

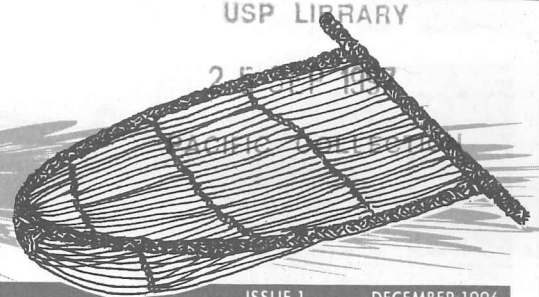
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Article 101(1)

Qolilawa



THE NEWSLETTER OF THE FIJI LAW REFORM COMMISSION

ISSUE 1

DECEMBER 1996

Why a Newsletter?

A distinctive feature of law reform is its participatory nature. "Taking law reform to the people" has become a hallmark of the law reform process. It is incumbent on the Commission to facilitate effective and productive consultation with specialist, professional and other public interest groups in the wider community. Public submissions provide invaluable guidance and context to issues under reform. Such a process permits the cross-fertilisation of ideas from different levels within society and across boundaries as well.

To inform the public and raise awareness of the Commission's role and activities, the Fiji Law Reform Commission (FLRC) will be putting out a quarterly newsletter the "QOLILAWA". This Fijian term is derived from the two words *Qoli* (which means to fish) and *Lawa* (which means a net or indeed the Law). The concept which Qolilawa tries to capture is the process of dissemination of information, consultation, and the gathering in of the views and opinions of as many as possible.

This process enables the Commission to arrive at recommendations which are appropriate and representative of the diverse multi-cultural community of Fiji.

Call for a Hindustani Translation

The Commission would be very grateful to receive advice or suggestions as to the appropriate Hindustani word or term/s that describes the concept of Qolilawa. Despite earnest attempts on FLRC's part, the Commission has not been able to obtain a suitable translation.

Presentation and Launch

The Commission is hosting a function on December 17 at which it will present, to the Attorney-General, its 1994-1995 and 1996 Annual Report. It will also launch its Reform Agenda 1997-1998.

The Commission has had difficulties completing projects in the past and it is with this in mind that a Reform Agenda or work programme has been agreed upon. This schedule provides a useful plan on how the work of the Commission will be subdivided over the next two years. It is a useful tool for the Commission in planning the allocation of resources in terms of materials, finances and staff. The publishing of the Agenda is also a step towards becoming more productive, efficient and accordingly more accountable, thus ensuring the Commission's future existence.

Qolilawa will provide updates and progress on the Commission's work programme. Any feedback, comments and suggestions will be gratefully received.

What is the Fiji Law Reform Commission

The Fiji Law Reform Commission was set up in 1979 to take and keep under review all the law applicable to Fiji with a view to their systematic development and reform, including in particular the codification of such laws, the elimination of anomalies, the repeal of obsolete and unnecessary enactments and generally the simplification and modernisation of the laws.

The Chairman of the Commission is a person qualified to be a High Court Judge, appointed (for a term not exceeding 4 years) by the President, on the advice of the Prime Minister given after he has consulted with the Leader of the Opposition. The Commissioners are appointed by the Attorney-General

officers are appointed by the Judicial and Legal Services Commission. Other members of staff are appointed by the Public Service Commission.

The Commission receives its references from the Attorney-General and its work programme is subject to Cabinet approval and priority. However, the Commission determines its own procedure.

The Commission reports are given to the Attorney-General. These reports outline options for change with recommendations that are considered the most practical for Fiji's society, and given its limited resources. It is the Government (not the Commission) who decides whether these



Merry Christmas
and a
Happy New Year
to you all!



Chairman

Dr Anthony (Tony) Tarr is not new to Fiji or to law reform, having recently served as a part-time Commissioner responsible for Insurance Law Reform. His report was completed in November 1995 and culminated in the passage of legislation of the same name in July 1996.

Dr Tarr has a Phd from Canterbury (NZ) and a LLM from Cambridge (UK). He is a Fellow of the Australian Institute of Management, and an Adjunct Professor of Law at Queensland University of Technology.

Dr Tarr serves his post of Chairman concurrently with his position as Chief Executive Officer of the Queensland Law Society - a position he has held since 1992. Prior to this Dr Tarr held academic appointments on both sides of the Tasman, the most notable being his appointment as Foundation Dean and Professor of Law at Bond University in 1988.

Dr Tarr brings with his appointment valuable expertise and experience which will benefit the Commission in its future work.

The Challenge of FLRC's Independence

The Commission has links with the Attorney-General's Chambers for administrative, staff and budgetary purposes. From the outset, and due largely to logistical requirements (ie staff and accommodation) the Commission has been perceived as "part of the State Law Office". That impression should not be encouraged as it is important not only that the Commission is independent, but that it be seen to be independent. At the same time the nature of the Commission's work requires it to work closely with the State Law Office and other Government departments as well as with the Fiji Law Society, interest groups and the General Public. The Commission should be able to undertake wide ranging consultation and to stimulate public debate, outside the political arena.

Only by being truly independent can the Commission fulfil its role of being capable of detached and detailed study of a kind the Legislature expects and deserves. Working out this effective balance is one of the challenges

The References, The Commissioners and their Legal Officers.

Criminal Justice System

There is a public perception that the Criminal Justice System is not being efficiently administered. Agencies involved with the Criminal Justice System also acknowledge that this concern is not unfounded. In November 1994 the Attorney-General referred the Reform of the Criminal Justice System to the Fiji Law Reform Commission. A Commissioner was appointed but he was unable to continue due to ill health. In October 1996 this reference was divided up into 3 parts and three new part-time Commissioners appointed.

Evidence



High Court Judge M.D. Scott is the Commissioner probing into the state of 'evidence' law in criminal proceedings. The Commission will address the particular issues of hearsay evidence, expert evidence and opinion evidence,

credibility, compellability compulsion and admissibility, privilege, competence and vulnerable witnesses, any other related matter.

Judge Scott started his legal life as a Barrister in England. His travels brought him to Fiji in 1978 where he became a Resident Magistrate, Chief Registrar, Acting Puisne Judge, Director of Public Prosecutions and from 1990 a High Court Judge. A three year period from 1987 - 90 was spent in Brisbane at the DPP's office.

Judge Scott's experience will stand him in good stead for the reference assigned to him. His contribution as editor of Fiji Law Reports and Fiji Court of Appeal Reports show his commitment to recording developments in the legal process.

