

STANDING COMMITTEE ON
JUSTICE, LAW AND HUMAN RIGHTS

[Verbatim Report of Meeting]

HELD IN THE

COMMITTEE ROOM (WEST WING)

ON

FRIDAY, 22ND FEBRUARY, 2019

VERBATIM NOTES OF THE MEETING OF THE STANDING COMMITTEE ON JUSTICE, LAW AND HUMAN RIGHTS COMMITTEE HELD AT THE SMALL COMMITTEE ROOM (WEST WING), PARLIAMENT PRECINCTS, GOVERNMENT BUILDINGS, ON FRIDAY, 22ND FEBRUARY, 2019 AT 8.40 A.M.

Interviewee/Submittee: **Office of the High Commissioner of Human Rights (OHCHR)**

In Attendance:

- | | | | |
|----|------------------------|---|--|
| 1. | Dr. Chitralekha Massey | - | Regional Representative |
| 2. | Ms. Raleshni Karan | - | National Human Rights Office/Legal Officer |

MR. CHAIRMAN.- Good morning ladies. I hope you did not have difficulty in finding the Committee.

On behalf of the Committee, I would like to welcome your Office to this meeting to deliberate on the Code of Conduct Bill, Bill No. 33 of 2018. Without any delay, because we are actually caught up with time at the moment, I will just introduce my team.

(Introduction of Committee Members by Mr. Chairman)

The floor is yours. You may introduce your team and go on with the presentation. Thank you.

DR. C. MASSEY.- Good Morning, Mr. Chairman.

(Introduction of OHCHR Team)

We are very grateful for this opportunity to engage with you on this very important matter. We have a short presentation that supplements the written submission that we had made. While we are just getting the presentation on the PowerPoint, I was wondering if I could just check with you if you would like us to walk you through the presentation or shall we just move on straight to the points, depending on the amount of time we have, it would be useful guidance for us. Thank you.

So may I take this opportunity just to walk you through our written submission then, while the technical stuff is sorted out.

I think basically we are making three points. Very broadly speaking, it is about ensuring that there is nothing prone to misinterpretation and that there is nothing prone possible discrimination because of the wording and a request for greater clarity on some of the definitions provided being in need of more robust articulation in the Bill itself.

So this is the main submission in a nutshell, and if I can walk you through on to Page 3 of the written submission. You will see that it is starting with the possible discrimination against people with strong political beliefs and opinions. It is really looking at the possibility that if we are looking at the word, “politically motivated”, I think that will need further definition in detail.

HON. MEMBER.- (Inaudible)

DR. C. MASSEY.- I can read, no problems while we wait for her.

MS. R. KARAN.- Mr. Chairman and Honourable Members, I will take you through this legal framework and concerns. We appreciate that the Code of Conduct Bill has several issues of interest concerning the limits on the rights and freedoms that is available to the Fijians. However, in the 2013 Constitution, we accept that it allows for some limitations to be placed on certain rights.

It might be in the freedom of expression, speech, publication, the right to privacy and the access to information, all of that, under the authority of any legislation can limit the rights that is given. However, our concerns are basically that there is discrimination against people that are embedded in this Bill.

The first issue that we have is in Clause 12 of the Bill which basically says that, “the Commission must investigate any complaint received by the Commission unless...”. It uses the words, “unless the Commission is of the opinion that”. There are two things; there is opinion and there is discretion given to the Commission. Unless the Commission is of the opinion that the complaint is malicious and is politically motivated or is made for the purpose of discrediting, defaming or causing reputational damage to the person; the subject of the complaint.

That particular provision that is there, and I must apologise our PowerPoint is not actually there, but I believe the technical persons are helping us here. These provisions stipulates that the Commission has a discretion not to investigate a complaint. That provision basically says that the Commission has discretion not to investigate a complaint based on its opinion and not upon actual finding of fact.

It can give an opinion that the complainant has no substance without actually carrying out an actual investigation. How they come up with that opinion is also a matter of discretion. They can just give a letter saying, “We are of the opinion that this complainant is politically motivated” or “this complainant is trying or making this complaint for the purpose of desecrating this Minister or this person”.

That is one of those contentious issues that we wish to highlight in this forum and before you, Honourable Sirs. One of those reasons is because this sort of provision leaves fertile ground for abuse and abuse of power and interference by members of the Commission.

The Bill was intended to bring about transparency, it was intended to bring about accountability of public office holders, but it seems that when you read this Bill, there is no accountability or transparency in the way the complaints are being carried out or how they are investigated or how they are handled or how will they be dismissed? So it is all decided in this Commission at that point before it is transferred to FICAC for prosecution or even if it goes to FICAC for prosecution. So the members of that Commission basically have that power to decide which complaint actually goes ahead or which does not.

There should be some recognition that complaints can be submitted in good faith by people who may be politically motivated. They still can provide a complaint in good faith and that may have good grounds. If it is done, it cannot be malicious.

The wordings of this provision, we implore you to relook at it and amend it. The terms “malicious” and “politically motivated”, they are not defined in this Bill. Perhaps, that can be fixed by the drafters and they can provide a definition, but we are hoping that words such as, “politically motivated” be taken out entirely from the Bill.

Section 23 of the 2013 Constitution enshrines freedom to persons to make political choices. It provides that freedom and the right to people to campaign for a political party and participate in activities for a political party, join a political party of their choice. The Constitution does not limit that right for the

purposes that is described under this Code of Conduct. So that right is not in any way supposed to be limited.

One of the reasons for dismissing a complaint without any investigation is that, if the Commission finds that they are politically motivated, but there is no definition. That is one of the crux of this submission; one of them that it is there.

Article 19 of the Universal Declaration of Human Rights and I understand this is not binding but Fiji is a party and Fiji is, of course, looking at it and on a number of times taken heed of it, states that everyone has the right to freedom of opinion and expression, which right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers. So Clauses 12, 13 and 14 of this Bill makes a distinction and we humbly and respectfully submit that it discriminates people based on their political beliefs and opinions.

Article 26 of the ICCPR, which has been ratified and is binding on Fiji, states that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the legislations in Fiji need to prohibit any discrimination, and guarantee to all persons equal and effective protection against discrimination. It should not discriminate people based on grounds such as, holding political or any opinion for that matter. It needs to treat everyone equal, regardless of their political opinions, affiliations or beliefs.

We submit that those provisions should be amended and should conform to the principles of the Universal Declaration of Human Rights and the ICCPR to which Fiji is a party.

I will skip to Part B of the submissions which brings me to the second point. This Bill has some provisions which are vague and undefined. Basically, the danger in having vague and undefined provisions is that, it can always be open to abuse by people or offices.

Interestingly, Clause 3 of the Bill states that the power authority, duty and function of the Commission is to be prescribed under the Bill. This means it has to be stated under the Bill. However, the Bill is worded and is currently dependent right now on someone filing a complaint. For example, it does not automatically go ahead, so someone has to file a complaint before the Commission starts moving. There is nothing in the Commission that out of to their own volition, they can go and investigate. That, we believe, can be strengthened, if you add an obligation on the Commission to open a complaint more to appropriate, when it suspects violation of the Code of Conduct, so that it does not have to be dependent on a complainant.

Bringing me back to that point, neither the Bill nor its Schedules provide any clarity on the rules, procedures or limits on the way the Commission will function. The process of implementation of the commission is in no way stated in this Bill, and that was a requirement under Section 149(b) of the 2013 Constitution. It was an expressed requirement that legislation be passed that states this clearly, and this Bill does not state those things clearly. It makes a vague, sort of, sentence in that the power, duty and function will be prescribed, but it is not. So we think that, that should be relooked at again.

Clause 4 of the Bill does provide discretion to the Commission to make ad hoc guidelines and directions from time to time for the performance of the Commission's functions and for the handling of complaints. But again, this was not the intention under Section 149(b) of the 2013 Constitution. The 2013 Constitution wanted transparency, which is why it says that that process should be properly prescribed under a legislation, and at this point it is not.

