



**Advancing the Implementation of
CEDAW in the Cook Islands:
Good Practice Approaches to
Civil Family Law Bill**

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CONTENTS

Executive Summary	9
1. INTRODUCTION	28
Background	28
CEDAW Implementation in the Cook Islands	29
Benefits of a CEDAW Compliant Family Law Bill	30
Methodology	31
2. MARRIAGE	33
Introduction	33
Marriageable Age	33
Who Can Marry?	34
Requirement for Full and Free Consent	35
Voiding of Marriage	36
3. THE END OF MARRIAGE	38
Introduction	38
Application for Divorce	39
<i>Current Cook Islands Law</i>	39
<i>Approaches to Divorce</i>	39
Separation Procedures	41
<i>Legal Effects of Separation</i>	41
<i>Approaches to Separation</i>	42
4. THE CARE OF CHILDREN	44
Introduction	44
The Principle of the Best Interests of the Child	45
<i>Legislative Definition</i>	45
<i>Statutory Checklist of Factors</i>	46
Parental Responsibility	49
<i>The Progression from Parental Authority to Parental Responsibility</i>	49
<i>Legislative Definition of Parental Responsibility</i>	49
<i>Who has Parental Responsibility?</i>	49
<i>The Age At Which Parental Responsibility Legally Ends</i>	51
Parenting Orders	51
Definition of Parenting Orders	51
Types of Parenting Orders	51
<i>Residence Order</i>	51
<i>Contact Order</i>	52
<i>Specific Issues Order</i>	53
<i>Prohibited Steps Order</i>	54



Applications for Parenting Orders	54
<i>Persons Who Can Apply</i>	54
<i>Mandatory Separate Representation</i>	55
The Principle of Non-Intervention	56
Primacy of Court Order Over Parental Responsibility	56
Parenting Plans	57
Enforcement of Parenting Orders	57
The Abduction of Children Overseas	57
Public Orders: Care and Supervision	59
<i>State Obligations to Protect Children</i>	59
<i>Definition of Care and Supervision Orders</i>	59
<i>Who can Apply for an Order?</i>	60
<i>Grounds for Application</i>	60
<i>Legal Effects of Care Orders</i>	61
<i>Legal Effects of Supervision Orders</i>	61
<i>Family Group Conferences</i>	62
Adoption of Children	65
<i>Purpose of Adoption</i>	65
<i>Who May Adopt a Child?</i>	65
<i>Who Can Be Adopted</i>	66
<i>Consent</i>	66
<i>Grounds for Determining Adoption</i>	69
<i>The Legal Effects of Adoption</i>	70

5. CHILD AND SPOUSAL SUPPORT 74

Introduction	74
Spousal Support	75
<i>Definition of Spousal Support</i>	75
<i>The Definition of a Spouse</i>	75
<i>Right of Spouse to Support and Determination of a 'Just' Award</i>	77
Child-Bearing Expenses	81
Child Support	81
State-Run Support Schemes	82
Child Support Order	82
<i>Eligible Children</i>	82
<i>Eligible Applicants</i>	83
<i>Liable Parties</i>	83
<i>Considerations in Determining Contribution</i>	84
Variation or Cessation of Orders	85
Form of Support	85
Enforcement of Support Orders	85



Determination of Parentage	85
<i>Reasons for Parentage Determination</i>	85
<i>Who Can Apply for a Parentage Order?</i>	86
<i>Determining Parentage</i>	86
<i>Corroboration is Not Required</i>	87
<i>DNA Parentage Testing Orders</i>	87
6. DOMESTIC VIOLENCE	90
Introduction	90
The Definition of an 'Act of Domestic Violence'	92
<i>Good Practice Definition (New Zealand)</i>	93
<i>Other Factors for Inclusion</i>	94
<i>The Inclusion of Comprehensive Definitions of Factors</i>	96
Definition of 'Protected Person'	100
Definition of Protection Orders	104
Types of Protection Orders	104
<i>Protection Order</i>	104
<i>Emergency Protection Order</i>	109
<i>Occupation Order</i>	111
Obligation on Police Officer to Apply for Order	115
Duration of Order	116
The Precedence of Protection Orders Over Parenting Orders	116
Enforcement of Orders	117
Discharge or Variation of Orders	119
Compensation	119
7. DIVISION OF PROPERTY AFTER MARRIAGE OR RELATIONSHIP BREAKDOWN	123
Introduction	123
Who is Protected?	124
What Property is Part of the Settlement?	124
Basis of Property Division	126
Determining Contributions	127
Glossary	130
Bibliography	137
Table of Legislation	143



Executive Summary

Introduction

1. This publication was developed to support an undertaking by the CEDAW Law Reform Committee, an inter-departmental working group established by the Cook Islands Government, to work towards legislative consistency with Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The Committee named marriage and family life and the safety and security of women and children as priorities for law reform. In order to work towards consistency with CEDAW in these areas, the Committee recommended the development of a comprehensive civil Family Law Bill to replace and modernize the disparate pieces of legislation that currently govern family law in the Cook Islands.
2. It presents the results of a desk review commissioned by the UNDP Pacific Centre to identify good practice law reform options in six areas pertaining to family law in the Cook Islands. The publication does not recommend any particular approaches for the Cook Islands rather it identifies the range of different good practice approaches that could be adopted to achieve legislative consistency with CEDAW. It was developed to help inform a consultation held in Rarotonga in February 2010 in which local participants discussed and recommended the approaches best suited to the culture and context of the Cook Islands, and to inform the draft Family Law Bill that was subsequently developed for the Government of the Cook Islands.
3. Family law in the Cook Islands is currently governed by a complex range of legislation that is now largely outdated including; the Marriage Act 1973, the Marriage Amendment Act 2007, the Cook Islands Act 1915, the Cook Islands Amendment Act 1994, the Infants Act 1908, the Prevention of Juvenile Crime 1968 and the Matrimonial Property Act 1976 (NZ). The Constitution of the Cook Islands 1965 guarantees men and women the equal protection of the law, but it does not guarantee them equal benefits or outcomes. The Constitution guarantees a range of fundamental rights and freedoms 'without discrimination on the grounds of sex' but it does not define discrimination to include direct and indirect discrimination. Further, the Constitution does not expressly bind actions of either private actors or public authorities and institutions, leaving the scope of the anti-discrimination provisions unclear.
4. The drafting of a single, clearly articulated and contemporary Family Law Bill provides the Cook Islands with the opportunity to develop a legal framework that is reflective of the values and context of contemporary Cook Islander society, including national commitments to gender equality and the implementation of CEDAW. It will also provide the opportunity to replace and modernize the old laws, which reflect the norms and values of the former colonizing countries at the time they were adopted. Whilst there are a number of components that are universally required in a civil family law to reflect good modern practice and to be CEDAW compliant, the specific culture and context of the Cook Islands will provide the framework for considering which good practice approaches, including non-discriminatory customary practices, in each of the key areas are the most appropriate for the Cook



Islands. A modern CEDAW compliant Family Law Bill has the potential to improve the accessibility of family law to a wide range of parties and to provide an important contribution from the Cook Islands to good practices for other Pacific Island countries, and globally.

5. The six areas reviewed in this paper are; i) marriage, ii) the end of marriage, iii) the care of children, iv) spousal and child support, v) domestic violence and vi) property division after marriage or relationship breakdown. For each of the six areas this policy paper identifies; the current relevant law in the Cook Islands (or where there are gaps in the current laws) and the range of components that are essential to a comprehensive, good practice and CEDAW compliant civil Family Law Bill. For each component, the policy paper identifies a range of good practice approaches (based on international conventions to which the Cook Islands is a party including CEDAW, the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD), international declarations and commentary, relevant academic literature and government and non-government reports). Finally, the paper provides a range of good practice examples that illustrate how different countries have approached each particular component or issue in their respective law(s). Where possible examples from Oceania have been chosen (Pacific Island countries and territories, New Zealand and Australia) but this publication also provides international comparison by drawing on examples from around the world that represent aspects of good practice in various laws.
6. The law of inheritance is an important aspect of family law in which serious discrimination against

women occurs when law and practice do not treat females equally with men. Many legislative frameworks worldwide, including in the Cook Islands, continue to provide that male family members receive larger portions of an inheritance. This is often justified in part, by stereotypes about the roles that women and men should play within the family and the community, and stereotyped assumptions that women will marry and leave the family of origin. The complexity of the issues involved in inheritance in the Cook Islands context, and the national stakeholders' decision that there needs to be comprehensive consultations on these issues before proposals for inheritance law reform are pursued, has led to the exclusion of inheritance from this publication, and the drafting of the civil Family Law Bill that it accompanies. However, because of its importance, inheritance is an area which should be among the priorities for future law reform initiatives in the Cook Islands.

Marriage

7. Marriage is governed in the Cook Islands by the Marriage Act 1973 . Reform in this area would be best achieved through amendments to the Marriage Act.
8. Marriage is limited by the Marriage Amendment Act 2007 to persons of opposite gender. A recognition that the principle of non-discrimination requires that marriage rights be available equally to all members of the community has led to the extension of marriage to same-sex couples or the establishment of domestic registered partnerships and civil unions in many countries throughout the world. In the Pacific region in 2009 the French collectivities of Wallis and Futuna and New



Caledonia introduced civil unions for same-sex couples providing a basis for similar reform in other Pacific Island countries.

9. There are two situations in which a marriage is automatically void under the Marriage Act 1973. A void marriage is one where the marriage is not recognized as having ever existed in law. This is different from ending a legally recognized marriage through divorce. The first situation in which a marriage is automatically void is if the two people being married are within specified prohibited degrees of relationship (i.e. siblings and parents and children are not allowed to marry each other because of their close genetic relationship etc). The second reason for voiding a marriage is if one of the parties is still married to someone else. There is however, no active requirement for consent in the Act, nor a process for voiding a marriage if full and free consent was not obtained as is required by Article 16(1)(b) of CEDAW. Both of these necessary components should be incorporated into the Marriage Act 1973 in order for there to be compliance with CEDAW (as reflected in CEDAW legislative compliance indicator 16.2).
10. The minimum age for marriage in the Cook Islands is currently 16. However, minors (which in the Cook Islands has been applied to include all persons between 16 and 21) cannot marry in the Cook Islands without the consent of both parents. The CEDAW and the CRC recommended minimum age of marriage is 18 for both women and men. The CEDAW Committee in its Concluding Comments to the Cook Islands in 2007 urged the Cook Islands 'to raise the minimum age of marriage for women to 18 years, in line with article 16(2) of the Convention, the Committee's General

Recommendation 21 and the Convention on the Rights of the Child.' The CEDAW Committee has explained that a low legal age of marriage may prevent girls from continuing their education, lead them to drop out of school early and may result in difficulties in their achievement of economic independence and empowerment. Raising the age of marriage to 18 would satisfy CEDAW legislative compliance indicator 16.3.

The End of Marriage

11. Separation is governed in the Cook Islands by the Cook Islands Amendment Act 1994 and divorce is governed by the Cook Islands Act 1915 and the Family Proceedings Act 1963 (NZ). Law reform in this area would best be achieved through the repeal of the applicable provisions in these existing laws and incorporation of the area into the new Family Law Bill.
12. In the Cook Islands, divorce procedures are still based on fault, which means proving a matrimonial offence (typically desertion, adultery or cruelty). Although divorce is often a difficult process for all involved, placing blame on one or both parties, by using fault as the legal basis for granting a divorce, is no longer appropriate. A fault-based approach is criticized for interfering with the autonomy and independence of both men and women and each person's right to choose when to enter and leave relationships. In addition, fault based divorce often exacerbates hostility and bitterness between the parties and this is often not in the best interests of any children. It can also make it difficult for women to leave violent relationships since the requirement to provide evidence of a specific matrimonial crime may force them to provide evidence of situations



that are humiliating, embarrassing or frightening. International obligations and contemporary good practice standards now specifically require that fault not be used as a requirement or prerequisite for obtaining a divorce. In response, modern separation and divorce laws have shifted and progressed from a reliance on finding one of the spouses at fault, towards neutral and non-adversarial systems of divorce. The introduction of a no-fault divorce procedure into Cook Islands law would satisfy CEDAW legislative compliance indicator 16.13.

13. Two good practice no-fault approaches have been adopted in modern divorce law. The first and most popular approach is a requirement that the relationship has broken down in such a way it is 'irretrievable', without any need to show that a spouse is at fault. Whilst some countries require evidence or proof that the marriage has broken down this has proven difficult and often adds to the time and effort required to qualify for a divorce. Another means of establishing the marriage is irretrievable is to specifically set out in the law, a period of separation (usually one year) after which the marriage is automatically deemed irretrievable. Whilst this approach is morally neutral, simple and easily understood, it has been criticized because legally requiring a delay of a year in every case before a divorce can be granted, can cause significant personal and financial hardship for the parties (including in relation to those who may need to find alternate housing. Neither best practice approach precludes reconciliation between the parties but they do not require that the parties must attempt reconciliation.
14. A second approach which is more consistent with international standards that require the recognition

of the autonomy of both spouses as individuals, is to enable an immediate and unilateral termination of a marriage by either party at will. The rationale behind this approach is that marriage is the voluntary union of two persons and therefore a unilateral wish by one of the spouses to end the marriage should be enough to do so.

15. Separation procedures in the Cook Islands are not currently fault-based. Instead, the parties can obtain a separation order if 'there is a state of disharmony between the parties to the marriage'. However, the primary legal effect of the separation order is that the parties no longer have to live together. This does not resolve or determine the new relations between the parties.
16. Both divorce and separation procedures must be linked to essential legal remedies such as; i) their duties and obligations relating to property that they own, ii) the responsibilities of either or both of them to provide spousal and child support, iii) determining who lives in the marital home, and iv) settling residence and contact arrangements for any children. Access to such legal remedies are central to good practice for both separation and divorce procedures in modern divorce law.

The Care of Children

17. The Cook Islands Act 1915 governs the law relating to children in the Cook Islands. The Act, almost 100 years old, contains very limited coverage of the issues discussed in this publication. Law reform in this area would be best achieved through the repeal of any applicable provisions in the Cook Islands Act 1915 and incorporation of the area into the new Family Law Bill. The new Family Law Bill should be consistent the CRC and the intention to



have the CRC guide the interpretation of the Bill can be explicitly stated in the Bill itself.

Best Interests of the Child as Paramount

18. Article 1(d) of CEDAW states that 'in all cases the interests of the children shall be paramount.' Article 3(1) of the CRC states that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. In response to these international obligations modern family law typically includes a clear statement in the legislation to the effect that the principle of the child's best interests in all matters relating to children is paramount. In the Cook Islands, there is a statement of the best interests of the child in relation to custody hearings. However, it is important that the principle extends to all proceedings relating to children. The inclusion of such a statement would satisfy CEDAW legislative compliance indicator 16.18. Additionally and importantly, to assist the court in determining the best interests of the child, good practice requires a list of factors of what may be considered the best interests of the child to be included in the legislation.

Parental Responsibility

19. Article 18(1) of the CRC obligates State parties to ensure that both parents have common responsibilities for the upbringing and development of the child. Accordingly, a good practice approach in the modern family law context is to include a legislative statement that parental responsibility is equal and shared and continues until the child is 18 regardless of other circumstances, such as a parent subsequently remarrying or entering into a de facto or other relationship.

Parenting Orders

20. The Cook Islands Act 1915 authorizes the court to make custody orders on the basis of what 'it thinks fit' in relation to the children of the marriage. The Infants Act 1908 provides that custody shall be determined on the basis of the welfare of the child as the first and paramount consideration. Access, according to the Infants Act shall be determined on the basis of the welfare of the infant and the conduct of the parents. Good practice requires a consolidation of the legislation and an explicit statement that the best interests of the child are paramount in all proceedings involving children. Additionally, modern family law legislation has moved away from the terminology of custody and access orders, which foster notions of ownership in children and focusing on the respective 'rights' of the parents. Instead, the new approach is an emphasis on parental agreement as the primary means of settling parenting arrangements including when parents do not live together, through the issuing of parenting orders. Parenting orders in modern family law legislation typically consist of a range of orders termed 'residence', 'contact' 'specific issues' and 'prohibited steps' orders. Each of these is discussed below.
21. A residence order determines where a child is to live and who has the day to day care of the child. A contact order determines whether and in what circumstances a parent or other person shall have contact with a child. The reason for a contact order is to recognize and maintain the beneficial relationships already established between the child and other children in the family or other adults, to the maximum extent possible, in the light of changed family circumstances. Contact orders typically permit reasonable contact but may specify the times, frequency and location of visits and may include a variety of forms of contact such as emails, letters or



telephone calls. A contact order may also provide for specific protections, such as in a situation of abuse, where a condition might be imposed that an abusive partner can have contact with a child only if supervised.

22. A specific issues order complements residence and contact orders. A specific issues order will detail who will make a particular decision or how a particular decision will be made. Examples of topics that might be included in a specific issues order include; who is to have responsibility for the day-to-day care, welfare and development of the child, and who is responsible for decisions about the child's medical treatment, holidays or religious education. Whilst the best arrangement is for all relevant adults and the child(ren) to jointly agree on all decisions that need to be made, specific issues orders ensure that it is clear who has the authority and responsibility to make such decisions if agreement is unlikely or impossible.
23. A prohibited steps order prevents a particular decision from being made without returning to the court for permission or, alternately, without permission from the other parent. A prohibited steps order can prohibit a parent from making specific major decisions in relation to the child, such as changing the surname of the child, removing the child from the country, changing the nationality or domicile of the child, or consent to the adoption process. The availability of a prohibited steps order provides a means of protecting the rights of the child in accordance with the CRC.
24. Mandatory separate legal representation for the child is good practice in proceedings where there are extenuating circumstances such as abuse or neglect. Sometimes, there are differences of opinion

between the parents and others, and/or a conflict between the best interests of the child and the interest of (each) parent (or other adults). The role of the separate representative is to make submissions to the court on what is in the best interests of the child, including from the child's perspective, where appropriate, and is independent from the submission by the parent(s) on what they (each) argue is in the best interests of the child. In order to carry out this role, the separate representative may be authorized to seek information from relevant parties including; the child (particularly when the child is old enough to give information on what has happened in the past, as well as her/his wishes), the child's school, and other relevant agencies and to obtain an expert's report from appropriate persons such as a child psychologist. Such provisions, however, are dependant upon government funding and its inclusion in the legislative provisions must be accompanied by the necessary administration and financial commitments from the state.

25. Parenting orders may not be necessary to settle arrangements about where and with whom the child(ren) will live (a residence order), and how each parent (or other relevant adults) are allowed to interact with the child (a contact order). A good practice approach is to explicitly provide that a court must not make a parenting order unless it considers that doing so would be better for the child than making no order at all. In this way, the court only intervenes in the child's life if there is a real problem in need of resolution and not simply as a matter of routine or because the court has the power to do so.
26. A parenting plan is an agreement between the parents of the child that deals with issues such as residence, contact, child support or any other



aspect of parental responsibility. To encourage divorcing or separating parents or parents who are not living together to take mutual responsibility for their children, some countries have included parenting plans in their family law legislation. A parenting plan can be registered with the court, if it accords with the welfare and best interests of the child, and enforced in the same manner as a court order.

27. Parental responsibility provisions may enable a parent to be obstructive in the exercise of parenting orders. It is important therefore that the legislation clearly states that parental responsibility, especially to the extent that it involves any kind of 'authority' in relation to decision-making, is superseded by a parenting order.
28. It is critically important that parenting orders can be enforced. The range of good practice approaches to enforcement include the following: i) expressly stating what the consequences of orders and contraventions are, ii) varying or discharging (ending) the parenting order (for example, by reducing or eliminating altogether the time in which the child is in the care of, or has contact with, the parent or other relevant person who is in contravention of the order), iii) punishing the parent or other relevant person who is in breach of the order with penalties such as fines, imprisonment or community service orders iv) requiring a deposit of a bond after the breach of a parenting order as an assurance that the order will not be breached again.

The Abduction of Children

29. The Hague Convention on the Civil Aspects of International Child Abduction 1980 aims at securing the prompt and safe return of children

who have been wrongfully removed from one Convention country to another, and to ensure that rights of residence and contact under the law of one country are respected in other countries that are party to this Convention.

30. The Cook Islands is not yet a party to the Hague Convention although the removal of children from the Cook Islands may be a growing problem as freedom of movement between countries increases. Accession to the Convention would require the Cook Islands to set up a Central Authority to receive applications, collect relevant information and take the necessary steps to ensure that abducted or unlawfully retained children are returned to their resident country. In relation to children removed from the Cook Islands, a procedure must be established that provides evidence to the country to which the child has been removed that the child is 'habitually resident' in the Cook Islands and that the removal or keeping the child outside of the Cook Islands is wrongful. Wrongfulness is defined as a breach of the custody rights of another person or institution and although an order is not required this is the easiest process for its establishment.

Care and Supervision Orders

31. Article 20 of the CRC obligates States parties to provide to special protection and assistance including alternative care to a child that temporarily or permanently is unable to be in her or his family environment, or in whose own best interests cannot be allowed to remain in that environment. The first and best option if a child's safety is at risk in her or his home due to abuse or gross neglect is to remove the abuser (not the child) from the home. However, in some circumstances this may not be possible. In such circumstances, although it is considered to be 'an option of last resort', the state may need to



intervene to safeguard the welfare of the child. In the Cook Islands the Prevention of Juvenile Crime 1968 provides that a child can be taken into state care if it appears to the court the child is living in a place of 'ill-repute' or is likely to be ill-treated or neglected. However, no duty is placed upon the state to provide an appropriate level of care. The Act also provides for a supervision order but only if the child has committed an offence and the aim of the order is primarily punitive rather than to provide assistance for the welfare of the child.

from their family or mandatory intervention in the family (through a supervision order). Using the best interests of the child as the only criteria for care and supervision orders is not always suitable because it could enable the removal of children from their homes on grounds where the child's safety is not at immediate risk through abuse or neglect. An alternate good practice approach is to have a two step process to ensure that removing the child is absolutely necessary for the child's safety. The first step requires establishing whether the child is at risk of significant harm due to either inadequate care provided by the parent or lack of parental control. Only if this is satisfied is the second step considered, which is applying the principle of the best interests of the child to establish whether an order is the best option in the circumstances of the case.

32. The approach adopted in modern family law legislation is to enable the state to take action through two forms of public orders; a care order and a supervision order.

33. A care order allows the state to remove the child from the home and obligates the state to provide appropriate alternate services for the child such as placing the child in foster-care, with another relative or family friend or into institutionalized care, and in all cases ensure that an appropriate standard of care for the child is provided.

34. A supervision order, which keeps the child in the home, allows the state to supervise, for example by undertaking regular scheduled visits or ensuring that the child attends school. The reason for having a supervision order is that it provides some state control over a family situation where a child might be at risk, but a care order (which means removing the child from their home) is not considered necessary or in the child's best interests.

35. The statutory factors (which means a list of factors that are specifically contained in the law itself) for care and supervision orders are crucial since the result is either the compulsory removal of a child

36. A family group conference (FGC) is a meeting of specified family members and other relevant persons to try to develop the best possible plan for a child who is the victim of neglect, abuse or is a juvenile offender, before turning to the court to grant care and/or supervision orders. Family group conferencing originated in New Zealand in the late 1980's in situations of neglect and abuse as a response to the removal of Maori children by the state and their placement with 'cultural strangers' or in state institutions and in light of evidence that it is better for children to remain in their families, including their extended families, rather than being taken into state care. Family group conferences represent a collaborative, rather than an adversarial approach to assist families to address the neglect and/or abuse of a child. A core principle of family group conferencing is the involvement of extended families, a principle very relevant to the Cook Islands where extended families are often involved



in all aspects of the parenting process. Whilst family group conferencing can represent an important alternative approach to resolving arrangements in relation to children in need of care and protection, it is important to introduce safeguards. First, appropriate chairpersons to convene and facilitate family group conferences must be selected, and trained in managing family dynamics, gender equality and the issues relating to children in need of care and protection. Chairpersons could be selected and trained from church groups, NGOs and other relevant community groups. Second, the legislation must prohibit family group conferences in situations of domestic violence, to ensure that no victim of domestic violence, child or adult, is forced to face or reach agreement with an offender or family members that are supportive of the offender. Finally, because different factors may come into play in some family dynamics, which may affect the decisions or plans agreed to during family conferencing, it is important to ensure that the court retains the authority to make final determinations on the basis of the welfare and best interests of the child.

Adoption of Children

37. Adoption ends the legal status of a birth family and gives a new, permanent home for a child. It replaces, in law, one family with another. The adoptive parent or parents become legally responsible for all aspects of parenthood, and the child is legally treated as a member of the adoptive family.
38. In the Cook Islands adoption is governed by the Cook Islands Act 1915 which provides separately and differently for 'Native adoption' and 'European adoption'. Cook Islanders are prohibited from adopting non-indigenous children whilst 'Europeans' can adopt any child including Cook Islander children. These provisions were enacted in the context of early twentieth century colonization and require modernizing to meet international standards and obligations under CEDAW and the CRC.
39. The primary purpose of an adoption process is to place a child in a stable, secure and loving environment. This can be provided in a range of family forms including by grandparents, aunts and uncles, married and de facto couples, both opposite sex and same-sex, and by individuals. Good practice requires therefore that the emphasis in adoption law should be on what is in the child's best interests in light of the abilities and capabilities of the prospective adoptive parent or parents. The law should not limit who can apply to adopt and instead, should consider their suitability as adoptive parent[s] on the basis of criteria used to determine whether they are capable of providing a stable and secure environment for the child and what in the circumstances is in the best interests of the child. The criteria should be the same for all potential adoptive parents (whether single or a couple).
40. The Cook Islands Act 1915 requires that biological parents give their consent to all adoptions unless 'the child has been deserted by that parent, or that parent unfit to have the care and custody of the child, or if the Court for any other reason whatsoever considers that the consent of that parent should be dispensed with'. For European adoption, where the application is made by either a husband or wife alone, no order can be made without the consent of the spouse of the applicant, unless they are living apart and their separation is likely to be permanent.
41. Consent from both biological parents is historically and currently a central part of the adoption process



unless; i) the parent cannot be located, ii) if the parent abused or neglected the child or iii) if consent is 'unreasonably' withheld. Other good practice factors that should be included in the law as reasons for not requiring the consent of both biological parents for adoption are; if the child is the result of the rape of the mother, if the parent has failed to discharge her or his parental duties, or if it is in the best interests of the child to do so. A requirement for the consent of the child has been incorporated into some modern adoption law however this requirement has been criticized by some on the basis that it amounts to asking the child to reject her or his birth parents.

42. Young people and people with impaired intellectual ability may be vulnerable to pressure to agree to adoption and may provide consent that is not full and free. The CRPD specifically requires that 'States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.' A good practice approach requires safeguards in the legislation to ensure that their rights are protected. Such safeguards could include a requirement for a report that confirms that the person is capable of understanding the consent to adoption, a requirement that the person has received legal advice, the inclusion of a revocation period so that the birth parent can change their mind during a designated period of time and finally a requirement that all the options for care and services are explored fully.
43. Article 21 of the CRC obligates states parties to ensure that the principle of the best interests of the child is the most important consideration in adoption determinations. In the Cook Islands the grounds for both European and Cook Islander adoption are that 'the applicant is a fit and proper

person to have the care and custody of the child and of sufficient ability to maintain the child, and the adoption will not be contrary to the welfare and interests of the child.' Uniformly, the approach of modern adoption law is to incorporate the best interests of the child as the (or a) primary consideration and also that the person who is applying for the adoption is fit and proper and of sufficient ability to provide the day-to-day care for the child.