Asenaca Uluiviti is the Legal Officer assisting Judge Scott. She is an Auckland graduate who returned to Fiji in 1995.

Professor Mark Findlay has been appointed part-time Commissioner responsible for the following areas:

- Breathalyser Regulations Reform;
- Bail Act; and
- Police Powers.

Professor Findlay has been an academic lawyer for most of his career. He became Foundation Professor of Law

Prior to that he was Associate Professor at the Department of Law and Director of the Institute of Criminology, University of Sydney. He has published and participated in law reform projects in various jurisdictions including Papua New Guinea, Australia, Hong Kong and Italy to name a few. Here in Fiji Professor Findlay has aided the Commission on a number of occasions in the past.

Professor Findlay is assisted by Legal Officer **Daiana Buresova**, a Bond University graduate, who joined FLRC in August 1996.

Breathalyser Legislation

This reference is a response to the ever increasing problem relating to the use of motor vehicles, and the consequent rise in the number of prosecutions pursuant to the Traffic Act. The unusually high road death toll for 1996 simply adds to the urgency of this reference. The Commission is directed to assess the effectiveness of the law in this area with particular focus on section 48 of the Traffic (Amendment) Act 1986 which introduced breathalyser equipment and associated procedures for ascertaining blood alcohol and breath alcohol levels.

The Commission will consider the evidentiary status of blood, and breath-alcohol results and recommend changes to procedures, and standards of equipment. Furthermore it will define the law relating to police powers of arrest, mandatory tests and penalties. The Commission has leeway to make proposals on other related matters.

Police Powers

This reference aims to strike a balance between the protection of individual rights and liberties, and the community's rights and need for practical and effective law enforcement.

The Commission will review procedures in the exercise of police powers of entry, search and arrest, a definition of the scope of such power:

inherent and constitutional rights to a fair trial including their rights to legal aid, legal representation, and access to a lawyer, or family/friend. Appropriate mechanisms for processing grievances against police officers will also be considered.

The decision to prosecute raises such questions as whether the Police force has the required level of skilled resources to carry out this function, or should there be a National Prosecutions Office? Whatever the outcome, the merits of a scheme which diverts 'young' and/or 'accidental' offenders from criminal proceedings will be explored. As in all references resource implications will be considered along with each recommendation.

The Commission is also directed to reach recommendations on the following issues: a clear classification of indictable and summary offences; preliminary hearings and criminal discovery; the burden of proof; and the acquisition, status and admissibility of children's and other vulnerable witnesses' evidence particularly involving sexual offences.

Bail Act

The efficiency and effect of the bail law, policies and rules will be reviewed for codification into a comprehensive and explicit statement of the law. The suitability of bail, variants and alternatives will be considered. While every offender is bailable as of right, except in specified serious offences, this needs balancing with the competing public interests of safety, law and order.

Criminal Procedure and Penal Codes

The Codes date back to 1945. There has been little change since that enactment. The practical procedural problems that outdated legislation create are far reaching and do not facilitate the efficient administration of justice.

The reference looks at the rights of a



end, this will include police investigation, procedural and evidentiary issues.

Mr Anthony (Tony) Gates is the part-time Commissioner responsible for this reference. However, there are areas of over-lap in the three Commissioners' references and a collective approach is called for. However, it must be reiterated that the recommendations will depend to a considerable degree on public input.

Mr Gates is an English Barrister whose career began in London, in the Chambers of Lord Boston of Faversham QC. In 1977 he came to Fiji and served in the Director of Prosecutions Office until 1988. From 1988 to 1993 he lived in Brisbane working in the DPP's office for Queensland and the Commonwealth. Mr Gates returned to Fiji in 1993 where he is Principal in the firm of Koya and Co., Barristers and Solicitors.

Mr Gates will be assisted in his work by Legal Officer **Ropate Cabealawa**, a Waikato Graduate who joined the Commission in November 1995.

Family Law



Ms Imrana Jalal, feminist, human rights activist and lawyer, is the Commissioner in charge of the reforms of the various legislation which govern family and domestic relationships. Ultimately, the Commission's objective is the codification and implementation of a

incorporate these statutes: The Marriage Act, Matrimonial Causes Act, Maintenance and Affiliation Act, Maintenance (Prevention of Desertion and Miscellaneous Provisions) Act, Maintenance Orders (Facilities for Enforcement) Act, Maintenance Orders (Reciprocal Enforcement) Act, Juveniles Act, Legitimacy Act, Adoption of Infants Act and Married Women's Property Act.

Ms Jalal, holds a LLB and LLM (Honours) from the University of Auckland, and a MA (Women's Studies) from the University of Sydney. As a past Public Legal Advisor with the Social Welfare Department, Ms Jalal worked tirelessly despite the constraints and anomalies in the existing law. She continues such commitment through her broad network of activities in Fiji, the region and beyond.

She is a founding member of, lobbyist and voluntary legal advisor to both the Fiji Women's Crisis Centre and the Fiji Women's Rights Movement. Currently she is employed as a Resource Trainer (Rights) with the Pacific Regional Human Rights Education Resource Team (RRRT).

Ms Jalal will be assisted by Legal Officer **Asenaca Uliviti**.

Company, Commercial Law



Professor Di Everett is Professor of Law and Acting Pro Vice Chancellor at Bond University, Queensland.

She is the Commissioner in charge of reforms in this field. The Commissioner is charged with the task of proposing recommendations to existing commercial and company laws and practice to improve the conduct of

proceedings and regulations governing companies, insolvency, personal property and securities law. Specific areas under study include Hire Purchase and Credit Contracts, Bills of Sale, Sale of Goods, Bankruptcy and Insolvency, Intellectual Property, Copyright Laws and the Companies Act

