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**Fiji Law Reform Commission
Family Law Reform**

**Affiliation Orders
Discussion Paper 3 - 1997**

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PREFACE

The Fiji Law Reform Commission has been given the reference to inquire into and to report on the efficiency and effectiveness of the existing laws relating to family and domestic proceedings, and to make recommendations for the appropriate legislative means of reforming these laws to implement a unified and comprehensive system of family law. The reference was given to the Commission by the Attorney-General & Minister of Justice in October 1996. Ms. P.I. Jalal is the Commissioner responsible for Family Law Reform.

This paper looks at one area of family law, namely Affiliation and Maintenance for ex-nuptial children. Papers on other areas of family law will follow this paper.

You are invited to make comments and submissions on the options set out in this paper. Your criticisms and comments will assist us in preparing a final report to the Attorney-General & Minister of Justice on how the law dealing with divorce can be reformed.

Written comments should be sent to.

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Please note that this discussion paper is designed to encourage, public participation and debate on Affiliation and Maintenance for ex-nuptial children. It is not a final report and does not necessarily represent the final views of the Commission.



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18 December 1997

**FAMILY LAW REFORM : AFFILIATION AND
MAINTENANCE FOR EX-NUPTIAL CHILDREN**

I am pleased to enclose a copy of Fiji Law Reform Commission's discussion paper on Affiliation and Maintenance for ex-nuptial children. This discussion paper is the third in a series of papers that will be published by the Commission on different areas of family law.

The paper looks at the anomalies in the existing law and policy that affect ex-nuptial children. These anomalies and disparities are considered against the backdrop of:-

- changing social attitudes
- adverse effects of the archaic law and policy
- progressive developments in other jurisdictions
- constitutional safeguards and implications
- Treaty obligations under the United Nations Convention on the Rights of the Child and the United Nations Convention on the Elimination of all forms of Discrimination Against Women

Upon examination of these issues and comparison with the position in other countries, this paper highlights the problem of obsolescence of family law in Fiji, and puts forward a number of options and recommendations.

The Fiji Law Reform Commission invites submissions or comments on the issues and proposals discussed in this paper. Please note that the views and options put forward in this discussion paper are intended to encourage community discussion and input, and are not necessarily the final views of the Commission. Comments on this paper should be addressed to the Commission and reach it by 31 February 1998.

Yours sincerely

FP [Florence T. Fenton]
Director - Fiji Law Reform Commission

TABLE OF CONTENTS

Executive Summary

2	Introduction	p 1
3	Should ex-nuptial children have a different legal status?	p 1
4	Are the statutory time limits reasonable?	p 4
5	Who may apply for an affiliation order?	p 5
	Is an affiliation order necessary?	p 7
	What kinds of evidence are required for an action?	p 9
	What is the status and purpose of blood, tissue, and DNA tests?	p 11
	How long should maintenance payments last?	p 13
	Who has rights to custody of ex-nuptial children?	p 14
	Jurisdiction of the Court	p 15
	Summary of recommendations	p 16
	Notes	p 18
	Bibliography	p 21

EXECUTIVE SUMMARY

Obtaining and enforcing maintenance or child support is a major problem in Fiji. Legally imposed standards of legitimacy add another layer of difficulty to this. They duplicate law and practice in ways that are wasteful and socially unjust. The main issues that will be addressed here are:

- The different legal statuses of children**
- Time limitations and restrictions for affiliation actions**
- Who may apply for an affiliation order**
- Whether an affiliation order is necessary**
- The evidence requirements for an affiliation action**
- Whether corroboration is necessary**
- The status of blood, tissue and DNA tests in affiliation actions**
- The duration of maintenance payments**
- Custody and access of ex-nuptial children**

These issues are considered in the light of the UN Convention on the Rights of the Child 1989, the UN Convention on the Elimination of all Forms of Discrimination Against Women 1985, the Constitution of the Republic of Fiji, and the legal obligations which flow from them.

The reasons for making distinctions between nuptial (or legitimate) and ex-nuptial (or illegitimate) children cannot be justified morally, economically or socially. The law ought to reflect this.

In recognition of this fact many jurisdictions have taken progressive steps to provide for the best interests of children equally and equitably. Reform efforts must of course remain mindful of the conditions peculiar to Fiji when tailoring the experiences of these jurisdictions to local needs.

The recommendations of the Fiji Law reform Commission within this paper seek the abolition of the differing legal status of nuptial and ex-nuptial children. It also aims for the provision of basic child support to the majority of children.

AFFILIATION ORDERS - MAINTENANCE FOR EX-NUPTIAL CHILDREN

1.0 *Introduction*

1.1 Children of legally married parents automatically receive maintenance. In contrast mothers of *ex-nuptial* (or natural or 'illegitimate') children -whose parents are not married- have to prove paternity in order to receive maintenance for their children. For this she will need an affiliation order which confirms the alleged defendant male as the putative father of her child. The Magistrate will then consider whether maintenance is necessary. Proving paternity is a difficult task. The legal proceedings contain several anomalies and discriminatory practices against female complainants which contravene the CEDAW and the Fiji Constitution.

1.1.1 This disparity highlights the legal disabilities of children born to unmarried parents. This is unconstitutional since children are now guaranteed equal legal status regardless of their birth circumstances¹.