Clause 13 which is a follow up from Clause 12 and provides imprisonment and penalties for breach and being malicious or being politically motivated, deters complaints from being made to the Commission. It is a deterrence because it will be based on the fear of being prosecuted.

With the provision that allows the Commission to go ahead and charge complainants based on an opinion of a member, will always deter the public from bringing forward complaints, especially by people who are known to have strong political opinions and views. I think in Fiji, everyone holds some sort of political view or opinion on politics.

Having said that, we are submitting that this will deter people from bringing forward their complaints. They will always have that fear that, "Hey what if I get prosecuted, then maybe better not to make a complaint."

Clause 16 of the Bill states of situations of exceptions where disclosures of certain materials or matters are not required. And one such exception is, if answering of question involves disclosure of proceedings or decisions of Cabinet which relate to matters of a secret or confidential nature, the secret or confidential nature again is not defined in this Bill. So what happens then?

This Bill is intended to give power to the members of the Commission to go and regulate the Ministers in their conduct, but if the Minister says, "Hey you cannot ask me for these documents, I am not going to give you this documents because this is of a secret or confidential nature", the Commission really cannot do much. The terms, "secret and confidential nature" needs to be properly defined in this Bill. There should be an assumption against Governmental information being secret and confidential. Otherwise, it will be very easy for any Government official to decline providing information saying that it is "State secret". The Bill is as worded and by virtue of Clause 16 (4) requires:

"... either the Attorney-General or the Prime Minister to decide whether the information falls under State secret and whether it is confidential in nature."

So only two persons will decide whether it is a State secret or whether it is confidential in nature but the Bill is also intended to look at their conduct as well. So that is something that needs to be relooked at.

There are inconsistencies as I have stated briefly of the provisions with the 2013 Constitution. One of those major parts is the immunity for complainants. Clause of the Bill provides provisions for immunity. This section is however limited given that the immunity can be forfeited for the reasons that is outlined in Clause 12 and Clause 24.

So immunity is limited, it does not provide protection for whistle-blowers, being persons who are in good faith making disclosures, that a public officer or a person having high rank authority as covered under the Bill has breached the Code of Conduct. So it does not provide any protection to them. The limits on immunity provisions contravenes Section 149 (e) of the 2013 Constitution. It has an effect of creating fear for highlighting a complaint to the Commission or to the relevant authority as well. So Clause 17(1) of the Bill is problematic as it does not seem to consider the situation of whistle-blowers within the Commission.

If the Commission member for example detects corruption, nepotism or violation of the due process of the investigations, what protection does that officer have? Can he highlight anything? Will he be able to speak out? We submit that the whistle-blower provisions of the 2013 Constitution should not be contradicted.

At this point, Sir, the Bill makes everything confidential as soon as the matter comes. In fact before the matter even comes to the Commission, if I, for example, want to make a complaint and I go and discuss this with my supervisor that I am intending to make this complaint against, for example, my Director, and I go and discuss it very quickly with the supervisor, I am stopped from coming to the Commission because there is a confidentiality clause that if I discuss with any person apart from myself, if I talk to anyone, I do not know whether it covers lawyers or whether it covers a priest or whether it covers an educated person who can advise. It does not at this point, then I cannot bring that matter to the Commission. The Commission will say, "Hey, you have breached this provision, you cannot bring this matter here anymore." So those are the provisions that really need to be looked at properly. There are several provisions that question the independence of the members of the Commission. A general concern that we have is that the Commission is made up of members appointed by the President. So that is under Section 121 of the Constitution, yet they are supposed to investigate the President. Their independence, we respectfully submit, is in question.

Our final point that we wish to raise in this is that it interferes with Judicial independence and the separation of powers. I hope that there is clarity on this, I do not know whether the Chief Justice has been actually called or has made a submission on this matter but he probably will have more to say on this.

Basically the Judicial Officer includes the Chief Justice, a Judge of the Supreme Court, President of the Court of Appeal, Masters of the Court, Magistrates and members of the Tribunal.

Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial in this country. Judicial officers must be kept independent of legislative and executive branches of the Government and are subject only to the provision set out in the Constitution and in Fiji's case the 2013 Constitution.

Even if you look at the 2013 Constitution, it is reflective of the separation of powers because it divides these provisions under legislature, executive and judiciary separately. It keeps everything separate.

Now the independence of Judiciary is guaranteed by the State and it is enshrined in the 2013 Constitution. It should also be reflected in the laws of the country.

At this point it is essential that the Judiciary inspires confidence in its members, in the general public that the judicial proceedings will be carried out in conformity with these principles. They should be able to decide matters before them impartially without any outside influences, without any improper, any inducement, any pressure, any threat or any kind of restriction whether direct or indirectly.

What basically we are saying is that justice must be seen to be done. At this point, this Bill is trying to regulate the *vis-à-vis* of judges. In a normal context that should not be the case. The Constitution should decide what happens to the Judges and the Constitution has decided.

The 2013 Constitution basically says there is a Judicial Services Commission and that Commission is set up of a very competent set of people who will decide on what the Judges are supposed to do, what they are not supposed to do, how they will be trained, who will train them and how will they conduct themselves. In fact the Chief Justice has taken out the guidelines on the Code of Conduct of judges already in 2002.

There is no need for a duplication of the Code of Conduct and neither is there a need for a body that duplicates the work of the Judicial Services Commission. The Constitution does not allow it and also there was no requirement for that to be included in this Bill. What we are basically saying that this Bill

should keep Judiciary separate. It should take out all those provisions that deals with the Judiciary and of the Judicial Department.

So, in conclusion, I will just basically take you through the summary:

- We have concerns with Sections 12, 13 and 14 where we feel that there is no transparency and accountability in dealing with complaints.
- This Bill we submit is discriminatory to people based on their political beliefs and opinions.
- There are vague and undefined provisions in this Bill.
- The provision deters complaints being made to the Commission based on fear of prosecution.
- The independence of the Commission members are questionable because it is being regulated by the President and at certain points that stays secret which are defined only by the Attorney-General and the Prime Minister.
- It is inconsistent with the 2013 Constitution.
- It does not provide protection to whistle-blowers as was a requirement of the 2013 Constitution.
- Immunity to complainants are limited.

We also make the final submission that it interferes with the Judicial independence and doctrine of separation of powers. I do not know how we doing on time but I think that is all we want to say at this point.

MR. CHAIRMAN.- Thank you very much, Ms. Karan. Before I actually give the chance to my Members to ask questions and get some clarification, with regards to what you have said about politically motivated or malicious, just an open discussion type of a question, what if it comes in a form of a regulation that will actually guide the Commission to determine whether a complaint is politically motivated or malicious in nature. Definitely the Commission cannot just come in without any regulations or guidelines and say, “in our opinion it is malicious” because I think under the new structure of how laws are formulated, now majority of the things are sent down to regulations and not embedded in the Act because it is very difficult to change Acts these days.

Because we are dealing with such a provision that nature of complaints would be changing on a daily basis, the people are coming in with complaints. In Fiji we have more than 800,000 minds and all those minds do not operate the same way. So, if it comes as a regulation, would there be an issue?

MS. R. KARAN.- If there is a regulation, it will fix the defect, yes. But at this point, the Bill that is proposed to become a legislation, this Bill is stating a very prominent section that says, “... unless the Commission is of the opinion that ...” The term, “is of the opinion that” can be decided even before an investigation begins? Even without carrying on an investigation, all they have to see is whether the complainant is malicious, or is politically motivated or whether the case is vexatious and they can all decide that only based on an opinion.

How that opinion will be made will never be in the regulation because that is something human, so how a Commission member looks at that. The political motivation terminology being defined can be done later but it should come with this legislation because these are very prominent features of this legislation. Politically motivated is a ground for persons to be criminally prosecuted and suffer an imprisonment term. It is not a small thing that can be fixed by regulation.