44. The adoption process has historically been kept closed and secret. A more open and inclusive system of adoption may be appropriate in the modern context, particularly in communities (such as the Cook Islands) where kinship networks are important, broad and enduring, and advances the right of the child (reflected in the CRC) to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. An "open" adoption process is where the child, in some circumstances, maintains ongoing contact with her or his birth parents and/or other extended family members. Contact may range from regular meetings between the birth parents and the adoptive family, and / or to intermittent ongoing contact. The aims of this contact are to ensure that the child feels as psychologically secure as possible and to mitigate any sense of loss she or he might experience. Whilst open adoption is recommended by many experts it has not yet been incorporated into many adoption law regimes.

Spousal and Child Support

45. Child and spousal support is currently governed in the Cook Islands by the Cook Islands Act 1915 and requires modernization to meet good standard



practices and to comply with CEDAW and the CRC. Reform in this area would be best achieved through the repeal of any applicable provisions in that Act and incorporation of the area into the new Family Law Bill.

Spousal Support

46. The Cook Islands Act 1915 limits spousal support to only married couples. Good practice requires that it also be extended to de facto couples. In General Recommendation 21(13) of CEDAW, the CEDAW Committee supports the recognition of de facto unions stating that the form and concept of the family can vary and in whatever form it takes, the treatment of women in the family, at law and in private, must accord with the principles of equality and justice for all, as required by Article 2 of CEDAW. Although the recognition of same-sex relationships has not yet been explicitly addressed by the CEDAW Committee, many consider there is sufficient support in CEDAW and the CRC (and in the growing international jurisprudence and in its acceptance within many societies) that terms such as family, and discrimination on the grounds of sex or marital status should be interpreted to obligate States parties to provide equal rights and protections for those in same-sex relationships. Such recognition would also satisfy CEDAW legislative compliance indicator 16.20.
47. The recognition of de facto relationships for the purpose of spousal support requires a definition in the law of a de facto relationship. Two different approaches are used in contemporary family law to establish the existence of a de facto relationship. The first is to designate a time period that the parties must have lived together continuously, which is usually 2 years. The second approach is to provide a range of factors, which can include (but is not limited to) factors such as whether they have children, the level of financial interdependence and public recognition of their relationship. In this approach, the duration of a relationship may also be among the determining factors but the period of time required is not specified in the law.
48. The Cook Islands Act 1915 provides for spousal support on the basis of reasonableness. However, in contemporary family law, a right to spousal support and the amount to be awarded (if there is such a right) is now uniformly decided on the basis of what is 'just' or 'fair' coupled with a mandatory consideration of a range of factors. The inclusion of a specific list of factors in the law, which can include both the duration of the marriage or relationship and the effects on earning capacity of the division of functions within the marriage or relationship while parties lived together, ensure that courts take into account the discriminatory effects that marriage and relationships can have upon the earning capacity of one partner (usually the female partner) especially if there are children and one party has given up education and/or paid employment or employment advancements to be able to provide domestic and child care for the family.
49. Article 16(1)(d) of CEDAW makes both parents equally responsible for a child whether or not they are legally married. The costs of medical attention and other costs associated with pregnancy and childbirth should therefore be shared equally by both biological parents and the legislation should expressly provide for the payment of such expenses. The provision in the legislation of child-bearing expenses to be paid by the biological father to the birth mother would satisfy CEDAW legislative indicator 16.23.



Child Support

50. The CEDAW Committee states in General Recommendation 21(19) that after separation and divorce many fathers fail to share the responsibility of care, protection and maintenance of their children and has urged States parties to 'put in place adequate legislative measures, including the review and amendment of existing laws, to guarantee that women obtain child support.' The payment of child support after relationship breakdown and divorce ensures that fathers take responsibility for the costs of child rearing and at the same time recognizes the reduced earning power of many mothers and the costs that women bear in the raising of children. It is important however that the provisions are gender neutral to ensure that in cases where fathers do have the day-to-day care of their child, they can also obtain child support. The inclusion of access to child support on the basis of the needs of the child would satisfy CEDAW legislative indicators 16.10 & 16.24.
51. There are two main approaches in contemporary family law to child support. The first, adopted in many common law countries including New Zealand, England and Australia, is the establishment of state-run child support schemes which assess and collect monies (from the parent who has been ordered to make financial contributions) through automatic payment systems. This approach, which has proven effective, requires state commitment to its administration and the related costs.
52. The second approach is to include a procedure to apply for a child support order in the law. The Cook Islands Act 1915 provides for the court to issue a child support order for a child born either within a marriage or outside. Contemporary family law simply requires that the child is under 18 years old

and not financially independent. The Cook Islands Act 1915 does not explicitly state who may apply for a child support order but the language implies that it is limited to a mother or a father. In contemporary society where there is a range of family forms and situations where care for children is provided, good practice now requires that anyone who is providing the day-to-day care of a child should also be able to apply for child support.

53. Traditionally, the biological parents of a child, or an adoptive parent have been the only people that have had child support orders issued against them. The Cook Islands Act 1915 provides for the issuance of a child support order against the mother or the father of a child. While the question of whether and to what extent step-parents should also be liable is controversial, most contemporary family law provides, that where a parental relationship of some sort as formed, even if the adult is not the biological or adoptive parent, then a support order can also be made against this person. The reason for this is that the step-parent has voluntarily assumed that role and it is not in the best interests of children that they be permitted to abandon it simply because the adult relationship has ended.
54. The Cook Islands Act 1915 provides for the provision of child support on the basis of what the court thinks reasonable. Good practice in contemporary family law is to provide in the law a list of factors that courts must take into account when determining the appropriate contribution by the liable parent. This child centered approach ensures that courts take into account the variety of needs that a child may have, and shifts the primary focus away from the liable person or the applicant.



Variation, Form of Payment and Enforcement

55. Usually modern family law specifically allows for the variation of child support orders if the circumstances of the liable party, the recipient, or the child changes. Additionally, although a child support order might ordinarily end when a child reaches 18 years, a modern and good practice approach requires that financial support be continued if children are over 18 years of age but are still in full-time education, or are mentally or physically handicapped and therefore required long-term support.
56. The Cook Island Act 1915 provides only for periodical payments of money for both spousal and child maintenance orders. Contemporary family laws have moved towards more flexible approaches to payment of support orders including lump sum payments, the provision of goods (in the Cook Islands this could include fish, meat, taro and livestock such as pigs, goats and chicken etc.) the provision of services, and the transfer or usage of property or assets.
57. A system of enforcement is crucial to ensuring that spousal and child support payments are made. Mechanisms that have been used in other countries include deductions through the tax system, ordering the employer (if the liable parent is working) to deduct a certain amount from her or his salary to meet the support payments, garnisheeing bank accounts, forcing the sale of assets or property, fines and imprisonment in accordance with the law.

Determination of Parentage

58. The determination of who is a parent, (usually the father) of a child, is important because of the parental obligations to provide child support and

child-bearing expenses. The Cook Islands Act 1915 limits applications for paternity to 'an unmarried woman who is the mother of an illegitimate child or who is with child.' Modern family law typically allows a child or either parent, and any other party if they have 'a proper interest in the result' to apply. Other parties might include grandparents or other relatives, social workers, government agencies, trustees and executors. The inclusion of appropriate procedures for determining parentage would satisfy CEDAW legislative compliance indicator 16.22.

59. The Cook Islands Act 1915 gives the court authority to determine the paternity of a child but it does not include a specific formula or set of criteria that is to be used to do so. Additionally, no application can be made if the child is 12 years or older. If the child is 6 years or older, no application can be made unless the prospective father has either contributed to child support during that six years, or has cohabited with the mother in a de facto relationship, in which case any application must be made within two years of either the financial contribution or the cohabitation. Such limitations are arbitrary and do not accord with modern good practice.
60. In modern family law presumptions of paternity are typically made in certain circumstances. These include if the father is the husband or de facto partner of the mother at the time of the birth, or at the time of conception, or if the father's name is registered on the birth certificate. In the Cook Islands other presumptions that could be included might include; whether the father bought items for the baby, visited the mother in hospital or any other kind of traditional acknowledgement of the child. Where there is no presumption, paternity is typically based on evidentiary submissions.



61. Discriminatory assumptions about women's dishonesty in reproductive matters were historically relied on in many jurisdictions to develop a discriminatory requirement that a woman's testimony in relation to paternity must be corroborated. A requirement for corroboration (independent evidence that supports the claim of paternity) is discriminatory because it is not required in other matters. In addition, it implies that a woman's word is inherently worth less than that of the prospective or presumed father even though there is no evidence that mothers should be viewed as a particularly unreliable class of witness. The Cook Islands Act 1915 provides that whilst the evidence of the mother is not necessary for the making of a paternity order, no order can be made upon the evidence of a pregnant woman unless it is corroborated. Good practice requires a specific statement in the law that corroboration is not required in any circumstances.

62. DNA testing now enables paternity (or maternity) to be established conclusively. This is most commonly done by taking a buccal or blood sample from father and child, although it can be done on any number of other body parts such as hair follicles. Generally however genetic testing without the consent of the person being tested is controversial since taking any sample is an intrusion on bodily integrity, dignity and privacy. Two approaches to DNA testing have been taken in modern family law. The first is that the court can recommend parentage testing and if this is refused then the court can use the prospective father's refusal to be tested as evidence of paternity. In the same way if the mother refuses to give consent to the testing of the child (if requested by the father or the court) this can be used as evidence that the man in

question is not the father. The second approach is to empower the court to order mandatory testing. The reason behind this approach is that it is in the best interests of the child, her or his parents and the general public that parentage determinations are made on the basis of accurate DNA parentage testing.

Domestic Violence

63. Domestic violence has been increasingly recognized in the Cook Islands as a growing and substantial problem, which impacts on the physical and mental health of victims and also upon families and communities. The importance of a strong, effective and comprehensive legal response to domestic violence has been recognized worldwide as public recognition of domestic violence as a social problem has increased. This publication focuses on reforming the civil law aspects of domestic violence. A comprehensive approach to domestic violence includes both civil and criminal law protections, which serve different but complementary purposes. There are two good practice approaches to domestic violence legislation to achieve this. The first is to enact one comprehensive criminal and civil domestic violence law that incorporates both criminal offences to enable the prosecution of offenders, and civil law protection orders that prohibit the abuser from any further act of domestic and/or enables victims to remain in the family home to the exclusion of the abuser. The second approach, which has been adopted by the Cook Islands, is to keep these aspects separate but to make the relevant reforms to both the criminal law, and the civil law (rather than to enact one law covering both criminal and civil aspects).



64. Civil law domestic violence initiatives focus on the protection of persons 'exposed or potentially exposed to violence in a domestic setting' with the establishment of protection orders, emergency protection orders and occupation orders. The aims of domestic violence civil law provisions are, broadly, to prevent domestic violence, to ensure the safety of all persons who experience domestic violence, to provide victims with effective and accessible remedies, and to promote nonviolence as a fundamental social value.
65. The Cook Islands Amendment Act 1994 provides access to occupation orders and non-molestation orders for victims of domestic violence. However, these orders provide protection only to a limited range of persons, and only for protection from a limited range of behaviours, in a limited range of circumstances. Therefore, in this area, in many regards, the Act does not meet international good practice standards. Law reform in this area would be best achieved through the repeal of any applicable provisions in the Cook Islands Amendment Act 1994 and either the incorporation of the area into the new Family Law Bill or the development of a separate Domestic Violence Bill.
66. It is critical to have a good practice definition of domestic violence in the civil law (and in the criminal law) that reflects its breadth and complexity. Domestic violence occurs in many forms, including physical violence, sexual abuse, emotional abuse, intimidation, harassment, stalking, economic deprivation, property damage, causing a child to witness domestic violence, animal abuse or threats of any of the above. It is particularly important that both physical and non-physical forms of abuse are explicitly recognized and identified in the legislation. Non-physical forms of domestic violence should specifically be included as they are often not perceived by the community as 'real' violence, despite research consistently showing they may be the cause of severe and ongoing harm.
67. Domestic violence occurs in many contexts and between persons in a range of personal relationships where there are power imbalances. Good practice requires that the full range of people who experience or are at risk of experiencing domestic violence should be able to access protection orders. However, pursuant to the Cook Islands Amendment Act 1994 occupation orders are only available to married persons. Whilst the legislation extends access to non-molestation (protection) orders to de facto (opposite sex) couples and gives the court the discretion to issue a protection order for the protection of any 'other person' it does not explicitly extend protection to all persons at risk. The approach adopted by contemporary good practice domestic violence law is to explicitly extend the range of protected persons beyond 'traditional concepts of family' to include spouses, persons in a 'marriage-like' relationship (either opposite or same-sex), persons in close personal relationships, relatives, those in a care relationship, any child who resides with the abuser and in some countries, a person who is or has been a member of the other person's household.

Protection Orders

68. Protection orders are a civil remedy typically issued by a court, the police or other authorized person to prevent a person from making contact with, harming or harassing another person. The CEDAW Committee has stated that the availability of protection orders is an 'essential component of a comprehensive legal framework designed to protect women in situations



of domestic or sexual violence' and that a failure to provide for protection orders amounts to discrimination under Article 1 of the Convention.

69. In contemporary domestic violence legislation, the range of people who can apply for a protection order typically includes an adult protected person (as defined in the legislation), a child protected person who is a mature minor (who understands the nature and the consequences of the proceedings) a parent of a child protected person on behalf of the child, and any person with a residence order in relation to a protected child. In some circumstances it may be difficult for a protected person to apply for an order and therefore a good practice approach is to enable applications to be made by 'any other person on behalf of the aggrieved person. In Pacific Island countries this could include church leaders, traditional leaders or other community members.

70. Protection orders should be available for all persons at risk, and not just after an act of domestic violence has occurred. The Cook Islands Amendment Act 1994 recognizes this in part, by not requiring an act of violence to have occurred and instead enabling the court to issue a non-molestation order if the court is satisfied it is 'necessary for the protection' of the applicant. A good practice approach goes further and simply requires that the victim has a reasonable apprehension of an act of domestic violence. An alternate approach requires that the victim has an actual fear of an act of domestic violence (whether 'reasonable' or not). This ensures that a person living in fear (and who may be very aware of the signs of impending danger of domestic violence), does not have to meet any standard of 'reasonableness' before being given protection.

Emergency Protection Order

71. An emergency (or interim) protection order is a protection order that is immediately and easily available. It is essential that domestic violence victims be provided with access to protection orders when they do not have immediate access to a court. This is particularly crucial given that domestic violence often occurs after 5pm, during the week and on weekends, or in areas (such as outer islands or rural areas) where there is no formal court. If a domestic violence victim seeks protection from the legal system during a crisis outside of standard court hours, or where a court is not readily accessible, the system must be able to respond and offer an appropriate level of protection. In order to provide immediate protection an emergency protection order must be accessible 24 hours a day, 7 days a week, be available without the testimony of the abuser, and there must be persons authorized and available to issue an order at all times.

Occupation Order

72. An occupation order enables the protected person to remain in any home that she or he shares with the abuser regardless of the abuser's legal or equitable rights in the property. Requiring the violent party (rather than the one at risk of violence) to leave the home reinforces the message that domestic violence is unacceptable and that abusers will be held accountable in a range of ways. Inclusion of a provision enabling victims of domestic violence to occupy the shared residence would satisfy CEDAW legislative compliance indicator 16.11.

73. Good practice in contemporary family law is to provide a list of factors in the law that courts must take into account when determining whether to make an occupation order. Such factors include;



- i) the impact on the safety and protection of the protected person and any children who live at the residence if an occupation order is not made, ii) the desirability of minimizing disruption to the protected person and any child living with the protected person and iii) the importance of maintaining social networks and support and ensuring continuity in childcare, education, training and employment for protected persons and children who live with them.
74. Access to personal property may be a significant issue for all parties when there is an occupation order in place. The party that is excluded from the home will need access to their personal effects in order to take up residence elsewhere. In practice, orders allowing a respondent to return to the premises from which they are excluded to collect their belongings may need to be tightly controlled in order to ensure that protected person(s) are not intimidated, influenced or put at risk of any kind of violence. Equally, if an occupation order enables a protected person and/or any children to remain in the home, it may be important to prevent the excluded party from removing necessary items from the premises (i.e. all the food or furniture).
75. The former UN Special Rapporteur on Violence against Women has recommended that States parties should provide for the removal of the abuser from the shared home and allow the victim-survivor to retain her present housing, at least until formal and final separation is achieved. Good practice requires that the courts are directed to start from the position that the interests of the protected person and their children would be best served by them remaining in their home.
76. The police response to domestic violence is a critical aspect of ensuring safety for women and children. Good practice requires obligations to be placed upon police officers to respond appropriately and seriously to domestic violence. Some jurisdictions have made it mandatory that the police must apply for a protection order when domestic violence has or is likely to occur, regardless of whether the protected person consents. In other jurisdictions a lesser obligation is placed upon police officers. For example, if an application is not made, the police must record the reasons they did not make the application. Such provisions provide clear direction to police officers of their responsibilities in relation to domestic violence. It also sends a message to the community and the perpetrator; that domestic violence is unacceptable, that the police will act, it increases the likelihood of an order being made, it lessens the burden on the victim, can deflect blame from the victim where the application is seen as a police matter and out of the victim's hands, and increases the likelihood that a woman will pursue an application when she knows she will be supported by the police.
- Enforcement of Orders***
77. A strong system of enforcement is crucial to ensuring the protection order scheme is effective in protecting domestic violence victims. If police or the courts do not respond adequately to breaches of orders, they will be viewed as ineffectual by victims and perpetrators alike. It will also give victims a false sense of safety and security, heightening their danger if a perpetrator behaves violently. To be effective, a breach of a protection order must be a criminal offence.



78. Contemporary domestic violence legislation typically has fines and/or imprisonment as the penalty for breaches of protection orders. Some jurisdictions have harsher penalties for second offences. Another approach to enforcement is to require the abuser to attend a rehabilitation program. Such a measure, is however reliant on the existence of a well-resourced programs for the court to refer the offender to.
79. Good practice requires that the police are empowered to immediately arrest and detain an offender as soon as there is any breach of a protection order. In the Cook Islands the Criminal Procedure Act 1965 provides that a police officer may arrest or take into custody without a warrant a person 'he finds committing, or whom he has good cause to suspect of having committed, any offence punishable by death or imprisonment for life or for three months or more.' This law will be sufficient in the Cook Islands to enable the arrest of any person who breaches a protection order if the penalty for a breach is a term of 3 months imprisonment.
80. In General Recommendation 19(24)(i), the CEDAW Committee states that compensation should be provided for victims of gender-based violence. Compensation provides 'therapeutic' benefits in assisting the recovery of victims from the medical, psychological, cultural, vocational and relational consequences of domestic violence. Although victims of domestic violence can sue for damages in the civil law in common law jurisdictions including the Cook Islands, this is usually an expensive and ineffective avenue. Good practice approaches to compensation now include state-funded criminal injuries compensation schemes, compensation provisions in either criminal or civil

law legislation which enable the court to award damages to the victim which are payable by the perpetrator and the establishment of a support fund for domestic violence victims administered by the state. It is important that the legislation specifically states that any compensation paid under custom may be taken into consideration in determining the amount of compensation to be paid to the victim (i.e. amounts paid to the victim following a customary compensation arrangement could be deducted from the total amount of compensation payable to the victim under the FLA), but does not of itself extinguish a right to compensation under the Act.

Property Division after Relationship Breakdown

81. Property division when a marriage ends is governed in the Cook Islands by the Matrimonial Property Act 1976 (NZ). The Act is CEDAW compliant in many respects and law reform could be achieved through amendments to the Act. However, a better approach would be the repeal of the Act and incorporation of the area into the new Family Law Bill. This would enable the process of property division to be linked to spousal and child support and for the development of a clearer and more straightforward framework.
82. The Matrimonial Property Act 1976 (NZ) does not extend protection to de facto couples. De facto couples in the Cook Islands must therefore rely on common law property rules to determine the division of property after separation. This particularly disadvantages women as non-financial contributions carry little weight under this regime. The CEDAW Committee in its Concluding



Comments in 2007 called upon the Cook Islands ‘to establish a system of equitable division of marital property upon dissolution of de facto marriages.’

83. The Matrimonial Property Act 1976 (NZ) divides property into ‘matrimonial’ property and ‘separate’ property. Matrimonial property includes the family home and chattels (regardless of whether it was acquired before or after the marriage) and all other property including businesses, investment, benefits and superannuation acquired during or directly before the marriage. Separate property is all property that is not matrimonial property and generally consists of property held by the parties at the commencement of the marriage. This approach to the categorization of marital property is consistent with good practice.
84. The Matrimonial Property Act (NZ) provides that the matrimonial home and family chattels shall be divided equally. The rationale for equal sharing, which is a good practice approach, is that marriage is a joint cooperative venture in which equal sharing of the couple’s assets is fair and appropriate. There are three exceptions to equal sharing; i) if the marriage is of short duration, which the Act defines as less than 3 years, and if the contribution of one spouse has clearly been ‘disproportionately greater’ then a contributions approach will be applied, ii) if there are extraordinary circumstances that render equal sharing ‘repugnant to justice’, then the matrimonial home and family chattels shall be determined on the basis of contributions, iii) matrimonial property other than the family home and chattels such as a business, second homes and other property, shares, insurance and

superannuation are to be divided equally unless one spouse’s contribution to the partnership is ‘clearly been greater’ than the other.

85. The major criticisms of the exceptions are i) the arbitrariness of the 3 years rule and, ii) that the major portion of matrimonial property is determined on the basis of contributions rather than on the principle of equal sharing. Such an approach typically disadvantages women and good practice therefore requires the principle of equality to apply to all matrimonial property, a measure introduced by New Zealand in 2001. Such an amendment to current Cook Islands law would represent full compliance with CEDAW legislative indicator 16.15.
86. If one of the three exceptions apply then the individual contributions are measured (rather than a presumption of equality) to determine how property should be divided. A good practice approach to the determination of contributions is to include a mandatory list of factors in the law for the court to consider. In addition, it is also important that the legislation explicitly states that non-financial contributions should be given equal weight with financial contributions. In General Recommendation 21(32) the CEDAW Committee states that in relation to the division of marital property ‘financial and non-financial contributions should be accorded the same weight’. The Committee explains that non-financial contributions during a marriage such as raising children, caring for elderly relatives, and discharging household duties enable a husband to earn an income and increase the assets of the marital relationship.



Chapter 1

Introduction

Background

- 1.1 On the 18th December 1979, the United Nations General Assembly adopted the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW).¹ On the 3 September 1981, the Convention came into force with over 20 countries becoming signatories to the Convention. As at 15 March 2010, 186 countries are parties to the Convention, making it one of the most recognized conventions in the world. CEDAW seeks to comprehensively address women's rights to equality and non-discrimination. State parties are required to take all necessary measures, including taking active steps to amend or introduce legislative measures, to eliminate discrimination against women and to pursue policies that will bring about substantive equality in the lives of women. In particular, Article 16 of CEDAW details the measures required to achieve legislative compliance in the area of family and marriage relations whilst General Recommendation 19 outlines the legislative measures identified by the CEDAW Committee that are required in the area of gender-based violence including the enactment of civil provisions to protect women and children from domestic violence.
- 1.2 The United Nations *Convention on the Rights of the Child* (CRC)² came into force on 2 September 1990 and as at 15 March 2010, 194 countries are

states parties to the Convention. The Convention sets out the civil, political, economic, social and cultural rights of children with the four core guiding principles of non-discrimination, devotion to the best interests of the child, the right to life, survival and development, and respect for the views of the child.

- 1.3 The *Convention on the Rights of Persons with Disabilities* (CRPD)³ came into force on 3 May 2008 and as at 15 March 2010, 82 countries are parties to the Convention. The Convention provides a comprehensive framework of the rights of persons with disabilities and the obligations of State parties to promote, protect, and ensure those rights.
- 1.4 A good practice approach to a Family Law Bill is to incorporate in the 'purposes' section a commitment to enact provisions and interpret the legislation in accordance with the most relevant human rights conventions and the Act can include a specific reference to those conventions (i.e. CEDAW, CRC and CRPD). The purposes section of legislation is included by drafters as a guide to the interpretation of the Act and to provide an overall guiding framework for the legislation. Additionally, in some Pacific Island countries where custom is given constitutional status, it is important that the legislation specifically states that it takes precedence over any traditional or customary practices. For example, the Family Law Act would take precedence if there is a customary rule that fathers should be given greater rights than mothers in determining who should have the day-to-day care of a child.

1 1979 G.A. Res 34/180 (UN Doc A/34/46) hereinafter CEDAW or 'the Convention'.

2 1990 GA Res 44/25 (UN Doc A/44/736) hereinafter CRC.

3 2008 GA Res 61/106 (UN Doc A/61/49) hereinafter CRPD.



1.5 The Cook Islands, through its relationship of free association with New Zealand, initially became a party to CEDAW in 1985 when New Zealand ratified the Convention. However, the Cook Islands acceded to CEDAW in its own right in 2006 and to the Optional Protocol to CEDAW on 27 November 2007 and also furnished its initial report to the CEDAW Committee in that same year. The Cook Islands became a party to the CRC in 1997 and acceded to the CRPD on May 8, 2009. Accession obligates the Cook Islands to work towards the modification of its constitution and legislation to accord with the articles of CEDAW, the CRC and the CRPD. Additionally, through its relationship of free association with New Zealand the Cook Islands, although internally and externally fully self-governing, is obliged to uphold a 'standard of values generally acceptable to New Zealanders in its law-making and policies'.

1.6 Whilst compliance with CEDAW is the primary focus of this paper, the relevant norms and standards contained in the CRC, the recently adopted CRPD and those of other core international human rights treaties are also referred to, as together, they form the comprehensive framework of international human rights norms and standards to guide the Cook Islands in the development of the proposed comprehensive civil family law Bill.

CEDAW Implementation in the Cook Islands

1.7 The Cook Islands government has taken a number of positive steps towards the implementation of CEDAW in recent years. In 2005 it commissioned a report which recommended a range of law reform steps to be taken by the Cook Islands legislature to achieve legislative compliance with CEDAW.⁴ The report was later endorsed by Cabinet. In 2006 the Cook Islands government submitted its initial report to the CEDAW Committee and a group of Cook Islands NGOs prepared and submitted a shadow report. In 2007, the Cook Islands delegation engaged in constructive dialogue in New York with the CEDAW Committee. The Concluding Comments to the Cook Islands issued by the CEDAW Committee were subsequently tabled in Parliament. In response to the Concluding Comments the Cook Islands government established the CEDAW Law Reform Committee, an inter-departmental working group, to work towards legislative consistency with CEDAW.

1.8 In 2008 the UNDP Pacific Centre, after a request from the Cook Islands Government, replicated a review that had been previously applied in nine Pacific countries⁵ to assess in detail the legislative compliance of the Cook Islands with CEDAW. The review required the application of 113 indicators (originally developed by UNIFEM Pacific and the UNDP Pacific Centre) to the Constitution and

4 J Liddicoat, *Pathways to Development: A Report on Cook Islands Legislation and Consistency with the Convention on the Elimination of All Forms of Discrimination against Women*, 2005. V Jivan & C Forster

5 "Translating CEDAW into Law: CEDAW Legislative Compliance in Nine Pacific Island Countries" was jointly published by the UNDP Pacific Centre and the UNIFEM Pacific Regional Office in 2007. The publication contains 113 legislative compliance indicators that were developed as a comprehensive guide for how the articles of CEDAW can (and should) be concretely translated into law, as well as complete legislative compliance reviews of nine Pacific Island countries: the Federated States of Micronesia (FSM), Fiji, Kiribati, Marshall Islands, Papua New Guinea, Samoa, Solomon Islands, Tuvalu and Vanuatu. The completed country compliance reviews provide an important road map for each Pacific Island country to use in developing its short term and longer term national plan for legislative reform as part of implementation of CEDAW.



legislation of the Cook Islands. The resulting publication *Translating CEDAW into Law: CEDAW Legislative Compliance in the Cook Islands* was launched in Rarotonga in May 2008. The review provided, through the application of the indicators, a thorough analysis of the legislation of the Cook Islands and assessed its legislative compliance with CEDAW. It revealed a range of areas in which law reform was required for compliance with the convention. The Cook Islands CEDAW Law Reform Committee subsequently named marriage and family life and the safety and security of women and children as important priorities for law reform. In order to achieve law reform in these areas, the working group recommended the development of a comprehensive civil Family Law Bill to fill the gaps, and, where necessary, replace and modernize the disparate pieces of legislation that currently govern family law in the Cook Islands.