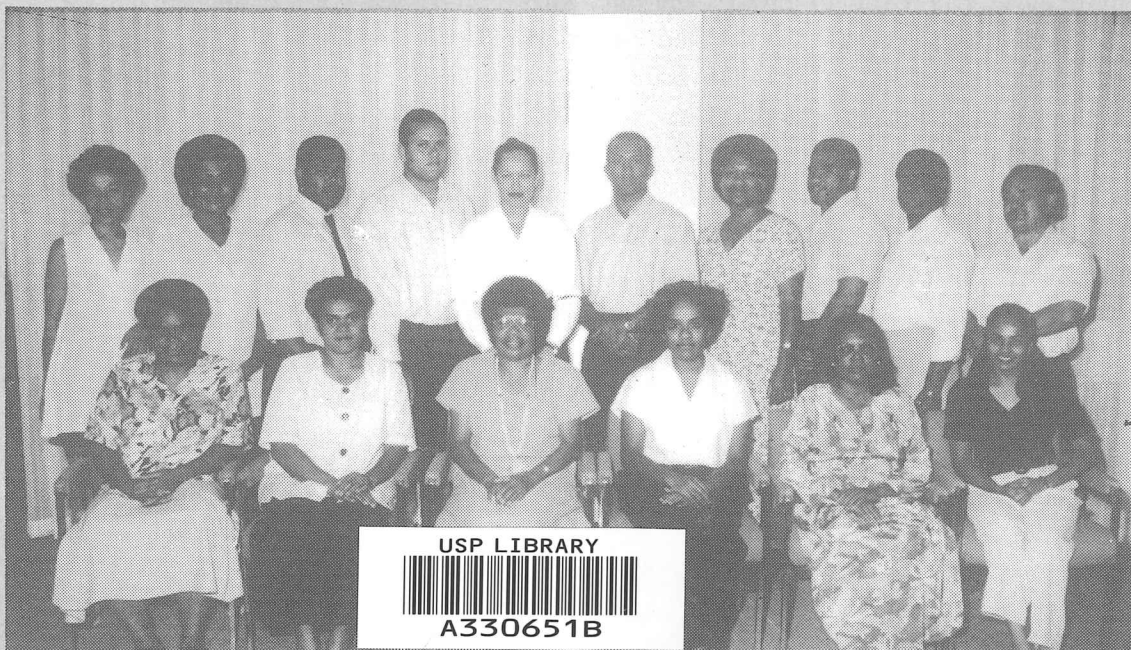
Her research and teaching interests include corporate debt and equity finance, real and personal property, particularly commercial aspects of security law and insolvency.

Professor Everett was the Principal Consultant to the Australian Law Reform Commission on Personal Properties Securities Law Reform. In the private sphere she consults for major law firms, banks and educational institutions.

Staff News

Introducing the Legal, Administrative and Support Staff of the Commission.

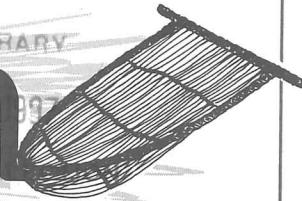
FLRC's latest recruit is **David Cokanasiga** the Commission's first Librarian. David's addition to the Commission is very timely as the library support is crucial to the Commission's research and work. Future newsletters will provide information on the publications available in the Commission's library. Our aim is to provide a useful resource, not only for the Commission itself, but for other government departments the legal profession and academics.



Standing from L-R: Ms A. Uliviti (LO), Ms S. Naceba (Sec.), Mr R. Cabelawa (LO), Mr K. Gortz (TRCO), Ms F. T. Fenton (Director), Mr D. Cokanasiga (Lib.), Ms T. Marawa (SCO), Mr Jone Vaniqi (Mess.), Mr J. Raibevu (Driver) and Mr O. Joseph (AO).
Sitting from L-R: Ms V. Nabulagi (S/T), Ms A. Vataniyaragi (S/T), Ms Sera Lee (A/PAS), Ms D. Buresova (LO), Ms R. Rukmini (S/Sec.) and Ms A. Saldze (S/T).

Qolilawa Darpan

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THE NEWSLETTER OF THE FIJI LAW REFORM COMMISSION

ISSUE 2 MARCH 1997

Drink/Driving Law Reform in Fiji



How should the law deal with drivers who endanger themselves and others on the roads after having consumed alcohol? This is the fundamental question being considered under this reference.

In its report due in April 1997, the Commission will discuss the following issues and make suggestions for reform to the law presently governed by Section 48 of the Traffic (Amendment) Act No. 20 of 1986:

(i) Evidentiary Status of Blood or Breath Tests

At the heart of an effective prosecution for drink driving under effective legislation is the accurate measurement of blood or breath alcohol level which is used as evidence in court.

Another important factor to consider is the point in time which should be used for fixing alcohol concentration. Any delay on the part of the police in carrying out the breath analysis will normally favour the suspect.

It is vital that all breath analysis should be completed promptly in all cases, be accurate and be carried out with the minimum necessary inconvenience to road users.

(ii) Police Powers of Arrest

The present legislation provides that a police officer may arrest, without a warrant, any person reasonably suspected by him/her of committing an offence.

In seeking reform in this area, the community must be cautious about what they expect the police to do when they find such behaviour and ensure that the powers given to the police will enable them to carry out those expectations effectively and efficiently.

The United Kingdom experienced

The Commissioner responsible for this reference is Professor Mark Findlay. He is assisted by Legal Officer Daiana Buresova.

to exercise their powers on the basis of mere suspicion or to circumvent this requirement by the pretence of consent.

(iii) Random Breath Testing

One of the most controversial law enforcement practices in this area is Random Breath Testing (RBT). This simply means that an enforcement officer may require a driver to take a breath screening test in the absence of any suspicion that the driver has consumed alcohol. RBT clearly invokes human rights issues. However, there are broad community safety issues which counterbalance concerns over inherent human rights violations. The reformed legislation aims to strike a fair balance between these two competing interests.

The resource implications of introducing such a scheme will also be considered.

(iv) Penalties

Criminal sanctions play an important role in deterring potential offenders. However, the penalties imposed under the present legislation are not effective in deterring potential or actual offenders. The penalties are dependent on whether the offender is a first, second or third time offender.

When looking at deterrence one also needs to consider an improvement in enforcement practices.

The outcry from the community following the 1996 national road death toll and recent press comments on the significance of custodial sentences clearly points to the need for a revision of penalties in deterring potential or actual offenders.

(v) Education Programmes

The Victorian (Australia) experience

rehabilitative education programmes supplemented by licence suspension and imprisonment have reaped benefits for the Victorian State in deterring would-be offenders.

Nevertheless, the resource implications of such a scheme will need to be considered.

Conclusion

The necessity of reforming the law on drinking and driving cannot be understated. It is important to realise that legislation be seen to pre-empt change in the behaviour of drunken drivers. Ultimately, however responsibility must rest on the shoulders of each individual driver.

QOLILAWA दर्पण

The Fiji Law Reform Commission is grateful to various people for their contribution and inspiration in giving Qolilawa...Darpan its identity. Mr Paul Geraghty is credited for his thoughts and suggestions which helped us coin an appropriate name for this newsletter.