MR. CHAIRMAN.- But if someone is prosecuted for bringing in malicious or politically motivated complaint, if it goes to court then the same question arises. Would not the Judge request how did the Commission come up with an opinion? Is there any regulation? Is there any guideline?

They cannot just actually say that it is in our opinion that this particular complaint is malicious. The Judge would definitely ask for more details as to how that conclusion was made, that a particular complaint was malicious in nature. So, without even having a regulation, the Commission cannot state that it is malicious. I may be corrected on this, but this is just my opinion as to how I see the Bill that without a regulation, they cannot and they need to come up with a checklist so whenever there is a written complaint, they need to go through that checklist before coming up with an opinion whether it is malicious in nature or not. If it is malicious in nature, it does not stop there, they need to actually prosecute that person.

DR. C. MASSEY.- Yes. Mr. Chairman, the submission is that because this is going to open it up to grounds of possible biases, it would be advisable to consider reframing this. In our opinion, it is that whole linkage to an opinion that is problematic. The regulations can come in at a later stage, can be defined in an annex but if this Bill which is not likely to be amended easily is going to allow for this to happen, so the damage may be done already.

MS. R. KARAN.- And having said that, the regulations will be made by the Ministers, the Minister in line. The Bill is intended to regulate that Minister. So, how will that Minister or let us hypothetically put this. There is a complaint against a Minister, there is no definition right now, this Bill is passed as it is. That same Minister goes and starts, "Alright, I will pass this regulation, this is not the definition" and he excludes himself. So, there is possible biasness as Dr. Massey has said but having said that, back to your original question, it can go to the court, it definitely will go to court. But it can go to the Magistrate's Court too because the provision are only \$10,000 fine. If it goes above on a substantial figure, of course, then it will go to the High Court, et cetera, but it can go to the Magistrates Court, and if it goes there, then the Magistrates Court is a creature of statute. They will look at the statute, which is the legislation and if the legislation says that the Commission members can come and offer an opinion and close the matter, the Magistrate will say, "Yes, they can close it, they don't need a reason", basically that.

MR. CHAIRMAN.- The other point that I would actually like some clarity on, is with regards to the Judiciary's independence. I believe this Bill actually targets the position and not the proceeding of the Court.

MS. R. KARAN.- Yes.

MR. CHAIRMAN.- In no way it actually hinders or interferes in the proceedings of the Court. Like, for example, any other law that is actually made, even the people in the Judiciary are subjected to it. So if this Bill actually covers people in the Judiciary, including magistrates, judges, lawyers and everyone, actually you are stating that it should be independent.

MS. R. KARAN.- So basically, Mr. Chairman, it is this way, this Bill also does one thing, it allows the members of the public to go and dig up information on any person that they may have reasonable cause to believe that for any reason, they would have gone to this Commission and get their financials. They want to see "All right, how much loan does this person have; where did he get the loan from; who gave this; let us look at the child; wife; kids; how are they, et cetera?"

There are so many cases in the Magistrates Court as well as the High Court and the people who will possibly be not happy with the Judge or the way the proceedings are going, they will all go and dig it up.

Then they might come up with “Hey, the Judge has taken a loan from this bank, this bank, has done this, he is not paying me, this insurance company is also” They will try to then start talking about it and start publishing stuff, start alleging things.

The Judiciary is kept separate from the rest of the public for this very reason. The reason is, that they are meant to have some sort of proprietary away from people. In the economical context, they cannot be seen talking to lawyers, even if it is in the profession, even if that lawyer does nothing on the proceedings, if he interferes nothing on the proceedings, they do not go, they do not sit down and they do not start in a waterhole anyway and start having a chat.

They do not publicly go and do cases, they do not go, there are several things that the judges are not allowed to do, they keep to themselves and the rest of the public. This Bill allows the public to penetrate that, and go and dig up information on these judges. It will create this that justice is not being done because this judge had something to do with this Company or entity, this and many years back. It can bring it up and say, “No, this judge is being biased” or “justice is not being done” just simply because of that. That is one of those things that we are basically saying, that why allow the public to dig these things from the judges?

There is the FRCS Office which is a very strong Office. The tax officers are there, all of that are there, they already have these statements. Why create another body that will have those same documents and allow other people to come and get that out? Why allow that?

There is no rationale behind it, there is a Code of Conduct there already. There is a body there already, so if that is maintained and that is done under strict confidentiality, this Bill is actually opening the doors. Again, there are no guidelines on who can or who cannot be given this information.

MR. CHAIRMAN.- Thank you very much. I open the floor to the Committee Members now, if they have any clarification.

Honourable Dr. Salik?

HON. DR. S.R. GOVIND.- Just to follow up on the first point from the Honourable Chairman.

What if the clause is amended to say that the Commission will, after appropriate or proper investigation, decides whether it is malicious or not?

MS. R. KARAN.- Yes, then it is compliant but you have got

HON. DR. S.R. GOVIND. - Is it all right then?

MS. R. KARAN.- Then it would be all right because you have some basis to close a matter. If someone is bringing a complaint to you, you cannot just come up with an opinion.

HON. DR. S.R. GOVIND.- Yes, so we can suggest that for all complaints, there has to be investigation before a decision is made.

MS. R. KARAN.- Yes, without fail. Every complaint has to be investigated to come into an opinion to close it.

HON. S.R. GOVIND.- Yes, the investigation has to happen before they make an opinion.

MS. R. KARAN.- Yes.

DR. C. MASSEY.- May I just offer a very small example. For example, the Office of the High Commissioner for Human Rights (OHCHR) receives numerous complaints from people, but before we decide whether this can be investigated or not investigated, it is weighed on matter of principles and rights to say, is there a possible violation here that requires and falls within the mandate of this office or not? It is a very simple procedure but it is mandatory and it is recorded. There is a documentation issue of it.

HON. N. NAWAIKULA.- Thank you for your submission. It tells me that you are the experts on human rights and we are not. Basically, the way I read it is that this is good, but be careful and balance it against the rights of other people. If we are not careful, it will infringe on those. That is my whole interpretation of what you have submitted and just taking each of the points that you raised on clause 12, I can understand that. I can also understand the difficulty it will face the legal practitioners even if you do not define what does, in his opinion, you must set standards there.

I also think that that cannot be addressed in the regulation. It must be addressed in the legislation because you cannot regulate that. My question basically is that, I agree with everything that you say, but it is for us and it is for everyone to convince the drafters. The drafters are not here, we can only take this and take it up to them.

Your opinion on 12(2) as well as the other one, even on the independence of the Judiciary that has been raised also, but the whole challenge for us is to take all these up and we are only convicted to put it before the drafters who are not here. What might help and this is the thing I want to ask you, are there any examples or how are these addressed in other jurisdictions that might help convince the drafters because the drafters have their own opinion too. They will say “Hey, you do not know anything about drafting, and you are putting this up”. If we can point to them, “Look, we raise this, and this is how it is addressed here”.

If you have any comments on that, these things that you are raising here are addressed in other legislations, and maybe because what we are doing is collecting this putting it up to the drafters and say, “We will refer it to the drafters”, this is how they have addressed it here.

DR. C. MASSEY.- Thank you very much, you know actually we were having this discussion before we came that if we could come with some best practises to you.

Honourable Member, if you can give us a little bit of time, we will try to get you some best practices and send them over to you and the Chair to consider. If you can give us a little bit of time, we will send that over to you. For each of these sections of each of the areas that we are making a submission on, we will send you something to consider, maybe one or two examples that if not one, you can go with the other

MR. CHAIRMAN.- If it is possible, if you can change the format of your written submission to our format. If you can put the clause and those kind of things because what we have done is, our first, second set of questions have already gone to the drafters, so tomorrow is the last day for submission on this because on Monday, we are starting on the Adoption Bill.

We would request if you can bring it in that format, so it will be easier for us to send it to the drafters for their explanation and clarification.

MS. R. KARAN.- Is it possible to submit this on Monday?

MR. CHAIRMAN.- That should not be a problem, even next week will be fine because they are working on, I think, around 40 or 41 questions from us at this point in time.

