LAW REFORM COMMISSION

Opinion Paper

Draft Police and Criminal Evidence Bill

[March 2012]

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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 to the Commission.
Executive Summary

Opinion Paper Draft PACE Bill
[March 2012]


The Commission is of opinion that further consultation and reflection may be needed on issues such as “police powers to stop and search vehicles”. Getting issues such as stop and search right is vital. This is an important factor in police/community relations.

The Commission, after examining the Commonwealth Model Disclosure Legislation and Model Disclosure Guidelines, which have been approved at the 2011 Meeting of Law Ministers and Senior Officials (Sydney, Australia, 11-14 July 2011) [para. 31 of Final Communiqué], is of the view that the statutory regime for ‘Disclosure by Person charged’ could be made less constraining than what is currently proposed.

The Commission considers it is desirable to examine whether the evidential rule laid down by section 188C of the Courts Act [added by section 11(1)(d) of the Piracy and Maritime Violence Act No. 39 of 2011], to the effect that an out of court statement would be admissible when the maker of a statement is unavailable, should not be made applicable to other criminal proceedings. The Commission is also of opinion that further reflection is needed as to the circumstances when video-recording of statements would be required by law.

The Commission is also of the view that the elaboration of a PACE Bill offers the opportunity to review our evidential rules, which are mainly based on the common law, in the light of developments in other Commonwealth jurisdictions and observations/recommendations made by other law reform agencies.
Re: Draft PACE Bill

1. On 27 January 2012, Cabinet agreed to the draft Police and Criminal Evidence Bill [PACE Bill] being circulated for public consultation.

The Bill makes better provision to guarantee the citizen's constitutional rights to liberty, protection of property, freedom of movement and protection of the law.

The Bill also, amongst others, improves the statutory regulation of provisional information and spent convictions; requires a party to disclose his cause to the Court and to the other parties in a criminal case; gives the Court a general power to exclude unfair evidence; and provides for the enforcement of the rights of victims of offences.

2. The Commission welcomes the Draft PACE Bill. LRC has been reviewing the law on criminal investigation as far back as early 2007.

In answer to the PNQ asked to him on 17 April 2007, the Prime Minister informed the House that LRC is working on laws relating to procedures in criminal investigations and had this to say:

“I should also say that the Law Reform Commission is looking at all the laws relating to procedures in criminal investigations. That is why I say we want to modernise the law governing crime and the investigation of crime. We are looking, in fact, at the possibility of introducing a Police and Criminal Evidence Act in this country which will put everything together, including the Code of Practice.”

3. For some time, Government had been inclined to think that the adoption of a “system of Juge d’Instruction” was needed [vide para. 250 of 2005-2010 Government Program, as well as para. 21 of 2000-2005 Government Program].
4. In January 2010 [LRC 2009 Annual Report to Hon. Attorney-General on its activities], the Commission, after conducting extensive research work on the subject-matter of criminal investigation, concluded that the adoption of the system of “juge d’instruction” in Mauritius would not necessarily achieve the objective sought. LRC’s research confirmed that the view expressed by the Hon. Prime Minister at the National Assembly in April 2007, viz. 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], was the way forward for greater professionalism and transparency in the conduct of criminal investigations.

5. After Government announced in its 2010-2015 program on 8 June 2010 [at para. 21] that “a Police Procedures and Criminal Evidence Act, with Codes of Practice designed to regulate the conduct of persons entrusted with the duty of investigating offences”, the Commission released an Issue Paper on “Criminal Investigation: Reform of Police Procedures & Practices” [July 2010].

6. In the Issue Paper, the Commission after considering the background to UK PACE and its evolution, examined inter alia police powers and procedures under PACE and their relevance to Reform of the Law of Mauritius:
   (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 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. The Commission 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.

7. As regards the Draft PACE Bill circulated, the Commission has this to say:

(1) The Commission takes note that the provisions on “Investigations” have been modeled on the provisions of the UK Police and Criminal Evidence Act 1984 (as subsequently amended). The proposed PACE procedures do represent some of the best practice with regard to police powers and pre-trial process.

(2) The Commission reiterates the view that it had already expressed in its Issue Paper on “Criminal Investigation: Reform of Police Procedures & Practices” [July 2010]: the proposed legislative scheme shall, as was the case in UK with PACE, bring about greater professionalism in the conduct of criminal investigations whilst safeguarding the rights of suspects.

(3) The Commission considers, however, that legal transplants - just as organ transplants in medicine – may lead to tissue rejection. The Commission is therefore of opinion that further consultation and reflection may be needed on issues such as “police powers to stop and search vehicles”. Getting issues such as stop and search right is vital. This is an important factor in police/community relations.

(4) The Commission also takes note that the provisions on “Disclosure of a Case” have been modeled on the UK Criminal Procedure and Investigations Act 1996 (as subsequently amended by the Criminal Justice Act 2003).

(5) The Commission has already recommended in its Report on “Disclosure in Criminal Proceedings” [December 2008] that a statutory regime could be adopted
for disclosure in criminal proceedings by prosecution and defence, on lines similar to those in force in UK.

(6) In the Report, the Commission considered – in the light of observations made by the UK Royal Commission on Criminal Justice chaired by Viscount Runciman (July 1993, cm. 2263) on reasons for defence disclosure and the European Court's decision in Murray v United Kingdom [Decision of 8 February 1996, (1996) 22 EHRR 29] - that a statutory obligation on the accused to disclose his/her case would not contravene the right to silence as guaranteed by section 10(7) of the Constitution.

(7) The Commission, however, after considering the Commonwealth Model Disclosure Legislation and Model Disclosure Guidelines, which have been approved at the 2011 Meeting of Law Ministers and Senior Officials (Sydney, Australia, 11-14 July 2011) [para. 31 of Final Communiqué], is of the view that the statutory regime for ‘Disclosure by Person charged’ could be made less constraining than what is currently proposed.

The Commission is now of the opinion that, in accordance with the Commonwealth Model Disclosure Legislation, a defence statement should not be mandatory. The statutory regime should provide for voluntary defence statements, save when an accused intends to adduce evidence in support of an alibi (in which case disclosure would be compulsory).

(8) The Commission has examined the provisions on “Evidence”, and in particular clause 53 on ‘Admissibility of certain depositions and statements’. The provisions in this clause are modeled on section 16 of EIRE Criminal Justice Act 2006 [which was reproduced in LRC’s Issue Paper on “Evidence of...

(9) In its Issue Paper on “Evidence of Reluctant/Intimidated Witness in Criminal Proceedings: Proposal for Reform of the Law” (May 2010), the Commission has analysed the constitutional safeguards laid down by the Supreme Court of Canada in *R v B (K.G.)* [1993] 1 S.C.R. 740 for the Admissibility of Previous Statement by a Witness. The Commission is of the view that the proposed provision does not fall foul of the constitutional requirement of a ‘fair hearing” as laid down in section 10 of the Constitution (which is modeled on Article 6 ECHR).

(10) The Commission considers it is desirable to examine whether the evidential rule laid down by section 188C of the Courts Act [added by section 11(1)(d) of the Piracy and Maritime Violence Act No. 39 of 2011], to the effect that an out of court statement would be admissible when the maker of a statement is unavailable, should not be made applicable to other criminal proceedings.

(11) The Commission is also of opinion that further reflection is needed as to the circumstances when video-recording of statements would be required by law.

(12) The elaboration of a PACE Bill offers the opportunity to review our evidential rules, which are mainly based on the common law, in the light of developments in other Commonwealth jurisdictions and observations/recommendations made by other law reform agencies.