



# LAW REFORM COMMISSION

*Issue Paper*

## Establishment of a Family Court and the Conduct of Family Proceedings

[November 2011]

Port Louis, Republic of Mauritius

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# LAW REFORM COMMISSION

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## **About the Commission**

THE LAW REFORM COMMISSION OF MAURITIUS 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.

Under the direction of the Chairperson, the Chief Executive Officer is responsible 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 responsible for taking the minutes of all the proceedings of the Commission and is also responsible, under the supervision of the Chief Executive Officer, for the administration of the Commission.

The Commission may appoint staff on such terms and conditions as it may determine and it may resort to the services of persons with suitable qualifications and experience as consultants.

## **Executive Summary**

### **Issue Paper on “Establishment of a Family Court and the Conduct of Family Proceedings”**

**[November 2011]**

The Commission is of opinion that a Family Court with all the required support services must be established. The Court would have exclusive original civil and criminal jurisdiction in respect of family affairs. Provision must be made for Conciliation for the settlement of disputes relating to family affairs. Counseling services should be made available to parties in proceedings before the Family Court. The Family Court should be empowered to secure the services of a medical expert or such other person, including a person professionally engaged in promoting the welfare of the family, as it may think fit.

## **Background Note**

1. At paragraph 288 of the Government Program 2010-2015, Government committed itself to setting up a Court of Appeal and a High Court, and to providing the High Court with a Family Division that has all the required support services.
2. The Commission has, at the request of Hon. Attorney-General, considered legislation that is needed to provide for the establishment of a Family Court and the conduct of family proceedings.
3. The Commission is of the view that:
  - (a) The Family Court must be established as a Division of the High Court;
  - (b) The Family Court should have exclusive original civil and criminal jurisdiction in respect of family affairs;
  - (c) Provision must be made for support services;
  - (d) Provision must be made for Conciliation for the settlement of disputes relating to family affairs;
  - (e) Counseling services should be made available to parties in proceedings before the Family Court;
  - (f) The Family Court should be empowered to secure the services of a medical expert or such other person, including a person professionally engaged in promoting the welfare of the family, as it may think fit.
4. Draft legislation is attached as an Annex to this Issue Paper.

**Annex: The Family Court Bill**

(Bill No. .... of 2012)

**ARRANGEMENT OF CLAUSES**

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**A Bill**

To provide for the establishment of the Family Court as a Division of the High Court of Mauritius, with exclusive original civil and criminal jurisdiction in respect of family affairs, and to make provision for conciliation and the assistance of experts, and for matters connected therewith.

**PART 1 – PRELIMINARY**

**1. Short title**

This Act may be cited as the Family Court Act 2012.

**2. Interpretation**

In this Act, unless the context otherwise requires-

- (i) “Family Court” means the Family Division of the High Court established under section 3;
- (ii) “Judge” means a Judge, or as the case may be, the Presiding Judge of the Family court;
- (iii) “Proceedings” includes an action, cause, matter, petition or application;
- (iv) “Notification” means a notification published in the Official Gazette;
- (v) “Prescribed” means prescribed by rules made under this Act;
- (vi) “Family” means husband and wife which includes a man and woman who, although not married to each other, live or have lived together as husband and wife in a home in which there is a child of either or both; custodian and child; or any group of persons related by blood or marriage who are residing in one home or where one is related to the other by any of the following degrees of relationship:
  - (a) Mother
  - (b) Father
  - (c) Mother-in-law
  - (d) Father-in-law
  - (e) Brother
  - (f) Sister
  - (g) Brother-in-law
  - (h) Sister-in-law
  - (i) Son
  - (j) Daughter
  - (k) Son-in-law
  - (l) Daughter-in-law
  - (m) Grandfather
  - (n) Grandmother
  - (o) Grandson
  - (p) Granddaughter
  - (q) Stepfather
  - (r) Stepmother

- (vii) "Relative" means any person within the immediate family and any grandparent, uncle, aunt or first cousin.

## **PART II - FAMILY COURT**

### **3. Establishment of the Family Court**

There is hereby established as a Division of the High Court a Court to be known as the Family Court.