MS. R. KARAN.- Then you take the five that you like , Monday to

MR. CHAIRMAN.- Yes, so that at least before we start compiling the report, we have something back from the drafters explaining what you have stated.

MS. R. KARAN.- Are there any further questions?

HON. N. NAWAIKULA.- One last question: how are the other jurisdictions attending to these transparency matters, are we right on top there or are we in the middle or everyone is doing it, who are in front, who are late?

MS. R. KARAN.- There is an International Code of Conduct for public officials and there was a study done by the UN, I forgot the year but in that year, a lot of countries in the African and Caribbean were chosen and all of them have a similar Code of Conduct. Where we are in reference to that, we will have to pick up all the legislations and do another sort of study but having said that, this legislation would have been fine if what we have submitted today is addressed. If it is addressed properly, this would be a very good piece of legislation.

MR. CHAIRMAN.- Thank you very much, Team from UN Human Rights. We are pressed with time actually and the other submitters are here as well. Thank you very much for availing yourselves and enlightening us with regards to the Code of Conduct Bill. On behalf of my Committee, a big *Vinaka Vakalevu*.

MS. R. KARAN.- Thank you, Mr. Chairman and Honourable Members, on a completely different topic, just to say that we are very delighted that we have had the chance to engage with you. We have done this in the past as well. I was just wondering if at any time, Mr. Chairman, you and the Honourable Members think you would like to have a little bit of in-depth insight into what the legal obligations of Fiji are within the UN mechanisms, we would be very happy to organise at your convenience sessions for you and the Committee on Human Rights. Thank you.

The Committee adjourned at 9.22 a.m.

The Committee resumed at 9.30 a.m.

Interviewee/Submittee: Ministry for Women, Children and Poverty Alleviation

In Attendance:

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| 1. | Dr. Josefa Koroivueta | - | Permanent Secretary |
| 2. | Mr. Rupeni Fatiaki | - | Director, Social Welfare |
| 3. | Ms. Shelley Casey | - | UNICEF Consultant |
| 4. | Ms. Ela Tukutukulevu | - | Head of Child Services |
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MR. CHAIRMAN.- Good morning, Mr. Permanent Secretary (PS) and the team from the Ministry of Women, Children and Poverty Alleviation. I believe you are well aware of the reason why we actually invited you before the Committee this morning.

From Monday next week, we will be starting on public consultations and collecting submissions on the Adoption Bill, Bill No. 32 of 2018.

Therefore, the Committee would like to actually have an in-depth insight of the Bill itself, so we thought that these people to actually call in for clarification, doing the presentation and giving an in-depth about the Bill, that is, people who actually have worked on that particular Bill. So this morning, I will introduce my team.

(Introduction of Committee Members by Mr. Chairman)

Before we proceed, we will get you to introduce your team and from there we will continue. Thank you.

DR. J. KOROIVUETA.- Thank you, Honourable Chairman, Sir. To the Standing Committee, we just wanted to take this time to express how grateful we are to be here before the Committee to present on the Bill.

We are excited to provide information and also updating. On the team, on my left we have Mr. Rupeni Fatiaki, the Director for Social Welfare; the good lady on my right is Ms. Shelley Casey, she is a UNICEF Consultant and had been working on the Bill since 2012; and the lady further to that is Ela Tukutukulevu, she is Head of the Child Services Unit in the Ministry. That is our team, Sir, before the Committee this morning.

While we are trying to get the PowerPoint up, maybe we just introduce the Bill. This Bill has undergone extensive years of architectural work and also consultation. It was work undertaken under one of the Sub-Committees of the National Co-ordinating Committee for Children, which is on the Legal Sub- Committee, and it has gone through the Solicitor-General's Office, Justice sector, through the Ministries, so there has been a lot of consultations right throughout.

Ms. Casey is actually going to make her run-down on the presentation. What this Bill has basically put before the Committee is that, it is a replacement of a very archaic Adoption Bill, the Adoption of Infants Act. It puts inline Fiji's commitment to the Hague Convention which we have ratified as a country.

In the centre of it, it is putting the interest of the child right at the centre and is really engineered so that the child is protected and safeguarded from growing international threats or risks.

Some of that, I think, Ms. Casey will dwell into is the issue about child trafficking, sale of children and exploitation of child labour in that particular regard. So, it really puts us at the forefront that this is best for the Fijian children. It is also very much aligned to the Fijian Constitution 2013, and also the United Nations Convention on the Rights of the Child.

That is the thinking that we had behind the Bill, but we had some issues with the Bill, now it is presented before the Committee and that is the issue about Fijian children maintaining their birthrights. I think Ms. Casey will dwell on that. So, that is sort of introduction on the works being done. Some of the work captured in the Bill is actually work being done now. I think it is a Bill that sets us as a nation on proper best practice, proper procedural mechanisms that will have to be followed, both by the central authority of an overseas country and also with the central authority established within Fiji. So I know there is work to be done to work out specific procedures/steps that needs to be done within a country and certainly, awareness as well in that particular regard.

Mr. Chairman, Sir, that is a very brief introduction into the Adoption Bill as presented before the Standing Committee.

Honourable Chairman, Sir, can we ask Ms. Casey to continue.

MR. CHAIRMAN.- Yes.

MS. S. CASEY.- Honourable Chairman, thank you. I am pleased to be appearing before you this morning to present on the Bill and then answer any questions or comments you may have on the specific contents.

MR. CHAIRMAN.- Thank you, Madam. Just before we actually start since the PowerPoint is giving issues, we can print out the hard copies of the presentation or have it photocopied. Unfortunately, our rooms are occupied on the other side where everything seems to be functional.

HON. N. NAWAIKULA.- General discussion is normally better. So how long have this been ongoing in trying to put this Bill across? Is it initiated by your Ministry?

MS. S. CASEY.- Yes, it was initiated in 2011. The legal subcommittee of National Coordinating Committee on Children (NCCC) took it up then. We had a small technical working group - inter-agency, representatives from all the key agencies that were involved in adoptions.

We are working together over a series of technical workshops where we looked at international standards and best practices, then talked about what was most feasible and appropriate in the Fijian context, and then a draft was produced from there. It was debated by the previous Parliamentary Standing Committee on Justice Law and Human Rights last year, but I think then did not get up to Parliament before the Elections were called.

HON. N. NAWAIKULA.- On the legal side, we have a lot of issues on overseas parents trying to adopt, so that has been addressed?

MS. S. CASEY.- Yes, that is one of the key reasons or justifications to need the Bill and to need the Bill urgently. Fiji is the first and only Pacific country to ratify the Hague Convention on Inter-Country Adoption. That was ratified in 2012 and came into force at the beginning of August 2012.

Through that Instrument, it sets out a very clear safeguards and procedures for whenever a child is being adopted from parents from one country to another country. And Fiji has ratified that Convention but we have yet to reflect it in the national laws, so we are in a bit of limbo unfortunately, in terms of being able to process those adoptions particularly with other Hague countries.

Once you ratify the Hague Convention, then no child can be transferred to another Hague country, unless those specific procedures have been followed. I would say that most of the countries that overseas parents are coming from are also Hague members - Australia, New Zealand, UK, Canada, India and America.

So the advantage of the Hague Framework is that, it gives both countries clear safeguards and procedures to follow to make sure that there is no untoward practices and no change of money that should not be happening.

It also requires that all communications happen between the central authorities in the two countries so that when the Courts here in Fiji are making a decision about adoption of a child to overseas parents, they have a very detailed background report on those parents from their own Social Welfare Ministry, police clearance...

HON. N. NAWAIKULA.- We have a lot of difficulty with the Judges, in trying to make decisions but the old law has locked them in, into the local jurisdiction so I hope this is being addressed.