1.9 In order to begin the process of development of a Family Law Bill, the UNDP Pacific Centre, in response to a request from the Cook Islands Government, prepared this publication to explain in plain language the key elements of a CEDAW, CRC and CPRD compliant civil Family Law Bill. The publication includes an examination of the current relevant law in the Cook Islands alongside simple explanations of the key components required to meet international good practice standards, as well as a range of examples of provisions drawn from legislation in other countries that reflect a range of global and Pacific good practices and approaches in various laws.

1.10 In February 2010 a consultation was held in Rarotonga, Cook Islands, to provide the foundations for the approach of the Family Law Bill that would be developed. The findings of the draft of this policy

publication were presented and the consultation group, which included representatives from various government departments, including Crown Law, Internal Affairs, and Probation, local lawyers practicing in family law, educators, a Pastor, a representative from the House of Ariki as well as non-government representatives, considered which of the good practice approaches to each of the core issues were best suited to the context and culture of the Cook Islands. The recommendations of the consultation group are included at the end of each Chapter of this publication.

Benefits of a CEDAW Compliant Family Law Bill

1.11 Family law in the Cook Islands is currently governed by a number of pieces of legislation including the Marriage Act 1973, the Marriage Amendment Act 2000, the Marriage Amendment Act 2007, the Cook Islands Act 1915, the Cook Islands Amendment Act 1994, the Infants Act 1908, the Prevention of Juvenile Crime 1968 and the Matrimonial Property Act 1976 (NZ). In large part this legislation was adopted from New Zealand during colonization and reflects neither local values nor contemporary international norms but rather the mid-twentieth century values of England and New Zealand.

1.12 The drafting of a Family Law Bill provides the opportunity to develop a legal framework that is reflective of the values and context of contemporary Cook Islander society, including the national commitments to gender equality and the implementation of CEDAW, to replace the old laws which reflect the norms and values of the colonizing countries when they were developed. Whilst there are a number of components that are universally required in a civil family law that reflect



good modern practice, and is CEDAW compliant, the specific culture and context of the Cook Islands will provide the framework for considering which of the good practice approaches to each of the key areas and issues, are most appropriate for the Cook Islands.

- 1.13 The development of a civil Family Law Bill is intended to consolidate the multiple pieces of family law legislation into a single, clearly articulated and contemporary Bill. The Bill will improve the accessibility of the law in this area, particularly to the general public. Family law is a complex area however the development of a single piece of civil legislation in simple language will facilitate access to the law to a wide range of parties. It will also provide the opportunity to ensure that all family law legislation is in compliance with the international instruments to which the Cook Islands is a party. In addition, the development of a CEDAW, CRC and CRPD compliant Family Law Bill will also provide an important contribution by the Cook Islands to good practices that can be relied on both by other Pacific Island countries, and globally. Whilst the civil Family Law Bill will not incorporate targeted domestic violence criminal law offences this is an important area for future law reform.

Methodology

- 1.14 This paper considers law reform options in six areas pertaining to family law in the Cook Islands. The six areas are; i) marriage, ii) the end of marriage, iii) the care of children, iv) spousal and child support, v) domestic violence and vi) property division after marriage or relationship breakdown, For each of the six areas this policy
- paper identifies the range of components that are essential to good practice and CEDAW, CRC and CRPD compliant legislation. For each of these components this paper provides a simple definition and an explanation of the rationale that underlies its inclusion. It also provides an overview of the law in the Cook Islands, where relevant, in relation to each component. After an overview of the relevant law, the policy paper provides a statement on what constitutes good practice (based on international conventions to which the Cook Islands is a party, international declarations and commentary, relevant academic literature and government and non-government reports). The paper also includes a range of good practice examples that illustrate how different jurisdictions have approached each particular component. Where possible, examples from Oceania have been chosen (the Pacific Islands and Territories, New Zealand and Australia) but this paper also provides international comparison by drawing on examples from around the world that represent good practice.
- 1.15 The policy paper does not cover the area of inheritance although this is an important aspect of family law in which serious discrimination against women occurs when law and practice do not treat females equally with males. The CEDAW Committee in General Recommendation 21(34) directs States parties to implement the Economic and Social Council Resolution (884) which requires States parties to ensure that 'men and women in the same degree of relationship to a deceased are entitled to equal shares in the estate and to equal rank in the order of succession.'⁶ Further, the Beijing Platform recommends that governments 'enact and strictly enforce legislation that guarantees equal rights to

6 General Recommendation 21, *Equality in Marriage and Family Relations*, 1994, 13th Session (UN Doc A/49/38) at para [34].



succession and equal rights to inherit regardless of the sex of the child'.⁷ Many legislative frameworks worldwide, including the Cook Islands, continue to provide that male family members receive larger portions of an inheritance. This is often justified, in part, by stereotypes about the roles that women and men should play within the family and the community, and stereotypes assumptions that women will marry and leave the family of origin. The complexity of the issues involved in inheritance in the Cook Islands context, and the

national stakeholders' decision that there should be comprehensive consultation on these issues before law reform proposals are pursued, has led to the exclusion of inheritance from this publication, and the drafting of the civil family law Bill that it accompanies. However, because of its importance, inheritance is an area which should be among the priorities for future law reform initiatives in the Cook Islands.

A glossary of terms is provided as an appendix.

⁷ *Report of the Fourth World Conference on Women, The Beijing Declaration and Platform for Action, Beijing, 1995*, at para [8] (UN Doc A/CONF.177/20/REV.1) at para [274].



Chapter 2

MARRIAGE

Introduction

- 2.1 This chapter considers law reform issues relating to marriage. Currently, marriage is governed in the Cook Islands by the Marriage Act 1973 and reform in this area would be best achieved through amendments to that legislation. Many of the existing provisions of the Marriage Act 1973 are already CEDAW compliant. Therefore this chapter identifies and discusses only three areas that are currently non-compliant with CEDAW for consideration.
- 2.2 These include, first, considering whether to raise the minimum marriageable age, which is currently 16, to the CEDAW and the CRC recommended age of 18. It also requires considering whether to remove the requirement placed on 'minors' (which in the Cook Islands has been applied to include those persons between the ages of 16 and 21) to obtain consent from both parents before marriage can take place. Such a provision denies the autonomy of those over the age of 18 to choose if and when to marry (which legally does not depend on whether or not the person still resides with her/his parents).
- 2.3 Second, marriage in the Cook Islands is limited to persons of opposite sex. Same-sex marriage is still controversial for many in the Pacific and this is reflected in the decision of the participants at the Cook Islands consultation on the Family Law Bill not to include same-sex marriage in the new reforms.

There is however a growing worldwide recognition that the principle of non-discrimination implies that marriage rights should be available equally to all members of the community. This has led to the extension of marriage to same-sex couples or the establishment of domestic registered partnerships and civil unions throughout the world. Although there is not yet a direct enforceable obligation under international law to extend marriage to same-sex couples, increasingly countries are amending their laws to do so. In the Pacific region, in 2009, the French collectivities of Wallis and Futuna and New Caledonia, introduced civil unions for same-sex couples providing a basis for similar reform in other Pacific Island countries.

- 2.4 Finally, a marriage is automatically void under the Marriage Act 1973 if the parties are within specified prohibited degrees of relationship (which means the two people are either too closely related or are related in a way that makes marriage unacceptable and inappropriate such as two siblings) or if one of the parties is already married. The Act does not however require the consent of the parties before a marriage can proceed and there is no process for voiding a marriage if full and free consent was not obtained as required by Article 16(1)(b) of CEDAW.

Marriageable Age

- 2.5 The Cook Islands Marriage Act 1973, s 17(1) designates 16 as the minimum age of marriage for both males and females. In General Recommendation 21(36) the CEDAW Committee states that international standards require that the minimum age of marriage for both men and women be set at 18 years since marriage carries with it important responsibilities which require maturity



and capacity to act.⁸ The CEDAW Committee in its Concluding Comments to the Cook Islands in 2007 urged the Cook Islands ‘to raise the minimum age of marriage for women to 18 years, in line with article 16(2) of the Convention, the Committee’s general recommendation 21 and the Convention on the Rights of the Child’.⁹ Raising the marriageable age to 18 would also satisfy CEDAW legislative compliance indicator 16.3.¹⁰ The Committee has explained that ‘a low legal age of marriage may prevent girls from continuing their education, lead them to drop out of school early and may result in difficulties in their achievement of economic autonomy and empowerment’.¹¹ An early marriage can have negative effects on their ‘enjoyment of their human rights, especially their rights to health and education’¹² in part because of the increased likelihood of early motherhood and the associated health risks including an increased risk of HIV/AIDs.¹³

- 2.6 Minors (which in the Cook Islands has been applied to include those persons between the ages of 16 and 21) those children and persons between

the ages of 16 and 21), must obtain consent from both parents before they can marry. This is not in line with international standards as it denies the autonomy of those over the age of 18 to choose if and when to marry.

Who Can Marry?

- 2.7 In the Cook Islands the Marriage Amendment Act 2000 amended the Marriage Act 1973 with the insertion ‘A man may not marry another man and a woman may not marry another’. In 2007 that Act was repealed by the Marriage Amendment Act 2007, which prohibits marriage between persons of same gender. The two Acts provide a clear statement on the position of the Cook Islands in relation to legalizing same-sex unions, which contradicts the growing worldwide trend to legalize either same-sex marriage or to introduce either same-sex civil unions or registered domestic partnerships (in addition to repealing other related laws such as colonial era anti-sodomy laws).¹⁴ An increasing number of countries agree with human rights experts that there is sufficient support in CEDAW

8 In General Recommendation 21 the CEDAW Committee notes that in the CRC a ‘child’ means any human being below the age of 18 unless majority is attained earlier under national law.

9 Concluding Comments of the CEDAW Committee: Cook Islands (2007) 39th Session at para [39] (UN Doc CEDAW/C/COK/CO/1). See V Jivan & C Forster, *Translating CEDAW into Law: CEDAW Legislative Compliance in the Cook Islands* (Suva: UNDP Pacific Centre, 2008) at 37.

10 Concluding Comments of the CEDAW Committee: Peru (2007) 37th Session at para [34] (UN Doc CEDAW/C/PER/CO/6).

11 Concluding Comments of the CEDAW Committee: Serbia (2007) 38th Session at para [36] (UN Doc CEDAW/C/SCG/CO/1); India (2007) 37th Session at para [56] (UN Doc CEDAW/C/IND/CO/3). See also General Recommendation 21 at para [36]; J Sagade, *Child Marriage in India: Socio-Legal and Human Rights Dimensions* (New Delhi: Oxford University Press, 2005) who discusses the adverse consequences of child marriage at 175-192.

12 WHO, *Gender and Health*, 2003, at 2. Online: http://www.who.int/gender/documents/en/HIV_AIDS.pdf.

13 See also UN CESCR General Comment 14, *The Right to Health*, 2000 at para 22 E/C/12?2004/CESCR).

14 See for example the Crimes Decree 2009 (Fiji) which removed previous provisions which criminalized “sodomy” and “unnatural acts.”



and the CRC through a broader interpretation of terms such as family, and discrimination on the grounds of sex or marital status to obligate States parties to broaden marriage to include same-sex marriage or alternately to introduce civil union or domestic partnership legislation which bestow either the same rights or some of the same rights as marriage.¹⁵ Same-sex marriage has been legalized in 7 countries, as well as in Mexico City and in a number of states in the United States to date.¹⁶ The legalization of civil unions or domestic partnerships has been rapid and widespread.¹⁷ Although it may take some time for these principles of non-discrimination to be widely accepted by all segments of Cook Islands society, this approach is already being adopted in the Pacific. The French collectivities Wallis and Futuna and New Caledonia recognize same-sex civil unions, in Australia the states of Tasmania, Victoria and the Australian Capital Territory have legalized domestic partnerships and notably New Zealand, with which the Cook Islands is in a relationship of free association, which carries with it an obligation to 'standard of values generally acceptable to New Zealanders in its law-making and policies,' has introduced the legal category of civil union which carries with it the same rights and obligations of marriage except that non-married couples (same-

sex and opposite sex) cannot adopt. Extending marriage to same-sex couples or introducing civil unions would satisfy CEDAW legislative compliance indicator 16.20.¹⁸

Requirement for Full and Free Consent

- 2.8 The Marriage Act 1973 does not have the necessary requirement for full and free consent (as illustrated in the example of Trinidad and Tobago below). Article 16(1)(b) of CEDAW expressly obligates States parties to ensure on a basis of equality with men, that women have the same right to freely choose a spouse and to enter into marriage only with their free and full consent. General Recommendation 21(16) states that a woman's right to choose a spouse and enter freely into marriage is 'central to her life and to her dignity and equality as a human being' and a woman's right to choose 'when, if and whom she shall marry must be protected and enforced at law'. The Beijing Platform for Action specifically recommends that governments 'enact and strictly enforce laws to ensure that marriage is only entered into with the free and full consent of the intending spouses'¹⁹ and therefore an express requirement for full and free consent should be incorporated into the legislation.

¹⁵ For an overview of these arguments see R Wintemute, *The Legal Recognition of Same-Sex Relationships: A Study of National, International and European Law* (London: Hart Publishing, 2001) at 751-758.

¹⁶ Countries to date that have legalized same-sex marriage are Canada, Spain, the Netherlands, Belgium, Norway, South Africa, and Sweden. It has been also legalized in Mexico City (coming into effect 4 March 2010) and in the US states of Connecticut, the District of Columbia (coming into effect on the 10 March 2010), Iowa, Massachusetts, New Hampshire, Vermont and in the Indian tribe of Coquille in Oregon (however although the tribe has sovereignty same-sex marriage will not have legal effect in the broader state of Oregon).

¹⁷ The following countries have legalized either same-sex civil unions or registered domestic partnerships: Andorra, Austria, Colombia, Czech Republic, Denmark, Ecuador, Finland, France, Germany, Greenland, Hungary, Iceland, Luxembourg, New Zealand, Slovenia, Switzerland, United Kingdom, Uruguay, and in the Mexican state of Coahuila, the US states of Wisconsin, Nevada, Washington, Oregon, New Jersey, Maine, Hawaii, Colorado and California, the French collectivities of Wallis and Futuna and New Caledonia, the Australian states of Tasmania and Victoria and the Australian Capital Territory, in Argentina Buenos Aires, Rio Cuarto, Villa Carlos Paz and the Rio Negro province and finally the Venezuelan state of Merida.

¹⁸ See *Translating CEDAW into Law* note 3 at 41.

¹⁹ See Report of the Fourth World Conference on Women, *The Beijing Declaration and Platform for Action*, Beijing, 1995, at para [8] (UN Doc A/CONF.177/20/REV.1) at para [274(e)].



EXAMPLE

Requirement for Consent

Orisa Marriage Act 1999, s 8
(Republic of Trinidad and Tobago)

The requisites of a valid Orisa marriage under this Act are that—

- (a) the parties understanding the nature of the contract, shall freely consent to marry one another in the presence of the Marriage Officer who solemnises the marriage.
- (b) both parties shall, as regards age, mental capacity and otherwise, be capable of contracting a valid marriage.

Voiding of Marriage

2.9 The Marriage Act 1973 provides for the voiding of marriage in two situations. The first situation in which a marriage is automatically void is if the two people being married are within specified prohibited degrees of relationship (i.e. siblings are not allowed to marry each other because of their close genetic relationship). The second reason for voiding a marriage is if one of the parties is still legally married to someone else. However, the Act does not yet provide for the voiding of marriage if consent has been obtained through duress, fraud, misrepresentation or mistaken identity, intoxication or if one of the parties is incapable of understanding the nature of the consent (as illustrated in the example of Australia below). The inclusion of a provision that explicitly voids marriages not obtained with full and free consent would also satisfy CEDAW legislative compliance indicator 16.2.²⁰

2.10 Duress can occur when a party is incapable of refusing a marriage due to coercion or threats (usually against the woman or her loved ones). Fraud can occur if someone is deceived as to the reason for the marriage, for example if someone is induced to marry ostensibly for love but in fact the real aim of one party is to gain residence.²¹ Misrepresentation can occur if the person does not understand the nature of the ceremony, for example, an English speaking woman in India thought she was facilitating marriage for a friend but in fact was signing the marriage register on her own behalf.²² Mental incapacity and intoxication are relevant when they result in the party not understanding the nature and effect of the marriage ceremony.

²⁰ See *Translating CEDAW into Law* note 4 at 37.

²¹ A Dickey, *Family Law* (Sydney: Lawbook Company 4th ed, 2002) at 167.

²² *Mehta (orse.Kohn) v Mehta* [1945] 2 All ER 690.



EXAMPLE

Grounds on which marriages are void **Marriage Act 1961, s 23B** **(Australia, replicated in Fiji)**

- (1) A marriage is void where: (d) the consent of either of the parties is not a real consent because:
- (i) it was obtained by duress or fraud;
 - (ii) that party is mistaken as to the identity of the other party or as to the nature of the ceremony performed; or
 - (iii) that party is mentally incapable of understanding the nature and effect of the marriage ceremony.

Recommendations of the Cook Islands Consultation - Marriage

1. To raise the marriageable age to 18.
2. To remove from the Marriage Act 1973 the requirement for minors (those between the age of 16 and 21) to obtain consent of both parents before they can marry.
3. To insert a requirement for 'full and free consent' into the Marriage Act 1973.
4. To insert a provision into the Marriage Act 1973 that voids a marriage not obtained with full and free consent.
5. The consultation believed that the Cook Islands was not yet ready to legalise same-sex marriage or civil unions and therefore decided not to incorporate same-sex marriage into the family law reforms. The group acknowledged that this was discriminatory and not in accord with international obligations and that it would require further discussion over time.



Chapter 3

THE END OF MARRIAGE

Introduction

- 3.1 This chapter considers law reform issues relating to separation and divorce. Currently, separation is governed in the Cook Islands by the *Cook Islands Amendment Act 1994* and divorce is governed by the *Cook Islands Act 1915* and the *Family Proceedings Act 1963 (NZ)*. Law reform in this area would be best achieved through the repeal of the applicable provisions and incorporation of these areas into the new Family Law Bill. The significance of both separation and divorce law is primarily in the legal determination of the new relations between the parties, including their duties and obligations relating to property that they own, the responsibilities of either or both of them to provide spousal and child support, determining occupation of the marital home, and settling residence and contact arrangements for any children. These topics are individually considered in the chapters that follow. Therefore, this chapter focuses instead on the grounds on which separation orders and divorce are granted, and their respective immediate legal effects.
- 3.2 This chapter identifies and discusses two key aspects of the law in the Cook Islands relating to the end of marriage that are currently non-compliant with CEDAW and contemporary good practices in family law.

- 3.3 First, the current divorce procedures in the Cook Islands are still based on fault. This is contrary to international obligations, which expressly require the abolition of fault-based divorce.²³ Modern separation and divorce laws have progressed and shifted from a reliance on the establishment of fault, which requires proof of a matrimonial offence (typically desertion, adultery or cruelty) towards a non-fault based, neutral and non-adversarial system of divorce. Fault-based separation and divorce provisions were originally introduced into many legal systems based on a religious belief that divorce is a sin, and that accordingly the rules of divorce should punish the matrimonial crime²⁴ freeing an 'innocent spouse from the contractual obligation of a lifelong marriage to a guilty spouse.'²⁵ However, this approach is no longer considered consistent with the demographics of changing family forms whereby marriages breakdown has dramatically increased and can no longer be regarded as a lifetime union. Fault-based systems have been further criticized for several reasons, including; because they interfere with the autonomy of both men and women and each persons' right to choose when to enter and leave relationships,²⁶ and for exacerbating hostility and bitterness between the parties and therefore operating in opposition to the interests of any children. Fault based systems can also make it more difficult for women to leave violent relationships because the requirement to provide evidence of a matrimonial crime may force them to provide evidence of situations that are humiliating, embarrassing, frightening²⁷ and finally the futile and often difficult nature of allocating blame.

23 Concluding Comments of the CEDAW Committee: Luxembourg (2008) 40th Session at para [34] (UN Doc CEDAW/C/LUX/CO/5).

24 M Antoloskaia, "The Search for a Common Core of Divorce Law: State Intervention Versus Spouses Autonomy" in M Martin-Casals (ed) *The Role of Self-Determination in the Modernisation of Family Law in Europe* (Girona: Documenta Universitaria, 2006) at 36.

25 H Kay, "No-Fault Divorce and Child Custody: Chilling out the Gender Wars" (2002-2003) 16 *Family Law Quarterly* 27 at 30.

26 J Herring, *Family Law: Issues, Debates, Policy* (Devon: Willan Publishing, 2001) at 34.

27 S Thistle, *From Marriage to the Market: The Transformation of Women's Lives and Work* (Los Angeles: University of California Press, 2006) at 49.



- 3.4 Second, whilst separation procedures in the Cook Islands are not fault-based, the primary legal effect of a separation order is that the parties are no longer obliged to cohabit. The order does not resolve and determine the new legal relationship between the parties.

Application for Divorce

Current Cook Islands Law

- 3.5 A divorce order ends the legal status of marriage between the parties and the legal rights and duties associated with marriage. Divorce is primarily governed in the Cook Islands by the Family Proceedings Act 1963 (NZ) and requires the application of fault-based criteria by the High Court. Most of the grounds included are now widely regarded as outdated and inappropriate. These grounds include: adultery; artificial insemination of the respondent wife without the husband's consent; desertion for three years; habitual drunkenness for three years, with failure to support or neglect of domestic duties (as the case may be), or cruelty; conviction for murder or certain attempted murders; insanity and confinement for this reason for certain periods without likelihood of recovery; non-compliance for three years with a decree for restitution of conjugal rights; separation by Court order or agreement for three years; living apart for seven years without likelihood of reconciliation; conviction for certain offences of violence or sexual offences; rape, sodomy, or bestiality (wife's petition). Although these grounds also still remain in the laws of other Pacific Island countries such an approach is out of step with modern divorce laws which have minimized or removed the

involvement of courts, removed the requirement that fault be found and instead relying on the wishes of one or both of the spouses to divorce. Introducing a no-fault system of divorce would also satisfy CEDAW legislative compliance indicator 16.13.²⁸

Approaches to Divorce

- 3.6 Two identifiable approaches to no-fault frameworks of divorce, which facilitate the dissolution of marriage through simple procedures, have been adopted in contemporary family laws. The most popular approach is a requirement that the relationship has broken down that in such a way that it is 'irreconcilable', 'irremediable' or 'irretrievable', without reference to spousal conduct and typically upon the request of one spouse.²⁹ Some jurisdictions require evidence or proof that the marriage has broken down 'irretrievably' but this has proven to be a considerable burden, takes longer, and is not considered good practice. An alternate approach, as illustrated in the example of Australia below, is that once a specified period of separation has elapsed, typically one year, the marriage is automatically designated as irretrievable. Whilst this approach is morally neutral, simple and easily understood, it has been criticized because it creates a delay of a year before divorce can be granted.³⁰ The delay can pose significant financial hardship for the parties who, for example, may need to find alternate housing for one party until financial settlement upon divorce. Australia has approached this difficulty by not requiring the parties to live apart during the one year separation. However, if the relationship between the parties is acrimonious this may not be possible or desirable. If this approach is adopted it is important to have clear separation procedures (discussed below)

28 V Jivan & C Forster, *Translating CEDAW into Law: CEDAW Legislative Compliance in the Cook Islands* (Suva: UNDP Pacific Centre, 2008) at 39.

29 C Starnes, "One More Time: Alimony, Intuition and the Remarriage -Termination Rule" (2006) 81 *Indiana Law Journal* 971 at 987.

30 The CEDAW Committee in its constructive dialogue with Fiji in July 2010 criticized the one year period of separation provided by the Fiji Family Law Act 2003. See also S Cretney & J Mason, *Principles of Family Law* (London: Sweet & Maxwell, 1997) at 322.



that provides for either spouse to apply for support, property division or adjustment, occupation of the marital home and residence orders in relation to any children. There must be processes available to immediately resolve these issues so they are not delayed until the divorce is granted. This approach can be coupled with a procedure that converts a

separation order into a divorce order automatically without any requirement to proceed to a hearing or to file further documents. Neither best practice approach precludes reconciliation between the parties but they do not require that the parties must attempt reconciliation.



EXAMPLE

Grounds for Divorce: “Irretrievable Breakdown”

Family Law Act 1975, s 48, s 49
(Australia)

- S 48(1) An application under this Act for a divorce order in relation to a marriage shall be based on the ground that the marriage has broken down irretrievably.
- S 48(2) In a proceeding instituted by such an application, the ground shall be held to have been established, and the divorce order shall be made, if, and only if, the court is satisfied that the parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for the divorce order.
- S 49(1) The parties to a marriage may be held to have separated notwithstanding that the cohabitation was brought to an end by the action or conduct of one only of the parties.
- S 49(2) The parties to a marriage may be held to have separated and to have lived separately and apart notwithstanding that they have continued to reside in the same residence or that either party has rendered some household services to the other.

3.7 A second approach, which is less popular to date, but more consistent with international standards that require the recognition of the autonomy of individuals, is to enable an immediate unilateral termination of a marriage by either party at will. The rationale behind this approach is that marriage is the voluntary union of two persons and therefore a unilateral wish of one party to end the union should be seen as sufficient to terminate the marriage. Proponents argue that whilst marriage provides a statement of intent that the relationship will be long-lasting, it is however a legal bond which either spouse should be able to enter or

leave with relative (or absolute) freedom. The state cannot require people to live together or continue a relationship and it does not have a legitimate role in attempting to delay or prevent divorce. Instead, it should provide the means to resolve the important legal questions relating to financial settlement, the division of property and the care of children.

3.8 Sweden has adopted this approach however it has imposed some limitations as illustrated below. If both spouses agree that their marriage should be dissolved they have a right to an immediate divorce (except where there is a child under sixteen years of



age, when a reconsideration period of six months is obligatory). If the other spouse does not consent to divorce, a reconsideration period (of six months) must precede the divorce. If the spouses have lived apart for at least 6 months, either of them

is entitled to divorce without any reconsideration period. The circumstances of each case are irrelevant and no reasons need to be given in support of the application for divorce.



EXAMPLE

Grounds for Divorce: Unilateral The Marriage Code (Äktenskapsbalken) 1987, Chapter 5 (Sweden)

Section 1

If the spouses are agreed that their marriage should be dissolved, they shall be entitled to divorce. Divorce shall be preceded by a reconsideration period if both spouses request one or if either of them is living on a permanent basis with a child of his or her own who is under 16 years of age and of whom that spouse has custody.

Section 2

If only one of the spouses wishes the marriage to be dissolved, that spouse shall only be entitled to divorce following a reconsideration period.

Section 3

The reconsideration period shall begin when the spouses make a joint application for divorce or when notice of one spouse's application for divorce is served on the other spouse. If the reconsideration period has run for at least six months, a decree of divorce shall be granted if either of the spouses then submits a separate application for such a decree. If such an application is not submitted within one year from the start of the reconsideration period, the question of divorce shall lapse. If the proceedings for divorce are disallowed or the case is dismissed, the reconsideration period shall cease to run.

Separation Procedures

Legal Effects of Separation

- 3.9 The main legal significance of a separation procedure is, like divorce, to enable the court to; award spousal and child support to either of the parties, to determine a property adjustment in lieu of a final property settlement, to settle the occupation of the marital home and to resolve issues in relation to any children. It is crucial that

the legislation explicitly provides the authority for the determination of these matters during any period of separation, regardless of which divorce process is adopted. If there is a mandatory separation period or even if an immediate unilateral divorce process is applied (since the parties may choose not to proceed immediately to divorce) access to the relevant legal remedies must be facilitated by the separation process.