### **4. Principles to be applied by the Family Court**

The Family Court shall, in the exercise of its jurisdiction under this Act, have regard to:

- (i) The need to preserve and protect the institution of marriage;
- (ii) The need to preserve and to give the widest possible protection and assistance to the family as a unit fundamental to the maintenance of a stable, democratic society;
- (iii) The need to protect the rights of children and to promote their welfare;
- (iv) The need to ensure safety from family violence and the means available for assisting parties to consider reconciliation or the improvement of their relationship to each other and to their children.
- (v) that a marriage which has irretrievably broken down and is being brought to an end should be brought to an end without trying to persuade the parties at all costs to stay together and-
  - (i) with minimum distress to the parties and to the children affected;
  - (ii) with questions dealt with in a manner designed to promote as good a continuing relationship between the parties and any children affected as is possible in the circumstances; and
  - (iii) without costs being unreasonably incurred in connection with the procedures to be followed in bringing the marriage to an end.

### **5. Judges, appointment and qualifications**

- (1) The Family Court shall be composed of not less than five Judges of equal, judicial authority. One Judge shall be the Presiding Judge of the Division.
- (2) Every endeavour shall be made to ensure that Judges are assigned to the Family Court because of interest in and understanding of family and child problems.

**6. The powers and duties of Judges of the Family Court**

- (1) The Presiding Judge shall be responsible for ensuring the orderly and expeditious discharge of the business of the Division including, without limiting the generality of the foregoing, the scheduling of the sittings of the Family Division, and the assignment of judicial duties.
- (2) A Judge of the Family Court shall exercise such powers and shall perform such duties as are assigned by the Presiding Judge.

**7. Appointment, qualifications and duties of Court Administrator**

- (1) There shall be a Court Administrator who shall assist the Presiding Judge in the exercise of such functions conferred on the Presiding Judge by section 6 subsection (1).
- (2) No person shall be qualified for appointment as Court Administrator unless he is the holder of a Bachelor's degree in Law with not less than three years' experience in either governmental or private business administration or its equivalent.
- (3) Under the supervision of the Presiding Judge, the Court Administrator shall –
  - (i) Be secretary to the Court in matters that pertain to the business of the Court
  - (ii) With the Director of Support Services, coordinate the judicial, social, legal, clerical and administrative services of the Court.
  - (iii) Perform all duties prescribed by the Presiding Judge.

**8. Appointment, qualifications and duties of Director of Counselling and Treatment Services**

- (1) There shall be a Director of Counselling and Treatment Services who shall be the holder of a postgraduate degree in sociology, psychology, social work or social sciences, with experience in administration and counselling.
- (2) Under the supervision of the Presiding Judge, the Director of Counselling and Treatment Services shall
  - (a) Be at the Head of the Counselling and Treatment Services Unit;
  - (c) Develop and monitor the Unit's special services for families and children, as well as its integrated referral service delivery;

- (d) Identify needs of families and children, design and maintain programs and services and develop training programs for counselling of personnel;
- (e) Perform all duties prescribed by the Presiding Judge.

**9. Counselling supervisors, counsellors and other officers of the Family Court**

- (1) The Government shall, in consultation with the Presiding Judge, determine the number and categories of counselling supervisors, counsellors, officers and other employees required to assist the Family Court in the discharge of its functions and provide the Family Court with such counselling supervisors, counsellors, officers and other staff as it may deem fit.
- (2) Without limiting subsection(1) of this section, there may from time to time be appointed such counselling supervisors, counsellors and other officers as may be necessary to enable the Family Court to perform any function conferred on it by enactment.
- (3) Every such counselling supervisor, counsellor and other officer, while performing any duty under the auspices of the Family Court, shall be deemed to be an officer of that Court.

**10. Association with social welfare agencies**

The Chief Justice may, in consultation with the Presiding Judge, provide, by rules, for the association, in such manner and for such purposes and subject to such conditions as may be specified in the rules, with the Family Court of-

- (a) institutions or organisations engaged in social welfare or the representatives thereof;
- (b) persons professionally engaged in promoting the welfare of the family;
- (c) persons working the field of social welfare; and
- (d) any other person whose association with the Family Court would enable it to exercise its jurisdiction more effectively in accordance with the purposes of this Act.