We are proud to present this second issue with the two translations sitting side-by-side. The Hindi translation is the product of solid canvassing into the community. Several suggestions were made for a Hindi term that best addresses the concept of 'Qolilawa'. After much discussion and debate, we have adopted the word 'Darpan', which in Hindi means reflection or a mirror. Darpan conceptualises law reform as a process that not only involves effective consultation and gathering and disseminating of views and opinions of community interest groups and individuals, but also making recommendations that 'reflect or mirror' the concerns and viewpoints of the diverse and multi-ethnic community in Fiji.

To Messrs. Ashwant Dwivedi, Jai Ram Reddy and Harish Sharma, for their probing thoughts on this matter, thank you

"A word from Commissioner Jalal on Family Law Reform"

The Family Law team at the FLRC is moving fast on the family law reforms and I am very happy with the progress so far. Legal Officers have been assigned different areas of interest. So far very basic first draft discussion papers have been

prepared in the following areas: marriage and separation, maintenance, custody and access of children, divorce and matrimonial property.

Each Tuesday morning I meet with the FLRC team and one area is canvassed thoroughly. Controversial issues are debated and attempts are made to reach a consensus. When consensus is not achieved more research is required in the specific area. The process is as important as the outcome and both lawyers at the FLRC and I have learnt much from these exchanges. The enthusiasm,

zeal and commitment of these legal officers has been a source of great satisfaction. It is very clear that when new lawyers (as I was once!) arrive in Fiji armed with their new degrees they know very little about Family Law in Fiji. Most obtain their degrees in "progressive" jurisdictions where family law has developed in a more humane direction. The same cannot be said of Fiji's family law. Many practising lawyers are still unfamiliar with the complexities presented by family law even though many practice in the area. Most treat it in the same way that they treat commercial or more mainstream law. The family deserves more consideration than this.

It is most unfortunate that new lawyers are not required to sit local bar exams so that at least they have a working knowledge of family law before they are unleashed on the unsuspecting public. It is a matter of some satisfaction to me that the team at the FLRC will have a thorough working knowledge of family law in Fiji when the family law reform process is completed in 1998.

The Working Committee appointed by the former AGMJ, the Honourable Mr Kelemedi Bulewa, has met and given preliminary conditional approval to take family law in a more humanitarian direction, based on the conciliation approach rather than on the more mainstream system.

A matter of great disappointment to me and the team at the FLRC is the lack of public submissions from both non-Government organisation and individuals. This is so despite the huge number of complaints about family law over the years and that the reforms likely to be proposed will affect the social fabric of Fiji. Suffice to say the quality of public submissions received to date have been of very high quality.

The FLRC welcomes more submissions. I encourage people to make individual submissions. These can be oral (spoken) and if written need not be written formally. They can even be chatty and anecdotal. We care about what you think and not how you say it. The law reform process belongs to the citizens of Fiji, not to the lawyers! Exercise your Constitutional right to influence the cause of your nation's destiny. Appropriate the law. Make it yours.

Future articles of Qolilawa will

Company and Commercial Law Reform

After meetings in February with some of the many groups interested or involved in commercial and company law in Fiji Professor Di Everett will be preparing detailed issue papers which will be available as the basis for further discussions.

Some of the issues which appear to be of particular current relevance and concern to local lawyers, accountants, administrators and financiers are:

- i. an overloaded administration, particularly in relation to registration of deeds, bills of sale, companies and bankruptcies;
- ii. an apparent high number of bankruptcies;
- iii. difficulties in collection debts of a consumer nature; and
- iv. the use of business names and family companies without registration updates.

Preliminary thoughts on the direction for reform have been floated such as:

- establishing a single register for security over chattels and other personal property regardless of whether it is a hire purchase or a bill of sale. This type of register would need to be computerised and searches could be made by way of an alphabetical name list and/or by reference to an identifying number of the property involved, eg. Motor vehicles boats

provided there has been no illegal conduct by the bankrupt.

- raising the level at which bankruptcy (and winding up of insolvent companies) can occur to say \$2,000
- facilitate the use of garnishee processes to encourage efficient judgment debt collection by deduction from wages.
- provide for automatic de-registration of companies and business names for failure to file annual reports.
 - introducing legislation relating to Consumer Credit to complement the Fair Trading legislation to ensure that consumers are fully informed as to the nature of their obligations and their rights and to regulate the rights and obligations of financiers.
- ensure that the corporate and commercial legislative regimes are attractive to investors both local and foreign by refining the existing legislation with a view to simplification wherever possible, whilst maintaining compatibility with the legislative regimes of foreign partners and potential investors.

The process is only just beginning and input from all the professions, academics, traders, financiers, administrators and consumers is

Reform of Penal Code and Criminal Procedure Code

The Commissioner responsible for this area of reform is Anthony Gates. Shortly a paper will be issued with a draft bill, a Miscellaneous Provisions Bill. It is hoped such a Bill will be brought to Parliament on an annual basis as a means of dealing swiftly with gaps in the law that have appeared, obvious errors, necessary small corrections and a few miscellaneous reforms of a non-controversial nature.

It is noted that:

- a) there are delays in all parts of the Court System, therefore reform first must aim to streamline procedures, an speed up trials.
- b) if necessary, a radical approach may be needed.

- c) reform in some instances unavoidably at first will be piecemeal; consolidation will be undertaken later.

Areas presently being focused on are:

- i) Allowing admissions by an Accused of either evidence or facts.
- ii) Duties placed on judicial officers to ensure committal papers are forwarded in a timely fashion to High Court.
- iii) Appeals in bail to be allowed to Court of Appeal and against conditions imposed. Widening of jurisdiction of High Court.
- iv) Clarification on what orders can be appealed.
- v) Raising of maximum sentence in certain cases; eg. Sacrilege.

- vi) Manner of recording evidence to be by electronic device.
- vii) Restrictions on unnecessary adjournments.
- viii) Manner of delivering judgements in criminal cases.

Later in the year direction will be turned towards Reform of fixed penalties, video-recording of police interviews, rights of election for trial at High Court and Assaults aggravated by the extent of violence, or by their sexual nature. This last topic is a large area and one which has gathered a good deal of interest. The paper will present the issues and Parliament will ultimately decide what reforms it wishes to see enacted.

International Conference on Global Drugs Law

The Indian Law Institute, in conjunction with the United Nations International Drug Control Programme for South Asia and the International Law Association, hosted a conference on **Global Drugs Laws** in New Delhi from February 28 - March 3. FLRC was invited to present a paper at the conference.