MS. S. CASEY.- Yes. The key for the Hague is to try to avoid those situations and it make sure that if the proper procedures are followed, then you are guaranteed by the time it comes to Court you will have a certificate from their home countries saying, "we accept this adoption." It will be approved and the child will be granted a visa and allowed to travel to the parents' home country. So once Fiji has those procedures clearing its law, it will avoid the situation (and we have had in a number of Pacific countries) where the national courts accept the adoption but then the parents are not able to get approval to take the child back to their own country of origin. So we try to avoid all of those complications and difficulties, to make sure by the time it comes to court you are clear, this child would be allowed to travel back with their parents.

HON. DR. S. GOVIND.- Just for interest, I just wanted to know how many adoptions were under the previous birth? Was there some kind of pattern?

MS. E. TUKUTUKULEVU.- This is inter-country adoption, Sir?

HON. DR. S. GOVIND.- (Inaudible)

MS. E. TUKUTUKULEVU.- Local has a lot of cases but I do not have the number right now but with our local adoptions, that is almost ongoing but with inter-country, we have had requests from overseas countries but like as mentioned by Ms. Casey, we need the processes in place before we can fully comply with the Convention.

HON. DR. S. GOVIND.- (Inaudible)

MS. E. TUKUTUKULEVU.- There has been, yes.

HON. N. NAWAIKULA.- Inter-country was very, very hard because the legislation locked it in, and we are trying to release that.

MR. CHAIRMAN.- Alright, Members, I think the powerpoint presentation is up and running now, so we will actually start with the formal presentation and we will have questions and answers after the presentation, thank you.

MS. S. CASEY.- Sir, I will start with just a few slides about why the Ministry thought this Bill was necessary and important and then I have brief slides on the key features of the Bill.

The Bill is intended to replace the Adoption of Infants Act 1960 which is now quite an outdated piece of legislation that was inherited from the colonial period. Overall, some of the concerns raised by the UN Committee on the Rights of the Child is that the Crime Act does not fully meet the new modern standards for adoption and in particular, it does not properly reflect Fiji's obligations and the procedural safeguards required from that Hague Convention on inter-country adoption that was ratified in 2012.

The intention of the Bill, of course, is not to stop adoption. We know from many children, adoption is a positive option, particularly children who have been orphaned or abandoned, adoption is a very positive option that allows children to be placed with the loving family and to have that sense of belonging to being with the family.

However, globally, there has been growing concern over the last 20 years about adoption abuses and in particular, of the sale and trafficking of babies under the guise of adoptions. This was the primary impetus behind the development of the Hague Convention - the optional protocol to the CRC which deals with sale of children and, of course, the CRC itself which requires all States parties to have clear procedures in place to make sure that adoption safeguards are in place to prevent sale of children and to ensure that adoptions are always done in the best interest of the child.

Globally, we have seen in a number of countries that the lack of a strong legal framework and lack of appropriate safeguards has led to a number of problems, including agents, attorneys or orphanages actively seeking out poor families to relinquish their children, to give them up for adoption because of the fees that can be charged and the money that can be made. Within some countries, they even had abduction of babies from hospitals and maternity wards in order to put them up for adoption, and also young women being induced to give birth in order to be able to give their child back for inter-country adoption.

This is to some extent, being fuelled by the global demand for babies in particular, for adoption and we see a significant disconnect between supply and demand of babies for adoption in western countries. So, there is a market of parents who cannot have their own children who are desperate to be parents and will sometimes overlook improprieties or will put money on the table in order to have a baby and this has put significant pressure on overseas countries to, sort of, meet this demand. And as a result, we see particularly in Africa and throughout Asia and increasingly in the Pacific, a highly profitable market for inter-country adoption and help making babies available.

Generally, the way the global trends have been is that, once one country tightens its rules and regulations, the market moves to where things are still loose and open. And we are in a situation now where most of Africa, most of South East Asia has really tightened up its procedures and the worry is, the Pacific is the next destination for these types of practices.

Fiji's current Adoption of Infants Act was based on the old British Common Law approach to adoption and it has not really kept pace with these new modern challenges and new modern practices in terms of adoption. In particular, it does not have the kinds of safeguards we now see in many countries, to ensure that some of these illegal adoption practices are properly controlled.

Essentially under the current practice, adoption is a private matter between two families and anyone can come into the country, as long as they have been here for at least three months, they can negotiate directly with a birthmother to take her baby when she has that baby and take that baby before the courts to get an adoption order. There is no oversight of the process by Department of Social Welfare to ensure that children are always ending up with the best possible parent for them.

The UN Special Rapporteur on the sale of children, child prostitution and child pornography has flagged a number of key best practices or safeguards that should be in place to ensure that adoption is in the best interest of the children and to prevent illegal adoption practices. In particular, they recommend that you have a strong Government agency, usually in most countries the Department Social Welfare, to monitor and regulate all aspects of adoption.

You should have that Government agency screening all prospective adoptive parents and matching children in need of adoption with the best available parents for them.

The Special Rapporteur also recommends, as does the Hague Convention that private arrangements between families either be prohibited or at least regulated and restricted.

It would also like to see restriction on payment of fees and other amounts of money in the adoption process and to strictly punish those where there are financial arrangements that fall outside acceptable rates or fees.

So, the new Bill was intended to align with some of those new global best practices both, in terms of domestic adoptions or adoptions by Fijians in Fiji, as well as inter-country adoption. Adoptions by people who are not resident in Fiji, who are coming to adopt a child resident in Fiji.

In particular, in the adoption of interstate adoption, there is no reference whatsoever to the Department of Social Welfare Department or their role in adoptions. In practice the courts currently request the background report from the Department of Social Welfare as part of the approval process so that has been happening in practice for many years, but it is not even clear in the law that, that is a requirement. It is just something that is developed by practice over the years rather than being mandated. So, in this new Bill, we strengthen that requirement and make it clear that the Department of Social Welfare should be assessing and determining the eligibility of everyone who wants to adopt a child.

Currently, the Department of Social Welfare already has clear procedures for giving back home study reports, criminal background checks and determining the suitability of parents.

The Department of Social Welfare will also be responsible of doing counselling of mothers who are wanting to give their babies up for adoption to make sure that their consent is fully informed and voluntary.

Currently, the consents are signed by the, often done by the lawyer of the people wanting to adopt rather than, which does not ensure that the mother fully understands and has her own independent counselling about this very important decision. The Bill would also say that if, before a child can be handed over into the hands of the adoptive parents, the Social Welfare Officer must check that couple to make sure that they are safe and appropriate and meet the criteria under the law to adopt.

The Bill would also require the Social Welfare Department to take a more proactive approach in terms of identifying adoptive parents by having a list of pre-approved adoptive parents, so people wanting to adopt a child can apply to the Ministry. They would do the screening and the background checks and then they can be put on a waiting list. In that way, as soon as a baby is available for adoption, for example,

abandoned at the hospital, you have a list of pre-approved parents already ready to go and that baby can be transferred to them quite quickly. That reduces (in most countries that have that procedure in place) the need for inter-country adoption because as a first choice, you already have Fijian parents on a list waiting. It also reduces the amount of time children need to spend in orphanages or baby homes, which we know from international studies is not best for their brain development, nurturing and their long term prospects, and that early bonding with the primary care is very essential.

Again, this is something that the Ministry has already developed in practice. They already take applications and maintain a waiting list of people wanting to adopt in Fiji. This just provides a clear legal framework for it.

In terms of scope, the current Act covers the same scope as the existing Adoption of Infants Act, that is, we focus primarily on formal adoptions process through the Court and it does not address the issue of informal or customary adoption or kinship care of a child by relatives. So we are not addressing that broader category, it is just looking at the formal side of adoption through the Courts.

The current Act really focuses only on the Court process for approving adoption, whereas this Bill looks a lot more at that pre-court process, the role of Social Welfare in doing the background checks, assessments so that when the parties arrive in Court, the Court has a much stronger picture upon which to make a best interest determination. There is also more guidance in terms of the requirements to bring counselling to birth parents and also details about the background checks including criminal record checks that need to be done on the applicants.