**11. Duty of Family Court to make efforts for settlement**

- (1) In every suit or proceedings, every endeavour shall be made by the Family Court, where it is possible to do so consistent with the nature and circumstances of the

case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or proceeding and for this purpose the Family Court may, subject to any Family Court rules, follow such procedure as it may deem fit.

- (2) If, in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the Family Court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement.
- (3) The power conferred by sub-section (2) shall be in addition to, and not in derogation of, any other power of the Family Court to adjourn the proceedings.

### **PART III - JURISDICTION OF COURT**

#### **12. Civil and Criminal Jurisdiction**

- (1) Subject to the other provisions of this Act, the Family Court shall have exclusive original civil jurisdiction and may exercise the powers and duties possessed by the High Court in relation to, and shall have and may exercise all the jurisdiction exercisable by the High Court or any subordinate civil Court under any law for the time being in force in respect of suits and proceedings in the following matters, other than by way of appeal:
  - (a) Formation of marriage;
  - (b) Declarations of status including validity of marriage;
  - (c) Annulment of marriage;
  - (d) Judicial separation, divorce and dissolution of marriage;
  - (e) Actions and causes concerning matrimonial property including injunctions, partition and settlements;
  - (f) Marriage settlement, matrimonial regime, change of matrimonial regime, dissolution of community;
  - (g) Entitlement to support, child and spousal support;
  - (h) Custody and access;
  - (i) Enforcement and variation of orders under subsections (g) and (h) above;
  - (j) Parental authority, termination of parental authority;
  - (k) Paternity and filiation;
  - (l) Adoption;
  - (m) Guardianship of any person or minor, emancipation of minor;
  - (n) Interspousal and familial torts;
  - (o) Those other matters that are provided by or under an Act to be within the jurisdiction of the Family Court.

- (2) Subject to the other provisions of this Act, the Family Court shall have and exercise exclusive original jurisdiction over any or all charges, offences (except crimes) and matters arising from any one or more of the following Acts:
  - (i) The Protection from Domestic Violence Act;
  - (ii) The Child Protection Act, where the offence is committed by a member of the family;
  - (iii) The Criminal Code, for any offence under sections 260 to 262 and 267 or where the offence is committed by a member of the family;
  - (iv) The Employment Rights Act, in so far as it relates to prosecution for an offence respecting the employment of children;
  - (v) Such other jurisdiction as may be conferred on it by any other enactment.
- (3) The Family Court shall have exclusive original criminal jurisdiction in all proceedings concerning any child under the age of 16 charged with having committed any offence classified as misdemeanour under the Criminal Code.
- (4) Notwithstanding subsection (3) above, a Judge of the Family Court may, upon application, order that a proceeding started in the Family Court be transferred to an appropriate Court or another Division of the High Court where, in the opinion of a judge, there is a preponderance of convenience for the proceeding to be dealt with by that Court or Division.

### **13. Exclusion of jurisdiction and pending proceedings**

- (1) The jurisdiction of the Trial Division of the Supreme Court and Courts of summary jurisdiction is suspended by this Act in relation to proceedings in which the Family Division has exclusive jurisdiction.
- (2) Every suit or proceeding of the nature referred to above in section 12 which is pending immediately before the establishment of the Family Court before the Supreme Court, any District Court or other subordinate Court and which would have been required to be instituted or taken before or by such Family Court if, before the date on which such suit or proceeding was instituted or taken, this Act had come into force and such Family Court had been established, shall stand transferred to such Family Court on the date on which it is established.

**14. Judge may transfer case**

- (1) Where a proceeding that should not have been started in the Family Court is started, a Judge of the Family Court may direct the proceeding to be transferred to another Court, and steps taken by a party in the proceeding and orders made before the transfer are valid and effectual as if they were made in the Court in which the proceeding ought to have been started.
- (2) The provision of this Act in relation to the procedure of a proceeding transferred to another Court under subsection (1) shall apply, with the necessary changes, to that proceeding in the other Court.