1.2 *International Treaty Obligations*

1.2.1 Despite social change the law has not altered to reflect these needs. It is appropriate to assess such laws in light of Fiji's moral and legal obligations under the UN Convention on the Rights of the Child (CRC) and the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). In formulating new laws to reflect the principle of the "best interests of the child" the CRC strengthens Fiji's earlier commitment under the CEDAW.

1.3 This discussion paper looks critically at the current law and suggests options for reform in light of progressive developments in other common law countries.

2.0 *Should natural children have a different legal status?*

2.1 Giving children different status depending on their parents' marital status was unknown in traditional Pacific cultures². The law in Fiji, as imported from Britain, discriminates against ex-nuptial children. The English common law preserves the status of legitimacy for property and religious reasons. Such children are deemed children of the marriage, in only specified circumstances³.

2.1.1 The legal and social implications for an ex-nuptial child are many. S/he is not eligible for any financial support unless paternity is proved, and then only until 16 years of age⁴; for inheritance claims to either parent's estate at intestacy, unless specified or there are no other surviving legitimate issue⁴. Illegitimacy itself can be a social and psychological burden.

The present law

- 2.2 The *Maintenance and Affiliation Act* Cap. 52 ("MAA") governs all matters pertaining to ex-nuptial children. Those pertaining to other children of the marriage, whether or not legitimated under the *Legitimacy Act* Cap. 57, are governed by the *Matrimonial Causes Act* Cap 51 ("MCA"). Separate rules correspond to each legislation. Such parallel regimes create confusion in law and practice.
- 2.2.1 The *Convention on the Rights of the Child* ("CRC") prohibits discrimination on the basis of "birth or other status"⁵. No discrimination against, or punishment to, the child is tolerated on account of his/her parents' status. It gives rights to children which were previously attributed only to adults. The "best interests of the child"⁶ principle underpins these rights and imposes a duty on state parties to ensure direct and continued contact between child and her/his parents⁷ irrespective of their status⁸. The CRC evolved from the *UN Declaration of Human Rights 1948* which declares that 'all children whether born in or out of wedlock, shall enjoy the same social protection'⁹. Equal legal status is also guaranteed¹⁰.
- 2.2.2 The CRC aims to shift the legal burden or disability from the child to his/her parents. This is in keeping with the legal maxim in which each individual is responsible for, or bears the legal burden of, his/her own "offence" or wrong doing; not a third party. Prioritising 'fault' unfairly eclipses more important issues of the care and welfare of the children. This can partly be achieved by abolishing the different legal status of children.

The law elsewhere

- 2.3 Changing social attitudes have removed the distinction in seven Canadian jurisdictions. In New Zealand every person's relationship with his/her parents must not be defined by the parents' marital status¹¹. This applies to any person born at any time in, or outside of, NZ whose parents may not be domiciled in NZ¹². All entries relating to illegitimate children are 'deemed to be expunged and deleted'¹³.
- 2.3.1 The (UK) *Family Law Reform Act 1987* shares this objective. It improves the unmarried father's position in gaining parental responsibility for his children's upbringing, but not automatically¹⁴. It prevents any law passed, or legal document made, after the Act came into force from expressly including children of, or other relationships traced through, unmarried parents. These are included in all familial references like 'father', "son" or 'grandfather' unless a different intention is specified¹⁵. The *Children's Act 1989* follows the same policy.
- 2.3.2 This position is ambiguous, and less bold than in NZ. However, in both cases the status of legitimacy is losing its meaning. Many parents favour cohabitation over marriage and planned to have, children. Accordingly the focus has also shifted from making material provision for the future of a few select children to the future welfare or best interests of all children.
- 2.3.3 The law should also be mindful of future categories of children which may introduce other prejudices. Artificial or donor insemination, cloning, surrogacy, *in vitro fertilisation*, sex-selection, will all raise questions about parentage and children's status.
- 2.3.4 Children form part of a family in different ways. A couple may be unofficial guardians

of a child who, in law and tradition, cannot justifiably adopt the child. The couple may not be married^{14A}. Alternatively if married, one or both parents/may have adopted the child. In another scenario a child may simply have been a member of the family at the time of the break-up. The law, in defining a child of the marriage, should accommodate these situations. It may go further to qualify this definition for particular circumstances or issues^{15A}.

2.4 *Options for Reform*

- 2.4.1 Administering two separate regimes based on the different legal status of children is unwieldy and costly. The objective of the CRC and the CEDAW is to remove such barriers and thus relieve social and community burdens. This cannot be fulfilled without legal reforms.
- 2.4.2 The current social environment encourages the application of international human rights standards. Children being born outside marriage is more commonplace and there is less social stigma. Marriage has thus become less relevant to a child's legal position. So, the law should refer more to parental, rather than parent-child, relationships. As the need to express the legal status of children in the law narrows, it becomes necessary to review the status and validity of the Legitimacy Act. It also necessitates one consolidated legislation for uniform application to all children without prejudice. This will simplify the law.
- 2.4.3 The shift is evident in statutory definitions in other jurisdictions. A child of a marriage includes children who are ex-nuptial, biological, artificially inseminated, adopted or not, still born, nuptial or of no blood relation to either parent^{16A}.