The Bill as it is currently framed, would still allow a birth mother to make a private arrangement with someone to adopt her baby. So some countries do completely prohibit that, and we explored that as an option here in Fiji and through their technical workshops in consultations, the conclusion was that, it would be too strong a position to take now. So it would allow a mother, for example, to make an arrangement with someone to adopt her baby once it is born, but, before that couple takes the child into their home and the handover happens, they have to notify Welfare and get a home check (background check) and then the birth mother can see that report and then make an informed decision about whether these are the best people to hand her baby over to. That requirement would not apply if it is in the family, if it is your sister, your mother, then we assume she knows her mother and sister, so it is only if the adoption is outside the family.

We have also made some minor modifications to the requirements for adoptive parents, but not significant ones previously, other than in relation to inter-country. If you are going to apply as a Domestic Adoption and not follow the inter-country rules then you have to have been in country for at least 12 months continuously. So that is to ensure that, once you have been here for 12 months, at least, you are reasonably permanently here.

You might be an expatriate working for an international organisation or an NGO but you are settled and established here. So that distinguishes you from someone who is just here as a visitor flying in, flying out. If you are applying by the domestic adoption rules, you have to have been here for 12 months, that was previously three months. The minimum age same as before, 25 years, we also allow singles or couples who have been married for two years that includes people in a de-facto relationship under Fijian law. It is specific in a de facto relationship pursuant to Fijian law which we exclude same sex couples. There is a general requirement that they be of good character, fit and proper and then an overarching requirement that they be assessed by a Welfare Officers and deemed by Welfare Officer to be suitable to adopt.

In line with the CRC and the recommendations of the UN Committee, we also require that children from the age of 12 consent to their adoption because at that age children are mature enough to be able to have a voice in such an important decision about their lives. We do still give the Magistrate over-riding ability to override the child's consent, if it is necessary and in the best interest, recognising some children do not always make good decisions for themselves.

And we require the case can come to Court, we would like the child to be living with the couple for at least six months so that Welfare Officers can have then a post placement assessment and see how well the child is fairing, whether they are bonding and how their relationship is going. So the child will be placed by welfare, they would pre-approve, the child would stay with the parents for at least six months before they come to Court and then at least somewhere between the three and six-month mark, Welfare will go back in, check on the child, check on the home situation and then prepare a report for the Court about how the parents are fairing with the child.

Currently under the Adoption of Infants Act, any Magistrate can issue an Adoption Order. Under the new Bill, we have proposed that be transferred to the family, specifically to the Family Division partly because they have expertise in dealing with family, custody, children's issues, they have on-site counsellors, so would be best place to hear these kind of decisions.

In terms of inter-country adoption, there is now a new quite detailed section that aligns Fijian National Laws with the Hague Convention which as I mentioned has been ratified in 2012 and these applies both to non-Fijians adopting a Fijian child and also we have made allowance for situations where Fijians might be adopting a child from another country and wanting to bring that child back to Fiji. The first case is most common but the second case still sometimes happens, so we have made allowances for that as well.

As I have mentioned earlier, the Hague Convention has very clear procedures that requires whenever a child has been moved from one country to another, the process should be managed by the central authority in each country. Once Fiji ratified the Hague Convention, you nominated the Permanent Secretary of the Ministry of Women as your central authority. So now under the new Bill, any adoption of a Fijian child would follow that process and be centrally managed by the Permanent Secretary with the possible delegation of certain authority to the Director.

Effectively what happens under the Hague process is that if someone from New Zealand or Australia, for example, wants to adopt a Fijian child, they have to first apply to their own Social Welfare Ministry in Australia or New Zealand. They would do a comprehensive background assessment, criminal record check, home study of those parents and prepare a report, check that they are eligible to adopt under their own national laws and that they are suitable.

That report and usually what happens is, Australia would compile a list of pre-approved parents (maybe 15 or 20 of them) and send them to the central authority here in Fiji. The central authority here in Fiji would then, if there are any children available for adoption inter-country, they would select from that list of Australians or New Zealanders and they might have a mix from Australia, Canada, New Zealand and they would choose which parents are best for that Fijian child. So the decision, the matching is made by your own Social Welfare authorities rather than allowing parents to come and pick their own baby. That is a key requirement of the Hague Convention to prevent orphan shopping where expatriates come and pick a baby from an orphanage and select their own child. It is your Welfare Ministry that determines, first of all, is there a family in Fiji that will take this child so that the child can retain their sense of culture and identity. If not, then who is the best expatriate from the many options we have for this particular child.

Once the Permanent Secretary on the advice of the Adoption Panel makes that matching that that information is communicated back to the Australian or New Zealand couple, “you have been matched.” Then they have to get their documents in a row in terms of their immigration status, they will need to get confirmation from Immigration authorities in their home country and a letter certifying that once the adoption procedures are completed, that child would be able to grant a visa and travel back.

The main aim of this procedure is to prevent as I said that sale of children, the change of hands of money and also to ensure that children are going to overseas couples only if there are no domestic options available. The legislation is clear on that, in line with the requirements of the Convention on the Rights of the Child but inter-country adoption should only take place if there is no option for another family, whether it is an extended family or an adoption family within the country. It also makes sure that the Court approves an Adoption Order will guarantee that child will be accepted back by the parent country. The adoption will be recognised, so the child is not going to end up with any irregular status or concerns about parentage and also their ability to travel and get a visa and end up with residency status.

The Bill also includes new provisions to relax the secrecy provision around adoption and this again is in line with global trends and the Convention on the Rights of the Child. Since the Convention on the Rights of the Child was introduced, a lot of the countries have had a rethink of this whole issue of the secrecy around common law adoptions and particularly trying to improve respect for children’s right to know their identity and to know their birth family.

So, we have now included provisions that says that once an adopted child turns 18, they will be allowed to have access to their original birth certificate, to know who they birth mother and birth father were. However, we have allowed for either the child or the parents to put veto on the file, to keep it secret. So if a birth mother really never wants the child to know, she can put a veto on the file to say “do not release my name” and the child’s information cannot be released to the birth mother until the child is at least 18 years old. When the child turns 18 years old, they can also put a veto. So we have allowed some easier access but we have allowed both the parties to reject that openness for reasons of their own, would choose not to have that made public.

The final point, when we presented to the Standing Committee back in October 2017, one of the key issues that has come up in the context of this Bill is the impact of adoption on children’s customary rights. The current adoption of Infants Act follows the Common Law on British Approach which is once you are adopted, you are a child as though you were born of that couple. So you lose all rights from your birth and you gain all rights from your adopted parents. The current draft of the Bill reflects that British standard, as does that the previous Act. But I know there have been some concerns about that and as a result, the Ministry, based on the recommendations from our discussions with the Standing Committee last time, proposed a possible solution based specifically on what the Standing Committee requested.

So the Ministry had drafted an addition under Section 30 of the Act that would say “an adopted *iTaukei*, Rotuman or Banaban child retains all the rights and entitlements conferred by their birth parents with respect to kin landownership, access to marine resources and chiefly title.” You adopt a child that you keep any rights that you had but you do not gain any rights by adoption. An adoption child would not acquire any of those rights. So if an *iTaukei* child is adopted by a non-*iTaukei* family, they retain their *iTaukei* rights but if a non-*iTaukei* child is adopted by an *iTaukei* family, they do not gain any *iTaukei* rights. So they keep what they had at birth. That was our proposal based on the discussions we had with the Standing Committee at our last session.

That is not reflected in your current version of the Bill, however, but that is one possible solution should it come up through the consultations. This is similar to the approach used in Samoa and how it deals with chiefly titles and customary land rights.

We have also made provision, in this we have proposed adding in the section where birth mothers are counselled about when they are giving their consent, we have included a section in there to say that they should also be advised about registering the child under VKB before the adoption takes place, so that this becomes clearer and easier to track.