3.10 The Cook Islands Amendment Act 1994 (based on the New Zealand Family Proceedings Act 1980) provides that a separation order can be issued if “there is a state of disharmony between the parties to the marriage of such a nature that it is unreasonable to require the parties to continue cohabitation.” The only major legal effect of a separation order under this legislation is that it is no longer obligatory for either party to cohabit. This however is no longer considered sufficient or appropriate in modern divorce laws. It is not enforceable, and is irrelevant to and has no role in determining the important legal issues that must be resolved when a relationship breaks down. A separation order issued under the Act therefore has little legal impact because currently the important legal issues that typically arise after separation that need to be determined, are governed by other legislation which can be accessed with or without a separation order. For example, the Cook Islands Act 1915 provides for spousal support if there is ‘reasonable cause’ for a wife or a child to live apart from their father or husband. Provision is made for interim property division or adjustment in the Matrimonial Property Act 1976 (NZ) upon separation and for an occupation order to determine who has the right to occupy the matrimonial home on the basis of what the court thinks ‘fit’. Issues relating to children, such as who will provide day-to-day care, are determined by the Cook Islands Act 1915 and the Infants Act 1908 on the basis of the best interests of the child.

Approaches to Separation

3.11 Two approaches have been taken to separation procedures in modern divorce law. The first and most straightforward, as illustrated in the example of Sweden below, is to expressly allow either party to apply for spousal and child support from the other and for occupation of the marital home upon separation. This approach does not require either party to establish that the marriage is ‘irretrievable’ merely that separation has occurred at the request of either party. Additionally, it does not require a separation order and is therefore administratively efficient. The second approach is to establish a procedure for obtaining a separation order. The legal effect of the separation order is to enable either party to: apply for spousal and child support, to determine who will occupy the marital home, and to also enable either party to apply for residence and contact orders if necessary. This approach is administratively much less efficient than the first, and should be adopted only if the parties are required to provide a reason for separation rather than merely enabling access to the relevant legal remedies once separation has, in fact, occurred. A good practice procedure in this model should mirror the divorce procedure adopted, and not require the finding of any fault by either party in order for a separation order to be applied for or granted.



EXAMPLE

Separation procedures **The Marriage Code (Äktenskapsbalken) 1987, Chapter 5** **(Sweden)**

Section 7

In a divorce case, the court may, with respect to the period prior to the determination of the question by a judgment that has become non appealable, on the application of either spouse,

- (1) determine which of the spouse is entitled to continue to reside on the spouses' joint dwelling; how ever, this shall be for no longer than until such time as property division has taken place;
- (2) Order that one spouse be obliged to contribute towards the maintenance of the other spouse.

Recommendations of the Cook Islands Consultation – Divorce

1. To adopt a model of divorce similar to that of Sweden with the following features:
 - Immediate divorce if the parties jointly apply for divorce unless there are children of the marriage in which case there shall be a 12 month period of separation
 - If only one of the two parties applies for the divorce there shall be a 12 month period of separation before divorce
 - Once there has been a 12 month separation either party can request an immediate divorce
2. No procedure for obtaining a separation order shall be included in the Bill as this serves no purpose in the divorce procedure adopted.
3. Separation shall begin when either of the parties applies for a divorce, when the parties cease to cohabit, or when either party determines that separation has begun even if the parties are still cohabiting.
4. Upon separation either party can apply for spousal and child support, occupation of the joint residence, property division and residence and contact orders in relation to any children.



Chapter 4

THE CARE OF CHILDREN

Introduction

- 4.1 This chapter considers law reform issues relating to children. In particular this chapter considers;
- i) the responsibilities of parents in relation to the care of their children until they reach 18,
 - ii) the various kinds of arrangements required for children when parents do not live together, including the resolution of disputes in relation to those arrangements and the basis on which those disputes are to be resolved, iii) the circumstances in which state care and/or supervision can and should be invoked and, lastly, iv) adoption. In the Cook Islands the Cook Islands Act 1915, the Infants Act 1908, and the Juvenile Crimes Act 1968 govern the law relating to children. However, the three Acts contains very limited coverage of the issues discussed in this chapter. Law reform in this area would best be achieved through the repeal of any applicable provisions in the three Acts and incorporation of the area into the new Family Law Bill.
- 4.2 In relation to the legal issues relevant to the care of children, a paradigm shift in thinking has occurred in recent years, away from a focus on parental rights and authority, towards a focus instead on the combination of parental responsibilities and the rights of the child. This shift reflects the tenor of the United Nations Convention on the Rights of the Child (CRC) to which the Cook Islands became

a party in 1997. It also reflects many changes in the demographic structure and make-up of family forms in recent years in many countries including the Cook Islands. The Explanatory Note to the New Zealand Care of Children Act 2004 which came into effect in 2005, with the aim of modernizing the law in relation to the care of children articulated this as follows:

“Family and ethnic demographics in New Zealand have changed considerably since the 1968 Act was enacted. The 1968 Act is premised upon a traditional nuclear family model that does not reflect the diversity of family arrangements that now exist in New Zealand. More modern legislation must provide a framework that recognises and supports all types of family units that care for children, for example, single-parent households, extended families, reconstituted families, and de facto relationships (including those of the same sex).”³²

- 4.3 In the majority of cases in the Cook Islands, after the breakdown of a relationship or when the parents do not live together, the parties reach agreement on what arrangements should be made for children without court intervention. This can often be in the children’s best interests. Agreement in such situations is achieved either through personal mutual compromise or solicitor-negotiated settlement. The standards represented in the law can provide a strong basis for the decisions and agreement reached. Protections must be in place, however for those circumstances where agreement cannot be reached or agreement is not in the best interests of the child.

32 Care of Children Bill 2003 (NZ) No 54-1, Explanatory Note, General Policy Statement, at 1. Online: http://www.brookers.co.nz/bills/enacted_bills/b030541.pdf



Therefore the enactment of a comprehensive legislative framework guiding by the ‘best interests of the child principle’ provides the dual purpose of guiding judges when disputes do reach the court, and guiding solicitors and parents when determining the issues in relation to their children outside of the court setting.

The Principle of the Best Interests of the Child

Legislative Definition

4.4 Article(1)(d) of CEDAW states that ‘in all cases the interests of the children shall be paramount.’ Article 3(1) of the CRC states that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. In response to these international obligations, modern family law typically includes a clear statement in the legislation that the principle of the child’s best interests in relation to all matters pertaining to children is paramount, as illustrated below in the example of England. The inclusion of a list of statutory factors to be used to determine what is the best interests of the child is discussed

below in paragraph [4.6]. A legislative statement confirming the paramountcy of the best interests of the child in all proceedings concerning children would also represent compliance with CEDAW legislative indicator 16.18.³³

4.5 Currently, in the Cook Islands the Infants Act 1908 provides that in any proceedings relating to ‘the custody or upbringing of an infant’ (defined as a person under 18)³⁴ the court ‘shall regard the welfare of the infant as the first and paramount consideration’. The Cook Islands Act 1915 states that the the High Court may ‘in and by any decree for the dissolution of marriage, or at any time and from time to time thereafter, make such order as it thinks fit as to the custody of the children of the marriage.’³⁵ There are some difficulties in determining how these two Acts were originally meant to interact, as well as with the current interpretations and practices however, the case law suggests that judges do apply the principle of the best interests of the child. It is important however that there is a clear statement in the legislation that explicitly states that the principle of the best interest of the child is to be applied in all proceedings relating to the care of children to ensure the principle is consistently applied in every case.

³³ See V Jivan & C Forster, *Translating CEDAW into Law: CEDAW Legislative Compliance in the Cook Islands* (Suva: UNDP Pacific Centre, 2008) at 41.

³⁴ *Infants Amendment Act 2009*, s 3.

³⁵ *Cook Islands Act 1915*, s 538.



EXAMPLE

Best Interests of the Child Paramount **Care of Children Act 2004, s 4 (1)** **(New Zealand)**

The welfare and best interests of the child must be the first and paramount consideration—

- (a) in the administration and application of this Act, for example, in proceedings under this Act; and
- (b) in any other proceedings involving the guardianship of, or the role of providing day to day care for, or contact with, a child.

Statutory Checklist of Factors

4.6 The trend in modern family law is to provide a statutory checklist (which means a specific checklist of factors is included in the law itself) to guide the court in determining what is in the child's best interests in family law proceedings. The arguments in favor of including such a checklist in the law, are that; it provides clarity and therefore enables a more consistent and systematic approach to decision-making by all judges, it enables judges to clearly identify the reasons for their decisions, simplifies the judicial process, it gives parents and children a greater understanding of the basis of the judge's decision, and it assists professionals when they prepare reports for the court to ensure that all aspects of the best interests of the child are covered. Finally, including a checklist also provides guidance for settling issues in relation to children outside of the court setting. Conversely, some argue against the use of a statutory checklist on the basis that; it

may lengthen proceedings, judges may come to take a mechanical approach to decision-making relying solely on the checklist and that the best interests of the child principle is all-encompassing and does not require explicit guidance.³⁶

4.7 Most modern family law legislation does however contain a checklist including, in the Oceanic region, Australia, Fiji, and New Zealand. There are a number of factors that are common to all countries while some have only been adopted by a few countries to date. The range of possible factors is detailed in the table below and accompanied by a commentary explaining the rationale for its inclusion. Some of the factors relate to particular types of proceedings. For example, the factor on the effect on the child of separation from a sibling or other close person relates primarily to a residence order although it could also be relevant to a public order, such as a care order, or adoption.

36 Scottish Law Commission, *Report on Family Law (1992, No 135)*, at para [5.21].



Checklist Factor	Commentary
<p><i>The ascertainable wishes and feelings of the child concerned (considered in the light of her or his age and understanding).</i></p>	<p>This factor requires consultation with the child in accordance with Article 9(2) and Article 12(1) of the CRC which provides that States parties ‘shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.’ Article 12(2) goes on to provide that the child ‘shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.’ Care must be taken to ensure that the child(ren) are not being pressured by either parent (or others) when they express their wishes.</p>
<p><i>The likely effect of any changes in the child’s circumstances on the child, including any separation from:</i></p> <ul style="list-style-type: none"> <i>(i) either of her or his parents; or</i> <i>(ii) any other child, or other person, with whom he or she has been living or with whom she or he has a close relationship.</i> 	<p>This factor requires the court to consider the relationship of the child with her or his parents, siblings or any other person with whom the child normally resides (including for example grandparents) recognising the potential impact on the child, of any change in such arrangements. This factor recognises the importance of maintaining existing relationships, emotional bonds and physical environment and in particular that siblings should, wherever possible, be brought up together in the same household so that they can be of emotional support to each other.</p>
<p><i>The child’s age, sex, background and anything relevant to her or his identity which the court considers relevant.</i></p>	<p>This factor recognises that the needs of children will vary depending upon their particular age and sex or other characteristics. Parents or persons seeking residence or contact orders may offer different skills or particular advantages which may indicate who is best suited to fulfil the needs of the child.</p>



Checklist Factor	Commentary
<i>The child's physical, emotional and educational needs and the capability of each of the child's parents, and any other person in relation to whom the court considers the question to be relevant, to meeting those needs.</i>	This factor recognises that each parent or person seeking residence or contact orders may have different skills or offer particular advantages which may indicate who is best suited to fulfil the physical, emotional and educational needs of the child. Article 28 of the CRC recognises the right of the child to education.
<i>The need to protect the child from physical or psychological harm caused, or that may be caused, by:</i> <i>1. being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or</i> <i>2. being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person.</i> <i>Or any harm which she or he has suffered or is at risk of suffering.</i>	This factor makes clear that children should not be placed in situations of risk from physical, sexual or psychological abuse either directly or indirectly by being exposed the abuse, ill treatment or violence towards others. Article 19(1) of the CRC states that States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
<i>The attitude to the child, and to the responsibilities of parenthood, demonstrated by those seeking parenting orders.</i>	This factor acknowledges the importance of focusing on the quality and commitment to parenting by persons seeking parenting orders, as reflected in each parent's concrete actions and the commitment to the child and parenting shown before and after separation.
<i>Any other factor or circumstance that the court thinks is relevant.</i>	<i>It is important that the list is not exhaustive so that other factors relevant to each case can also be included.</i>



Parental Responsibility

The Progression from Parental Authority to Parental Responsibility

- 4.8 The role of parents in relation to their children has been, in many common law countries, historically conceptualized in terms of their rights and authority over a child, rather than in terms of their responsibility for the child's welfare and best interests. In contrast to this approach, Article 18(1) of the CRC obligates state parties to use their best efforts to ensure recognition of the primary role of parents in protecting the interests of children and states that both parents have common responsibilities for the upbringing and development of the child. Accordingly, a number of countries (including Fiji) have in recent years shifted from the parent-focused 'parental rights and authority' approach towards the more child-focused concept of 'parental responsibility'. The inclusion of a provision defining parental responsibility accords with the CRC and good practice in the modern family law context.

Legislative Definition of Parental Responsibility

- 4.9 Two approaches have been taken in modern family laws to defining parental responsibility. The first approach is to include a detailed description of the particular responsibilities expected of both parents (as seen in the example of Scotland below). The second approach is to include a short generic provision that does not detail the responsibilities but instead leaves it to the discretion of the judges (as seen in the example of Fiji below). The inclusion of a detailed list of responsibilities could be seen by some as too restrictive and directive. On the other hand, the generic approach, such as the one taken by Fiji, could be viewed as failing to

give appropriate guidance to parents and the judges in determining parental responsibility. This may result in differing and uneven interpretations and applications of the law. The more detailed approach adopted by Scotland accords more closely with the obligations under the CRC. Article 6 states that the 'responsibilities, rights and duties' of parents to provide, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention. Article 9 states that a child who is separated from one or both parents has the right to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

Who has Parental Responsibility?

- 4.10 Article 16(1)(d) of CEDAW obligates States parties to ensure 'on a basis of equality of men and women the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children.' Historically, in many common law countries biological fathers had sole parental rights in relation to their children born within marriage whilst mothers were primarily left with responsibilities for children born outside of marriage. The obligation to place the child's interests as paramount and the contemporary view that 'the burdens and pleasures of child rearing' should be shared by both parents, has resulted in a shift in modern family law towards equal parental responsibility. As well as a clear statement of equal and shared parental responsibility, some countries have included in the legislation a provision stating that parental responsibility continues until the child is 18 regardless of other circumstances such as a parent re-partnering. This approach is reflected in the good practice examples of Fiji and England below.



EXAMPLES

Definition of Parental Responsibility

**Children (Scotland) Act 1995, s 1
(Scotland)**

A parent has in relation to [her or] his child the responsibility:

- (a) to safeguard and promote the child's health, development and best interests; and
- (b) to provide, in a manner appropriate to the stage of development of the child: (i) direction and (ii) guidance to the child; and
- (c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and
- (d) to act as the child's legal representative

**Family Law Act 2003, s 45.
(Fiji)**

In this part 'parental responsibility' in relation to a child means all the duties, powers, responsibilities and authority which by law parents have in relation to children.



EXAMPLES

Who has Parental Responsibility?

**Children Act 1989, s 2(6)
(England)**

A person who has parental responsibility for a child at any time shall not cease to have that responsibility solely because some other person subsequently acquires parental responsibility for the child.

**Family Law Act 2003, s 46.
(Fiji)**

- (1) Each of the parents of a child who is under 18 years has parental responsibility for the child.
- (2) Subsection (1) has effect despite any changes in the nature of the relationships of the child's parents such as becoming separated or either or both of them remarrying.



The Age At Which Parental Responsibility

Legally Ends

- 4.11 The age at which legal parental responsibility ceases differs in modern family law with some countries opting for when the child turn 18 years old, some opting for 16 years old and some 16 and 18 depending on the particular responsibilities in question. In Scotland all parental responsibilities, except the responsibility to provide guidance which lasts until the child is 18, cease when the child reaches 16 years of age.³⁷ In Fiji all aspects of parental responsibility continue until the child is 18³⁸ and this approach most closely aligns to Article 1 of the CRC which defines a child as a 'human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.'

Parenting Orders

Definition of Parenting Orders

- 4.12 The Cook Islands Act 1915 authorizes the High Court to make custody orders on the basis of what 'it thinks fit' in relation to the children of the marriage.³⁹ The Infants Act 1908 however provides for custody to be determined on the basis of the 'welfare of the infant as the first and paramount consideration'. Whilst the Cook Islands Act 1915 only applies to children whose parents are married to each other, it is unclear whether the Infants Act 1908 applies to unmarried parents. The Infants Act 1908 also provides for access orders, to be determined on the basis of the welfare of the infant and the conduct of the parents. Good practice requires a consolidation of the legislation, an explicit statement that the best interests of the

child are paramount in all proceedings involving children, and the removal of any reference to parental conduct or to any relationship that either parent may have with another person.

- 4.13 Modern family law legislation has moved away from the terminology of custody and access orders, which foster notions of ownership in children by focusing on the respective 'rights' of the parents, and on which parent has been granted 'possession' of the child to the exclusion of the other. Instead, the new approach emphasizes parental agreement as the primary means of settling parenting arrangements when parents do not live together, and the issuing of parenting orders. When parents are not living together, parenting orders are made to settle arrangements in respect of; the child's residence, to enable continuing contact with both parents, or with other important adults in the child's life, provided this is in the best interests of the child, and to determine the process for making important decisions in relation to the child. Parenting orders in modern family law typically consist of a range of orders termed 'residence', 'contact' 'specific issues' and 'prohibited steps' orders.

Types of Parenting Orders

Residence Order

- 4.14 Residence orders determine where a child is to live and who has the day-to-day care of the child. In modern family law a residence orders replace custody orders. In some Pacific Island countries, the age of the child is the factor that determines whether the father or the mother should have

³⁷ *Children (Scotland) Act 1995, s 1(2) (Scotland).*

³⁸ *Family Law Act, 2003, s 46 (Fiji).*

³⁹ *Cook Islands Act 1915, s 538.*



‘custody’⁴⁰ however in the Cook Islands the law specifically states that neither the father nor the mother has a ‘superior’ claim to the other.⁴¹ In the Cook Islands, currently the law gives the custodial parent virtually all rights concerning the upbringing of the child.⁴² A residence order is conceptually

different from a custody order because it gives one parent the day-to-day care and responsibility for the child but does not remove the responsibility of the other parent to participate in parenting as much as is practicable.



EXAMPLES

Residence Order

Children Act 1989, s 8(1)
(England)

A residence order is an order settling the arrangements as to the person with whom a child is to live and who has the day-to-day care and best interests of the child.

Children (Scotland) Act 1995, s 11(2)(c)
(Scotland)

A residence order is an order regulating the arrangements as to with whom; or if with different persons alternately or periodically, with whom during what periods a child under the age of sixteen years is to live.

Contact Order

4.15 A contact order determines whether, and in what circumstances, a parent or other person shall have contact with a child. In modern family law contact orders replace access orders. Access orders were historically adult-centered, permitting another person to visit the child for the benefit of the adult. In contrast, a contact order is child-centered, requiring the person with whom the child lives to allow contact with the other parent or other person

named in the order, if it is in the best interests of the child. It signals a move away from approaching contact with the child as a parental right, to viewing it instead as the child’s right and part of the range of responsibilities that parents have for their children. The rationale underscoring a contact order is therefore to recognize and maintain the beneficial relationships already established between the child and other children in the family or other adults to the maximum extent possible in the light of changed family circumstances. Contact orders typically permit

⁴⁰ For example in Tuvalu paternal presumption applies to a child over 2 years of age. *Native Lands Ordinance [Cap 22] 1957, s 20(2)(1)* (Tuvalu).

⁴¹ *Infants Act 1908*.

⁴² *Cook Islands Act 1915, s 538*



reasonable contact but may specify the times, frequency and location of visits and may include a variety of forms of contact such as emails, letters or telephone calls. Contact orders can also be used to provide important protections if there are any

concerns about whether specific kinds of contact, by a parent or any other person need to be avoided, restricted or regulated to ensure the best interests of the child.



EXAMPLES

Contact Order

**Care of Children Act 2004, s 3
(New Zealand)**

A parenting order determining that a person may have contact with the child may specify any of the following:

- (a) the nature of that contact (for example, whether it is direct (that is, face to face) contact or some form of indirect contact (for example, contact by way of letters, telephone calls, or email));
- (b) the duration and timing of that contact;
- (c) any arrangements that are necessary or desirable to facilitate that contact

**Children (Scotland) Act 1995, s 11(2)(d)
(Scotland)**

An order regulating the arrangements for maintaining personal relations and direct contact between a child under that age and a person with whom the child is not, or will not be, living.

Specific Issues Order

4.16 Specific issues orders have been incorporated into contemporary family laws to complement residence orders and contact orders. A specific issues order can detail who will make a particular decision and/or how a particular decision will be made. A specific issues order aims to resolve any potential problems in relation to decisions involving the child when there is a residence order in place and whether, and if so, when the other parent should be notified or consulted in relation to decisions about the child. The power to attach conditions and other

incidental or supplementary provisions enables the court to resolve particular disputes or to direct how such a dispute is to be dealt with in future. Examples of topics that might be included in a specific issues order include; who is to have responsibility for the day-to-day care, the welfare and development of the child, who is responsible for decisions about the child's medical treatment, holidays or religious education. Alternately, if there was a dispute about which school a child should attend, a specific issues order could specify that the child attend a particular school.



EXAMPLES

Specific Issues Order

Children Act 1989, s 8
(England)

A specific issue order means an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.

Prohibited Steps Order

4.17 A prohibited steps order prevents a particular decision being made without returning to the court for permission or, alternately, without permission from the other parent. A prohibited steps order is typically issued to prohibit major decisions in

relation to the child such as changing the surname of the child, removing the child from the country, changing the nationality or domicile of the child, or consent to the adoption process. The availability of a prohibited steps order provides a means of protecting the rights of the child in accordance with the CRC.



EXAMPLES

Prohibited Steps Order

Children Act 1989, s 8(1)
(England)

A prohibited steps order is an order that no step which could be taken by a parent in meeting her or his parental responsibilities or her or his parental rights for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court.

Application for Parenting Orders

Persons Who Can Apply

4.18 The trend in modern family law is to enable a wide range of potentially interested parties to apply for a parenting order. In Australia (and Fiji which has

replicated the Australian provisions), an application for a parenting order may be made by a representative of the child, by either or both parents, or any other person concerned with the care, welfare or development of the child.⁴³ This is a good practice approach.

43 Family Law Act, 1975, s 65C (Australia); Family Law Act 2003, s 65 (Fiji).



Mandatory Separate Representation

4.19 Separate legal representation for children is recommended in proceedings in which the best interests of the child is a relevant consideration, and where there are extenuating circumstances, as illustrated in the example of Australia below. The role of the separate representative is to make submissions to the court on what is in the best interests of the child (which may differ from the interest of one or both of the parents or interested

others). In order to carry out this role, the separate representative may be authorized to seek information from relevant parties including the child's school and the social welfare services if relevant and to obtain an expert's report from appropriate persons such as a child psychiatrist. Mandatory representation is however dependent upon state funding and its inclusion in the legislative provisions must be accompanied by a commitment to funding separate representation.



EXAMPLES

Separate Representation

Family Law Act 1975, s 68L(3)

(Australia)

1. where there is an apparently intractable conflict between the parents,
2. where the child is apparently alienated from one or both parents,
3. where there are real issues of cultural or religious difference affecting the child,
4. where the conduct, either of one or both parents or some other person having significant contact with the child, is alleged to be anti-social to the extent that it seriously impinges on the child's welfare,
5. where there are issues of significant medical, psychological, psychiatric illness or personality disorder in relation to either party or a child or other person having significant contact with the child,
6. in any case where it appears neither parent seems a suitable custodian,
7. where a child of mature years is expressing strong views which, if given effect to, would change a long standing custodial arrangement or result in a complete denial of access by a parent,
8. where a parent proposes permanently removing a child from the jurisdiction or to such a place within the jurisdiction as to greatly restrict or, for all practical purposes, exclude the other party from the possibilities of access,
9. where it is proposed to separate siblings,
10. where none of the parties are legally represented,
11. where the court's welfare jurisdiction is being exercised, in particular relating to the medical treatment of children, and the child's best interests are not adequately represented by one of the parties, and
12. in cases involving allegations of child abuse, whether physical, sexual or psychological.



The Principle of Non-Intervention

4.20 If there is a dispute between the parties, an order may be required in the child's best interests in order to; give stability to the existing arrangements, to clarify the respective roles of the parents, or to reassure the parent with whom the children will be living that such arrangements have in fact been made. However, orders are not always necessary to settle arrangements in relation to residence and contact. A good practice approach is to explicitly provide in the legislation that a court must not make an order unless it considers that doing so would be better for the child than making no order at all. This measure ensures that the court only intervenes in the child's life where there is a real problem in need of resolution and not simply as a matter of routine (because it can). The rationale underscoring this approach is that if parents are prepared to co-operate between themselves or through a mediation process to ensure suitable continuing arrangements for their children, not making an order would be in the best interests of

the children, and this would enhance and support the parents' future relationship.

Primacy of Court Orders Over Parental Responsibility

4.21 The inclusion of parental responsibility provisions in the law may enable a parent to be obstructive in the exercise of parenting orders. In the Australian context, a review of the provisions on parental responsibility (introduced into the Family Law Act 1975) revealed that 'the meaning of joint parental responsibility, and how joint parental responsibility should be exercised after the making of court orders, was not clearly stated in the legislation and was not well enough understood by the legal profession and the public'.⁴⁴ It is important therefore that the legislation clearly states that parental responsibility, especially to the extent that it involves any kind of 'authority' in relation to decision-making, are superseded by any court order as illustrated in the example of England below.



EXAMPLES

Primacy of Parenting Orders

Children Act 1989, s 2(8)
(England)

The fact that a person has parental responsibility for a child shall not entitle her or him to act in any way which would be incompatible with any order made with respect to the child under this Act.

44 H Rhoades, R Graycar and M Harrison, *The Family Law Reform Act 1995: The First Three Years* (Dec 2000, University of Sydney and Family Court of Australia).



Parenting Plans

4.22 To encourage divorcing or separating parents or parents who are not living together to take mutual responsibility for their children, some countries (for example Australia and then Fiji) have included provisions for the making of parenting plans. A parenting plan is an agreement made between the parents of the child that deals with issues such as residence, contact, child support or any other aspect of parental responsibility. The parenting plan can then be registered with the court and subject to enforcement in the same way as any court order. The rationale underscoring parenting plans is that they encourage parents and those caring for children to make their own arrangements and to honor them by providing the parties with a legal means of enforcing those arrangements. It is important that safeguards are included to ensure that no parenting plan can be registered unless it accords with the welfare and best interests of the child and to ensure that no pressure was exerted on either party to agree to the plan.

Enforcement of Parenting Orders

4.23 For parenting orders to be effective in their operation there must be provisions for their enforcement, and to sanction those who do not respect them. The approaches that various countries have adopted to ensure that orders are enforced and that those who contravene them are sanctioned include the following:

- expressly spelling out the consequences of orders and contraventions;
- varying or discharging the parenting order (for example, by reducing the time

in which the child is in the care of, or has contact with the party that contravenes the order);

- requiring the deposit of a bond to the court as an assurance that the parenting order will not be contravened again;
- punishing the party in breach of the order with penalties such as fines, imprisonment or community service orders.