2.5 *Recommendations*

- 2.5.1 The separate status given to legal and natural children is unjust and irrelevant and should be removed.
- 2.5.2 The Legitimacy Act should be revised and renamed accordingly, if not repealed.
- 2.5.3 There should be one uniform legislation which regulates all matters affecting children generally with no reference whatsoever to their legal status;
- 2.5.4 That a definition of a child of the marriage should include all children in defined circumstances. For instance, a child of the husband and wife including any other who was a member of both parents' family at the time of the break-up or application for court action. This extends to those born before the marriage, of an annulled or dissolved marriage, of a marriage terminated by one parent's death, through artificial conception procedures, or adopted by one or both parents.
- 2.5.5 In terms of maintenance entitlements the age discrimination between nuptial and ex-nuptial children should be removed

3.0 *Are the Statutory Time Limits Reasonable?*

- 3.1 An affiliation hearing will determine the *putative* father of the child. It will then depend on the court's discretion *judging all the circumstances of the case* whether or not he is liable to maintain the child¹⁶. A single woman *may* file an affiliation application during her pregnancy or within 12 months after birth¹⁷. Outside of that period she must prove financial or other support by the "father" during the 12 month period; if he was abroad, within 12 months of his return.
- 3.2 The strict and short time limitations are unrealistic. They disadvantage many women whose access to justice is impeded; rural women especially. They also compound the many dilemmas women face and should resolve before taking court action.^{17A}
- 3.3 Other jurisdictions provide for longer time limits¹⁸. In NZ and Solomon Islands the High court can extend it for a good cause¹⁹. There is no such flexibility in Fiji. Australia^{19A}, Tuvalu and Kiribati impose no statutory time or age limits. In Australia only an action for child bearing expenses by the father must be brought within twelve months^{19B}.

3.4 *Options for Reform*

- 3.4.1 Extending the time limitation beyond 12 months has worked satisfactorily in other jurisdictions. It allows time for a prospective applicant and defendant to prepare for the case. They may reach a workable arrangement without further need for court action.
- 3.4.2 A provision permitting applications out of time should screen off vexatious proceedings. It should also ensure that the court is provided with fresh evidence as soon as possible.
- 3.4.3 Fixing no statutory limitations may create hardship on the alleged father if the paternity order is retrospective to the date of birth. Generally the alleged father has some idea of his purported offspring. Any resulting hardship may be cured by appropriate court guidelines in awarding the sum, and the manner of payment.
- 3.4.4 In all three options the child may be deprived of any child support for the duration of the limitation period. This is avoided if the object of the court action is to confirm paternity and identify the liable parent. Thus the child is guaranteed financial support. In this regard the Australian law offers a desirable option. The following recommendations should work if the payment of child support continues in spite of an affiliation hearing whose primary objective is to identify the liable parent.

3.5 *Recommendations:*

- 3.5.1 The statutory time limits for application for an affiliation order should be increased to 3 or 6 years
- 3.5.2 The legislation must provide for applications out of time, upon reasonable grounds.
- 3.5.3 Alternatively, the legislation sets no time limitation for affiliation applications.
- 3.5.4 In both instances, appropriate guidelines should facilitate the work of the court.

4.0 *Who may apply for an affiliation Order?*

4.1 A single woman at the time of birth may apply for an affiliation order²⁰. This includes a married woman who is separated from her husband²¹ which is premised on the English common law principle that such a wife has lost the common law right to be maintained by him²². Where the mother dies "the person in whose care the child" is placed may make the application²³.

4.1.1 That an affiliation action is optional for women raises some problems where the alleged defendant is married. A woman may be less likely to take such option which might cause disrepute and embarrassment. A court action may also jeopardise the defendant's family stability. In not taking the affiliation action, the opportunity for child support or maintenance is also forgone. The direct relationship between affiliation and child support should be avoided and reviewed.

4.1.2 The court can refuse a single woman's application²⁴ if the Magistrate, arbitrarily,:-

- doubts the application is in good faith
- suspects the application aims to threaten or blackmail
- is not satisfied that there is reasonable cause to believe the alleged putative father is the father of the child

Such refusal can only be challenged by judicial review in the High Court which is a costly and burdensome step.

4.1.3 Such adverse assumptions about women imply that they are at fault. They flag their purported sexual impropriety, bad faith and intentions of threats and blackmail to taint the alleged father's credibility. Such legal assumption are irrelevant, and trivialise women's real fears for the predicament and welfare of their children. These assumptions disadvantage women and children, are unconstitutional, and offend the *CEDAW*, and the *CRC*. Legislating for the best interests of the child in no-fault and gender-neutral language and objectives will rectify this difficulty.

4.1.4 Where paternity is not disputed and the father cares for the child, does he have any similar right to apply? He does in other countries, as noted above. No such remedy exists in Fiji law. Fathers who need legal redress for the best interests of their children are thus unfairly disadvantaged.

4.2 To this end the right to apply should vest evenly in either or both parents. In Tonga either the child's mother or care-giver may apply. Failing that, a "reputable" person, or the State via the Attorney-General, must apply²⁵ for the sake of the child. This may be useful leverage in a community which lacks a welfare system of benefits.

4.2.1 In UK, NZ and Australia the right to apply for child support is given to a wider range of people. A parent, guardian, the child, social welfare if the child is in its care, or a child's legal representative may apply if it is appropriate in the case. In NZ if the mother is under 16 years her custodian may apply for a paternity order. With a mother's consent a social worker may apply²⁶. Both jurisdictions also provide for children who were conceived artificially.

4.2.2 Notably a paternity order is not necessary for the payment of child support to the child or her/his relatives; only if the presumptions of parentage are disputed by the father. If he is successful he will stop paying his liable parent contribution for child support. In these countries, the child's other parent must be identified in law specifically for this purpose. Failing that, a reduced benefit is paid

unless one of three conditions applied. The child was conceived through incest or sexual violation, there is insufficient evidence to establish who in law was the other parent, or identification would jeopardise a stable family relationship of that parent²⁷. These are essentially policy considerations.