MR. CHAIRMAN.- I do remember actually when I was sitting in for a Justice, Law and Human Rights Committee Meeting and I did sit in for certain sessions and this is a huge issue with regards to this particular Bill. There are a lot of scenarios that came in like, for example, a single mother adopting someone or a single father; an *iTaukei* being adopted by an *iTaukei* and all those things came up and I think we are trying to get a matrix so that we can get a clear-cut picture on how these rights would be protected because, for example, there is a clause within the Bill on the secrecy matters. For example, if at birth the child was from a chiefly family and then no information needs to be revealed after 18 years, so how does he actually gain his chiefly title, et cetera, because the law on one side says his right will be protected at birth, and on the other, it says, for example, if the parents do not want any information to be released when he is 18 years, so how does that correspond with each other? That is another scenario that came up.

MS. S. CASEY.- In the proposed amendments that we have drafted, we tried to address that in two ways: one is, like counselling of the birthmother at the time she signs her consent to ensure that she registers the child with the VKB before the adoption proceeds, so at least she is registered and that the child's identity is clearer and preserved.

The other provision we have is to give PS a discretion, currently the PS has discretion to release information about the identity of the child if it is necessary for their welfare or health. That sometimes come up, for example, we need to trace a birth family for medical reason, transplant or medical treatment. We have added to that also where it is needed to preserve the child's cultural rights. So the PS could override secrecy and disclose the child's birth identity where necessary to preserve or protect the child's cultural rights.

It is tricky to come up with the universal solution, unfortunately, I think if the child is registered at birth with the VKB under the regional identity then it becomes easier, but it is difficult to balance that secrecy versus protecting cultural rights.

MR. CHAIRMAN.- Yes, because the only thing that was not matching was actually the cultural rights of the parents and the secrecy bit, if the parents do not want the original birth certificate to be revealed to the child but if the child is, let us say, to be crowned as the chief and then he will definitely know who his or her parents were. So balancing of that within the act actually was the major concern, I think, that revolved around this Bill back in 2017 and 2018 as well.

MS. S. CASEY.- I would say that globally the trend is to do away with parents' right to secrecy and adoption. New Zealand faced it in over a five-year period but now, for example, in New Zealand, Australia, Canada and the UK, the parents do not have an option for secrecy.

The child who is turning 18, it is the child's absolute right to know their birth identity. So globally in other countries they have leaned towards the child's right to identity, as trumping the parents' right to secrecy. Now it is clear from the beginning of the process, someday this child will know who he or she is, and they may come looking for you, and parents going into the adoption process now, know that, there is no secret deals any more around adoption in other countries.

So they have elevated children's rights even more so then we have in the Bill. We have made the veto provision because there is a concern about going that full right of a child to know their identity would

immediately cause some concerns for a lot of people. So we have kind of come up with a compromise but other countries have put the child's right to know over the parents' right to secrecy.

MR. CHAIRMAN.- Was that the last slide or you still have any left, before we get indulged with the open discussion?

MS. S. CASEY.- Sorry, yes, that was the last slide just to show the exact language of what we propose adding to clause 30 of the Bill you have in front of you.

MR. CHAIRMAN.- So this is our first submission collected on behalf of the Ministry of Women, Children and Poverty Alleviation.

Anyways I would like to thank the team from the Ministry for this wonderful presentation that you have presented before us. I will open the floor now, it will be more so like an open discussion, not actually questions and answers.

If our Honourable Members have set queries or concerns with regards to this particular Bill they can query now. I will be leaving shortly but the Honourable Members will continue, if the session is longer. But before I go I would like to request, since we will start collecting submission, PS, from next week, would you like your team to be part of the Committee as well, going out and collecting submissions? And if there is any clarification from the general public, somebody to be there to address and on behalf of the Committee as well?

DR. J. KOROIVUETA.- We will only be too happy, Sir, to be part of the Committee.

MR. CHAIRMAN.- So what our Secretariat team will do, they will liaise with your office and give all the information as to where and when we are going to be, because I think the major concern would be not with other parts of the Bill but No.30, where the rights are concerned, it is going to be an issue collecting submissions.

I think we are going to have an overwhelming welcome in Namosi, where one of the Honourable Members, Honourable Ratu Suliano Matanitobua is organising his team to be present there. So we do expect to have a good turnout this time around with regards to the Adoption Bill. So, Honourable Members, you are free to ask any question that you may want to.

HON. R.R. SHARMA.- Thank you, Honourable Chairman, just a few clarifications on that, like for secrecy, if the child after 18 knows where he belongs to, et cetera, is there any provision for the protection of the parents like, if the child wants to go back to the original parent(s) what will happen to the parents who have looked after the child for the last 18 years? Is there anything on that?

What will happen, they have done their best for the last 18 years to look after the child and then after 18 years, the child knows that this is the real mother or real dad and he wants to go there, and 18 years of their hard work is wasted. So is there any provision for these parents, et cetera?

Secondly, I have seen something there which you have said that parents will be on trial for six months, then the legal part will take place, is it like that?

What about in that six months, the Commission or whoever is concerned, like the Social Welfare does not agree with those parents whom the child has gone? Then how will that child be protected in that six months? Thank you.

MR. R. FATIAKI.- The Honourable Members of the Committee, yes, to answer that question, the six months is like a trial basis. So before the child is placed with the adopted parents and we put them on that, and so a report or assessment is done before the child is placed, and while the child is with the family, progressive visits are done. Yes, we have come across several cases where in a case we found that they are not ready or they did not want or it is not suitable, the child is returned to the Department of the Social Welfare. We have come across several cases like that. In the process the child is still under the care of the Director of the Social Welfare as the legal guardian, although they are foster parents for those periods, the legal custody of the child is still with the Department again.

HON. N. NAWAIKULA.- The first question that I want to ask is that, I am not sure whether you have the answer or we need to put this up to the drafters, but then we need the court there in the first place because a lot of these are what we call “non-contentious”. In the probate, you have non-contentious proceeding and contentious proceeding where you take to court. Non-contentious because here like when you go to court, you have the interest of the child where you have to make an application so that he is represented by the Department of Social Welfare and then the lawyer takes it from this side.

Most of the time that you go there, everything is referred to the Welfare Department. We wait for the Department of Welfare and whatever the Welfare Department does goes, so what is the need of the court there? I am asking that, why do you not delegate all these to the Welfare Department to receive the applicants, to process the application and only where you have contentious as you have in the probate, you have a dispute then you refer it to the court.

My second point is in clause 30. If I am a native owner and if I adopt someone from another tribe or from another race or whatever, I do not transfer to him my culture and my native land, I will be very sad. The reason is because culture is not about blood, it is about living the culture.

An example from where I came, there is an Indo-Fijian there, he speaks the language, he does everything that a native Fijian does. To me, that person is more native than some of my cousins who live elsewhere who do not even speak the language, who do not live the culture, so I am not sure how you are going to resolve that? That is my personal feeling.

As a native when I adopt someone I expect all my culture, all my traditional things, land and garden will go to that person. In here, you are denying that but you are giving that freedom to someone who goes out. What if he goes out and does not speak Fijian and he does not live my culture, does he even deserve to continue to maintain that right? Some comments, I know it is a big question but that is a feeling I have.

HON. RATU T. NAVURELEVU.- *Vinaka*, Mr. Chairman. My contribution towards this Bill, I was going to speak also on matters regarding Honourable Niko Nawaikula has already alluded.

Firstly, thank you very much for the presentation this morning. During the presentation, I was going to ask in regards to the customary land right in regards to the adopted *iTaukei*, all the rights or entitlement conferred to the birth right. I thank you that this part has been addressed in this Bill.

Secondly, concerning the orphan child as Honourable Niko has already alluded to, when we adopt someone, he does not have the customary right to own. When a woman abandoned a child and during adoption we do not know the mother or the father. When we adopt the child and when he is not given the right to own and when this child grows up, he is a great asset in the community. The child will be like his son or his daughter, however, when we deny him that right how will we feel as he is a human being and he is a great asset in the community? I am just giving some ideas as to how we can address that matter regarding an orphaned child. *Vinaka*, Sir.