The objectives of the conference included:

- Upgrading justice systems to meet the drug challenge beyond the year 2000;
- Overcoming inter-legal system obstacles to international legal cooperation;
- Increasing the use and effectiveness of mutual legal assistance and other forms of international legal cooperation; and
- Improving national justice system impact.

Part-time Commissioner Mr Justice Scott represented FLRC at the conference and here is his report:

"I was fortunate to be able to attend the UNDCP sponsored conference on Global Drugs Laws recently held in New Delhi.

Representatives from the 14 Countries attending included academics, practising lawyers and Judges, customs agencies and medical practitioners. The importance of the conference was reflected in the fact that it was opened by the Vice President of India while the Prime Minister attended the closing session.

There was broad consensus that the burgeoning drug problem is a global

social and medical health of the world community.

There was less unanimity on the correct approach to be adopted. While most delegates appeared to favour a "zero option" involving stringent penalties across the board accompanied by enhanced police powers a substantial minority opinion emphasised the need to distinguish between petty offenders and drugs traders. This body of opinion also expressed some anxiety over the possible threat to human and legal rights apparently represented by more draconian across the board legislation.

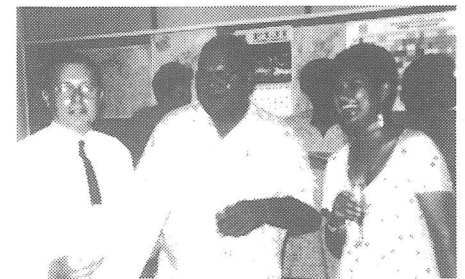
In briefly addressing the conference on behalf of Fiji I expressed some misgivings about the value of the mandatory sentencing policy introduced by the Dangerous Drugs Decree 1990. I also reminded delegates that some substances which could be classified as "drugs" e.g. Kava had been accepted for traditional use in certain communities since time immemorial. The approach to such substances required special care and sensitivity.

All in all a most useful, interesting and enjoyable conference."

The Launch.....

FLRC launched its Reform Agenda for 1997-1998 on Tuesday 17 December 1996 at its premises. Chairman Dr Tony Tarr presented this corporate plan, together with the FLRC Annual Report, to the Attorney-General and Minister for Justice the Hon. Ratu Etuate Tavai. The event also marked the launch of QOLILAWA.

Representatives of various government departments and agencies, professional organisations and institutions and non government organisations witnessed this occasion with members of the Commission. With cocktails and punches, soaked up with exotic hors d'oeuvres and finger foods from Yvonne's catering, the event was a success enjoyed by all, and not least by the media representatives who raised FLRC's profile.



Part-Time Commissioner Tony Gates, Permanent Arbitrator Ratu Jone Madraiwiwi and WCC Co-ordinator Shamima Ali.

A Tribute

FLRC wishes to pay tribute to the late Mr HM Patel for his contributions both on the Hindi name for our newsletter and also his discerning submissions on the various references of FLRC. Mr Patel never failed to make a submission when requested to do so and thus embodied the principle of participation in the law reform process. We note his passing with deep regret and offer our condolences to his family. However, we are confident that the legacy of

FLRC SECRETARIAT

Apart from the substantive work of the Commission the FLRC provides secretariat support to various bodies. These are:

(i) Criminal Justice Council (CJC)

The Council was established on the recommendation of the Law and Order Task Force and is also in line with the recommendations of Sir David Beattie who recommended that Agencies within the Criminal Justice System should meet in order to facilitate a more effective and efficient management of the administration of justice.

The meetings provide an opportunity:

- to discuss areas of mutual concern;
- to encourage the co-ordination and exchange of information; and
- to co-ordinate the management of resources within the Criminal Justice System to ensure accountability and transparency.

The Council has agreed on a work programme and this has helped focus the discussion as well as provide a systematic approach to reviewing and changing the administration of justice.

The work programme has identified a number of problem areas ranging from: lack of accurate statistics

and fragmentation of data, paucity of victim profiles, shortage of judges, poor case management and delays, sentencing/alternative sentencing options, prisons, juvenile offending, road traffic offences, unavailability of legal assistance and advice and the need for public awareness and education.

The work programme is not static and its flexibility is its major strength. The programme provides an opportunity for those involved in the criminal justice system, as well as the community, to bring about meaningful change that will assist in Fiji's social development and the accessibility of law.

The members of the Council are:

1. The CJ's nominee and Chairman:
Mr Justice Michael Scott.
2. The Solicitor-General and Secretary of Justice
3. The Director of Public Prosecutions
4. The Commissioner of Police
5. The Commissioner of Prisons
6. The Chief Registrar
7. The Chief Magistrate
8. The Director of Social Welfare
9. Fiji Law Society
10. Community Representatives

(ii) Civil Rules Committee

There has been concern expressed about the state of the present Civil Court Rules. The Attorney-General and Minister for Justice the Hon. Ratu Euate Tavai referred this matter to the Commission - to review the present rules and make recommendations for change. Therefore in exercise of the powers conferred upon the Attorney-General pursuant to section 3 (6) of the FLRC Act, he has appointed Mr Justice Scott as Chairman of the Civil Rule Committee.

The other members are:

1. *Mr Moti Rai* : Chief Registrar, High Court
2. *Mrs Madhuri Sharma* : Deputy Registrar, High Court
3. *Mr Peter Knight* : Barrister & Solicitor
4. *Mr Subhas Parshotam* : Barrister & Solicitor

The Committee welcomes the views, comments and submissions of members of the public, legal practitioners, judges and magistrates on procedural issues that are causing difficulties.

Please send your comments and views to the **Director, Fiji Law Reform Commission, 7th Floor Dominion House, P O Box 2194, Government Buildings, Suva.**

LIBRARY CORNER

Recent Publications received by the FLRC:

AUSTRALIA

Provisional Damages (NSW Law Reform Commission Report no. 78) inquires into the powers of courts to make such orders and the manner of assessment of damages.

Directed Verdicts of Acquittals (NSW Law Reform Commission Report no. 77) Considers the issue of whether the Crown should have a right of appeal where there is a directed verdict of acquittal.

Making Rights Count - Services for People with a Disability, (Australian Law Reform Commission Report no. 79) The Commission makes a recommendation for a new Commonwealth Disabled Services legislation.

Legal Risks in International Transactions. (Australian Law Reform Commission Report no. 80) highlights the problems and possible govern reforms in the law international commercial transactions.