4.3 *Options for Reform*

4.3.1 A gender-neutral law promises better options. It permits either parent and/or guardian with the care arrangements and upbringing of the child to seek child support, with or without an affiliation order. Failing that, the state has a duty through a welfare officer, *guardian ad litem*, court-appointed counsel or representative, or other designated person to secure it for every child. It will test the capacity of the state to administer child support at such magnitude.

4.3.2 Much hardships and injustices are thrust upon natural children under the current system. These include a failure of the law to provide social redress, and implement Fiji's legal and treaty obligations. Yet these laws commit much needed resources which are best diverted to reasonable, just and productive laws. For instance, the rationale for bringing an affiliation action should confirm a parent's liability for contribution in child support.

4.4 *Recommendations*

4.4.1 The legislation should define the range of people who may apply for child support or maintenance, beyond the child's mother.

4.4.2 Both parents or guardian, in particular the person who has the primary care-giving role and upbringing of the child, may apply with no legislative presumptions of fault on any party

4.4.3 Child support proceedings must be distinguished from paternity proceedings

4.4.4 That there be a guideline for either type of proceedings.

5.0 *Is an Affiliation Order necessary?*

5.1 An affiliation Order is made by the Court to determine the father of a child, where the parents are not married. A woman -who is the "applicant" or 'complainant'- applies to the court and claims that a specified man - the 'defendant' - is the father of her child. A married woman cannot apply unless she has been separated from her husband²⁸. It is noteworthy that maintenance obligations do not automatically flow from an affiliation order. Yet it is the main objective for women who exercise this option since no other means of child support is open to them. In light of the waning stigma attached to illegitimacy²⁹, separate laws and processes for the purpose of child support are uneconomical and unsound³⁰.

5.1.1 Affiliation and paternity orders are used interchangeably. However, their contexts differ. The predecessor of an affiliation order was a bastardy order³¹. It is specific to illegitimacy, whereas paternity orders confirm a child's father regardless of any legal status. Increasingly paternity orders are significant for child support purposes. It is thus more relevant today.

5.1.2 A possible solution which is in line with recommendations to remove legal differences between children, is the presumption of parentage rule. Legislation should define the rule to decrease the need

for unnecessary affiliation actions. In simplifying the law this rule should also facilitate a uniform child support system. It will only be necessary for the court to hear paternity disputes either to rebut or disprove a parentage presumption.

5.2 In NZ paternity orders replaced affiliation orders since the Domestic Proceedings Act 1968 which coincided with the enactment of the status of Children's Act 1969. Corresponding former Acts provided for affiliation orders.

5.2.1 Other jurisdictions have standard laws and administration for family/child support³². No affiliation actions are taken in NZ, UK or Australia for this purpose. Their child support schemes do require the identification of qualifying, and in turn liable, parents. Legislative presumptions of parentage³³, similar to those which appear in the Legitimacy Act³⁴, ease this task.

5.2.2 Outside these presumptions paternity orders are necessary to determine a parent's liability to pay child support contribution. Blood or DNA tests may be critical³⁵. In NZ, a paternity order is conclusive evidence of paternity for the purpose of maintenance liability³⁶. In all other proceedings it is only *prima facie* evidence of paternity and needs to be supported by further evidence. Commonly disputes are initiated to stall one's liability to pay or with the slim chance that relevant tests results will excuse a defendant from liability.

5.3 *Options for Reform*

5.3.1 Retaining affiliation actions in their current form will continue the unnecessary burden on the Courts, women, children and society at large. It is dated and goes against current trends to find equitable law and policies which are sanctioned by international customary laws. It will also bring into question the value of law in providing remedies to society's needs.

5.3.2 Another option is to streamline maintenance administration with a view to savings. Abolishing affiliation proceedings is a start. Presuming parentage in defined situations will then remove further unnecessary court actions. Only those cases which are genuinely on the borderline will be contested. At least the majority of the children will be provided with basic child support. This option has the added advantage of sharing the burden of initiating court actions between the parties.

5.4 *Recommendations*

5.4.1 Affiliation proceedings should be abolished.

5.4.2 That applications for paternity orders are limited only for the purpose of determining the liable parent for child support.

5.4.3 Child support proceedings must be distinguished from paternity proceedings

5.4.4 The law make presumptions of parentage in defined circumstances. For instance:

- the name of the person has been duly registered as the father or mother of the child
- the paternity of the child has been established by a court and has not been reversed
- arising from marriage
- arising from co-habitation

- arising from acknowledgments of parentage in other instruments
- by a High Court declaration that the defendant is the father of the child under any other law or rule of law

