigation is regarded by many legal systems as an abuse of the judicial process. In England, for instance, the Attorney-General may, under section 42 of the Senior Courts Act [formerly Supreme Court Act 1981] entitled “Restriction of Vexatious Legal Proceedings”, apply to the High Court to declare a litigant as ‘vexatious’. Law Reform Commissions and Agencies in the Commonwealth have during the past years reviewed the law as to the prevention of vexatious litigation. In June 2005, the Law Commission of India, in its 192nd Report on “Prevention of Vexatious Litigation” - after reviewing legislation curbing vexatious litigation in UK, USA, Australia, New Zealand, and Canada – recommended the adoption of the *Vexatious Litigation (Prevention) Bill*. In April 2006, the Law Reform Commission of Nova Scotia released its Final Report on ‘Vexatious Litigants’. In December 2008, the Parliament of Victoria Law Reform Committee released its Final Report in respect of its ‘Inquiry into Vexatious Litigants’.

In its Report, the Commission has recommended that the Courts Act be amended to enable the Supreme Court, where it is satisfied that a person has persistently started vexatious proceedings or made similar applications in any court, to make an appropriate order so as to restrain the start of such proceedings or the making of such applications. The amendment should take into account the practice in other jurisdictions as well as the analysis made by various law reform agencies in the Commonwealth.

34. The Commission has examined, under section 6 of the Law Reform Commission Act, the concept of ‘mediation and conciliation’, which is used for the resolution of employment relations disputes, and has considered its application – in furtherance of Government Business Facilitation Strategy - for the resolution of commercial disputes. A **Report on Mediation and Conciliation in Commercial Matters** was submitted to Hon. Attorney-General in November 2010.

In the Report, the Commission has reviewed developments of this aspect of the law in other jurisdictions, research work carried out by other law reform agencies, as well as the norms evolved by the United Nations Commission on International Trade Law [UNCITRAL]. The main objectives and principles of Alternative dispute resolution [ADR] in connection with mediation and conciliation in commercial matters were also considered.

The Commission has considered that ADR has become increasingly topical in the international business community. There is a world-wide trend for parties to turn to one of the processes of ADR, such as mediation and conciliation, when they feel that resolution of their disputes should, for various reasons, be sought outside the constraints of proceedings before national courts, and in a procedure which is the most informal possible. ADR processes, such as mediation and conciliation, provide an opportunity for parties in a commercial dispute to consider and resolve all dimensions of the dispute in a private and confidential environment which also preserves good business relations.

The Commission has been of the view that parties involved in commercial disputes should be encouraged to explore whether their dispute can be resolved by agreement, whether directly or with the help of a third party mediator or conciliator, rather than by proceeding to a formal “winner v. loser” decision by a court. The enactment by the Chief Justice of the Supreme Court (Mediation) Rules 2010 goes in that direction.

The Commission also considered that the resolution of commercial disputes by mediation and conciliation call for other developments. Parties should be encouraged to have recourse to Mediation Clauses in Contracts for the Settlement of Commercial Disputes. We also consider that it is in the interest of the nation that legislation be adopted, now that Mauritius has opened up to international law firms and the foundation has been laid for it to act as a jurisdiction of choice in the field of international arbitration, which would enable the country to emerge both as an ‘International Arbitration and Mediation Centre’ for international commercial disputes. The UNCITRAL Model Law on

International Commercial Conciliation (2002) could be incorporated in our law. A system of training and accreditation of arbitrators and mediators/conciliators should be put in place, as well as ethical standards laid down.

35. At the request of the Secretary to Cabinet and Head of the Civil Service, the Commission has examined the law and practice of international arbitration, as well as the operation of international arbitral centers and the capacity-building requirements for Mauritius to emerge as an international Arbitration and Mediation Centre.