The Abduction of Children Overseas

4.24 The Hague Convention on the Civil Aspects of International Child Abduction 1980⁴⁵ (The Hague Convention) aims at securing the prompt and safe return of children who have been wrongfully removed from one Convention country to another, and to ensure that rights of residence and contact under the law of one country are effectively respected in other countries that are party to the Convention.⁴⁶ A specific issues order (discussed previously) can prohibit the removal of children without the permission of the court and/or the other parent and linked to passport control. However, if a child is removed either in the absence of such an order, contrary to the order, or is removed legitimately for a holiday or some other purpose and not returned, then the Hague Convention can be used to facilitate the child's return if the child is resident in a country that is also party to the Convention.

4.25 The Cook Islands is not yet a party to the Hague Convention, although the removal of children from the Cook Islands may be a growing problem

45 *Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, Hague XXVIII, available at: <http://www.unhcr.org/refworld/docid/3ae6b3951c.html> hereinafter the 'Hague Convention'.

46 *Hong Kong Law Reform Commission, International Parental Child Abduction* (Apr 2002), at para [1.5].



as freedom of movement increases between countries. A party to the Hague Convention has dual obligations. On the one hand, if it becomes a state party, the Cook Islands would be required to set up a Central Authority to receive applications, collect relevant information and institute the necessary action for the return of abducted or unlawfully retained children from the Cook Islands to that of their resident country. This role includes discovering the whereabouts of the child, preventing any or further harm, securing voluntary return, initiating proceedings and making administrative arrangements for the child's return.⁴⁷ On the other hand, in relation to children removed from the Cook Islands, a procedure must be established that provides evidence to the country to which the child has been removed that the child is 'habitually resident' in the Cook Islands and that the removal

or retention of the child outside of the Cook Islands is wrongful. Wrongfulness is defined as a breach of the "custody rights" of another person or institution and although an order is not required this is the easiest process for its establishment.

- 4.26 The approach taken in the Family Law Act 2003 in Fiji, as illustrated in the example below, which is also not a party to the Hague Convention, provides a good practice example for the Cook Islands. The legislation authorizes the future enactment of relevant provisions to facilitate the return of abducted children should Fiji become a party to the Hague Convention at a later date. The worldwide situation for the return of children can only be improved by further ratifications to the Convention, which is recommended by numerous commentators.⁴⁸



EXAMPLES

Hague Convention of International Child Abduction

Family Law Act 2003, s 200(1)
(Fiji)

The regulations may make such provision as is necessary to enable the performance of the obligations of the State, or to obtain for the State any advantage or benefit, under the Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980 (the Convention) but any such regulations must not come into operation until the day on which that Convention enters into force for the Fiji Islands.

47 See S Cretney & J Masson, *Principles of Family Law* (London: Sweet & Maxwell, 1997) at 757.

48 H Slota, "Preventing and Responding to International Child Abduction" (2009) 23(2) *American Journal of Family Law* 73; J Caldwell, "Child Abduction Cases: Evaluating Risks to the Child and the Convention." (2008) 23(2) *New Zealand Universities Law Review* 161.



Public Orders: Care and Supervision

State Obligations to Protect Children

- 4.27 Article 19 of the CRC obligates States parties to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. Article 20 obligates the state to provide to special protection and assistance, including alternative care, to a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment.
- 4.28 Article 23 of the CRC also specifically requires recognition of the rights of children with disabilities and the CRPD prohibits discrimination against children with disabilities. The CRPD further states that under no circumstances is the disability of a child and either or both parents to be used as the reason to remove a child from the family.⁴⁹ Additionally, if the immediate family cannot care for a child with a disability, “States Parties shall... undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.”⁵⁰ The international obligations of a State party are therefore to ensure that children are protected from abuse and/or neglect.

Definition of Care and Supervision Orders

- 4.29 The first and most desirable option if a child’s safety is at risk in her or his home due to abuse or gross

neglect is the removal of the abuser (rather than the child). In some circumstances this may not be possible, for example, if both parents are involved in the abuse or if the abuser is the sole parent or caregiver. In such circumstances, although regarded ‘as an option of last resort’, the state may need to intervene to safeguard the welfare of the child by removing her or him. In such circumstances the state must ensure the highest standard of care possible in accord with Article 20 of the CRC.

- 4.30 In the Cook Islands the Prevention of Juvenile Crime 1968 provides for the removal of children from their ‘surroundings’ if the child ‘is living in a place of ill-repute, or is likely to be ill-treated or neglected or for any other reason’.⁵¹ There is no duty however placed upon the state to provide appropriate care to the child and the provisions are primarily aimed at punitive measures against the parents rather than ensuring the welfare of the child. The Act also provides for supervision orders but these are available only if a child commits an offence and are punitive in their intent rather than aimed at the care and protection of the child.⁵²
- 4.31 The approach adopted in modern family law legislation is to enable state intervention through two forms of public orders. The first, a care order, authorizes the state to remove the child from the home and obligates them to provide appropriate alternate services for the child such as placing the child in foster-care, with another relative or family friend or into institutionalized care. The second is a supervision order whereby the child remains in the home but the state plays a supervisory role, for example, by undertaking regular scheduled visits

⁴⁹ CRPD, Article 23(4).

⁵⁰ CRPD, Article 23(5).

⁵¹ Prevention of Juvenile Crime 1968, s 22.

⁵² Prevention of Juvenile Crime 1968, s 27.



to the home, or ensuring that the child attends school. The rationale underscoring a supervision order is that it provides some state control over a family situation where a child might be at risk but a care order (and the removal of the child from their home) is not considered necessary or in the child's best interests.

Who Can Apply for an Order?

4.32 There are a range of possibilities about who can be authorized by the legislation to make an application for a care and/or supervision order. Potential applicants can include a local government authority such as social welfare services, designated persons authorized by the statute such as educational authorities, or community leaders, as well as the court itself during private proceedings for parenting orders.

either the compulsory removal of a child from the family in the case of a care order, or mandatory intervention in the family through a supervision order. The application of the principle of the best interests of the child as the sole criteria is unsuitable for care and supervision orders because it could enable the removal of children from their homes when the child's safety is not at immediate risk through abuse or neglect. An alternative approach, adopted by England as illustrated below, is to use a two step process. A threshold requirement establishes whether the child is at risk of significant harm due to either inadequate care provided by the parent or lack of parental control. If this is satisfied then the principle of the best interests of the child, which applies to all proceedings under the Act, is then applied to establish whether an order is the best option in the circumstances of the case.

Grounds for Application

4.33 The statutory grounds for care and supervision orders are crucial since the order will result in



EXAMPLES

Grounds for Care and Supervision Order

Children Act 1989, s 31(2)
(England)

A court may only make a care order or supervision order if it is satisfied—

- (a) that the child concerned is suffering, or is likely to suffer, significant harm; and
- (b) that the harm, or likelihood of harm, is attributable to—
 - (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
 - (ii) the child being beyond parental control



Legal Effects of Care Orders

- 4.34 The legal effect of a care order is typically as follows. A care order obligates the state to receive the child into its care, provide an appropriate standard of care and gives parental responsibility to the state (and specifically the person or agency designated to represent the state, i.e. social welfare services). Typically it does not mean that the parents no longer

have parental responsibility but prevents them from exercising it in a way that is incompatible with the care order. The state authority must share parental responsibility with the parent and facilitate contact, if it is in the child's best interests. The legislation might also impose restrictions on making major decisions such as changing the child's surname or agreeing to adoption.



EXAMPLES

Legal Effect of a Care Order

Children Act 1989, s 33(1)
(England)

- (1) Where a care order is made with respect to a child it shall be the duty of the local authority designated by the order to receive the child into their care and to keep [her or] him in their care while the order remains in force.
- (3) While a care order is in force with respect to a child, the local authority designated by the order shall—
 - (a) have parental responsibility for the child; and
 - (b) have the power (subject to the following provisions of this section) to determine the extent to which a parent or guardian of the child may meet his parental responsibility for [her or] him.

Legal Effects of Supervision Orders

- 4.35 Supervision orders differ fundamentally from care orders because (unlike care orders) they do not give parental responsibility to the state and the parents remain responsible for the child's safety and welfare. The purpose of a supervision order is to enable the state to oversee a child at risk without

removing the child from the home. It thus provides a lesser form of state intervention than a care order. The approach taken in many countries is to appoint a supervisor who is then given responsibilities and duties. This may include monitoring the care given to the child, introducing participation activities to improve the socialization of the child, or ensuring that the child is attending school.



Family Group Conferences

What is a Family Group Conference?

4.36 A family group conference (FGC) is a meeting of specified or eligible family members and other relevant persons to develop the best possible plan for a child who is the victim of neglect, abuse or is a juvenile offender. Family group conferencing originated New Zealand in the late 1980's in situations of neglect and abuse where the state was poised to remove a child from a family. FGC was a response to; i) the removal of Maori children by the state and their placement with 'cultural strangers' or in state institutions, ii) evidence that children have been, and continue to be, abused in the child welfare 'substitute' care system, and iii) evidence that it is better for children to remain in their families, including their extended families, rather than being taken into state care. FGC has subsequently been applied in New Zealand to youth justice (delinquency) cases. Since the development of FGC in New Zealand,⁵³ it has been implemented in 17 countries including Canada,⁵⁴ throughout Scandinavia,⁵⁵ the United Kingdom,⁵⁶ Ireland⁵⁷ the USA⁵⁸ and Australia.⁵⁹

Procedure of Family Group Conferences

4.37 A FGC is typically called prior to any care and protection court hearing by the social welfare

services, the court or other person authorized by the legislation to request a conference. Although the New Zealand model does not offer such protection in no circumstances should a family group conference be convened if there is domestic violence, a suspicion of domestic violence or any likelihood of domestic violence occurring in the future. Once a conference is requested a chairperson is appointed by the registrar of the court (or other authorized person). Although this is not a feature of family group conferencing in New Zealand it is important that the chairperson receive specialized training to ensure they are skilled at facilitating family dynamics and to ensure they have an understanding of cultural or social traditions that may allow for men to dominate and are equipped with skills to prevent this and to ensure an equal and participatory forum.

4.38 Family group conferences in New Zealand and in other countries where they have been adopted typically occur in four stages as follows. The first stage of the conference is the introduction, where the chairperson welcomes all participants and describes the course of action and the purpose of the conference. This is done in a manner that is consistent with the family's cultural and social tradition including a choice of language and the choice to include prayer and/or food. It should be

53 S Holland, S O'Neill & M Levine, "The Family Group Conference in the New Zealand Children, Young Persons, and Their Families Act of 1989 (CYP&F): Review and Evaluation," (2000) 18 Behavioral Sciences and the Law 517.

54 R Immarigeon, R. (1996) 'Family Group Conferences in Canada and the United States: An Overview', in J Hudson, A Morris, A., G Maxwell & B Galaway, (eds), *Family Group Conferences: Perspectives on Policy and Practice* (Sydney: The Federation Press, 1996) 167.

55 T Heino, *The Focus on Children in Family Group Conferences: Results from the Finnish Project on the FGC Method 1997-2000*. A paper presented at the *Building on Strengths International Conference*, Manchester, UK, 2002.

56 L Brown, "Mainstream or Margin? The Current Use of Family Group Conferences in Child Welfare Practice in the UK" (2003) 8 *Child and Family Social Work* 331.

57 K Sundell, K. & B Vinnerljung, "Outcomes of Family Group Conferencing in Sweden: A 3-Year Follow-Up" (2004) 28 *Child Abuse & Neglect* 267.

58 L Hill, "Family Group Conferencing an Alternative Approach to the Placement of Alaska Native Children under the Indian Child Welfare Act" (2005) 22(1) *Alaska Law Review* 89.

59 N Harris, *Family Group Conferencing in Australia 15 Years On*, 2008, National Child Protection Clearing House. Available at <http://www.aifs.gov.au/nch/pubs/issues/issues27/issues27.html>



noted however that the provision of facilities, food and services requires a financial commitment by the state. The second stage of the conference is the sharing of information by relevant professionals with the family. Whilst in the New Zealand model the professionals do not give their opinions or make recommendations to family members and participants because this would be “an obvious departure from the Family Group Conference model that permits the family to formulate their own plan during the next stage, the family meeting” it is important the participants have a clear understanding of the principle of the welfare and best interest of the child.

4.39 The third stage of a conference involves the family having time on their own to deliberate and agree on possible solutions. The aim of this stage of the FGC is to arrive at agreement. The aim of the agreement is to determine i) whether the child is in need of care and protection, and if so ii) to formulate a plan that will address the care and protection of the child. Whilst in the New Zealand model the family is free to set their own procedures and conduct this part of the FGC as formally or informally as they wish, good practice requires that safeguards are introduced to ensure that discussion and negotiations proceed in a way that furthers the welfare and the best interests of the child and to ensure that participants have an equal ability to contribute. For a conference agreement to proceed to the court for consideration it is necessary that all participants agree. To ensure that agreement is full and free safeguards may be required to ensure that no pressure is exerted on any of the participants.⁶⁰

4.40 For the fourth and final stage of the FGC, the professionals rejoin the family and the final plan is determined. The professionals help the family fine tune the plan in order to reach one that is acceptable to all participants. A number of participants, namely the parents, social workers, care and protection coordinator, and the child’s lawyer are given veto power, which helps ensure that the participants involved in the FGC agree with the decision reached. Whilst in the New Zealand model a decision reached by the FGC is given legal effect this approach has not been adopted in Australia, where either the courts or the relevant government department must endorse any plans or recommendations before they can take effect.⁶¹ This approach represents a more desirable model of FGC and good practice requires that any agreement reached can only be given legal effect if the court considers the plan furthers the welfare and the best interests of the child. The court should be given authority to modify or remove any part of the plan which does not accord with the welfare and best interests of the child.

Family Group Conferencing in the Cook Islands Context

Collaborative rather than adversarial

4.41 Family group conferences represent a collaborative, rather than an adversarial, approach to resolving a problem. The focus is on agreement rather than placing the parties in opposition to each other through the court system and to enable a solution to be reached without the stress of a long, expensive court proceeding. A collaborative approach

60 E Walton, M McKenzie & M Connolly, “Private Family Time: The Heart of Family Group Conferencing” (2005) 19(4) *Protecting Children* 17.

61 N Harris, *Family Group Conferencing in Australia 15 Years On*, 2008, National Child Protection Clearing House. Available at <http://www.aifs.gov.au/nch/pubs/issues/issues27/issues27.html>



increases communication between the parents, social services, and the courts, thus helping the families involved to address the neglect and/or abuse and in some circumstances ensuring that the child is in the child welfare system for as short a time as possible. However, as noted above it is important that the conference provides a forum in which all participants are able to participate equally and that protections are introduced to ensure that no participant dominates the proceedings and that the process and outcome is always centered around the best interests of the child, and not the interests of any of the participating family members as these may not always be the same.⁶²

Including extended family members

- 4.42 A core principle of family group conferencing is that the ‘family’ consists of more than just the nuclear family. This principle is very relevant to the Cook Islands where extended families are often involved in all aspects of the parenting process. Additionally, FGC views child welfare as a responsibility shared by many entities including government agencies, communities and families. After nearly two decades in New Zealand, FGC is considered to be one of the “plausible, realistic methods for merging the needs and interests of children and families and the protection concerns of public child welfare agencies, the courts, and the community.

Family care rather than state care preferred

- 4.43 FGC presumes that extended families know their members best and are the best sources of expertise on what should be done about their children. It should be noted however that in many cases only some members of the family may have expertise

on the needs of the child (typically the women) and consequently those participants that do not have any demonstrated knowledge or experience should not be given authority in the process. FGC also takes the view that children are best cared for within their extended kin network and in situations of neglect or abuse extended families can create the sort of therapeutic conditions necessary for the rebuilding of damaged lives. It views families, no matter how imperfect, as important to a child’s upbringing. By enabling the extended family to devise a plan for the care of the abused or neglected child, with the approval and oversight of the court, the family is placed at the centre of the welfare proceeding thereby building and repairing the family’s ability to care for and protect the child.

Welfare and best interests of child must be paramount

- 4.44 The inclusion of family group conferences into the family law framework must ensure that the benefits of encouraging parents, other involved adults and the child to reach agreement do not compromise the best interests of the child. In the New Zealand model the actual decision-makers are the extended families. Conferences have the power to decide, if there is unanimous agreement, whether or not a child is in need of care and protection, as well as how this need can best be addressed. The intention of this process is to transfer the power and authority of decision-making for children into the hands of the people who have a life-long connection with them and who have to live with the outcome of the decisions made. However, if the plan formulated by the conference is not in accord with the principle of the best interests of the child then an important good practice protection is to compel the court to

62 S Holland & M Rivett, “Everyone Started Shouting’: Making Connections Between the Process of Family Group Conferences and Family Therapy Practice” (2008) 38(1) *British Journal of Social Work* 21.



modify or reject the plan and recommendations of the FGC so that it accords with the CRC principle of the paramount role of the welfare and the best interests of the child.

Domestic Violence

- 4.45 Although the New Zealand model does not prevent the convening of a family group conference in a situation of domestic violence, suspected domestic violence or potential domestic violence good practice requires that FGCs are prohibited in such circumstances. No victim of domestic violence, or person that is in fear of domestic violence either an adult or a child should be placed in a family group conference situation with an offender or a member of the offender's family.⁶³

Adoption of Children

Purpose of adoption

- 4.46 Adoption ends the legal status of a birth family or a parent and provides a new permanent home for a child replacing, in law, one family or parent with another. The adoptive parent or parents take on the legal attributes of parenthood and the child is treated by law as a member of the adoptive family or a child of the adoptive parent.⁶⁴ Historically, adoption focused on adult needs. When first introduced in England it served the dual purpose of offering a discreet exit from stigma and economic hardship for unmarried mothers and, at the same time, met the needs of childless parents. Modern adoption law is, by contrast, in accord with Article 21 of the CRC a child focused process centred on

a means of finding a family for a child rather than a child for a family, and recognizing the legal role and responsibilities of a new parent.⁶⁵ Adoption typically falls within three scenarios. The first is when a person or couple adopts a child that is orphaned or given up for adoption by the birth mother (or parents). The second is when a step-parent adopts a child that she or he is parenting, and the third is when the state has care of a child and seeks a permanent parent or parents for the child. In the Cook Islands adoption is currently regulated by the Cook Islands Act 1915 providing separately and differently for 'Native adoption' and 'European adoption'. These provisions were enacted in the context of early twentieth century colonisation and, in many aspects, require modernizing to meet international standards and obligations imposed by CEDAW and the CRC.

Who May Adopt a Child?

- 4.47 The Cook Islands Act 1915 provides separately for 'European' adoption and 'Native' adoption. There are four classes of persons who can apply for an adoption order under European adoption namely; a 'European husband and his Native wife jointly', a 'Native husband and his European wife jointly', a 'European husband and his European wife jointly' and a 'European' alone. If it is a joint application then one of the applicants must be 25 and at least 21 years older than the child. If the applicant is unmarried then he or she must be at least 30 years older than the child and if the child is female, and the sole applicant is male, there must be special circumstances.⁶⁶ A 'Native' adoption application

⁶³ C Cunneen & T Libesman, *A Review of International Models for Indigenous Child Protection*, 2000, NSW Department of Community Services, Sydney; J Pennell & G Burford, "Family Group Decision Making and Family Violence" in G Burford & J Hudson (Eds.) *Family Group Conferencing: New Directions in Community-Centred Child and Family Practice* (New York: Aldine De Gruyter, 2000).

⁶⁴ This is distinct from customary adoption which is common throughout the Pacific including the Cook Islands and may have differing effects depending on the practices of the island or region.

⁶⁵ A Bainham, *Children: The Modern Law* (Cambridge: Family Law, 2005) at 265.

⁶⁶ Cook Islands Act 1915, ss 459, 461.



may be lodged jointly by a husband and wife, and an order of adoption may be made in favour of both or either of the applicants. It can also be made by an individual unmarried person provided they are at least 30 years older than the child.⁶⁷ This adoption regime requires modernization to meet the good practice standards in contemporary adoption law.

particular groups in the community (such as de facto couples and persons not in relationships) and is compliant with the anti-discrimination provisions in both CEDAW and the CRC. At the same time, the legislation prevents adoption by any person that has been convicted for specified offences such as child abuse.

Who can be Adopted?

4.48 The primary purpose of an adoption process is to place a child in a stable, secure and loving environment. Research suggests that this can be provided in a range of family forms including extended family forms such as grandparents, aunts and uncles, married and de facto couples, both opposite sex and same-sex, and by individuals.⁶⁸ Good practice requires, therefore, that the emphasis in adoption law should be on what is in the child's best interests in light of the abilities and capabilities of the prospective adoptive parent or parents in accord with Article 21 of the CRC. Accordingly, the law should not limit who can apply to adopt but rather determine their suitability as adoptive parent[s] on the basis of criteria which focuses on their capacity to provide a stable and secure environment for the child and the best interests of the child, rather than other, often discriminatory criteria that has no bearing on the applicant's ability to parent a specific child. England introduced such a regime in 2002 enabling anyone over 21 to adopt, including same-sex and opposite sex couples who are 'living as partners in an enduring family relationship.'⁶⁹ Such an approach prevents unfounded prejudices and discrimination against

4.49 The Cook Islands provides differently for indigenous Cook Islander adoption and European adoption. The Cook Islands Act 1915 states 'No person other than a Native or the descendent of a Native (whether legitimate or illegitimate) shall be capable of being adopted by a Native.'⁷⁰ In relation to European adoption the Act states 'any child, whether Native or European, and whether legitimate or illegitimate, and whether domiciled in the Cook Islands or not, shall be capable of being adopted'.⁷¹ Whilst the purpose of prohibiting indigenous Cook Islanders from adopting non-indigenous children was (and is) to prevent non indigenous Cook Islanders from obtaining succession rights to native land, these provisions are discriminatory. Modern adoption law usually enables any child under 18 to be adopted by all eligible persons in accord with good practice.

Consent

Whose Consent is Required?

4.50 The Cook Islands Act 1915 requires the consent of the biological parents in all adoptions unless 'the child has been deserted by that parent, or that the parent is for any reason unfit to have the care and

67 Cook Islands Act 1915, ss 573B, 573D.

68 M Chittenden "Lesbians Parents Better at Raising Children", 2009, UK Times Online; F Tasker and S Golombok "The Role of Co-Mothers in Planned Lesbian-Led Families" (1998) 2(4) Journal of Lesbian Studies 49.

69 Adoption and Children Act 2002, s 144(4) (England).

70 Cook Islands Act, 1915, s 460.

71 Cook Islands Act, 1915, 573C.



custody of the child, or if the Court for any other reason whatsoever considers that the consent of that parent should be dispensed with'.⁷² For European adoption, where the application is made by either a husband or wife alone, no order shall be made without the consent of the spouse of the applicant, unless they are living apart and their separation is likely to be permanent.⁷³

- 4.51 Consent from both biological parents is historically and currently a central part of the adoption process unless the parent(s) cannot be located, if the parent abused or neglected the child or if consent is 'unreasonably' withheld. Other factors included by some countries are if the child is the result of the rape of the mother, or if the parent has failed to discharge her or his parental duties.⁷⁴

Some countries, as illustrated in the example of England below, do not require the consent of biological parents if it is in the best interests of the child. Additionally, in the example of England any agreement given by a new mother within 6 weeks of the child's birth is ineffective and can be withdrawn up until the time of the adoption order. A requirement for the consent of the child has been included into some modern adoption law as illustrated in the example of NSW, Australia below. Others have not included such a requirement on the basis that this amounts to asking the child to reject her or his birth parents.



EXAMPLES

Whose Consent is Required?

Adoption and Children Act 2004, s 52

(England)

(1) The court cannot dispense with the consent of any parent or guardian of a child to the child being placed for adoption or to the making of an adoption order in respect of the child unless the court is satisfied that—

- (a) the parent or guardian cannot be found or is incapable of giving consent, or
- (b) the welfare of the child requires the consent to be dispensed with.

(2) Any consent given by the mother to the making of an adoption order is ineffective if it is given less than six weeks after the child's birth.

⁷² *Cook Islands Act, 1915, ss 462, 573E,*

⁷³ *Cook Islands Act, 1915, 573E.*

⁷⁴ *See Child Care Act, 1983, s19 (South Africa).*



EXAMPLES

Requirement for the Child's Consent

Adoption Act 2000, s 58
(NSW, Australia)

- (1) The Court must not make an adoption order in relation to a child who is 12 or more but less than 18 years of age and who is capable of giving consent unless:
 - (a) the child has been counselled as required by section 63, and
 - (b) the counsellor has certified that the child understands the effect of signing the instrument of consent (as required by section 61), and
 - (c) the child consents to his or her adoption by the prospective adoptive parent or parents or the Court dispenses with the requirement for consent.

Full and Free Consent

4.52 Young people and people with impaired intellectual ability may be vulnerable to pressure to adopt and may provide consent that is not full and free. The CRPD also provides specific guidance about the protections required and best framework for persons with disabilities in relation to consent issues (in all matters). The CRPD adopts the approach that wherever possible, the preferred approach is to ensure that persons with disabilities are given appropriate assistance so they can make decisions themselves, rather than giving other people the power to make decisions on behalf of a person with disabilities (known as alternative decision making or consent). In addition, the CRPD specifically requires that

“States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.”⁷⁵ Some jurisdictions have already included safeguards in the legislation to ensure that the rights of young people and people with intellectual disabilities are protected. Such safeguards include requirements such as a report that the person is capable of understanding the consent, a requirement that the person has received legal advice, revocation periods and a requirement that all the options for care and services are explored fully. As the implementation of the CRPD progresses, there may be additional examples both of the support the States is required to provide to parents with disabilities (as well as to children with disabilities).

⁷⁵ CRPD, Article 23(2).



EXAMPLES

Full and Free Consent

**Adoption Act 2000, s 58
(NSW, Australia)**

- (1) Consent to a child's adoption is not effective unless it is:
 - (a) informed consent, and
 - (b) given in accordance with this Act.
- (2) Consent given by a person (other than a child under 18 years of age) is not effective if it appears to the Court that:
 - (a) it was not given in accordance with this Act, or
 - (b) it was obtained by fraud, duress or other improper means, or
 - (c) the instrument of consent has been altered in a material particular without authority, or
 - (d) the person giving or purporting to give the consent was not, at the time the instrument of consent was signed, in a fit condition to give the consent.
- (3) Consent is not effective if it is revoked during the time allowed by section 73.
- (4) Consent given by a birth parent who is less than 18 years of age is not effective if it appears to the Court that the birth parent did not have the benefit of independent legal advice concerning the adoption before the instrument of consent was signed by the birth parent.

Grounds for Determining Adoption

4.53 Article 21 of the CRC obligates States parties to ensure that the principle of the best interests of the child is the paramount consideration in adoption determinations. In the Cook Islands the grounds for both European and Cook Islander adoption are that 'the applicant is a fit and proper person to have the care and custody of the child and of sufficient ability to maintain the child, and the adoption will not be contrary to the welfare and interests of the child.'⁷⁶ Uniformly, the approach of modern adoption law is to incorporate the best interests of the child as the (or a) primary consideration and also that the person who is applying for the

adoption is fit and proper and of sufficient ability to provide the day-to-day care for the child. However, a range of other criteria has also been included such as; the prospective parent[s] willingness to comply with religious beliefs of the parents (as in the example of New Zealand below), respecting the racial origin and cultural background of the child, the wishes of the child (as in the example of New Zealand below), the likely effect on the child of ceasing to be a member of the original family and becoming an adopted person, the likelihood of relationships with the original (including extended) family continuing and the value to the child of the continuation of such relationships.

⁷⁶ *Cook Islands Act, 1915, ss 461, 573D.*



4.54 The CRC, ILO Convention 169⁷⁷ and the UN Declaration on the Rights of Indigenous Peoples⁷⁸ all reflect the international protections intended to safeguard the integrity of Indigenous families and communities. This can become an important consideration in relation to the temporary and permanent removal of indigenous children from their families and/or communities, and in the case

of adoption. The best option is to place indigenous children in a culturally similar home, but where this is not possible, alternative caregivers should encourage children to continue to practice their own culture and to be educated in their own culture and language. However, this should not amount to a specific prohibition on the adoption of indigenous children by non-indigenous individuals.