5.4.5 That all children are guaranteed basic child support

6.0 *What kinds of Evidence are required for maintenance?*

- 6.1 Is corroboration necessary? In an affiliation action the Magistrate must hear evidence by both the "mother" and the alleged "father", and by their respective witnesses³⁷. If the Magistrate is satisfied that the mother's evidence is corroborated, or proven, by other evidence", s/he can make an affiliation order confirming the alleged defendant as the child's "putative father"³⁸.
- 6.1.1 "If [the magistrate] sees fit in all the circumstances of the case..." then maintenance will be awarded for "maintenance and education", "expenses incidental to the birth of the child", "funeral expenses" if the child died before the order, and costs of the affiliation action³⁹. It is not awarded automatically⁴⁰.
- 6.1.2 "Corroboration involves evidence which shows or tends to show that the story is true"^{40A}. For the complainant's evidence to be corroborated, it has to be independently proven. Then the court may pronounce the alleged defendant as the 'putative' father. For instance, a witness may tell the Court that she saw the mother in circumstances which suggested sexual intercourse with the defendant at a certain time. The court will then calculate if that time falls at about the possible conception dates. It is not easy to find such "corroborative" evidence given the very private and secretive nature of extra- or pre-marital sexual relationships particularly in societies such as Fiji.
- 6.1.3 If the complainant cannot adduce corroboration, she cannot prove her claim. She may if the defendant admits it in Court, or to a third Party, or by implication (allows his name to be registered in the birth certificate, by his conduct, or suggestions). Failing all she needs to find independent witnesses.
- 6.2 The corroboration rule applies generally in criminal cases to sexual assault, and paternity claims. Women are the complainants in both types of offences. By casting such onerous burdens on women to prove their claims the law treats women differently from other witnesses in court hearings. In paternity suits additional corroborative evidence is a mandatory requirement. It is based on the belief that "vulnerable witnesses", such as women and children, may lie about sexual matters. This is despite the fact that in court the rules of cross examination are intended to elicit purported lies.
- 6.2.1 On the other hand women complainants often endure aggressive cross-examinations which contain insinuations of their purported sexual promiscuity or similar scandalous traits. These are often made despite their inadmissibility or irrelevance, or despite corroboration having been established. In some cases they have successfully clouded and affected the court's judgment⁵.
- 6.2.2 Where a defendant feels genuinely victimised sufficient civil or criminal remedies exist. Corroboration is also an official -though non-deliberate- device to dissuade women from taking affiliation actions. It is an unnecessary burden with the potential to undermine the best interests of the child. It is

unconstitutional and has been ruled so in other jurisdictions. The rule offends the CRC, CEDAW and Article 16 of the Constitution.

6.3 *Other Jurisdictions*

6.3.1 In NZ, there is no requirement of corroboration⁴¹. If a mother chooses to give evidence corroboration is not necessary⁴². False statements which are made in paternity application, and which would amount to perjury under oath, are liable on summary conviction to a fine of \$1,000 as per the Crimes Act⁴³. There is a blanket ban on the corroboration requirement in all evidentiary matters in Australia⁴⁴. In Canada, legislation does not require corroboration and the common law has ruled it unconstitutional⁴⁵.

6.3.2 The legislation in Australia, and to some extent in New Zealand, forbids aggressive cross-examination with its protective provisions for witnesses⁶. The court ultimately decides on whether a question is unduly offensive, scandalous, insulting or abusive. Such a protective regime seems to fit well into the conciliation model, the relative court informality, and the respect for privacy. However, thorough cross-examination is not compromised in situations when a fact needs to be tested.

6.4 *Options for Reform*

6.4.1 Consistent with the general move away from fault, corroboration is an unnecessary burden which weighs heavily against the best interests of the children. With parentage presumptions the burden of disproving a presumption shifts to the father. This alone renders corroboration unnecessary. It should be abolished accordingly. This is also the general approach in evidentiary regimes of other jurisdictions.

6.4.2 Witnesses' and parties' privacy should be observed and protected in the legislation which should dictate fair and sound procedures

6.5 *Recommendations*

6.5.1 It is not necessary that a mother gives evidence in any paternity action

6.5.2 If a mother does give evidence, the corroboration requirement is not necessary

6.5.3 There should be no legislative presumption for corroboration in family proceedings

6.5.4 Alternatively that the corroboration requirement be abolished in affiliation cases if such cases continue

6.5.5 There should be a penalty provision for false statements which amount to perjury

6.5.6 Witness protection provisions should be defined in the legislation

7.0 *What is the status and purpose of Blood, Tissue and DNA Tests?*

7.1 Some corroboration is given by means of blood tests on the child, mother and the alleged putative father. The legislation does not provide for a compulsory testing regime. It must be voluntary and the father's consent is essential. Between September 1986 and 1990 only 50 out of 793 defendants in affiliation cases filed in the Suva Domestic court agreed to take the test. The practice has developed unofficially to ease the court's task. This leads to the practice where positive results, while corroborative, still allow the defendant to deny paternity warranting a full court action yet again. Complainants must then find other evidence.

7.1.1 Blood testing is useful only in so far as it proves that the defendant is not the father if all three parties do not share blood groups. Although it cannot conclusively prove that the defendant is the father, it is a useful shield against a false accusation of paternity. Without legislative powers the court is reluctant to draw inferences from a defendant's refusal to take such tests. At least the court's power to make such inferences exists in common law. The standard testing facilities available are basic but costly. More sophisticated facilities which also test tissue- or DNA-types, and evidently give more accurate results, are not available in Fiji. The resource implication of bringing in these facilities need to be considered along with their accessibility, requisite skills, costs and other policy concerns.

The law in other jurisdictions

7.2 In UK and NZ, when a statutory presumption of parentage is challenged the court may recommend tests with or without the parties' request⁴⁷. Each party shares the costs unless the court orders otherwise⁴⁸. Test results are admissible evidence. If a party refuses to take the test the court may draw such inferences as appear just in the circumstances⁴⁹. Similarly, if the court is satisfied that the test is being misused either to stall the proceedings or for any other purpose, the court should be able to adjudge him as the liable parent or refuse the test⁵⁰.