Research work has since been carried out on

- (1) The operation of PCA (Permanent Court of Arbitration), ICC (International Chamber of Commerce) International Court of Arbitration, ICSID (International Center for Settlement of Investment Disputes), WIPO (World Intellectual Property Organization) Arbitration and Mediation Center;
- (2) International Arbitration in Europe, in particular operation of the LCIA, SCC (Arbitration Institute of the Stockholm Chamber of Commerce), AFEC (International Arbitral Centre of the Austrian Federal Economic Chamber), the Belgian Centre for Arbitration and Mediation, DIS (German Institute for Arbitration), VCCA (Vilnius Court of Commercial Arbitration - Lithuania), CEA (European Court of Arbitration), the Dublin International Arbitration Centre, and the Malta Arbitration Centre;
- (3) International Arbitration in Africa and the Arab World, in particular the operation of DIAC (Dubai International Arbitration Centre), RCICAC (Regional Centre for International Commercial Arbitration – Lagos), CRCICA (Cairo Regional Centre for International Commercial Arbitration), and AFSA (Arbitration Foundation of Southern Africa);
- (4) International Arbitration in Asia, in particular the operation of SIAC (Singapore International Arbitration Centre), KLRCA (Kuala Lumpur Regional Centre for Arbitration), HKIAC (Hong Kong International Arbitration Centre), CIETAC (China International Economic and Trade Arbitration Commission), BAC (Beijing

Arbitration Commission) and other Chinese Arbitration Commissions (Shenzhen Arbitration Commission, Suzhou Arbitration Commission, Huizhou Arbitration Commission, Guangzhou Arbitration Commission, and Nanjing Arbitration Commission), KCAB (Korean Commercial Arbitration Board), JCAA (Japan Commercial Arbitration Association), PDRC (Philippines Dispute Resolution Center), VIAC (Vietnam International Arbitration Center), and the Indian Council of Arbitration;

- (5) International Arbitration in Australia and the Pacific islands, in particular operation of ACICA (Australia Centre for International Commercial Arbitration), GIAC (Guam International Arbitration Center) and the Work of APRAG (Asia Pacific Regional Arbitration Group);
- (6) International arbitration in US, Canada and Latin America, and in particular focus on the operation of CCAC (Canadian Commercial Arbitration Center), BCICAC (British Columbia International Commercial Arbitration Centre), AAA (American Arbitration Association), MERCOSUR (Mercado Comun del Sur) and International Commercial Arbitration in Latin America;
- (7) Usefulness of institutions such as the Hong Kong Institute of Arbitrators, IAMA (Institute of Arbitrators and Mediators Australia), AMINZ (Arbitrators' and Mediators' Institute of New Zealand), the Chartered Institute of Arbitrators, the Danish Institute of Arbitration, the Swiss Arbitration Association, the ADR Institute of Canada, IIAM (the Indian Institute of Arbitration and Mediation) and the National Arbitration Forum (based in Minneapolis, USA); and
- (8) The work of other law reform agencies on international arbitration, such as the Cayman Law Reform Commission Discussion Paper on Arbitration (2009), the Report of the Hong Kong Law Reform Commission on 'The Adoption of the UNCITRAL Model Law of Arbitration' (1987), the South African Law Reform Commission Papers and Reports on an 'International Arbitration Act for South Africa' (1997), as well as the reports of the Law Reform and Law Revision Division of the Attorney General's Chambers in Singapore on the International Arbitration Act (2002).

The Commission has formed the opinion that these are some of the essential ingredients for successfully building and continually developing the landscape of arbitration in a jurisdiction for international and regional users:

- (1) Above all, there needs to be the Rule of Law.
- (2) Furthermore, there needs to be a supportive judicial attitude towards arbitration. The support from the courts may feature in different stages in the conduct of arbitration, namely enforcement of arbitration agreement, enforcement of arbitral awards, availability of interim measures and protection;
- (3) The existence of an independent arbitration centre that provides the necessary administrative support services and the ongoing promotion and continuing development of arbitration is certainly another essential ingredient in bringing about successes in international arbitration to a jurisdiction. The needs and expectation of users of arbitration have kept on evolving towards the administration of arbitration. Without a focal point to act as the one-stop spot for all, systematic establishment of a successful place for arbitration will not come easy.
- (4) In addition to the above key ingredients, up-to-date arbitration legislation and rules, adequate facilities for education and training in arbitration, and the availability of suitable resources (e.g. premises for arbitration, pools of experienced arbitrators, lawyers and experts with language capacities) are all important for building a successful place for international arbitration.