NEW ZEALAND

Evidence in Criminal Proceedings - Previous Misconduct of a Defendant (Law Commission Consultation Paper-NZ) discusses the current problems in the law and possible solutions.

The Execution of Deeds and Documents by or on behalf of Bodies Corporate (Law Commission Consultation Paper-NZ) highlights the need for consistency and uniformity of statutory interpretation in this area.

Succession Law and Testamentary Claims (NZ Law Commission Discussion Paper) discusses wills and

administration with guidelines for a new Succession Act in New Zealand.

HONG KONG

Privacy : Regulating the Interception of Communication (Law Reform Commission of Hong Kong) addresses concerns over privacy laws and how the interception of communication, through new surveillance technology, impinges on one's rights to privacy.

Report on Corporate Rescue and Insolvent Trading (Law Reform Commission of Hong Kong) A review of the law and practice relating to insolvency in Hong Kong.

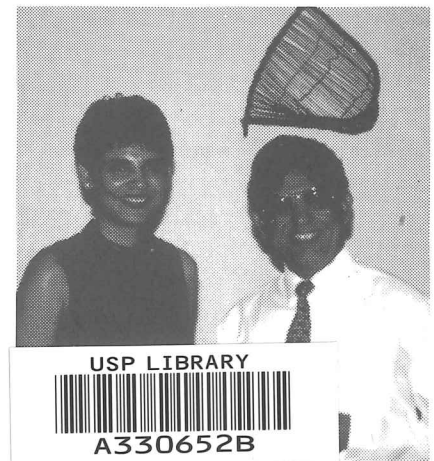
Report on Creation of a Substantive Offence of Fraud (Law Reform Commission of Hong Kong) and contains a draft Fraud Bill.

OTHER COUNTRIES & LOCAL PUBLICATIONS

Hearsay Evidence in Civil Proceedings (Law reform Advisory Committee for Northern Ireland Discussion Paper no. 1) discusses the law in Northern Ireland, England and Wales and sets out options for reform.

A Situation Analysis of Children and Women in Fiji 1996 (Government of Fiji/UNICEF) discusses the impact of social, demographic and economic changes on children and women. It also suggests plans and programmes to improve the situation of children and women in Fiji.

Revision of Surrogate Rules (Alberta Law Reform Institute) reviews the rules and procedure for the administration of an estate of a deceased person.



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At the Launch...

Part-Time Commissioner P. Imrana Jalal and former Insurance Law Reform Committee member R. I. Kapadia

STAFF NEWS

Graduate trainee Ms Anuja Sukhdeo left for ANU in January for her bar/professional course after four months of service to FLRC. Mr Sharvada Sharma, Waikato graduate, replaces her until September when he also takes up his professional course in New Zealand. Also pursuing further in-service training at Fiji Institute of Technology is FLRC Senior Clerical Officer Ms Tamari Marawa. Welcome back to our driver Mr Jekope Raibeve who has resumed duties after 2 months of long service leave. In his absence Mr Kalivati Rodaroro was relieving driver. We thank him and wish him well.

Qotilawa Darpai

THE NEWSLETTER OF THE FIJI LAW REFORM COMMISSION ISSUE 3 JUNE 1997

REFORM TREND

Since its enactment in 1945 little attention has been devoted to the reform of the Criminal Procedure and Penal Codes. These Acts have failed to keep pace with developments in criminal law. The Commission's Criminal Justice System reform includes the reform of Sexual Offences Law.

Over the past two decades the criminal law on sexual offences has received considerable attention. In contrast to other areas of the criminal law which may have remained relatively sheltered from the politics of reform, sexual offence laws have been the subject of comprehensive review and to varying degrees, substantial change.

This legislative activity can be attributed to various factors. An increased liberal attitude toward sexual roles and behaviour during the 1970s led to a general community perception that sexual offence laws were archaic and inadequate. The women's movement in particular was instrumental in highlighting deficiencies in the operation of rape laws and pushing for legislative change. Reform also focussed extensively on sexual offences against children. Much of the change that occurred has stemmed from concern at the extent of reported sexual abuse and its adverse effects.

The nature of reform has varied between jurisdictions but common features are discernible. For example:

- The term 'rape' has been overtaken by the new label 'sexual assault'.
- The basic offence covered a broader range of sexual conduct. Sexual contact and penetration of the vagina, anus and mouth by objects or parts of the body other than the penis came to be defined as 'rape/sexual assault'.
- Sexual offence came to be viewed in terms of violence. This led to offences being graded according to different levels of harm and seriousness.
- Evidentiary rules on sexual reputation and history, corroboration and complaint were modified.
- Rape within marriage came to be legally recognised.
- The presumption that males under a certain age group could not commit rape was abolished.

The Commission notes the lack of research and data collection on sexual offences. It is crucial to undertake comprehensive research of sexual offences

RAPE TO SEXUAL ASSAULT ?

government agencies to respond more effectively by providing appropriate services.

OBJECTIVES OF SEXUAL OFFENCE LAWS

There are two schools of thought on the approach to reforming sexual offences law.

It has been suggested that it is unnecessary to retain a separate category of sexual offences. There are two arguments. First, that a specific category of sexual offences only serves to further stigmatise victims. Second, that non-consensual sexual activity ought to be dealt with in the same way as other conduct involving violence. In other words, sexual behaviour should be regarded as only one aspect of human conduct that does not warrant separate attention by law.

It is widely accepted, however, that the criminal law should have specific sexual offences. This is because sexual attack is a particularly distinctive experience which cannot be compared to any non-sexual activity.

The Commission aims to promote the following objectives:

- The law should protect the sexual integrity and personal autonomy of all members of the community. A person should not be forced to submit to a sexual act to which she or he does not consent.
- Sexual offences cannot be considered in a vacuum. Legal principles such as the presumption of innocence and the requirement that the prosecution must prove all elements of a case beyond reasonable doubt must be observed.
- The vast majority of sexual offences are against females and the law should address and reflect this social reality. At the same time the law must not be discriminatory in application.
- The law should protect children and those who are particularly vulnerable from sexual

and precise to enable the just and speedy disposition of cases; and be accessible to all citizens.

GOVERNMENT'S COMMITMENT UNDER CEDAW AND CRC

Reform of Fiji's sexual offences law is undertaken with the Government's recognition of its commitment under the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) and Convention on the Rights of the Child (CRC). The exercise is aimed at promoting equality for women within the existing legal system with particular regard to sexual offences. The Commission has received a number of submissions from women's groups and other interested individuals. These submissions recommend that the reform of the existing laws dealing with rape and child abuse be brought into conformity with constitutional guarantees of women's equality and so discharge Government's obligations under CEDAW and CRC.