7.2.1 The result must be accompanied by an expert report. It explains how the result determines whether the defendant is, or is not, a likely parent⁵¹.

Options for Reform

7.3 A compulsory testing regime requires appropriate facilities, skills, money and other resources. It is unlikely that the state will pay for its use. Such a regime is potentially wasteful, and may also breach the constitutional rights of the defendant.

7.3.1 Tests are best recommended only when paternity is disputed. This means that even a defendant who fits a statutory presumption of parentage can apply for the test if he simply wants to satisfy himself. For instance, a husband may suspect his wife's child is fathered by another man. However, the regime targets only those cases with a higher likelihood of paternity being disproved. The court can be guided by a checklist to select such cases. Either parent, child, relative in certain cases, social worker or other state or appropriate non-governmental organisations may request the taking of tests with the consent of the parties. The legislation needs to define the process of obtaining these consent, particularly of the child.

7.4 *Recommendations*

- 7.4.1 Paternity tests of blood, tissue or DNA should be provided for in the legislation, provided facilities are available, and financial resources permit it.
- 7.4.2 The test results should go to proving or disproving presumptions of parentage.
- 7.4.3 The tests are not compulsory but recommended by the court at the request of the court or other specified people.
- 7.4.4 All the parties must consent to take the test using the consent-process defined in the legislation guideline.
- 7.4.6 The court will award costs as set by law between the party(ies), or as it deems just.
- 7.4.7 Refusal to take the test will allow the court to make appropriate inferences.

8.0 *How long Should Maintenance Payments last?*

- 8.1 Natural children face another disability in the duration of maintenance payments. Legitimate children are paid maintenance until 18 years of age; natural children to 16 years or 13 years by Court order⁵². This age difference is arbitrary and lacks a rationale.
 - 8.1.1 A legitimate child may continue to receive money after 18 years if "there are special circumstances that justify [it] for the benefit of the child"⁵³ if the parents divorce. Ex-nuptial children do not share this benefit. In contrast the magistrate may order the termination of the affiliation order to a ex-nuptial child at 13 years of age^{53A}. The Magistrate is merely to be satisfied that the child receives substantially sufficient income to maintain her/himself. There is no guideline as to how this discretion ought to be exercised.
 - 8.1.2 This discrimination violates the CRC and constitutional guarantees. Maintaining different regimes based on different legal status is unjust, confusing and unmanageable.

8.2 *Other Jurisdictions*

- 8.2.1 In the UK orders can be made for children who have reached 18 years if they are still undergoing training (even if combined with a job) or other special circumstances exist⁵⁴. The Court retains such powers under the MCA to order financial provision to children over 18 years in, or top up payments to sums derived from, the Child Support Act 1991. The law is similar to that in Australia⁵⁵. Child support also terminates upon the child's death, adoption, entering into marriage or a de facto relationship⁵⁶, or loss of citizenship or residency in NZ⁵⁷.

8.3 *Options For Reform*

- 8.3.1 The present regime is expensive, discriminatory, and unconstitutional. It undermines the best interests of children. The distinction, based on children's status, is artificial, dated and a legal anomaly.

- 8.3.2 It is fair, reasonable and sensible to remove the different conditions and age limits for the duration of maintenance support. It will give clarity and efficiency to law and practice, whilst ensuring that children are financially supported until a reasonable termination point as defined in the legislation. To this end it is logical to standardise the age limit to 18 years unless there is earlier termination.

8.4 *Recommendations*

- 8.4.1 The maximum age limit for the duration of a maintenance order should be standardised to 18 years regardless of any purported legal status.
- 8.4.2 The court should be empowered, aided by a guideline, to extend maintenance support beyond 18 years.
- 8.4.3 The law should define other instances when a maintenance order stops being in force.

9.0 *Custody and Access of Natural Children - Who has rights to custody?*

- 9.1 In this context, several questions arise. Should custody and access be tied up with the granting of maintenance? In particular, should access be dependant on whether or not maintenance is paid? Does the "putative" father have any custody or access rights? If so how do these weigh against the rights of the mother? How do all these issues compare in relation to the rights or best interests of the child?
- 9.1.1 The circumstances of each child will vary. The current regime is inconsistent. For instance, interim custody is not possible under MAA only under MCA⁵⁸. This discriminates against natural children.
- 9.2 In affiliation cases the common law⁵⁹ gives absolute custodial rights to the mother unless she is clearly an unfit or impeachable parent, or she permits the father or another person to take custody. This is true even after an affiliation order is made. The reason for seeking one differs for each case. It may involve an established *de facto* relationship or a short, fleeting affair. The important policy issue is whether or not children in either situation have rights to know and have contact with both parents.
- 9.2.1 The CRC requires that each child has the right to know and to have direct and indirect contact with either parent. This should be facilitated by the state, if the parents are unable to arrange it. Guidelines will assist in each case, as would any appropriate counselling. Parental rights to either custody or access is now qualified by what are in the child's best interests. A compromise situation exists in the UK law where a natural father's parental responsibilities do not automatically flow from a paternity order⁶⁰. It is noted that women compete with men for custody on unequal terms. However in the children's best interests standard principles and rules should apply for custody cases of all children with the legislation stipulating any exception.
- 9.3 In other jurisdictions, de-facto parents are treated equally in maintenance, custody and access matters. Marriage is defined to include them, at least for these issues⁶¹. These three issues should be treated independently which is in keeping with the CRC. The father's right as a guardian of his/her child arise not in his marriage to, but also from co-habitation with, the child's mother⁶². In Fiji the cultural obligations may impose higher burdens on a father, who was involved in a short-term affair

without cohabitation, to assume some parental responsibilities as a guardian. This is a matter for policy formulation.