Of the factors that contribute to a successful place of arbitration, user-friendly legal framework and arbitration environment, independence of arbitration centre, and neutrality of location are more often than not now to be weighted highly among the others.

36. The Commission considered, at the request of the Hon. Attorney-General, the policy aspects of the Draft Asset Recovery Bill.

The Commission has been of the view that:

- (a) The policy decision - as announced in the Government Program 2010-2015 (at para. 16 thereof) - to establish an independent law enforcement agency under the aegis of the Office of the Director of Public Prosecutions to reinforce the fight against transnational crime and to recover ill-gotten gains is in line with what obtains in other jurisdictions, such as England and South Africa;
 - (b) In the event that the Bill was to allow confiscation orders to operate retroactively, this would be in conformity with the Constitution which permits in such a case retrospective operation of civil laws.
37. During the year 2010, the Commission provided support to the Malawi Special Law Commission on Review of Prevention of Domestic Violence – comprising Justice Ivy Kamanga, Chairperson of the Special Law Commission, Mrs. Gertrude Lynn Hiwa, the Law Commissioner, Mrs. Fiona Kalemba, a Member of the Commission and Mr. William Msiska, Programme Officer - when it carried out its study visit from 24 to 27 August 2010.
38. A delegation from Botswana visited the Commission on 22 July 2010 and met the Chairperson and the CEO to exchange views on the proposed merger of the Botswana Export Development and Investment Authority and the Botswana International Financial Services Centre.

The delegation consisted of the following:

- (a) Ms. Khursheed Rossenkhan, Chief State Counsel, Attorney-General’s Chambers;
 - (b) Ms. Kelly Kokoro, Senior State Counsel, Attorney-General’s Chambers; and
 - (c) Ms. Tidimalo Sebogiso, Legal Advisor, Ministry of Trade and Industry.
39. The Commission provides an opportunity to law students, registered at a university which has an “accord de stage” with it, to do an internship at the Commission. From 23 August

to 8 November 2010, two students from the University of Pretoria reading an LLM in Human Rights and Democratization in Africa, Ms. Marian C.O. Atta-Boahene (from Ghana) and Ms. Ophilia Leonard Karumuna (from Tanzania), did their internship at the Commission during which they did research work respectively on “The Right to Protection from Domestic Violence in Africa” and “The Rights of Prisoners and Detainees in Africa”.

40. The Commission considers it as part of its mission that it should encourage learning/research on the laws of Mauritius and on legal practice.

With a view to motivate students reading law at the University of Mauritius, the Commission has decided that it would award each year to the most deserving student on the Bachelor of Laws with Honours (LLB) degree and to the most deserving student on any other joint law degree program] a *Law Reform Commission Shield and Cash Prize for Outstanding Performance in Legal Studies*.

The Commission has also decided to award each year to a successful student in the Vocational exam organized by the Council of Legal Education with the best performance in Advocacy a *Law Reform Commission Shield and Cash Prize for Outstanding Performance in Advocacy*.

Concluding Remarks

41. Our Reports/Papers on aspects of law reviewed are invariably uploaded on our website and brought to attention of the public to generate reflection on laws and their underlying policies.
42. We wish to stress that we do not lobby for implementation of our proposals because we do not have a political agenda to serve. We do not allow ourselves to be dragged in the political arena. Our duty is to enlighten policy makers and the public through opinions based on high-quality research. The contribution of independent law reform agencies to the development of the law has time and again been recognized at Commonwealth Law Conferences and at meetings of Commonwealth Law Ministers.
43. The strength of our institution lies in its membership [drawn from professionals with experience who value their independence] and its methodology [its observations/views about laws/policies are driven by research: benchmarking of best international practices on any aspect of the law; empirical research (through consultation or surveys) as to the actual practice of the law and its impact on the lives of interested parties].
44. Just as courts our opinions are based on an expertise which the lay person (or may be even a lawyer) does not necessarily possess and which society stands to benefit from for the orderly conduct of human affairs and socio-economic progress.