EXAMPLES

Grounds for Determining Adoption

Adoption Act 1955, s 35(1)
(New Zealand)

Before making any interim order or adoption order in respect of any child, the Court shall be satisfied—

- (a) That every person who is applying for the order is a fit and proper person to have the role of providing day-to-day care for the child and of sufficient ability to bring up, maintain, and educate the child; and
- (b) That the welfare and interests of the child will be promoted by the adoption, due consideration being for this purpose given to the wishes of the child, having regard to the age and understanding of the child; and
- (c) That any condition imposed by any parent or guardian of the child with respect to the religious denomination and practice of the applicants or any applicant or as to the religious denomination in which the applicants or applicant intend to bring up the child is being complied with.

The Legal Effects of Adoption

4.55 Adoption fundamentally affects the legal status of the child. The adoptive parent[s] gain parental responsibility for the child including the obligation to provide day-to-day care for the child and to make decisions regarding the education, medical care and upbringing of the child. In the situation

where a step-parent adopts the child the adoptive parent gains the responsibility of sharing the day-to-day care and decision making in relation to the child. The child's natural parent(s) gives up her or his (or their) parental rights and responsibilities in respect of the child (unless there is an agreement between the birth parents and the adoptive parents as part of an open adoption process as described below in 4.57).

⁷⁷ *C169 Indigenous and Tribal Peoples Convention, 1989.*

⁷⁸ *United Nations Declaration on the Rights of Indigenous Peoples 2007 (UN Doc A/RES/61/295).*



All legal agreements such as child support orders or residence and contact orders are terminated. Additionally, legal relationships with the child's previous wider family are severed and the child no longer has rights in relation to inheritance or citizenship in respect of her or his former family. This does not mean that emotional relationships with the child's former family need also be ended. In an open adoption regime as described below in 4.41 the parties can agree that such relationships can continue.

- 4.56 The adoption process has been historically kept closed and secret. Research has indicated however that the secrecy of closed regimes of adoption have caused both serious psychological trauma including feelings of rejection, confusion, or of being unwanted to some adopted children, and in some instances, lifetime bereavement to the birth family.⁷⁹ Experts have recommended therefore a more open and inclusive system of adoption as appropriate in the modern context, particularly in communities (such as the Cook Islands) where kinship networks are broad and enduring.⁸⁰

It is also consistent with the CRC which provides the child with the right to maintain personal relations and direct contact with both parents on a

regular basis, except if it is contrary to the child's best interests. An 'open' adoption process enables the child, in some circumstances, to maintain ongoing contact with her or his birth parents. The goal of an open adoption process is to ensure that the child feels as psychologically secure as possible and lessen any sense of loss she or he might experience. Research suggests that whether contact is direct or indirect by way of an annual report or photograph it is potentially important for the child's sense of identity and knowledge of family background.⁸¹

Additionally, it provides a means for a child's cultural heritage and ethnicity to be furthered. Further, there is no secrecy about where the child comes from or who their birth family is. Open adoptions are not shared parenting arrangements as both birth and adoptive parent/s have their own separate and distinctive roles. Whilst open adoption is favored it has not yet been incorporated into many adoption law regimes. New South Wales (Australia) however, as illustrated in the example below, has adopted an 'open adoption' procedure whereby birth parents and adopting parents can formulate a plan that details post adoption contact. Contact may range from regular meetings between the birth parents and adoptive family, to intermittent ongoing contact.

79 NZ Law Reform Commission, *Adoption and its Alternatives: A Different Approach and a New Framework*, 2000 at 67.

80 See *Adoption and its Alternatives* note 40 at 33.

81 C Smith & J Logan, *After Adoption: Direct Contact and Relationships* (New York: Routledge, 2004) at 33.



EXAMPLES

Adoption Plan **Adoption Act 2000, s 58** **(NSW, Australia)**

- (1) An “adoption plan” is a plan agreed to by two or more of the parties to the adoption of a child that includes provisions relating to:
- (a) the making of arrangements for the exchange of information between the parties in relation to any one or more of the following:
 - (i) the child’s medical background or condition,
 - (ii) the child’s development and important events in the child’s life,
 - (iii) the means and nature of contact between the parties and the child, and
 - (b) any other matter relating to the adoption of the child.

Recommendations of the Cook Islands Consultation – The Care of Children

Parenting Orders

1. To include a legislative statement in the new Bill that the welfare and best interests of the child must be paramount in all proceedings involving the care of children.
2. To include a statutory list of factors to guide the judge in determining what is in the best interests of the child.
3. To include statement of parental responsibility specifying that it continues until the child is 18 regardless of any change of circumstances such as re-partnering
4. To design a single parenting order that can provide, if required, for settling residence and contact arrangements, and for the inclusion of any specific issues and/or prohibited steps conditions that might be required. The reason for a single order (rather than 4 separate orders) is to reduce the administrative costs.
5. Any person concerned for the care of the child can apply for a parenting order.
6. Mandatory separate representation for the child to be included in the Bill when there are extenuating circumstances such as a major conflict between the parents, where neither parent appears to be a suitable custodian etc.
7. To include a principle of non-intervention which states that the court must only make an order where there is a real problem in need of resolution.
8. To include a statement in the legislation that parenting orders take precedence over parental responsibility.
9. To include provision for parenting plans to be agreed upon by all relevant parties which can be



Recommendations of the Cook Islands Consultation – The Care of Children

- registered in the court and have the same legal effect as a court order. The plan must however be in the best interests of the child.
10. To provide for the enforcement of parenting orders through varying and discharging orders if a party contravenes the order; or through the deposit of a bond to the court. The group was not in favour of imprisonment or fines for breaches of parenting orders.

Care and Supervision Orders

11. To introduce care orders and supervision orders to enable the court to remove children from their homes or to supervise the care of the child.
12. To adopt a two part process for determining whether an order should be made. The first part requires the child to be at risk of significant harm. The second part requires that removal or supervision is in the best interests of the child.
13. If a child is removed from their home under a care order the state is under an obligation to provide appropriate and adequate care.
14. If a supervision order is made the supervisor should be placed under a duty to assist the child
15. The introduction of family group conferencing shall be considered as a first step in resolving situations where a child is neglected, abused or is beyond parental control.

Adoption

16. Anyone over 18 should be able to adopt any child. The discriminatory restriction on adopting non-indigenous children should be removed however a provision that non-indigenous children who are adopted by indigenous Cook Islanders do not gain succession rights to native land should be incorporated. Whilst there was recognition that this was a discriminatory provision the consensus was that at this stage, it was important to retain rights to native land for indigenous Cook Islanders only. However, the group acknowledged that this was an issue that should be the subject of consultation and discussion for future law reform.
17. Consent to adopt must be obtained from both parents and any child over 12 with the capacity to understand the proceedings. Consent can be dispensed with in certain circumstances including if a parent cannot be found, if a parent is incapable of consenting, if the child is the result of rape, or if it is in the best interests of the child to dispense with consent.
18. Protections should be included in the legislation to ensure that young women and disabled women are not pressured into consent that is not full and free.
19. Prospective adoptive parents or parent shall be considered on the basis of their capacity and ability to parent.
20. To adopt an open adoption process to enable ongoing contact between birth parents and family and adoptive parents and family, if the parties wanted such an arrangement.



Chapter 5

CHILD AND SPOUSAL SUPPORT

Introduction

- 5.1 This chapter considers law reform issues relating to child and spousal support. In this chapter support refers to the requirement of one person to provide financial support for a spouse or a child in the form of a lump sum, periodic monetary payment, the transfer of valuable goods (such as crops, livestock and other food resources) or the provision of services. Child and spousal support is governed in the Cook Islands by the Cook Islands Act 1915 and requires modernization to meet good standard practices and to comply with CEDAW and the CRC. Reform in this area would best be achieved through the repeal of any applicable provisions in that Act and incorporation of the area into the new Family Law Bill.
- 5.2 This chapter identifies and discusses a range of issues relating to spousal and child support in the Cook Islands which are currently non-compliant with CEDAW. First, access to spousal support is currently limited by the Cook Islands Act 1915 to married persons. However, the CEDAW Committee has stated that those in de facto unions should have the same protections as if they were married. International obligations suggest that same-sex unions should also be provided with the same protections as marriage. Reform in this area should reflect changes in the form of family units, which include cohabitation between couples in intimate relationships whether opposite-sex or same-sex.
- 5.3 Second, a right to spousal support and the determination of the appropriate amount of support is currently determined in the Cook Islands on the basis of what the court thinks ‘fit’ and ‘reasonable’. However, contemporary good practice in family law is to provide a checklist of statutory factors that ensure the discriminatory effects that marriage and relationships can have on the financial situation and earning capacity of one partner are taken into account in the determination of the support award.
- 5.4 Third, the Cook Islands currently does not require a biological father to contribute to child-bearing costs however this is contrary to Article 16(1)(d) of CEDAW which states that both parents are equally responsible for a child. Fourth, in relation to child support, the Cook Islands limits child support applications to biological parents. Article 27(4) of the CRC and good practice in contemporary law enables anyone caring for a child to apply for child support from either or both biological parents and social parents in certain circumstances. A child support order is awarded in the Cook Islands on the basis of reasonableness. However, instead of relying on “reasonableness”, a good practice approach includes a statutory checklist of factors to ensure that the needs of the child are paramount.
- 5.5 Finally, parentage testing is important for the determination of liability for child support and child-bearing expenses. Whilst the Cook Islands does provide for paternity orders the procedures for determining orders do not accord with good practice. Good practice requires that a range of parties can apply for parentage determination, that there are presumptions of paternity in some circumstances, and/or that paternity can be determined on the basis



of the evidence presented but with a prohibition on any requirement for corroboration by a birth mother, and finally that the court can order DNA testing in some circumstances.

Spousal Support

Definition of Spousal Support

- 5.6 Spousal support is the provision of living expenses by one party to a marriage or relationship to the other party after separation and/or divorce. Historically, spousal support took the limited form of an obligation of a husband to provide ongoing support his wife after separation and/or divorce. A shift to the ‘clean break’ approach, where neither partner had any obligation to support the other occurred in the 1980s based on the premise that men and women should be equally able to provide for themselves financially after separation. However, this formal equality approach to spousal support often resulted in discrimination against women because it did not take into account systemic discrimination against women which results in women being unequally positioned financially after a marriage or a relationship breakdown. Many families organize their lives during marriage and de facto relationships on the basis of continuing reciprocity. In other words, one spouse, typically the woman, forgoes employment opportunities or advancements to focus on and further the welfare of the family, whilst the other spouse, typically the man, works, for financial gain. The result is that one

party to the relationship, typically the woman, is at a huge financial disadvantage after separation and often for many years thereafter (in terms of future employment opportunities and related earning potential).⁸² Provision for spousal support taking into account systemic discrimination is therefore an important component of modern family law and, additionally, satisfies CEDAW legislative compliance indicators 16.10 and 16.17.⁸³

The Definition of a Spouse

- 5.7 The Cook Islands Act 1915 limits the definition of spouse, and therefore who is entitled to spousal support, to married couples only. It provides that a maintenance order can be made against a husband in favor of his wife upon separation and upon the dissolution of marriage as long as she remains unmarried. Upon separation, but not divorce, the court can make an order against a married woman in favor of her husband. The Cook Islands legislation reflects a historical view that was and is still also found in many common law countries that, first, a marriage is the only relationship that should give rise to an obligation to pay spousal support and, second, that only a wife was entitled to receive support from a husband upon divorce. This position has been reversed in recent times by many countries, both in response to the demographic reality that many people are choosing to live in de facto relationships, including same-sex relationship,⁸⁴ and in addition, because international obligations have increasingly

82 M Gray & B Chapman, “Relationship Breakdown and the Economic Welfare of Australian Mothers and Their Children” (2007) 10(4) *Australian Journal of Labour Economics* 253; T Oldham, “Changes in the Economic Consequences of Divorces, 1958-2008” (2008) 42(3) *Family Law Quarterly* 419.

83 V Jivan & C Forster, *Translating CEDAW into Law: CEDAW Legislative Compliance in the Cook Islands* (Suva: UNDP Pacific Centre, 2008) at 38 & 40.

84 Although there are no statistics for the Cook Islands a 2006 study of the Pacific population in Auckland indicated that 13% of resident Cook Islanders were living in de facto relationships, the highest of all Pacific countries. G Sundborn, P Metcalf, D Schaaf, L Dyall, D Gentles & R Jackson, “Differences in Health-Related Socioeconomic Characteristics Among Pacific Populations living in Auckland, New Zealand” (2006) 119 *Journal of NZ Medical Association* 1228. f th 19 No 1228



been interpreted to regard the failure to recognize such relationships as discriminatory.

5.8 In General Recommendation 21(13), the CEDAW Committee supports the recognition of de facto unions stating that the form and concept of the family can vary and in whatever form it takes, the treatment of women in the family both in law and in private, must accord with the principles of equality and justice for all, as required by Article 2 of CEDAW. Indeed, the CEDAW Committee has recently expressed concerns about the implications of the 'lack of a legal framework for de facto unions and the resulting precarious situation in which women in such unions may find themselves when relationships break down'.⁸⁵ Although the recognition of same-sex relationships has not yet been explicitly addressed by the CEDAW Committee, many consider there is sufficient support in CEDAW and the CRC through a broader interpretation of terms such as family, and discrimination on the grounds of sex or marital status to obligate States parties to provide equal rights and protections for those in same-sex relationships.⁸⁶ The extension of eligibility for spousal support to those in de facto and same-sex relationships can be implemented

without enacting domestic partnership/civil union legislation or extending marriage to same-sex couples. Indeed, even in countries where there are civil unions or same-sex marriage it is essential to extend legal protection to all de facto couples as it operates as a safety-net or default system to those couples who have decided not to marry or enter into a civil union.

5.9 The recognition of de facto relationships for the purpose of spousal support requires a definition in the law of what constitutes a de facto relationship. Two different approaches have been taken in contemporary family law to establishing the existence of a de facto relationship. The first is to identify a time period (which is usually 2 years) during which the parties must have lived together continuously. The second approach, as illustrated in the example of Scotland below, is to provide a range of factors, which typically include duration (but do not specify how long the relationship has to have lasted), for the court to use in determining whether a de facto relationship existed. Other factors usually included are the nature of the relationship during that period and the nature and extent of joint financial arrangements during that period.

85 *Concluding Comments of the CEDAW Committee: Norway (2006) 39th Session at para [31] (UN Doc CEDAW/C/NOR/CO/7); Cook Islands (2007) 39th Session at para [41] (UN Doc CEDAW/C/COK/CO/1); Saint Lucia (2006) 35th Session at para [36] (UN Doc CEDAW/C/LCA/CO/6).*

86 *For an overview of these arguments see R Wintemute, The Legal Recognition of Same-Sex Relationships: A Study of National, International and European Law (London: Hart Publishing, 2001) at 751-758.*



EXAMPLES

Definition of de facto or cohabitant

Family Law (Scotland) Act 2006, s 25
(Scotland)

- (1) "Cohabitant" means either member of a couple consisting of
 - (a) a man and a woman who are (or were) living together as if they were husband and wife; or
 - (b) two persons of the same sex who are (or were) living together as if they were civil partners.
- (2) In determining for the purposes of any of sections 26 to 29 whether a person ("A") is a cohabitant of another person ("B"), the court shall have regard to—
 - (a) the length of the period during which A and B have been living together (or lived together);
 - (b) the nature of their relationship during that period; and
 - (c) the nature and extent of any financial arrangements subsisting, or which subsisted during that period.

Right of Spouse to Support and Determination of a 'Just' Award

5.10 In contemporary family laws, a right to spousal support and the amount to be awarded if there is a right to support, is uniformly determined on the basis of what is 'just' or 'fair' coupled with a mandatory consideration of a range of factors. However, the Cook Islands Act 1915 provides for spousal support to be awarded upon separation only if the court is satisfied that the husband has 'failed or intends to fail to provide his wife with adequate maintenance'. However, if the husband does not have 'sufficient ability to contribute' no order can be made unless the wife is destitute. Upon divorce the court can award spousal support 'if it thinks fit'. In both instances the amount is determined on the basis of reasonableness.

5.11 The inclusion of a list of factors in the law to be used in determining when spousal support must be paid, and in what amounts, ensures that courts take into account the discriminatory effects that marriage and relationships can have upon the earning capacity of one partner (usually the female partner). This is especially important if there are children and one party has forgone or reduced education and/or paid employment to provide domestic and child care for the family. Additionally, after divorce one party (usually the woman) will retain the custody and day-to-day care of children, further disadvantaging them in relation to their current and future ability to earn.⁸⁷ The failure to award any or adequate spousal support after separation and divorce is discriminatory because, as the CEDAW Committee states in General Recommendation 21(21), 'the responsibilities that women have in bearing and raising children affect

⁸⁷ M McKeever and N Wolfinger, "Reexamining the Costs of Marital Disruption" (2001) 82 *Social Science Quarterly* 2002 at 215; P Erera, *Family Diversity: Continuity and Change in the Contemporary Family* (Oxford: Sage, 2002) at 104



their ability to access education, employment opportunities and other activities related to their personal development.’ The assessment of spousal support after divorce and relationship breakdown should therefore fully account for the historical and ongoing disadvantages that women face in

supporting themselves and their children. This can be achieved by the adoption of clear criteria for the court to consider, as detailed below, an approach which is more likely to achieve fair and non-discriminatory results in assessing spousal support.



Checklist Factor	Commentary
<p><i>The age and state of health of each of the parties.</i></p>	<p>This factor recognizes that the age and state of health of the two parties may have a significant bearing on the earning capacity of the parties or the capacity of one party to provide support for the other.</p>
<p><i>The duration of the marriage or relationship and the effects on earning capacity because of the division of functions within the marriage or relationship while parties lived together.</i></p>	<p>This factor recognizes that during a marriage or a de facto relationship, particularly if there are children, one party, typically female, may forgo employment and education opportunities to provide essential domestic services to the whole family and care to children. As the CEDAW Committee states in General Recommendation 21(21) 'the responsibilities that women have in bearing and raising children affect their ability to access education, employment opportunities and other activities related to their personal development.' After separation the current and future earning capacity of that party may be significantly reduced.</p>
<p><i>The likely earning capacity of each of the parties taking into account the responsibilities of each of the parties to provide ongoing daily care to a child or any other person.</i></p>	<p>This factor recognizes that after divorce or separation one party, typically the woman, will be primarily responsible for the day to day care of children. This will impact upon her ability to engage in the paid workforce since they are likely to require child-care to do so. It is additionally important that sole parents (who are predominantly female) are provided with the choice to provide care to children or other dependant persons rather than having no choice but to participate in paid employment.</p>
<p><i>The property and financial resources of each of the parties.</i></p>	<p>This factor recognizes that the joint and individual resources of the two parties has a direct bearing on the ability of the parties to support themselves and each other.</p>



Checklist Factor	Commentary
<i>The responsibilities of each of the parties to provide financial support to a child or any other person.</i>	This factor recognizes that either or both parties may have parents, grandchildren or sick family members to support. This is particularly important to include in the Cook Islands where there is an expectation of support to extended families.
<i>The eligibility of each of the parties to a pension, allowance, benefit or superannuation.</i>	This factor recognizes that the party that was in paid employment during the marriage or relationship may, because of that employment, be entitled to an allowance or superannuation upon retirement.
<i>The undertaking by one of the parties to a reasonable period of education or training designed to increase the earning capacity of that party.</i>	This factor recognizes that one party may have foregone educational or training opportunities during the relationship particularly if there were children. An intention by that party to gain valuable skills and to become financially independent as a result, should be supported by the other who personally benefited from domestic support during the relationship or marriage.
<i>The financial circumstances of any cohabitation that either party has with another person</i>	This factor recognizes that whilst a party seeking support may be cohabiting with another partner this should not automatically mean that the party is or should be financially dependant on that person instead of the former spouse, or that the former partner should no longer have financial obligations toward the party seeking support. The entitlement to support flows from a joint contribution in a former marriage or partnership.
Any other fact or circumstance that the court thinks is relevant.	This factor recognizes it is important that the list of factors is not exhaustive to enable other factors relevant to each case to be included.



Child-Bearing Expenses

5.12 Article 16(1)(d) of CEDAW states that both parents are equally responsible for a child irrespective of their marital status. The costs of medical attention and other costs associated with pregnancy and

childbirth should therefore be equally assumed by both biological parents as illustrated in the example of Australia below. The inclusion of a provision to enable a birth mother to receive child-bearing expenses represents compliance with CEDAW legislative indicator 16.23.⁸⁸



EXAMPLES

Definition of de facto or cohabitant

Family Law Act 1975, s 67B (Australia, replicated in Fiji)

The father of a child who is not married to the child's mother is, subject to this Division, liable to make a proper contribution towards:

- (a) the maintenance of the mother for the childbirth maintenance period in relation to the birth of the child; and
- (b) the mother's reasonable medical expenses in relation to the pregnancy and birth; and
- (c) if the mother dies and the death is as a result of the pregnancy or birth, the reasonable expenses of the mother's funeral; and
- (e) if the child is stillborn, or dies and the death is related to the birth, the reasonable expenses of the child's funeral.

Child Support

5.13 Article 27 of the CRC requires States parties to take 'all appropriate measures to secure the recovery of maintenance for the child from parents or other persons having financial responsibility for the child.' The CEDAW Committee in its Concluding Comments in 2007 called upon the Cook Islands to put in place adequate legislative measures to guarantee that women

receive child support. The CEDAW Committee states in General Recommendation 21(19) that after separation and divorce 'many fathers fail to share the responsibility of care, protection and maintenance of their children' and has urged States parties to 'put in place adequate legislative measures, including the review and amendment of existing laws, to guarantee that women obtain child support.'⁸⁹

⁸⁸ See *Translating CEDAW into Law* note 44 at 38.

⁸⁹ *Concluding Comments of the CEDAW Committee: Cook Islands (2007) 39th Session, at para [41] (UN Doc CEDAW/C/COK/CO/1).*



The payment of child support after relationship breakdown and divorce, based on the needs of the child as well as the earning capacity of both parties ensures that fathers take responsibility for the costs of child rearing. At the same time, it also recognizes the reduced earning power of many mothers and the costs that women bear in the raising of children.⁹⁰ The provisions should however be gender-neutral to recognize that in some instances a father may be providing the day-to-day care of the child and needs to seek support from the mother. The inclusion of child support provisions based on the needs of the child represents compliance with CEDAW legislative indicator 16.16 & 16.24.⁹¹

5.14 There are two main approaches in contemporary family law to child support. The first, adopted in many developed common law countries including New Zealand, England and Australia, is the establishment state-run child support schemes which assess and collect moneys through automatic payment systems. This approach, which has proven effective, requires state commitment to its administration and the related costs. The second is to adopt the same procedures utilized to determine spousal support with an application procedure for a child support order.

State-Run Child Support Schemes

5.15 In many jurisdictions including New Zealand, Australia and England a poor record in payment of child support (usually by fathers) has resulted in the establishment of registration schemes and the collection of monies through state-run

automatic payment systems. Such schemes rely on a state funded administration unit that receives applications from parents or carers. A statutory formula is applied to assess the amount required to be paid. The formula is typically based on a percentage of the liable person's income after a deduction has been made for their own basic living expenses. The designated amount is then automatically deducted from the wage of the liable parent, or added as a tax to the income of the liable parent and paid to the beneficiary parent. In order to work, such schemes depend on sufficient state resources (human and financial) that are required to manage the administration and costs of this kind of scheme. In the Cook Islands the small population might support such a scheme as it would be relatively easy to identify parties and to assess liabilities. The primary advantage of such schemes is that evidence suggests child support is paid more regularly and more fully than under a court order based regime. The primary disadvantage is the cost to the state of administering the scheme. It is also less appropriate and would be much harder to implement in the outer islands, in rural areas, and where the cash economy is less prevalent and/or where subsistence gardening and fishing rather than formal paid employment are the primary means of securing food and other necessities.

Child Support Order

Eligible Children

5.16 The Cook Islands Act 1915 provides for the issuance of a child maintenance order for a child

90 P McKenny & S Price, *Families and Change: Coping With Stressful Events and Transitions* (Oxford: Sage: 2005) at 235.

91 See *Translating CEDAW into Law* note 44 at 40 & 42.



whether born within a marriage or outside. Good practice family law simply requires the child to be under 19 and not financially independent.

Eligible Applicants

- 5.17 The Cook Islands Act 1915 does not explicitly state who may apply for a child support order but the language implies that it is limited to a mother or a father. In contemporary society the wider range of family forms and situations where care for children is provided is now reflected in good practice which requires that anyone with the responsibility of caring for a child should be legally able to apply

for child support. The Fiji Family Law Act 2003 in a good practice example provides that a parent, anyone with a residence order or any other person concerned with the care, welfare or development of the child can apply for a support order.⁹² Additionally, although a child support order might ordinarily end when a child reaches 18 years of age, good practice requires, as illustrated in the example of Fiji below, provision for orders for the financial provision and maintenance of children who are over 18 but are still in full-time education, or are mentally or physically handicapped and therefore require longer-term support.



EXAMPLES

Child Support for Child over 18

**Family Law Act 2003, s 92(1)
(Fiji)**

A court must not make a child maintenance order in relation to a child who is aged 18 or over unless the court is satisfied that the provision of the maintenance is necessary

- (a) to enable the child to complete his or her education; or
- (b) because of a mental or physical disability of the child.

Liable Parties

- 5.18 The biological parents of a child, along with adoptive parents have traditionally been the only parties against whom a child support order can be made. The Cook Islands Act 1915 provides for the issuance of a child maintenance order against the mother or the father of a child. The question of whether and to what extent step-parents should also be liable is controversial for some. However,

most contemporary family law provides that if a parental relationship has been formed, then support obligations should follow. The rationale that underscores this position is that the step-parent has voluntarily assumed that role and it is not in the best interests of children that he or she be permitted to abandon it because the marriage or relationship has ended.⁹³

93 C Rogerson, "The Child Support Obligations of Step-Parents" (2001) 18 *Canadian Journal of Family Law* 9.



Whilst some jurisdictions provide that such a duty is secondary to the primary duty of biological parents (as in Australia and Fiji) others approach all parents on the same basis and rely on statutory

factors, as illustrated in the example of New Zealand below, to determine the appropriate contribution from the liable parent.



EXAMPLES

Definition of Step-Parent

Child Support Act 1991, s 99
(New Zealand)

In determining whether to grant a declaration that a person is a step-parent of a child, the court shall have regard to the following circumstances:

- (a) the extent (if at all) to which that person has assumed responsibility for the maintenance of the child, and the basis on which that person assumed that responsibility, and the length of time during which that person has discharged that responsibility; and
- (b) whether that person assumed or discharged any responsibility for maintenance of the child knowing that that person was not the natural parent of the child; and
- (c) the liability of any other person to maintain the child; and
- (d) whether or not that person was ever living with a parent of the child in a marriage, civil union or de facto relationship; and
- (e) whether that person has at any time been a guardian of the child.

Considerations in Determining Contribution

5.19 The Cook Islands Act 1915 provides for the provision of child support on the basis of what the court thinks 'reasonable'. However, good practice in contemporary family law is to provide a statutory list of factors that courts must take into account

when determining the appropriate contribution by each liable parent. Such an approach ensures that courts take into account the variety of needs that a child may have and that the primary focus is on the child, not on the liable person or the applicant.



Checklist Factors for Child Support Orders

The need to provide suitable accommodation for the child.

The age and health of the child including any special needs of the child.

The educational or training needs of the child

The financial circumstances of the child.

The availability and cost of suitable child-care facilities or services.

The needs and resources of the parties

The commitments of the parties to support any other child or person.