- 9.4 There is some logic in the argument that the father in a long term de facto relationship should be eligible to apply for custody. The same is not necessarily true for children born of fleeting relationships, or one in which the father has denied paternity in unreasonable circumstances in unreasonable circumstances forcing the mother to prove paternity.

9.5 *Options for Reform*

- 9.4.1 Reforms which effectively streamline administrative and other resources make good sense. It simplifies court processes and case management. Parenting plans or parental responsibilities will remove fault, shed some barriers and usher in more co-operative parenting options. Effective guidelines will aid the court's decision-making in such a sensitive area.

9.5 *Recommendations*

- 9.5.1 The legislation should allow both parents to apply for custody and access.
- 9.5.2 The guardianship status of either parent, relative or other person(s) should be defined.
- 9.5.3 Legislative guidelines will be a useful aid for the court in deciding on custody or access.
- 9.5.4 Whether the father is eligible to claim custody/access depends on whether there was a long standing de facto relationship. A father who has denied paternity forcing a paternity suit may not claim custody.

10.0 *Jurisdiction of the Court*

10.1 The CRC allocates to parents their responsibilities for the best interests of the children regardless of the circumstances of their birth, with the state and community support. A key element in this support resides in the High Court 'inherent' or administrative power or jurisdiction as 'parens patriae'. In this role the state is the guardian of classes of persons who need special protection by virtue of their legal disability, such as children. In safeguarding children's best interests this jurisdiction should be confirmed by legislation to ensure court intervention in all children's matters without unnecessary delay or debate. Such difficulties have stalled decisions on children's care issues thereby compromising their best interests, in known cases which searched for such powers in the existing law.

10.2 It follows from this position that the court will be discouraged from making 'no order' in situations which may arise under s7 MAA. No-orders delay decisions on children's care and welfare and sets in undue hardship which clearly defeats the purpose of any legislation.

10.2.1 Australia has abolished no-orders by the court; UK retains it. It is in keeping with the CRC that court orders are made swiftly, even in the interim.

10.3 Recommendations

10.4 The court's inherent jurisdiction as 'parens patriae' should be confirmed and defined in the legislation.

10.5 The legislation makes no provision for no-order situations

SUMMARY OF RECOMMENDATIONS

- 1.5.1 The separate status given to legal and natural children is irrelevant and unjust and should be removed.
- 1.5.2 The Legitimacy Act should be revised and renamed accordingly, if not repealed.
- 1.5.3 There should be one uniform legislation which regulates all matters affecting children generally with no reference whatsoever to their legal status;
- 1.5.3 That a definition of a child of the marriage should include all children in defined circumstances. For instance, a child of the husband and wife including any other who was a member of both parents' family at the time of the break-up or application for court action. This extends to those born before the marriage, of an annulled or dissolved marriage, of a marriage terminated by one parent's death, through artificial conception procedures, or adopted by one or both parents.
- 2.5.1 The statutory time limits for application for an affiliation order should be increased to 3 or 6 years.
- 2.5.2 The legislation must provide for applications out of time.
- 2.5.3 Alternatively, the legislation should set no time limitation for affiliation applications.
- 2.5.4 In both instances, appropriate guidelines will facilitate the work of the court.
- 3.4.1 The legislation should define the range of people who may apply for child support or maintenance beyond the mother of the child.
- 3.4.2 Both parents or guardian, in particular the person who has the primary care-giving role and upbringing of the child, may apply with no legislative presumptions of fault on any party
- 3.4.3 Child support proceedings must be distinguished from paternity proceedings
- 3.4.4 There should be a guideline for either type of proceedings.

- 4.4.1 The affiliation proceedings should be abolished and replaced by paternity proceedings.
- 4.4.2 That applications for paternity orders are limited only for the purpose of determining the liable parent for child support.
- 4.4.3 Child support proceedings must be distinguished from paternity proceedings
- 4.4.4 The law make presumptions of parentage in defined circumstances. For instance :-
- the name of the person has been duly registered as the father or mother of the child
 - the paternity of the child has been established by a court and has not been reversed
 - arising from marriage
 - arising from co-habitation
 - arising from acknowledgments of parentage in instruments
 - by a High Court declaration that the defendant is the father of the child under any other
- 4.4.5 That all children are guaranteed a basic child support
- 5.5.1 It should not be necessary that a mother gives evidence in any paternity action
- 5.5.2 If a mother does give evidence, the corroboration requirement is not necessary
- 5.5.3 There should be no legislative presumption for corroboration in family proceedings
- 5.5.4 Alternatively that the corroboration requirement should be abolished in affiliation cases if such cases continue
- 5.5.5 There should be a penalty provision for false statements which amount to perjury
- 6.4.1 Paternity tests of blood, tissue or DNA should be provided for in the legislation, provided facilities are available.
- 6.4.2 The test results should go to proving or disproving presumptions of parentage
- 6.4.3 The tests are not compulsory but recommended by the court at the request of specified people or the court itself
- 6.4.4 The consent of all the subject parties to a test is necessary.
- 6.4.5 Legislation must spell out in a guideline the process by which such consent is obtained
- 6.4.6 The court will award costs as set by law between the party(ies), or as it deems just
- 6.4.7 Refusal to take the test will allow the court to make its inferences.
- 7.4.1 The maximum age limit for the duration of a maintenance order should be standardised to 18 years regardless of any purported legal status.
- 7.4.2 The court should be empowered, aided by a guideline, to extend maintenance support beyond 18 years.