MR. CHAIRMAN.- Thank you very much, Honourable Member.

Honourable Members, may I be excused as I have another meeting to attend to. My Deputy will chair the meeting from here and on behalf of myself and my Committee, thank you Mr. Koroivueta and thanks for allowing your team to be with us from next week. *Vinaka*.

MS. S. CASEY.- The proposal from the Ministry was not necessarily something the Ministry has put forward as its own idea, this was in reaction to the Standing Committee's request the last time we appeared before them. The discussions in the room the last time which I think is very different from the discussions in the room today. It was not specifically a point that came up in our consultations in 2011 and 2012. So, it is not something we have had significant community feedback on.

My understanding is that the Standing Committee previously got quite a bit of feedback from the iTaukei Affairs. So, our discussions last time were informed by the (I was not present for them and the ministry was not present) comments presented to the Standing Committee by iTaukei Affairs. But I believe there has been community consultation on it and it does seem to be an issue that could go many different ways. So having further input from the community will be very helpful. Certainly in the position of the Standing Committee, the last time was as per what we have presented in the slide. They wanted it to remain as of birth and not transfer by way of adoption but that has not been opened up to wider community consultations.

HON. N. NAWAIKULA.- Yes, I think it will be interesting to speak to those who have experiences in that and who live in the village and accepting, of course, that in the village, adoption is not formal. I could have adopted someone from another tribe and nothing to do at all with an order and they will be staying with me and you will see that those people consider themselves members of that village. You will also see that they have been accepted because they live their culture there and I think culture is all about connection, it is not about blood or anything.

In my village these people have tried their best for years and years to remove their registration from another one (Kadavu) but the laws are stopping it. It is a big process to go through Native Lands Commission to try to de-register from there and to register here. These people that I am talking about have gone two or three generations. They have lost total connection with that but they still feel like foreigners in that village because they are still registered there. That is also how they are treating them there, so those are some things that we need to look into.

MR. DEPUTY CHAIRPERSON.- Thank you Honourable Niko Nawaikula. The Honourable Dr. Salik Govind.

HON. DR. S.R. GOVIND.- Thank you, Mr. Deputy Chairperson.

Other than this customary right issue, what other challenges you face in getting the Bill through during the last six or seven years?

MS. S. CASEY.- My understanding is, this is the one issue that has been the block.

HON. MEMBER.- (Inaudible)

MR. CHAIRMAN.- Anymore questions?

HON. N. NAWAIKULA.- If you go through these villages, you will see that they are from everywhere. The locals are very small and but one of the reason they say is, they all regard them as, “I am from here”, but the laws are stopping them from cutting off their connection to those other places.

Just to add to that; those will come out when you have disputes, where someone will call out to you, “you are not from here”, and that is very painful and that is in the village situation when someone tells you that. But, I live here, I follow the customs here, I do all the traditional obligations”.

MR. R. FATIAKI.- As Honourable Members know, the issue of customary rights, we have experiences where (it is on both sides), a couple adopted a child from a different “*mataqali*” or different place. Because in some places, in order for a child to be the member of the *mataqali* and to be part of that *mataqali*, the child has to be approved by the members of the “*mataqali*” and to be one of them.

In some situations and in cases we come across where the parents are willing but the difficulty is in the other members accepting the child as one of them. Those are some of the challenges or cases we have come across.

MR. CHAIRMAN.- Since we don’t have anymore...

HON. N. NAWAIKULA.- Mr. Chairman, first of all, we have a saying, we are like a school of fish, and if there is a fish from somewhere, they will be the ones who are causing the problem, and this is in the traditional structure. That is the reason why we say, “No, do not let that person from the other tribe be registered here.”

But I think, moving forward, everyone comes from different schools of fishers and what matters is, who looks at the obligations, who does the obligations. Even me, I can’t say that I am totally from my tribe because I live in Suva, unless I contribute and those are the things that we need to look at.

But for this one, if there are difficulties, I think, whatever the chiefs, whatever the hierarchy and the percentage of traditional Fijians agree, that should become the law so that we cannot say that we never consulted, and this is what the representatives of your people as indigenous people agree to. There is no, this way or that way, but this is the way that your chiefly system who we feel are the representative that matter, who have the mandate to talk on your behalf, agree to.

Like everything indigenous, you must consult and where they do not consult, I always jump up and down state that.

HON. DR. S.R. GOVIND.- Just thinking that there are a lot of good things in the Bill and a lot of best practices internationally, I was thinking if we just remove that customary part. Will it infringe on some basic human rights issue? We get the Bill passed, but leave that customary issue out of the Bill. So what do you think of that? What Human Rights infringement will be seen there, like an adopted child inheriting his land rights, et cetera, remove it?

MS. S. CASEY.- I think it is not essential to have that piece in there in terms of the best practice in international human rights framework. The challenge, which is why we did not touch it when we did the original drafting because the sense was, that issue was quite contentious.

The challenge is the existing Adoption of Children Act does have that provision, the same one that is in there now about the effect of an Adoption Order on a child’s inheritance rights. And so it is legally to not have something in there to say what happens to the inheritance rights of the child when they are adopted would be a bit of a gap. So we initially framed it exactly as it is in the current Act and it was

the iTaukei Affairs that raised that issue and want clarity around what happens with customary and cultural rights. Then there has been, I believe, some discussions since then but no resolution to the challenge.

So we would have to take out completely Clause 30 on the effects of an Adoption Order, but then that would leave it unclear in law of the inheritance rights of any child who is adopted. Most adoption laws in common law countries would have a clear provision to say, "Now that you are adopted, this is your legal relationship to those parents". As soon as we say anything about their legal relationship to their new birth parents that raises the red flag of their cultural rights and land rights. So it would be tricky to get around that issue and also tricky to come up with a solution that everyone is happy with, I think.

DEPUTY CHAIRPERSON.- Thank you.

HON. RATU T. NAVURELVU.- Deputy Chairperson, just one question; Adoption Order is concerning only orphaned children?

MS. S. CASEY.- It includes any child who is formally adopted. So it would not necessary have to be an orphaned child but only formal adoptions process through the court. So it does not cover custom or informal adoptions, only those that are processed through the court. And then it might be a baby who is an orphan, a baby abandoned at the hospital or young mother who is unwed and wants to give her child up for adoption; any of those cases would be captured right here.

HON. RATU T. NAVURELEVU.- In regards to the customary right to be given to an adopted child, I am thinking that maybe, consent can only be given to an adopted child who really does not know his or her father or mother or where he or she is from I think that best suits a child to be given the customary right.

When someone is an adult and then we adopt him/her, he/she knows that he/she is from this community, he knows his father and his mother and has been adopted to a custom. As Honourable Niko Nawaikula said, in a shoal of fish and if there is a different kind of fish, it will cause a lot of problems. So I think customary right can be given to an adopted child who really does not know where he/she is from, he/she has been adopted when he/she was young and has lived with them, drink and eat, he knows the customs and the tradition, especially when he/she grows up he contributed a lot in the community, as Honourable Niko Nawaikula has alluded to. I think that is the best way in terms of human rights.

I think we must recognise that he is a member of my family, he is in my community, my *mataqali* so he must be given the total right to use the land and all the customary rights. *Vinaka vakalevu.*

DEPUTY CHAIRPERSON.- Thank you very much, PS, and the team. Thank you for availing your time.

From Monday, we will be starting from Serua Province, Navua, Sigatoka, Nadi, Lautoka, Ba, Tavua, Rakiraki, Tailevu and then Vunidawa on Saturday. So definitely, Sunday we will rest and Tuesday, we will fly to Labasa. We will cover the whole of Vanua Levu until the other week on Saturday.

As I have said and as Honourable Chairman already said, these types of questions will definitely come. If there are some Officials from the Department of Social Welfare who can clarify their doubts and can answer them, it will be much better. But, thank you, Sir, for availing your time. We will break for tea now so I would request the team to join us for morning tea. Thank you.

The Committee Interview adjourned at 10.35 a.m.