Variation or Cessation of Orders

Modern family law typically makes provision for the variation or cessation of orders if the circumstances of the liable party, the recipient, or the child changes.

Form of Support

5.20 The Cook Island Act 1915 provides only for periodic payments of money for both spousal and child support orders.⁹⁴ Contemporary family law legislation has moved towards more flexible approaches to the payment of support orders including lump sum payments, the provision of goods such as crops and livestock (which could be appropriate in the goods based – rather than cash based - economy of parts of the Cook Islands), the provision of services, and the transfer or usage of property or assets. Generally, periodic payments are preferred over a lump sum since this allows for a more accurate calculation of the needs of the recipient.

Enforcement of Support Orders

5.21 A system of enforcement is crucial to ensure that spousal and child support payments are made. Enforcement mechanisms that can be employed include utilizing the tax system (New Zealand), ordering the employer (if the liable partner is working) to deduct a certain amount from her or his salary to meet the support payments, garnisheeing accounts, forcing the sale of assets or property, fines and imprisonment. An absconding debtor order could also be introduced which can prevent a person who has support obligations from leaving the country.

Determination of Parentage

Reasons for Parentage Determination

5.22 The law must specify who can apply to determine the biological parent(s) of a child and for what reasons, testing can be ordered. The determination of parentage, typically paternity, is important

94 Cook Islands Act 1915, s 564(1).



for the determination of child support and child-bearing expenses. Other reasons for seeking parentage tests include allocation of parental responsibilities, amendment of birth certificates, inheritance, immigration applications, identification of human remains, civil proceeding for adoption, medical reasons, to ensure ties and inclusion within extended families and communities, and personal interest. Uncertainty about who the father is might arise if a biological mother does not know who the biological father is, or does not want to reveal who the father is (which may occur for many reasons, including if the pregnancy is a result of a rape, or if the identity of the father will result in problems for the mother or the child within the family or community), or if a prospective biological father either does not acknowledge paternity or wishes to establish paternity. The determination of maternity is not often required but can be relevant in instances where a child has been adopted. The provision of an appropriate system of determining parentage in the legislation satisfies CEDAW legislative compliance indicator 16.22.⁹⁵

Who Can Apply for a Parentage Order?

- 5.23 The Cook Islands Act 1915 limits applications for paternity to ‘an unmarried woman who is the mother of an illegitimate child or who is with child.’⁹⁶ The purpose of the application is solely for child support. In the contemporary context the three parties most likely to request a parentage order are mothers, prospective or presumed biological fathers, and children. Modern family law typically provides for application by those three parties and any other party if they have “a proper interest in the result”. Other parties might include grandparents or other

relatives, social workers, government agencies, trustees and executors. However, there must be protections in place to ensure that parentage tests cannot be applied for in any circumstances. Such protections are to ensure that identifying a parent (particularly the father) is not used for discriminatory or improper purposes (i.e. to try to force a marriage of the mother and father).

Determining Parentage

- 5.24 The Cook Islands Act 1915 provides the High Court with the authority to make a determination of paternity however no formula for that determination is provided. Further, no application can be made if the child is 12 or over. If the child is 6 or older, no application can be made unless the prospective father has contributed to child support during that six years, or cohabited with the mother in a de facto relationship, in which case any application must be within two years of either the financial contribution or the cohabitation. Such limitations are inappropriate and do not accord with good practice.
- 5.25 In modern family law presumptions of paternity are typically made in certain circumstances. These include if the father is the husband or de facto partner of the mother at the time of the birth, or at the time of conception, or if the father’s name is registered on the birth certificate. In the absence of a presumption, paternity is typically based on evidentiary submissions. In the Cook Islands other presumptions that could be included are whether the father bought items for the baby, visited the mother in hospital or any other kind of traditional acknowledgement of the child.

⁹⁵ See *Translating CEDAW into Law* note 44 at 42.

⁹⁶ *Cook Islands Act 1915*, s 545(1).



Corroboration is Not Required

- 5.26 Discriminatory assumptions about women's dishonesty in reproductive matters historically led many jurisdictions to the discriminatory requirement that a woman's testimony in relation to paternity had to be corroborated.⁹⁷ A requirement for corroboration (independent evidence that supports the claim by the woman, in the case of questions of paternity, about who the father is) in a paternity hearing is discriminatory because it is not required in other matters. In addition, it implies that a woman's word is

inherently worth less than that of the prospective or presumed father, even though there is no evidence that mothers should be viewed as a particularly unreliable class of witness. The Cook Islands Act 1915 provides that whilst the evidence of the mother is not necessary for the making of a paternity order, no order can be made upon the evidence of a pregnant woman unless it is corroborated.⁹⁸ Good practice requires a legislative statement that corroboration is not required, as demonstrated in the example of New Zealand below.



EXAMPLES

Corroboration is Not Required

**Family Proceedings Act 1980, s 52
(New Zealand)**

- (1) The evidence of the mother of a child shall not be necessary for the making of a paternity order in respect of the child.
- (2) If the mother of the child gives evidence, no corroboration of her evidence shall be necessary for the making of a paternity order in respect of the child.

DNA Parentage Testing Orders

- 5.27 DNA testing now enables paternity (or maternity) to be established conclusively. This is most commonly done by taking a buccal or blood sample from the father and child, although it can be done on any number of other body parts such as hair follicles. Generally however, genetic testing without the consent of the person being tested is controversial since taking any sample is an intrusion on bodily integrity, dignity and

privacy. Two approaches to DNA testing have been adopted in modern family law. The first is that the court can recommend parentage testing and if this is refused by the prospective father then the court can use this as evidence of paternity (i.e. that he is the father). Conversely, if the mother refuses to give consent to the testing of the child, this can be used as evidence of non-paternity (i.e. that the man in question is not the father). The second approach is

⁹⁷ A Didick & F Kaganas, *Family Law, Gender and the State: Text, Cases and Materials* (London: Hart Publishing, 2006) at 155.

⁹⁸ Cook Islands Act 1915, s 546.



to empower the court to order mandatory testing. Such an approach has been adopted in Fiji as illustrated in the example below (adopted from the Family Law Act, 1975 Australia). The New Zealand Law Reform Commission has recommended that mandatory orders should be incorporated but with the threshold requirement that the court must consider whether there is a 'reasonable possibility that a person recognized as a parent is not the genetic parent or that a person not recognized as a parent is the genetic parent'. If this threshold is

satisfied, the next consideration focuses on 'why it would not be in the interests of justice, including the best interests of the child' to issue an order for DNA testing.⁹⁹ The rationale that underscores this approach is that it is in the best interests of the child, her and his parents and the general public that parentage determinations are made on the basis of accurate DNA parentage testing. A DNA parentage testing procedure, either mandatory or recommended, requires the availability of or access to registered testing facilities.



EXAMPLES

Mandatory Order for Parentage Testing

Family Law Act 2003, s 139

(Fiji)

- (2) The court may make such orders as it considers necessary or desirable-
 - (a) to enable the parentage testing procedure to be carried out; or
 - (b) to make the parentage testing procedure more effective or reliable.
- (3) The orders the court may make under subsection (2) include, but are not limited to -
 - (a) an order requiring a person to submit to a medical procedure;
 - (b) an order requiring a person to provide a bodily sample;
 - (c) an order requiring a person to provide information

99 NZ Law Commission *New Issues in Legal Parenthood Report 88*, April 2005, Wellington, New Zealand at 48.



Recommendations of the Cook Islands Consultation - Support

Spousal Support

1. To extend spousal support to those in de facto relationships on the same basis as marriage.
2. To define a de facto relationship on the basis of a combination of factors including length of relationship, shared financial commitments, and whether they share the parenting of any children
3. The Bill should include a statutory list of factors to determine the amount of spousal support that should be awarded.
4. To include provision for the payment of child-bearing expenses by a biological father to a biological mother.

Child Support

5. To include a child support order which can be applied for by a parent, a person with a residence order in relation to a child, or anyone concerned with the care, welfare and development of a child
6. Liable persons include biological and adoptive parents but not step-parents. The consultation recognised that good practice required step-parents to have liability, but decided that including this in the Bill might have the unintended impact of discouraging 'voluntary parenting' by de-facto step parents, which currently takes place in many de facto relationships in the Cook Islands. This is an area where further discussion over time by national stakeholders might result in a different approach to the issue of whether step parents should have legal liability for child support.
7. The basis for determination of a child support order shall be a statutory list of factors focused on the needs and best interests of the child.

General

8. Support can be in the form of a periodic payment, a lump sum and in the form of money, goods (including crops and livestock) and the provision of services. However, no award can include the transfer of rights in native land.
9. Spousal and child support orders can be enforced by deductions from the wages of the liable person and by automatic deductions from the bank account of the liable person.

Parentage Testing

10. A mother, a child a prospective and a presumed father can apply for parentage testing. Other parties with a 'proper' interest can also but there must be checks to ensure that testing is in the best interests of the child.
11. Presumptions will apply if the mother was either married to or in a de facto relationship with the man at the time of conception; and if the man is listed as the father on the birth certificate.
12. If there is a paternity hearing the mother cannot be required to give evidence. If she does give evidence the court is prohibited from requiring corroboration.
13. DNA tests can be recommended (but will not be mandatory). If a father refuses a test than the court can presume that he is the father; if a mother refuses to have her child tested than the court can presume that he is not the father



Chapter 6

DOMESTIC VIOLENCE

Introduction

- 6.1 This chapter considers the law reform issues relating to domestic violence in the civil law. There are two good practice approaches to law reform in the area of domestic violence. The first is to amend and repeal existing civil and criminal law to incorporate domestic violence and the second is the enactment of a separate Domestic Violence Bill. Either approach can be used to advance legislative compliance with CEDAW. Whilst the enactment of a separate Domestic Violence Bill has the potential to incorporate both civil and criminal provisions the Cook Islands has elected to incorporate civil domestic violence provisions into the Family Law Bill and, in a parallel process, to separately pursue law reform in the criminal law.
- 6.2 This chapter does not therefore consider domestic violence offences in the criminal law. In particular, this chapter focuses on the establishment of a good practice legal framework for protection orders. The importance of a strong, effective and comprehensive legal response to domestic violence has been recognized worldwide as public recognition of domestic violence as a social problem has

increased.¹⁰⁰ Further, a burgeoning body of research about the broad nature, dynamics, effects and costs of domestic violence has emerged.¹⁰¹ Domestic violence can be differentiated from generic violence (where there is no pre-existing relationship between the parties) by the existence of a relationship characterized by intimacy, familial ties or a shared household. It is this bond that renders domestic violence particularly serious because it exacerbates the impact of the violence and complicates the legal measures required, since victims need protection in the (often hidden) privacy of their homes and from someone with whom they share(d) an intimate or familial relationship.¹⁰² In Pacific Island countries, including the Cook Islands, domestic violence has been increasingly recognized as a growing and substantial problem, which impacts on the physical and mental health of victims and also upon families and communities.¹⁰³

- 6.3 Violence against women, children, elderly and persons with intellectual and physical disabilities within domestic relationships is a fundamental violation of human rights. The CEDAW Committee has stated: “Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships, women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of

100 A Vesa, “International and Regional Standards for Protecting Victims of Domestic Violence” (2004) 12 *American University Journal of Gender and Social Policy* 309 at 317; R Coomaraswamy, *Report of the Special Rapporteur on Violence Against Women: Its Causes and Consequences*, Commission of Human Rights, 1997, 53rd Session at para [34] (UN Doc E/CN.4/1997/47); I Jalal, *Good Practices in Legislation on Violence Against Women: A Pacific Islands Regional Perspective*, 2008 at 4 (UN Doc EGM/GPL/VAW/2008/EP.07).

101 L Avila-Burgos, R Valdez-Santiago, M Hajar, A del Rio-Zolezzi, R Rojas-Martínez, & C Medina-Solis, “Factors Associated with Severity of Intimate Partner Abuse in Mexico: Results of the first National Survey of Violence Against Women” (2009) 100(6) *Canadian Journal of Public Health* 436; J Lawrence, G Williams, B Raphael, “The Impact of Domestic Violence on Women’s Mental Health (1998) 22(7) *Australian and New Zealand Journal of Public Health* 796; J Astbury, J Atkinson, J Duke, P Easteal, S Kurrle, P Tait & J Turner, “The Impact of Domestic Violence on Individuals” (2000) 173 *MJA* 427; UNICEF, *Behind Closed Doors: The Impact of Domestic Violence on Children*, 2006.

102 M Dempsey, “What Counts as Domestic Violence” (2006) 12 *William and Mary Journal of Women and the Law* 301 at 313, 314.

103 UNIFEM Pacific, *Actions to End Violence Against Women: A Regional Scan of the Pacific* (Suva: UNIFEM Pacific, 2002) at para [4.1]



violence, which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. ... The effect of such violence on the physical and mental integrity of women is to deprive them [of] the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms.”¹⁰⁴ A number of international human rights instruments, to which the Cook Islands is a party, require states parties to take effective measures to prevent and eradicate such violence.¹⁰⁵ The former UN Special Rapporteur on Violence against Women has stated that in order to meet such obligations states parties should introduce targeted domestic violence legislation ‘rather than making marginal amendments to existing penal and civil laws’.¹⁰⁶

- 6.4 A recent global trend towards the introduction of targeted domestic violence legislation, both civil and criminal, marks how seriously the world community views domestic violence. This publication does not consider good practice in domestic violence criminal law provisions as it is beyond the scope of the proposed civil Family Law Bill in the Cook Islands. A civil Family Law Bill does not however remove the need for a strong framework of criminal law domestic violence offences as it is important to incorporate both civil and criminal laws dealing with domestic

violence as they serve different but complementary purposes.¹⁰⁷ The criminal law focuses primarily on determining the innocence or guilt of those accused of domestic violence, and the administering of appropriate punishment of offenders within the criminal law system, and in the modern context, the rehabilitation of the offender where possible. Criminal offences send a message to all members of society that domestic violence is a crime and unacceptable.¹⁰⁸

- 6.5 The complementary aims of civil law domestic violence provisions are, broadly, to prevent domestic violence, to ensure the safety of all persons who experience domestic violence, to provide victims with effective and accessible remedies, and to promote non-violence as a fundamental social value. Specifically, civil law initiatives focus on the protection of persons ‘exposed or potentially exposed to violence in a domestic setting’¹⁰⁹ with the establishment of various orders that prohibit the offender from any further acts of domestic violence and/or to enable victims to remain in the family home from which the offender is excluded. In the Oceanic region New Zealand and all Australian states have targeted civil laws providing a range of protection orders for victims of domestic violence. In the Pacific only Vanuatu has a targeted and comprehensive (civil and criminal) domestic violence law introduced in

104 Committee on the Elimination of All Forms of Discrimination against Women, General Recommendation 19 (11th session, 1992) UN Doc A/47/38.

105 International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination against Women 1979, Convention on the Rights of the Child. 1992.

106 R Commaraswamy, A Framework for Model Legislation on Domestic Violence (UN Doc E/CN.4/1996/53/Add.2) at 2(d) & 4.

107 J Roure, “Domestic Violence In Brazil: Examining Obstacles And Approaches To Promote Legislative Reform” (2009) 41(1) Human Rights Law Review; R Davis, Domestic Violence: Intervention, Prevention, Policies and Solutions (Boca Raton: CRC Press, 2008) at 213. See the Concluding Comments of the CEDAW Committee: Uzbekistan (2010) 45th Session at para [22] (UN Doc CEDAW/C/UZB/CO/4).

108 See the Concluding Comments of the CEDAW Committee: United Arab Emirates (2010) 45th Session at para [27] (UN Doc CEDAW/C/ARE/CO/1).

109 H Douglas & L Godden, “The Decriminalisation of Domestic Violence: Examining the Interaction between the Criminal Law and Domestic Violence” (2003) 27 Criminal Law Journal 33.



2008.¹¹⁰ Whilst this provides an excellent example for the region and marks an important achievement in Vanuatu, it requires some modification in order to fully meet the good practice standards mandated by CEDAW.

6.6 The Cook Islands in 1994 introduced both occupation orders and non-molestation (protection) orders.¹¹¹ However, these orders provide protection to a limited range of persons, from a limited range of behaviours, in a limited range of circumstances and do not meet international good practice standards. Therefore, this chapter identifies and considers a range of good practice approaches to the following key components of a fully CEDAW compliant civil law response to domestic violence. First, an appropriate and comprehensive definition of domestic violence must be developed, one that draws on a range of good practice examples which encompass physical violence, sexual abuse, emotional abuse, intimidation, harassment, stalking, economic deprivation, property damage, animal abuse or threats of any of the above. Second, a good practice domestic violence civil law should provide protection to any person who experiences or is at risk of experiencing domestic violence. Third, a system of protection orders, emergency protection orders and occupation orders, with an extensive range of potential conditions should be established. Fourth and fifth, there must be an obligation on the police and other state actors to apply for and enforce orders and a comprehensive mechanism for the enforcement of orders. Finally,

domestic violence law should enable the provision of compensation to victims of domestic violence. This can be incorporated into the civil or the criminal law or both.

The Definition of an Act of Domestic Violence

6.7 Domestic violence occurs in many forms, including physical violence, sexual abuse, emotional abuse, intimidation, harassment, stalking, economic deprivation, property damage, animal abuse (particularly of domestic pets as this is intended to scare or hurt the person(s) who care for them), or threats of any of the above and it is important that domestic violence legislation contains a definition that reflects its breadth and complexity. The Cook Islands Amendment Act 1994, which enables the court to issue occupation orders and non-molestation (protection) orders, does not contain a definition of domestic violence. A comprehensive definition of domestic violence which clearly articulates the range of behaviors which can give rise to an act of domestic violence is, however, an essential component of good practice domestic violence law. The former Special Rapporteur on Violence against Women has urged the adoption of the 'broadest possible definitions of acts of violence' in domestic violence legislation.¹¹² The same comprehensive definition of domestic violence should be reflected in both civil and criminal domestic violence laws.

¹¹⁰ *Fiji enables a court to issue an injunction to restrain a person from entering the place of residence, education or employment of a child, a parent, or a person with a residence or specific issues order in relation to a child. Family Law Act 2003, s 118 (Fiji). The Solomon Islands provides for orders prohibiting a perpetrator from using or threatening violence against their wife, husband or child and orders to require the perpetrator to leave the matrimonial home and to prohibit her or him from re-entering the matrimonial home. These orders are available only if the protected person or a child of the family is in danger of being physically injured by the perpetrator and are limited to those in married relationships. Affiliation, Separation and Maintenance [Cap1] 1971, s 22 (Solomon Islands).*

¹¹¹ *Cook Islands Amendment Act, 1994.*

¹¹² *See Commaraswamy note 5 at 3*



6.8 It is important that both physical and non-physical forms of abuse are explicitly recognized and identified in the legislation. Non-physical forms of domestic violence are often not perceived by the community as ‘real’ violence, despite research consistently showing they may be the cause of severe and ongoing harm.¹¹³ Contemporary good practice domestic violence legislation uniformly contains comprehensive definitions of domestic violence and the differences between the models largely lie in the range of factors which they include within their definition of domestic violence, and the fullness of the definitions of the different factors. A fuller definition has the advantage of clearly articulating the range of behaviors which the legislation contemplates as falling within the scope of domestic violence.

Good Practice Definition (New Zealand)

6.9 The example of New Zealand below provides a good practice ‘starting point’ for the region although, as discussed in the subsections below,

other jurisdictions have included additional factors within the definition of domestic violence, which should also be considered for inclusion. The New Zealand example is notable for its inclusion of non-physical abuse and additionally, the unique and important inclusion of a person causing a child to witness domestic violence. This is an important recognition that, even if a child has not been the specific target of violence, indirect exposure to domestic violence is so harmful that it may constitute a form of child abuse in its own right.¹¹⁴ Factors not included in the New Zealand definition and discussed below, that should be considered for inclusion are economic abuse, animal abuse, and the inclusion of a discretionary category to encompass any other behavior that results in the apprehension of fear in the protected person. The law should include both actual abuse and the threats of violence or abuse that are directed at a spouse, a child or any other person (ie. the protected person’s parents, siblings or other loved ones) where the intention is to scare, hurt or intimidate those within the household.

113 L Seff, R Beaulaurier, & F Newman, “Nonphysical Abuse: Findings in Domestic Violence Against Older Women Study” (2008) 8(3) *Journal of Emotional Abuse* 355.

114 J Fantuzzo & W Mohr, “Prevalence and Effects of Child Exposure to Domestic Violence” (1999) 9 (3) *The Future of Children* 21, 26–28; J Osofsky, “The Impact of Violence on Children” (1999) 9 (3) *The Future of Children* 33.



EXAMPLES

Definition of Domestic Violence Domestic Violence Act 1995, s 3(1) (New Zealand)

- (2) In this section, domestic violence means
- (a) Physical abuse:
 - (b) Sexual abuse:
 - (c) Psychological abuse, including, but not limited to -
 - (i) Intimidation:
 - (ii) Harassment:
 - (iii) Damage to property:
 - (iv) Threats of physical abuse, sexual abuse, or psychological abuse:
 - (v) In relation to a child, abuse of the kind set out in subsection (3) of this section.
- (3) Without limiting subsection (2)(c) of this section, a person psychologically abuses a child if that person—
- (a) Causes or allows the child to see or hear the physical, sexual, or psychological abuse of a person with whom the child has a domestic relationship; or
 - (b) Puts the child, or allows the child to be put, at real risk of seeing or hearing that abuse occurring;- but the person who suffers that abuse is not regarded, for the purposes of this subsection, as having caused or allowed the child to see or hear the abuse, or, as the case may be, as having put the child, or allowed the child to be put, at risk of seeing or hearing the abuse

Other Factors for Inclusion

Economic abuse

6.10 Economic abuse has been identified as a powerful form of domestic violence since it can prevent a protected person from leaving an abusive relationship or living situation. Economic abuse is the unequal control of money or finances in a relationship or domestic situation and can manifest

in different ways. It may involve one person having complete control of money and income, preventing family members from accessing their own money or bank accounts, paying bills or buying necessities, having unrealistic expectations of spending patterns and budgeting, controlling how other family members spend their income forcefully taking money from family members or threatening family members for money.



EXAMPLES

Economic Abuse **Domestic Violence Act 1998, s 1(ix)** **(South Africa)**

Economic abuse” includes-

- (a) the unreasonable deprivation of economic or financial resources to which a complainant is entitled under law or which the complainant requires out of necessity, including household necessities for the complainant, and mortgage bond repayments or payment of rent in respect of the shared residence; or
- (b) the unreasonable disposal of household effects or other property in which the complainant has an interest.

Domestic and Family Violence Act 2007, s 8 **(Northern Territory, Australia)**

“Economic abuse”, of a person, includes any of the following conduct (or any combination of them):

- (a) coercing the person to relinquish control over assets or income;
Example of coercion for paragraph (a) Using stand-over tactics to obtain the person’s credit card.
- (b) unreasonably disposing of property (whether owned by the person or owned jointly with the person or someone else) without consent;
- (c) unreasonably preventing the person from taking part in decisions over household expenditure or the disposition of joint property;
- (d) withholding money reasonably necessary for the maintenance of the person or a child of the person.

Causing or threatening to cause the death or injury to an animal

- 6.11 Animal abuse has been identified as a serious form of domestic violence since it can be a powerful tool by which abusers create a climate of fear for victims and their children or other loved ones, and can prevent a protected person from leaving

a violent relationship.¹¹⁵ Research has also indicated that victims of domestic violence may be particularly affected by pet abuse. The importance of human/animal relationships for people is often increased by social isolation or the onset of physical and emotional distress. Such relationships can improve people’s physical or emotional well-being and assist them in

¹¹⁵ N Fawcett, E Gullone & J Johnson, ‘Domestic Violence and Animal Abuse: Encouraging Collaborative Relations between Animal Welfare and Human Welfare Agencies in Australia’ (April 2002) *InPsych* 37.



dealing with stress and adjusting to life transitions. Thus, the killing or injuring of favorite pets or threats of animal abuse should be incorporated as a form of domestic violence in the legislation since without explicit inclusion the court is unlikely to recognize such behavior.

Discretionary open-ended factor

- 6.12 The definition of domestic violence should be non-exhaustive to ensure that behaviors not included in the specific list which cause ‘apprehension’ or ‘fear’ can be included on a case by case basis at the discretion of the court. Thus for example in the Australian state of South Australia, domestic violence includes any ‘other conduct, so as to reasonably arouse in a family member apprehension or fear of personal injury or damage to property or any significant apprehension or fear’.¹¹⁶

The Inclusion of Comprehensive Definitions of Factors

Physical and Sexual Abuse

- 6.13 A comprehensive definition of what constitutes physical and sexual abuse provides clear direction to the court in their determination of whether an act of domestic violence has occurred. In particular, the inclusion of ‘forcibly detaining the protected person or withholding the necessities of life’ as in the example of Namibia below may encompass situations where money to buy food or medical treatment is withheld or where the victim is prevented from having friends or to talking to or being with others.



EXAMPLE

Animal Abuse Model Domestic Violence Laws 1999, s 3(1)(c).

An act of domestic violence is causing or threatening to cause the death of, or injury to, an animal, even if the animal is not the protected person’s property



EXAMPLE

Physical and Sexual Abuse Combating of Domestic Violence Act 2003 s 2 (Namibia)

- (a) physical abuse, which includes -
 - (i) physical assault or any use of physical force against the complainant;
 - (ii) forcibly confining or detaining the complainant; or
 - (iii) physically depriving the complainant of access to food, water, clothing, shelter or rest;
- (b) sexual abuse, which includes –
 - (i) forcing the complainant to engage in any sexual contact;
 - (ii) engaging in any sexual conduct that abuses, humiliates or degrades or otherwise violates the sexual integrity of the complainant;
 - (iii) exposing the complainant to sexual material which humiliates, degrades or violates the complainant's sexual integrity; or
 - (iv) engaging in such contact or conduct with another person with whom the complainant has emotional ties.

Stalking or Harassment

6.14 A comprehensive definition of what constitutes stalking or harassment provides clear direction to the court to determine whether an act of domestic violence has occurred. It recognizes, in particular, that whilst certain individual events might not appear to be serious, a pattern of such behavior can cumulatively amount to dangerous and

unacceptable conduct and can result in real and long lasting harm to the person (usually a woman) who has been stalked or harassed. The definition should include conduct carried out through technologically-assisted methods of contact such as email or mobile telephone text messaging, as partially recognized in the example of South Africa.



EXAMPLE A

Stalking **Model Domestic Violence Laws 1999, s 3(1)(c)**

- (2) A person stalks another person if—
- (a) the person commits any of the following acts on at least 2 separate occasions—
 - (i) follows the other person;
 - (ii) loiters outside the place of residence of the other person or some other place frequented by the other person;
 - (iii) telephones the other person;
 - (iv) enters or interferes with property in the other person's possession;
 - (v) gives or sends offensive material to the other person, or leaves offensive material where it may be found by, given to or brought to the attention of the other person;
 - (vi) keeps the other person under surveillance;
 - (b) acts in any other way that could be expected to arouse fear in a reasonable person; and the person commits the acts with the intention of causing by the acts—
 - (i) harm to the other person or a third person; or
 - (ii) the other person, or a third person, to fear harm to any person.



EXAMPLE

Harassment **Domestic Violence Act 1998, s 1(xii)** **(South Africa)**

“Harassment” means engaging in a pattern of conduct that induces the fear of harm to a complainant including-

- (a) repeatedly watching, or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be;
- (b) repeatedly making telephone calls or inducing another person to make telephone calls to the complainant, whether or not conversation ensues;
- (c) repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant



Emotional, Verbal and Psychological Abuse

6.15 Emotional, verbal and psychological abuse involves using words or actions to control, isolate, intimidate or dehumanize someone. It includes any act or omission that reduces an individual's dignity, sense of self-worth and damages their

psychological and emotional integrity. Such abuse, often subtle and long-term, can be more difficult to identify than physical abuse and it is critical that the legislation provides a full, express and clear definition.