**15. Jurisdiction of Court may be extended**

Where a proceeding is started in the Family Court in a matter over which jurisdiction may be exercised in the Family Court and it is combined with a matter within the jurisdiction of a Judge of the High Court but over which jurisdiction may not be exercised in the Family Court, the Family Court may, with the consent of the parties, determine and dispose of the combined matters.

**PART IV - PROCEDURE**

**16. Family Court Rules Committee**

- (1) The Chief Justice may establish a Family Court Rules Committee which shall be composed of such members as are appointed by the Chief Justice who shall designate one of the members as chairperson.
- (2) The Chief Justice may, upon the recommendation of the Family Court Rules Committee, make such rules regulating the practice and procedure of the Family Court in proceedings that the Family Court has jurisdiction to hear and determine, as it may deem necessary for carrying out the purposes of this Act.
- (3) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:
  - (a) Regulating the pleadings, practice and procedure of the Family Court;
  - (b) Adopting rules of the Supreme Court, with such changes as are advisable, in relation to remedies in proceedings in the Family Court;
  - (c) Fees and costs payable in respect of proceedings in the Family Court;
  - (d) Forms and contents of documents to be used in proceedings;
  - (e) Methods for serving of documents including service out of the jurisdiction;
  - (f) Methods for giving notice;

- (g) Regulating the form and execution of any process of the Court;
- (h) Prescribing and regulating the proceedings under any enactment that confers jurisdiction upon the Family Court or a Judge thereof.
- (i) Normal working hours of the Family Court and holding of sittings of the Family Court outside normal working hours;
- (j) Holding of sittings of the Family Court at places other than their ordinary places of sitting;
- (k) The transfer of proceedings between the Family Court and any other Court;
- (l) The keeping, searching and transfer of records;
- (m) Practice and procedure under this Part as they consider expedient;
- (n) Efforts which may be made by, and the procedure which may be followed by the Family Court for assisting and persuading parties to arrive at a settlement;
- (o) Any other matters in respect of which rules regulating the practice or procedure of the Family Court are contemplated or specifically authorised by this Act or a specified Act.

(4) Subsection (3) shall not limit the powers conferred by subsection (1).

(5) Where provisions in respect of practice or procedure are contained in any Act, rules may be made adding to or modifying such provisions to an extent that is considered necessary for the equitable dispatch of the business of the Family Court unless that power is expressly excluded.

#### **17. Proceedings to be brought and dealt with under Family Court Rules**

Whilst any Family Court Rules are in force, all proceedings in the Family Court shall be brought and dealt with under those rules, except to the extent that the Act under which the proceedings are brought provides for them to be brought or dealt with under some other enactment.

#### **18. Assistance of medical and welfare experts**

In every suit or proceedings, it shall be open to the Family Court to secure the services of a medical expert or such person including a person professionally engaged in promoting the welfare of the family as the Court may think fit, for the purposes of assisting it in discharging the functions imposed by this Act.

#### **19. Avoidance of Unnecessary Formality**

Proceedings in the Court shall be conducted in such a way as to avoid unnecessary formality.

**20. Reservation of judgment**

Upon the hearing of any proceeding, a Judge of the Family Court may, of his own motion or by consent of the parties, reserve judgment until a future day, not later than six months from the day of reserving judgment.

**21. Contempt of Court**

Subject to this and any other Act, the Family Court shall have the same power to determine and punish civil and criminal contempt of its power and authority as is possessed by the Supreme Court.

**PART V - APPEAL**

**22. Appeal**

- (1) From any order, ruling, decision or judgment of the Court in any civil or criminal proceedings, including any delinquency proceeding, there shall be the right of appeal as provided by law to the Supreme Court.
- (2) No appeal shall stay the execution of any order of the Court unless such stay shall be specifically ordered by the appellate Court.

**PART VI - MISCELLANEOUS**

**23. Sittings of Court**

The Presiding Judge of the Family Court may by order provide for sittings of the Court established under this Act to be held outside Port Louis and may direct a Judge of the Court to hold sittings of the Court at such times and places as specified in the order.

**24. Regulations**

The Chief Justice may make such regulations as he thinks fit for the purposes of this Act.

**25. Act to have overriding effect**

The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

**26. Commencement**

This Act shall come into operation on a day to be fixed by Proclamation.