As courts we do not allow our process to be abused of by busy cranks and their cronies: we have selection criteria for deciding whether or not to embark on a review of an aspect of the law when requested to do so by a person, other than the Hon. Attorney-General.

We have, however, an advantage over courts when we express ourselves on an issue. Courts deliver their opinion based on the law “as it is”; we base our opinion on “the law as it ought to be” [having regard to best international practices and empirical impact assessments on the behaviour of those likely to be affected by the rule].

Courts give their opinions in relation to cases brought before them. We do express views on matters when requested to do so by the Hon. Attorney-General or any other person but we can also, of our own initiative, convey our views on any legal issue.

Appendix: LRC Reports/Papers on aspects of the law reviewed

- (1) Report on “Mediation and Conciliation in Commercial Matters” [November 2010];
- (2) Opinion Paper “Law as to Publicity for Appointment and Revocation of Agent and Proxy [November 2010];
- (3) Issue Paper on “Constitutional Protection of Human Rights” [October 2010];
- (4) Report on “Prevention of Vexatious Litigation” [October 2010];
- (5) Report on “Review of Aspects of Consumer Protection Law and Proposals for Reform” [October 2010];
- (6) Background Paper on “Reform of Codes” [October 2010];
- (7) Issue Paper on “Criminal Investigation: Reform of Police Procedures and Practices” [July 2010];
- (8) Issue Paper on “Evidence of Reluctant/Intimidated Witness in criminal Proceedings” Proposal for Reform of the Law” [May 2010];
- (9) Discussion Paper on “Judicial Review” [November 2009];
- (10) Issue Paper on “Social Partnership Framework” [November 2009];
- (11) Report on ‘Bail and other Related Issues’ [together with draft Bail (Amendment) Bill] [August 2009];
- (12) Report (together with draft Local Government Bill) on “Local Government Reform” [June 2009];
- (13) Discussion Paper on “Forensic Use of DNA” [April 2009];
- (14) Issue Paper on “The Office of Director of Public Prosecutions [DPP] and its Operational Autonomy” [March 2009];
- (15) Report (together with draft Bill) about “Law on Divorce” [December 2008];
- (16) Report (together with draft Bill) on “Disclosure in Criminal Proceedings” [December 2008];
- (17) Working Paper on ‘Reform of Local Government Legislative Framework’ [December 2008];

- (18) Issue Paper on “Equality/Anti-Discrimination Legislative Framework (*Re* Equal Opportunities Bill No. XXXVI of 2008)” [November 2008];
- (19) Report (together with draft legislation) on “Law relating to NGOs” [November 2008];
- (20) Review Paper on “The Criminal Justice System and The Rights of an Accused Person” [September 2008];
- (21) Report (together with draft Bill) on “Access to Justice and Limitations of Actions against Public Officers and the State” [May 2008];
- (22) Discussion Paper on “Law and Practice relating to Criminal Investigation, Arrest and Bail” [April 2008];
- (23) Issue Paper on “Disclosure in Criminal Proceedings” [December 2007];
- (24) Issue Paper “Commentary on some of the Human Rights dimensions of the Sexual Offences Bill No. VI of 2007” [June 2007];
- (25) Discussion Paper on “Access to Justice and Limitations of Actions against Public Officers and the State” [June 2007];
- (26) Report (together with draft Bill) on “Relationship of Children with Grand Parents and Other persons under the Code Civil Mauricien” [June 2007];
- (27) Report (together with draft Bill) on “Opening Mauritius to International Law Firms and Formation of Law Firms/Corporations” [May 2007].