SCOPE OF THE DISCUSSION PAPER

The Commission will circulate a Discussion Paper on sexual offences against the person, including sexual offences against children. The Discussion Paper will be confined to a consideration of the substantive criminal law procedures, consistent with the parameters of the Terms of Reference.

At an early stage, however, the Commission decided that attention ought to be directed to particularly evidentiary matters, namely sexual history, corroboration and complaint. These areas have proved to be so inextricably tied to the effective reform and operation of sexual offences law that the Commission agreed it was important that they be addressed.

The Commission is mindful that sexual offences reform has been accompanied by other important evidentiary and procedural changes. These have been primarily aimed at reducing the trauma experienced by complainants in court and to facilitate the giving of evidence. In matters involving sexual offences against children, for instance, almost all jurisdictions now allow for the evidence of a child witness to be given by closed circuit television or for the use of a screen in court to shield a child complainant from seeing the accused. In some jurisdictions there have also been Government initiatives in the areas of policing, counselling services and victim support services aimed at

Evidence Law Reform - An Update

The Commissioner responsible for Evidence reform is Mr. Justice Michael Scott. The Evidence Reform team has, in the past month, researched and discussed the present law on expert and opinion evidence. Particular reference was made to sections 191 and 291 of Criminal Procedure Code (Cap. 21).

After comparing and evaluating the position in other countries and after taking into consideration submissions from the public, the following issues have been noted by the team:

- There is a lack of a clear and comprehensive definition of an 'expert' and 'expert evidence' in the Criminal Procedure Code. The definition of an expert under section 191(2) is too restrictive and provides no scope for admission of recently developed scientific expert evidence. The Evidence Reform team is considering a provision that is more general, non-exhaustive and clear as to who an expert is and what constitutes expert evidence.
- Presently section 191 does not clearly provide for the manner of presenting parol expert evidence. The Evidence team is looking at the option of a separate provision, "manner of giving

expert evidence" that allows the expert to give expert evidence in a manner that most clearly communicates the evidence to court, including narrative presentation, diagrams, practical demonstration or video or computer presentation. This provision would be similar to a section drafted by the New Zealand Law Commission in its report.

- The Commission has received submissions highlighting the need for pre-trial notice and disclosure of expert evidence. The Commission has considered the New Zealand Law Commission's draft sections and section 84 of the Police and Criminal Evidence Act 1984 (UK), and has put forward an option for a similar provision in the proposed Fiji code. However, it must be noted that pre-trial notice disclosure should not only be restricted to expert evidence, but should extend to all evidence, parol or documentary. The Evidence team is also recommending a provision that outlines the procedure whereby a party wishes to adduce evidence that has not been disclosed pre-trial.

Clearly, more discussion and input is needed. A draft of early sections on expert evidence with explanatory notes

will be released soon for more input from the community.

The next area that the Evidence Law Reform team is researching is corroboration. We invite submissions from the legal profession and the general public on this subject. Some issues that have been identified at this stage are:

- In which cases should a requirement of corroboration be enforced by statute? Currently perjury and treason are two of the offences under the Penal Code which require corroboration.
- In which case, should a warning be given by the judge that the evidence is uncorroborated?
- Should there be any instance where even a warning should be prohibited by statute?
- What procedures should be adopted in relation to:
 - accomplices?
 - sexual offences?
 - evidence of children?
- What type of evidence should constitute corroboration?

We hope to receive more input on Evidence Reform from the public. This will enable us to reflect the needs and viewpoints of the community in our recommendations.

Reform of Bail Law

The concept of bail involves the delicate balancing of two competing interests - the need to preserve the freedom of the accused versus the need to protect the community from a potentially re-offending or dangerous individual. The right to bail is consistent with the presumption of innocence which is enshrined in Fiji's Constitution. These two competing interests were highlighted by the media in its coverage of the Amina Koya case.

The Commission is aware of the difficulties associated with bail law currently governed by section 26 and sections 108 to 118 of the Criminal Procedure Code (Cap.21). In the case of juveniles section 4 of the Juveniles Act (Cap. 56) applies. Sir David Beattie, in his report on the Courts of Fiji (pages 356 & 357) highlighted some of these problems

- Criminals being bailed and re-bailed thereby increasing

- No penalties imposed on persons providing surety for breach of bail by the defendant.

In its report due in September 1997, some of the options that the Commission will canvass for the reform of bail law are:

- Codification of principles developed in the High Court for granting of bail pending appeal;
- Alternatives to bail such as half-way houses established recently in Queensland, Australia and their resource implications;
- Separation of the jurisdiction of the Magistrates Court and High Court on the hearing of bail applications depending upon the nature and seriousness of the crime;
- Special bail conditions for offences of community concern; and

CUSTODY/ACCESS...OR A NEW TERMINOLOGY?

In its reform of laws governing family relationships the Commission is investigating various areas of concern for the first part of the work schedule. For interested parties public input at all levels of the reform process is intrinsic to law reform. In this regard the Commission is preparing discussion papers for circulation to interested parties on the following topics:-

Marriage & Separation

Divorce

Maintenance (legitimate children)

Maintenance (natural children)

De facto/or common law relationships

Custody and Access

Family Protection Measures

Miscellaneous (Legal Aid, Procedures, Enforcement, etc.)

Structure of the (Family) Court

Matrimonial Property

The issues relating to Legitimacy of Children, Adoption and Juveniles Act will be dealt with subsequently.

"Language" and "terminology" are generating much interest in law generally. This is evident, for instance, in the adoption of simple English texts primarily in legislative drafting. In other jurisdictions court documents and other legal documents are moving towards this trend. But, like everything else, there are competing schools of thought.

It is suggested that now is the time for reappraisal of the terminology used in the law. In particular, "custody" and "access" are notions derived from the 19th century Criminal, and Property law principles. Their relevance to that approach is limited to the then prevalent social and legalistic notions of the child, and other members of the family, as the property of the father. Subsequent developments have made it



over the child on the basis of the psychological "mother principle" and/or "tender years" principle.

Each undoubtedly served its purpose for its time. Both have also had their share of glaring problems. We are now at the cross roads. We are obliged to comply with international law and practice to guide our law-making processes. In particular, the Convention on the Rights of the Child 1989 (CRC) and the Convention on the Elimination of All Forms of Discrimination against Women 1985 (CEDAW) have significant implications for our family law reference.