- 7.4.3 The law should define other instances when a maintenance order stops being in force.
- 8.5.1 The legislation should provide for custody and access for all legal and natural children.
- 8.5.2 The guardianship status of either parent, relative or other person(s) should be defined.
- 8.5.3 Legislative guidelines will be a useful aid for the court in deciding on custody or access

Endnotes

¹ *Constitution (Amendment) Act* 13 of 1997 s38(3)

² See *Maori Affairs Act 1953* pre-1967 which included illegitimate children or relations in testamentary instruments and phrases ;cf *Niue Act 1968* s 708 cited in NZLJ [1969] 2 Nov. 1969

³ *MCA* s 3(1) and (2)

⁴ *MAA* s 21 of 18 years for legal children under *MCA*

⁴ *Legitimacy Act* Cap. 57 s11 of the rights of adopted children under the *Adoption of infants Act* cap 58 s 11

⁵ *CRC* Article 2;

⁶ *ibid* Art 3 of *CEDAW* Arts 5 (b) and 15

⁷ *CRC* Art 9.3, 7 & 8

⁸ cf *CEDAW* Art 1

⁹ Art 25 Paragraph 2

¹⁰ *UN Statement on General Principles of Equality and Non-Discrimination in respect of persons born out of wedlock as to legal status*

¹¹ *Status of children Act* 1969 (NZ) s 3(1)

¹² *ibid* s 3(4)

¹³ (NZ) *Births, Deaths & Marriages Registration Act* 1995 s 86

¹⁴ *Family Law Reform Acts*.1(1); *Children Act 1989* s 4

^{14A} *infra* para 8.3

¹⁵ *MAA* Part III s.16

^{15A} *FLA* s 60F cf s 55A(3)

¹⁶ *MAA* s 18

^{16A} *ibid*

17 3 years (Solomon Is, Tonga, UK) and 6 years (Cook Islands, NZ & W>Samoa) cf 12 months (Vanuatu) & 9 months (Nauru)

17A *Infra* para 4.1.1

18 *FPA* s 49

19 *MAA* s.16

19A *FLA* ss 66FA & 66ZB - Limitation provisions repealed in 1995

19B *FLA* ss 67

20 *MAA* s.2

21 *Jones v Evans* [1994] KB 582

22 *MAA* s.16 cf (NZ) *FPA* s 47

23 *MAA* s.17 and *infra* paragraph 3.2.1

24 see Discussion Paper No. 5: De facto Spousal Relationships

25 *MAA* s.17

26 (Aus) *FLA* s 60 cf (NZ) *FPA* s 47

27 *Social Security Amendment Act 1987*

28 *MAA* ss 2 "Single woman" and 16

29 *supra* paragraph 2.3.2

30 *supra* paragraph 2.2

31 *Bastardy Ordinance 1929*

32 (Aus) *FLA* Div 7; (NZ) *FPA* ss 47-59; (UK) *Children's Act, Family Law Reform Act 1987*

33 *FLA* ss 69P-69T; *Child Support Act 1991* s 7; *Status of Children Act 1969* s 5

34 Cap. 57 (1932) Schedule

35 *infra* paragraph 7.1

36 *FPA* s 51(2) *Status of Children Act* s 8(3)

37 *MAA* s 18(1)

38 " s18(2)

39 *ibid* cf (NZ) *FPA* s 78

40 *supra* paragraph 5.1

40A *simpson v Collinson*[1964]1 All ER 262, at 167 per Sellers LJ

⁴¹ *Status of Children Act* s 10 is silent

⁴² *FPA* s 52

⁴³ *FPA* s 53

⁴⁴ *Evidence Act* 1995 s 164

⁴⁵ *Bombol v Harton* [1987] 5 WWR [Sask, UFC]

⁴⁶ *MAA* s 16 (1) (1)

⁴⁷ (UK) *Family Law Reform Act 1987* s 23; (NZ) *FPA* s 54

⁴⁸ *FPA* s 58 cf *Sutton v McDonald* [1995] NZFLR 423;

⁴⁹ (NZ) *FPA* s 57; (UK) *McVeigh -v- Beattie* [1988] FCR 516.

⁵⁰ op cit at footnote 48; and (UK) *S v S, W v Official Solicitor* [1972] Action 24

⁵¹ *FPA* ss 54-56

⁵² *MCA* s 84(4) and *MAA* s21 respectively

⁵³ ibid

^{53A} *MAA* s 21

⁵⁴ Hoggett, B; *Parents & Children - The law of Parental Responsibility*

⁵⁵ *FLA* ss66L, 60F(1)(c), 60H(2), 66T

⁵⁶ *FLA* ss 66U & 66V

⁵⁷ *Child Support Act* s 25(1)(v)

⁵⁸ *K v K* Civil Appeal Appeal No. 3 of 1984 and supra paragraph 2.3

⁵⁹ *S v R & P* Civil Case No. 1 of 1987; *R v E* Civil Appeal case No. 13 of 1992

⁶⁰ supra paragraph 2.4.2

⁶¹ (NZ) *FPA* s 7 A

⁶² (NZ) *Guardianship Act* 1968

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