The status of the child is taking on a new and "humane" meaning. A child is no longer an "object", rather a legal subject complete with his or her own bundle of rights formerly attributed only to adults. No longer is a child the property of either or both parents.

state to exercise their respective duties - not "rights" - in ensuring the best interests of the child. This becomes the focal point for any decision affecting children.

Arguably parents' rights are treated as subordinate. The underlying goal of this philosophical change is to preserve the child's physical, emotional and psychological well being at all costs, when families break down. Parents are obliged therefore for life even if, and when, their spousal partnership breaks down. This demands gender-neutral language if the law aims to give equitable and socially just options and solutions.

The focus is on continuing parental responsibilities to the child in care-giving and up-bringing. Children should no longer be weapons in their parents emotional bickering and power struggles, upon separation. Like adults, parents should be obliged to make co-operative arrangements for the upbringing of their children. Appropriate mechanisms and services are essential to facilitate this shift. A change in law to embrace our international obligations is essential. A change in terminology - away from archaic terms like "custody" and "access" - better reflects today's social realities.

We may yet talk of "care-orders", "residence-orders", "parenting-orders", "contact-orders" and so forth. We will not be the first jurisdiction to introduce this change, but we can provide meaningful contribution to indigenous jurisprudence which is responsive to our local conditions. Any takers?

The Discussion Paper on Marriage and Separation is ready for distribution and the Commission will welcome any

DRINK/DRIVING LAW REFORM FOR FIJI

The Fiji Law Reform Commission Report, "Drink/Driving Law Reform for Fiji" contains three types of recommendations:

- those which suggest policy initiatives not requiring legislative support
- those which encourage law enforcement agencies to more effectively apply the already existing law, and
- those which necessitate legislative change and reform.

Regarding the latter, perhaps the most notable recommendations are:

- the creation of new offences, death by dangerous driving, and aggravated death by dangerous driving
- the revision of the breathalyser provisions in the present Traffic Act so that the present problems in prosecuting offences under section 48 will be overcome. In particular; police

will no longer be required to carry out certified tests. The magistrate may consider whatever evidence of intoxicants is presented and deal with this under the "best evidence" rule

- the removal of a prescribed content of alcohol from section 48 (breathalyser) offences so as to overcome any injustice in the operation of the "zero alcohol" policy and associated "first offenders" provision has been recommended
- the creation of powers for the police to conduct random breath testing operations. These powers must be controlled by detailed Commissioner's operational instructions
- the creation of powers of detention and arrest for the purposes of administering breath tests/analysis. These powers are effected by strict time limits
- the provision of new and higher penalties for drink/driving offences

- the creation of legal obligations on owner/operators of public transport vehicles, as well as on their drivers

At this stage no draft legislation has been proposed in the report, this should await the Parliament's views on the specific recommendations, and their relationship with the proposed Land Transport Bill.

In terms of general policy initiatives the report recommends:

- a public awareness campaign
- a code of conduct for Road Transport inspectors
- increased enforcement practices to ensure passengers wear seat restraints
- an improvement in trauma care for the injured
- a revision of "black spot" speed restrictions
- a more responsible approach to licensing laws amongst many other initiatives

LIBRARY CORNER

Recent publications received by the FLRC library:

United Kingdom

Offences of Dishonesty: Money Transfers (Law Commission Report No. 242) looks at the problem of prosecuting those who commit mortgage fraud or otherwise obtain a transfer of funds dishonestly.

Baldwin J; (1992) **The Royal Commission on Criminal Justice: The Conduct of Police Investigations Preparing Records of Taped Interviews** Research Study no.2 examines the evidentiary impact of one aspect of police investigation, that of preparing records of taped interviews.

Patterson F (editor) (1996); **Understanding Bail in Britain** discusses the law relating to bail and its role in the context of the British Criminal Justice System.

Australia

Review of the adversarial system of litigation (Australian Law Reform Commission Issues Paper 20) discusses the advantages and disadvantages of the present adversarial system of conducting civil, administrative review and family law proceedings before courts and tribunals exercising federal jurisdiction.

Waight, P.K (4th ed.) (1995); **Evidence: Commentary and Materials** examines in detail the law of evidence in Australia as it applies to both federal and state legislation.

Surveillance (New South Wales Law Reform Commission Issues Paper 12) analyses the scope and operation of the *Listening Devices Act 1984* and the need to regulate the use of visual surveillance equipment and any other related matter.

Scotland

Vulnerable Adults (Scotland Law Commission Report No.156) makes recommendations to assist local authorities and the Mental Welfare Commission for Scotland in making enquiries and in taking steps to protect the welfare and property of vulnerable adults.

New Zealand

Crown Liability and Judicial Immunity: A response to Baigent's case and Harvey v Derrick (New Zealand Law Commission Report 37) makes recommendations on the civil liability of the Crown, the simplification of the Crown Proceedings Act 1950 and the criminal liability of the Crown, its officers and agencies.

Local Publications

Regional Rights Resource Team (April 1997); **Information about the Law in the Pacific Region for the Professional and the General Public** - provides a comprehensive compilation on the law as it relates to human rights, women, young persons and families. Particular focus on the statutory and case law in Vanuatu, Fiji and Solomon Islands.

STAFF NEWS

STAFF MOVEMENTS

FLRC farewelled Research Assistant Mr. Ropate Cabealawa and Graduate Trainee Mr. Sharvada Sharma in late April. They are now committed to their Professional Legal Studies in Wellington, for the next three months before their admission to the Bar. FLRC commends their many and valuable contributions particularly in their assigned references.

Mrs. Selina Naceba, Acting Senior Secretary and PA to the Director, has finally ended her 19 years of service in the Attorney-General's Chambers and Ministry of Justice. We wish her well in her new posting at the Ministry of Finance. In her place, a big welcome to Maraia Qaranivalu who is settling into her new role. Mr. Kalivati Rodaroro returns briefly as a relieving "messenger".

The Director Ms. Florence Fenton recently attended a WIPO meeting in Seoul, Korea. Legal Officer Ms. Asenaca Uluiviti attended the 2nd World Congress on Family Law and the Rights of Children and Youth in San Francisco. All going well FLRC will send Legal Officer Ms. Daiana Buresova to the Society for the Reform of the Criminal Law "Law and Justice: Where Now?" Conference in London in July. These conferences will boost the work of FLRC in all its current references.

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