EXAMPLE

Emotional, Verbal and Psychological Abuse Domestic Violence Act 1998, s 1(xi) (South Africa)

“emotional, verbal and psychological abuse” means a pattern of degrading or humiliating conduct towards a complainant, including-

- (a) repeated insults, ridicule or name calling;
- (b) repeated threats to cause emotional pain; or the repeated exhibition of obsessive possessiveness or
- (c) jealousy, which is such as to constitute a serious invasion of the complainant's privacy, liberty, integrity or security.

‘Minor’ or ‘Trivial’ Behavior can Constitute an Act of Domestic Violence

6.16 Domestic violence can take the form of a single act of violence or a pattern of behaviors. The legislation should clearly state, both that a single

incident is ‘enough’ to constitute domestic violence and, that seemingly ‘minor’ or ‘trivial’ behavior can constitute an important part of the dynamics of family violence.



EXAMPLE

Single Act is an Act of Domestic Violence Domestic Violence Act 1995, s 3(1) (New Zealand)

- (a) A single act may amount to abuse
- (b) A number of acts that form part of a pattern of behavior may amount to abuse, even though some of those acts when viewed in isolation may appear to be minor or trivial.



Definition of 'Protected Person'



6.17 Domestic violence protection, primarily in the form of protection orders, is aimed at the protection of persons who have a domestic relationship with the abuser rather than those who experience violence perpetrated by a stranger. Domestic violence can occur in many contexts and between persons in an array of personal relationships where there are power imbalances and it is important that the range of persons protected by the legislation includes anyone who experiences or is at risk of experiencing domestic violence. The Cook Islands currently limits access to occupation orders to married persons which does not meet international standards which require that protection be afforded to all persons at risk. The legislation does however extend non-molestation (protection) orders to de facto (opposite sex) couples and gives the court

the discretion to issue an order for the protection of any 'other person'. Whilst this potentially provides protection for anyone at risk of domestic violence the Cook Islands courts are reluctant to make non-molestation orders to protect those not in married relationships. A more effective approach adopted by contemporary good practice domestic violence law is to explicitly extend the range of protected persons beyond 'traditional concepts of family' to ensure protection for those in all forms of domestic relations. The table below lists the range of persons and relationships protected in contemporary family law legislation with good practice examples drawn from a range of jurisdictions. A good practice approach would be to include all the categories of persons identified in the table below to ensure that all persons at risk of domestic violence are protected by the legislation.



Possible Protected Persons	Commentary and Good Practice Examples
<p><i>The age and state of health of each of the parties.</i></p>	<p>Spouse could include both married persons and those in de facto relationships or it could be limited to married persons with the addition of a separate category of de facto relationship.</p> <p> Example</p> <p>Domestic Violence Act, 1998, s 1(vii)(a) (South Africa)</p> <p>They are or were married to each other, including marriage according to any law, custom or religion.</p>
<p><i>De Facto</i></p>	<p>Persons in a 'marriage-like' relationship either opposite or same-sex.</p> <p> Example</p> <p>Domestic Violence Act, 1998, s 1(vii)(b) (South Africa)</p> <p>They (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other.</p>
<p><i>Intimate Personal Relationship or Close Personal Relationship</i></p>	<p>This is a broader category than de facto and could encompass more forms of relationship than de facto, for example, a couple who are dating but not necessarily living together.</p> <p> Example A</p> <p>Domestic and Family Violence Protection Act 1989, s (Queensland) s 12A(3) An intimate personal relationship is a relationship 'based on intimacy, trust and commitment'.</p> <p> Example B</p> <p>Domestic Violence Act 1995, s4(4) (New Zealand)</p> <p>In determining whether a person has a close personal</p>



Possible Protected Persons	Commentary and Good Practice Examples
	<p>relationship with another person, the Court must have regard to—</p> <p>(a) The nature and intensity of the relationship, and in particular—</p> <ol style="list-style-type: none">1. The amount of time the persons spend together2. The place or places where that time is ordinarily spent3. The manner in which that time is ordinarily spent – but it is not necessary for there to be a sexual relationship between the persons: <p>(b) The duration of the relationship</p>
<i>Family members</i>	<p>An elderly member of a family may be abused by those with whom she or he is living, parents may be abused by their violent child, children may be abused by a range of family members etc., so it is important to extend protection to persons outside the nuclear family, particularly in the Cook Islands where there are extended family groupings. The term relative can be defined prescriptively with a list of those who come within the category or alternately it can be more broadly defined to encompass extended or ‘non-traditional’ family groupings. Whether prescriptive or broadly defined contemporary family law legislation has typically left some discretion for the judge to encompass extended family relationships.</p> <p> Example A</p> <p>Domestic and Family Violence Protection Act 1989, s 12B (Queensland)</p> <p>A relative includes ‘someone reasonable to regard as a relative</p> <p> Example B</p> <p>Domestic Violence Act, 1998, s 1(vii)(f) (South Africa)</p> <p>They are family members related by consanguinity, affinity or adoption.</p>




Possible Protected Persons	Commentary and Good Practice Examples
Care Relationship	<p>Research has found that an unacceptably high proportion of women with disabilities both physical and intellectual, experience violence and abuse by carers, both in institutionalised and in domestic settings.¹¹⁷ The elderly are also vulnerable.¹¹⁸</p> <p> Example A</p> <p>Domestic and Family Violence Protection Act 1989, s 12C(1) (Queensland)</p> <p>Protected person includes a person who is dependant on someone else for help with an activity of daily living required because of 'disability, illness or impairment'.</p>
<i>Someone who is or has been a member of the other person's household.</i>	<p>This category extends protected relationships to boarders, family friends or anyone who resides in a person's household.</p> <p> Example</p> <p>Domestic Violence Act, 1998, s 1(vii)(f) (South Africa)</p> <p>Domestic relationship includes persons who 'share or recently shared the same residence'</p>
Child who resides with the abuser	<p>A child who is related to the abuser would ordinarily come within the definition of relative but depending on the broadness of that definition, a stepchild or a foster child, or a child who resides or stays with a family friend or other person (temporarily or long-term) might not come within the definition.</p>

¹¹⁷ See D Stubbs & S Tawake, *Pacific Sisters with Disabilities: At the Intersections of Discrimination*, 2009, UNDP Pacific Center at 18.

¹¹⁸ Carolyn Frohmader, *There's No Justice - There's Just Us: The Status of Women with Disabilities in Australia* (2002) 22; Laurie Powers et al, 'Barriers and Strategies in Addressing Abuse: A Survey of Disabled Women's Experiences. PAS Abuse Survey' (2002) 68 (1) *Journal of Rehabilitation* 10; Anne Lawrence and Sally Robinson, "Access to Injustice? Domestic Violence and Women with Intellectual Disabilities in Australia" 8(1) *Polemic* 34.



Possible Protected Persons	Commentary and Good Practice Examples
	 Example Model Domestic Violence Laws 1999 4.(1) A “protected person”, in relation to another person, means a child who – (i) ordinarily resides or resided with the other person; or (ii) regularly resides or stays, or resided or stayed, with the other person

Definition of Protection Orders

‘amounted to discrimination under Article 1 of the Convention.’¹²⁰

6.18 Protection orders (including emergency orders and occupation orders) are a civil remedy typically issued by a court, the police or other authorized person to prevent a person from making contact, harming or harassing another person or alternately to enable a victim of domestic violence to remain in the family home. The CEDAW Committee states in General Recommendation 19(24)(r) that civil remedies in cases of domestic violence are required to overcome family violence and in particular has called upon States parties to ensure that victims of domestic violence have immediate means of protection by way of protection orders issued by courts and/or the police.¹¹⁹ It has additionally stated that the availability of protection orders is an ‘essential component of a comprehensive legal framework designed to protect women in situations of domestic or sexual violence’ and that a failure to provide for protection orders

Types of Protection Orders

1. Protection Order

Who can Apply for an Order?

6.19 Protection orders should be easily accessible to anyone at risk of domestic violence. The range of persons who can apply for a protection order in contemporary domestic violence legislation typically includes an adult protected person (as defined in the legislation), a child protected person who is a mature minor over 14 (who understands the nature and the consequences of the proceedings) a parent of a child that is a protected person, any person with a residence order in relation to a protected child, or any person if a child is in immediate danger. In some circumstances it may be difficult for a protected person to apply for an order and therefore a good practice approach is

¹¹⁹ *Concluding Comments of the CEDAW Committee: Poland (2007) at para [19] (UN Doc CEDAW/C/POL/CO/6); Romania (2006) 35th Session at para [21] (UN Doc CEDAW/C/ROM/CO/6).*

¹²⁰ *See the CEDAW Committee’s Views, A.T v Hungary Communication No 2 (2003) 32nd Session where the Committee censured Hungary for not having provision in the law for restraining orders and stated this was in non-compliance with CEDAW.*



to enable applications to be made by ‘any other person on behalf of the aggrieved person’.¹²¹ Some jurisdictions have authorized applications to be made without the consent of the protected person including police officers or a person appointed by the court. The rationale for this is similar to that of ‘no drop’ criminal law procedures that require, for many reasons, including power imbalances, that if there is evidence of domestic violence, the police must proceed with criminal charges even if the

victim (usually a woman) does not request that charges be laid or even if the victim requests that charges be dropped. For some, however, this is controversial on the basis that it denies the autonomy of the protected person to decide for herself if she wants an order.¹²² The example of Namibia below reflects this approach allowing authorised others to apply for an order only with the consent of the protected person except in exceptional circumstances.



EXAMPLES

Application by Authorized Other Person Combating of Domestic Violence Act 2003 s 2 (Namibia)

- (1) An application may be brought on behalf of a complainant by any other person who has an interest in the well-being of the complainant, including but not limited to a family member, a police officer, a social worker, a health care provider, a teacher, traditional leader, religious leader or an employer.
- (2) An application made under subsection (1) must be made with the written consent of the complainant, except in circumstances where the complainant is -(a) a minor; (b) mentally incapacitated; (c) unconscious; (d) regularly under the influence of alcohol or drugs; or (e) at risk of serious physical harm,

but, in the case of paragraph (d) or (e), the court must approve the making of the application.

Who can Issue an Order?

6.20 Whilst all jurisdictions authorize a particular court, or courts in general to issue orders, in recognition of the need to ensure accessibility to orders, some jurisdictions enable other authorities (such as police officers or designated community persons)

to issue orders. A good practice approach is to provide for emergency orders which can be issued by a range of persons (discussed more fully below) but require the final order to be issued by a court where fuller evidence is presented and the abuser also has an opportunity to provide evidence.

¹²¹ See *Domestic Violence Act 2005, Cap 16, s 12*.

¹²² C O'Connor, “No-Contact Orders and the Autonomy Rights of Victims (1998-1999) 40 *British Columbia Law Review* 937.

***The Criteria for Issuing an Order***

6.21 Protection orders should be available in all situations where there is a risk of domestic violence and not just after an act of domestic violence has occurred. The Cook Islands Amendment Act 1994 recognizes this in part by not requiring an act of violence to have occurred and instead enables the court to issue a non-molestation order if the court is satisfied it is 'necessary for the protection' of the applicant. A good practice approach is to simply require that the victim (or an authorized other) has a reasonable apprehension of an act of domestic

violence. An alternate approach is require that the victim has an actual fear of an act of domestic violence (whether 'reasonable' or not) so as a person living in fear, and who may be very aware of the signs of impending danger of domestic violence, should not have to meet any standard of reasonableness before being afforded protection.¹²³ Another, but somewhat weaker approach, as in the examples of India and Tasmania, Australia and Vanuatu below is to require that an act of domestic violence is 'likely' to occur.

123 *Partnerships against Domestic Violence, Model Domestic Violence Laws, Canberra, 1999* at 63.

Available at http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Modeldomesticviolencelaws-report-April1999



EXAMPLES

The criteria for the issuance of an order Model Domestic Violence Laws 1999

A court may make a protection order against a defendant to protect the aggrieved protected person, or the aggrieved protected person's property, if the court is satisfied, on the balance of probabilities, that—

- (a) the defendant committed an act of domestic violence against the aggrieved protected person and the defendant is likely again to commit an act of domestic violence against the aggrieved protected person; or
- (b) the aggrieved protected person reasonably fears the defendant will commit an act of domestic violence against the aggrieved protected person.

Domestic Violence Act 2005, s 18 (India)

The Magistrate may, after giving the aggrieved person and the respondent an opportunity of being heard and on being prima facie satisfied that domestic violence has taken place or is likely to take place, pass a protection order in favor of the aggrieved person.

Family Violence Act 2004, s 14. (Tasmania, Australia)

The person has committed, or is likely to commit, a family violence offence.

Family Protection Act, 2008 s 11(1) (Vanuatu)

A court may, on an application made under section 28, make a protection order against a defendant if the court is satisfied that:

- (a) the defendant has committed an act of domestic violence against the complainant; or
- (b) the defendant is likely to commit an act of domestic violence against the complainant.



Conditions of an Order

6.22 The conditions of an order are critical to its effectiveness. There are two approaches in contemporary family laws that determine the conditions of an order. The first approach is to leave it to the discretion of the court to make the order entirely based on the circumstances of the case. However, typically the law includes a list of 'directions, restrictions and prohibitions' that can be imposed as illustrated in the example of South Africa below. The second approach is to

impose mandatory conditions for every protection order with discretion for the judge to attach extra conditions based on the circumstances of each individual case. If there are mandatory conditions these should correspond to the definition of an act of domestic violence that is included in the legislation. The advantage of a mandatory approach is that important protections, such as illustrated in the example of New Zealand, below, are not left to the judge's discretion.



EXAMPLE

Possible Conditions Domestic Violence Act 1998, s 7 (South Africa)

- (1) The court may prohibit the respondent from committing
 - (a) any act of domestic violence;
 - (b) enlisting the help of another person to commit any such act;
 - (c) entering a residence shared by the complainant and the respondent;
 - (d) entering a specified part of such a shared residence;
 - (e) entering the complainant's residence;
 - (f) entering the complainant's place of employment;
 - (g) preventing the complainant who ordinarily lives or lived in a shared residence as contemplated in subparagraph (c) from entering or remaining in the shared residence or a specified part of the shared residence; or
 - (h) committing any other act as specified in the protection order.
- (2) The court may impose any additional conditions which it deems reasonably necessary to protect and provide for the safety, health or wellbeing of the complainant.



EXAMPLES

Mandatory Conditions Domestic Violence Act 1995, s 19 (New Zealand)

- (1) It is a condition of every protection order that the respondent must not—
 - (a) Physically or sexually abuse the protected person; or
 - (b) Threaten to physically or sexually abuse the protected person; or
 - (c) Damage, or threaten to damage, property of the protected person; or
 - (d) Engage, or threaten to engage, in other behaviour, including intimidation or harassment, which amounts to psychological abuse of the protected person; or
 - (e) Encourage any person to engage in behaviour against a protected person, where the behaviour, if engaged in by the respondent, would be prohibited by the order.
- (2) It is a condition of every protection order that at any time other than when the protected person and the respondent are, with the express consent of the protected person, living in the same dwelling house, the respondent must not,—
 - (a) Watch, loiter near, or prevent or hinder access to or from, the protected person's place of residence, business, employment, educational institution, or any other place that the protected person visits often; or
 - (b) Follow the protected person about or stop or accost the protected person in any place; or
 - (c) Without the protected person's express consent, enter or remain on any land or building occupied by the protected person; or
 - (d) Where the protected person is present on any land or building, enter or remain on that land or building circumstances that constitute a trespass; or
 - (e) Make any other contact with the protected person (whether by telephone, correspondence, or otherwise).

2. Emergency Protection Order

An emergency (or interim) protection order is a protection order that is immediately and easily available. It is essential that domestic violence victims be provided with access to protection orders when they do not have immediate access to a court. This is particularly crucial given that domestic violence often occurs after 5pm during

the week and on weekends. Additionally in specific areas (i.e. remote outer islands) where there are no courts it is important that there are trained magistrates or Justices of the Peace, or other persons who can be nominated as authorized to issue emergency orders. If a domestic violence victim seeks protection from the legal system during a crisis outside of standard court hours, the system must be able to respond and



offer an appropriate level of protection. In order to provide immediate protection an emergency protection order must:

1. Be accessible 24 hours a day, 7 days a week. Ideally the order should be accessible over the phone (where there is telephone service), or by shortwave radio.
2. Be available ex parte (which means without the testimony of the abuser or need to inform the abuser of the application).

3. Provide for categories of persons authorized and available to issue an order at all times. Some countries have provided such authority to police,¹²⁴ others to Justices of the Peace, others to designated persons in the community. Vanuatu provides for nominated authorized persons to make temporary protection orders as illustrated below. This is a good practice example for the Pacific region.



EXAMPLES

Authorized Persons Family Protection Act 2008, s7 (Vanuatu)

- 2) The Minister is to recommend to the Judicial Services Commission persons for appointment under subsection (1). A person is to be recommended only if:
- (a) the person has undertaken training approved by the Minister for the purposes of this section; and
 - (b) the person has a good knowledge of this Act and understands how it works; and
 - (c) the person understands the social and cultural environment within which domestic violence takes place; and
 - (d) the person:
 - (i) is the principal chief of a village; or
 - (ii) is an assistant chief of a village, a church leader, a community leader, a teacher, or a village health worker nominated by the principal chief of the relevant village; or
 - (iii) is a member of the Vanuatu Police Force of or above the rank of inspector; or
 - (iv) has applied in writing to the Minister to be recommended for appointment.

Typically an emergency protection order is issued for a short period of time pending a court hearing for a protection order. The length of time stipulated should depend on the expected waiting time for the court hearing

and should not expire before the hearing. The conditions of an emergency protection order should be the same as that for a protection order as described above.



3. Occupation Order

Definition of Occupation Order

6.23 An occupation order enables the protected person to remain in any shared home that she or he might have with the abuser regardless of the abuser's legal or equitable rights in the property. Where violence or abuse has occurred or is threatened between persons who live together, it may be necessary or appropriate for the perpetrator of the violence or threatened violence to be excluded from the home. Requiring the violent party to leave the home (including before the violence has taken place) reinforces the message that violence is wrong and that perpetrators of domestic violence will be held accountable in a range of ways. The inclusion of an occupation order represents compliance with CEDAW legislative compliance indicator 16.11.¹²⁵

6.24 There are two approaches to the provision of occupation orders in contemporary family law legislation. The first approach is to make this a possible condition of an emergency protection order or a protection order, as illustrated in the example of Nova Scotia below. In some jurisdictions when a court is making a protection order or an emergency protection order it is mandatory to consider whether the respondent should be excluded from the home. If a court decides that it is appropriate to so exclude an (adult) respondent, and the protected person does not oppose this then the court must do so.¹²⁶ The second approach is to have a separate and distinct order as illustrated in the example of India below. The advantage of a separate order is that it enables a protected person to apply for an occupation order and not a protection order which might be all that is required in certain circumstances.



EXAMPLES

Occupation as a condition of a protection order **Domestic Violence Intervention Act 2001, s 8(1)** **(Nova Scotia, Canada)**

An emergency protection order may do any or all of the following :

- (a) grant the victim or other family members exclusive occupation of the victim's residence for a defined period regardless of any legal rights of possession or ownership;
- (b) direct a peace officer to remove the respondent from the victim's residence immediately or within a specified time;
- (c) direct a peace officer to accompany a specified person, within a specified time, to the victim's residence to supervise the removal of personal belongings.

¹²⁵ V Jivan & C Forster, *Translating CEDAW into Law: Legislative Compliance in the Cook Islands* (Suva: UNDP Pacific Center, UNIFEM Pacific, 2008) at 39.

¹²⁶ *Family Violence Protection Act 2008 Victoria* (Australia)



EXAMPLES

Free-standing occupation order Domestic Violence Act 2005, S 23, 19 (India)

(1) While disposing of an application under sub-section (1) of section 12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order -

- (a) restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household;
- (b) directing the respondent to remove himself from the shared household;
- (c) restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides;
- (d) restraining the respondent from alienating or disposing off the shared household or encumbering the same;
- (e) restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate; or
- (f) directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require:

Provided that no order under clause (b) shall be passed against any person who is a woman

Factors for Consideration

6.25 Good practice in contemporary family law is to provide a statutory list of factors that courts must take into account when determining whether to make an occupation order. The advantage of a

statutory list of factors is that it focuses the attention of the court on what an occupation order will achieve in terms of the safety and best interests of the parties.



Checklist Factors

The impact on the safety and protection of the protected person and any children who live at the residence (even if the children are not protected persons) if an exclusion order is not made.

The desirability of minimizing disruption to the protected person and any child living with the protected person and the importance of maintaining social networks and support.

Ensuring continuity of care for children who live with a protected person.

Ensuring continuity in childcare, education, training and employment for protected persons and children who live with them.

The accommodation needs of the parties.

The welfare of children of the respondent or the protected person.

Ancillary Orders that Facilitate

Access to Personal Property

- 6.26 Access to personal property may be a significant issue for all parties when an occupation order is in force. The party that is excluded from the home will need access to their personal effects in order to take up residence elsewhere. In practice, orders allowing a respondent to return to the premises from which they are excluded to collect their belongings may need to be tightly controlled in order to ensure that protected person(s) are not put at risk of further intimidation or any other forms of violence. Equally, if an occupation order enables a protected person and/or any children to

remain in the home, it may be necessary to prevent the excluded party from removing necessary items from the premises (i.e. taking all the food or furniture etc., from the home). In some cases, prescriptive and detailed terms may be required in the order setting out what items are to be left at the premises for the use of the protected person and her or his children. For example, in New Zealand if a person applies for an occupation order, a court may also make an ancillary furniture order granting to the applicant the use of all or any of the furniture, household appliances, and household effects in the dwelling house specified in the occupation order.



Presumption in Favour of Protected Persons Remaining in the Home

6.27 A good practice approach to protection orders is to include a presumption that directs courts to start from the position that the interests of the protected person and their children would be best served by them remaining in their home. Research suggests that it is safer and in the best interests for any children of the relationship to remain in their own home and area, without the need to change schools.¹²⁷ Additionally, studies have found that women and children are severely economically,

educationally and socially disadvantaged if they are forced to leave their homes due to family violence, and that there is a high risk they will become homeless or, with no other options, will return to the abusive environment.¹²⁸ Accordingly, the former UN Special Rapporteur on Violence against Women has recommended that all States should ‘provide for the removal of the abuser from the shared home and allow the victim-survivor to retain her present housing, at least until formal and final separation is achieved’.¹²⁹



EXAMPLE

Presumption in favour of a protected person with child **Domestic and Family Violence Act 2007, s 20** **(Northern Territory, Australia)**

(1) This section applies if:

- (a) the defendant and protected person normally live in the same home with a child (whether or not the child is also a protected person); and
- (b) in deciding the conditions of a DVO [Domestic Violence Order], the issuing authority imposes a restraint on the defendant having contact with the protected person or child.
- (c) The issuing authority must presume the protection of the protected person and child are best achieved by them living in the home.

127 R Edwards, *Staying Home Leaving Violence: Promoting Choices for Women Leaving Abusive Partners* (2004) 36.

128 Domestic Violence and Incest Resource Centre, *Family Violence and Homelessness: Removing the Perpetrator from the Home*, Discussion Paper No 2 (2002) 6.

129 See Coomarasamy note 5 at para [142].



Obligation on Police-Officer to Apply for Order

6.28 The police response to domestic violence is a critical aspect of ensuring safety for women and children. Historically, the police response to domestic violence has been inadequate, with violence in the home seen as a private matter, not serious or worthy of police attention.¹³⁰ In many countries in response to such historical discrimination, a range of obligations have been placed upon police officers. Some countries have placed a mandatory obligation on police to apply for a protection order when domestic violence has or is likely to occur regardless of whether the protected person consents. In New South Wales (Australia) for example, police must apply for an order where they suspect or believe that a family violence, stalking, intimidation, or child abuse has recently been committed, is imminent or is likely to be committed against a family member.¹³¹ Such an

approach provides clear direction to police officers of their responsibilities in relation to domestic violence. It also sends a message to the community and the abuser that domestic violence is unacceptable and obligates the police to act, it increases the likelihood of an order being made, lessens the burden on the victim and can deflect blame from the victim where the application is seen as a police matter and out of the victim's hands. Finally, it increases the likelihood that a woman will pursue an application when she is supported by the police.¹³²

6.29 In other countries a lesser obligation is placed upon police officers such as in the examples below. In the example of the Model Laws if an application is not made by the police, the reasons for not making the application must be recorded. In the example of India an obligation is placed on a range of persons including the police to inform victims of their right to apply for an order.

130 See Victorian Law Reform Commission, *Review of Family Violence Laws, 2005*, Melbourne at 116.

131 *Crimes Act 1900 (NSW)* s 562C(3).

132 Victorian Law Reform Commission, *Review of Family Violence Laws, Melbourne, 2000* at 146.



EXAMPLE

Police Obligations to Apply for Protection Orders Model Domestic Violence Laws 1999, s 8

- (1) This section applies if a police officer believes or suspects an act of domestic violence has been committed, is being committed or is of domestic violence has been committed, is being committed or is likely to be committed, the police officer must investigate whether the act of domestic violence has been committed, is being committed or is likely to be committed.
- (2) If the police officer investigates and does not make a protection application, or an application for a telephone interim protection order, the police officer must make a written record of the officer's reasons for not making an application.

Domestic Violence Act 2005, s 8(5) (India)

A police officer, Protection Officer, service provider or Magistrate who has received a complaint of domestic violence or is otherwise present at the place of an incident of domestic violence or when the incident of domestic violence is reported to him, shall inform the aggrieved person (a) of her right to make an application for obtaining a relief by way of a protection order.

Duration of Order

6.30 A range of approaches have been taken to how long the protection order should be in place. The first approach is to have designated periods (typically ranging from 6 months to two years) if no time period is stipulated in the order. A second approach is for the order to be in effect for an indefinite period and discharged only upon application by the protected person or the perpetrator as in the example of New Zealand below. A third approach is to leave the protection period to the discretion of the court on the basis of what is 'necessary to

protect a person'¹³³ or what is 'necessary to ensure the safety and interests of the person for whose benefit the order is made.'¹³⁴

The Precedence of Protection Orders over Parenting Orders

6.31 Research in Australia and internationally has demonstrated that the period immediately following separation from a violent relationship is the time of greatest risk of an escalation of violence. A recent NSW study found that a significant proportion of the post-separation abuse was linked to child contact,

¹³³ *Family Protection Act 2008, s 37(3) (Vanuatu).*

¹³⁴ *Family Violence Act 2004, s 19(a) (Tasmania, Australia).*



particularly where the contact or negotiations for contact gave the ex-partner some level of access to the mother.¹³⁵ Research from England and Denmark has similarly demonstrated that most post-separation violence committed against mothers is linked in some way to child contact. Substantial commentary has also been written in recent years on how the child's presumed right to maintain contact with both parents has resulted in courts favoring contact between the absent parent and the child, regardless, at times, of the concerns of the mother or the past history of violence by one parent towards to other (or between the partners).¹³⁷ This is contrary to Article 9 of the CRC which supports contact with both parents 'except if is contrary to the child's best interests.' Such findings have resulted in legislative statements in many countries that protection orders override contact orders.

Enforcement of Orders

6.32 A strong system of enforcement is crucial to ensuring the protection order system is effective in protecting domestic violence victims. If the police or the courts do not respond adequately to breaches of orders, they will be perceived as ineffectual by victims and abusers alike. It will also give victims a false sense of safety and security, heightening their danger if an abuser behaves violently. To be effective a breach of a protection order must be a criminal offence.¹³⁸

Penalties

6.33 Contemporary domestic violence legislation typically has fines and/or imprisonment as the penalty for breaches of protection orders. Some jurisdictions have harsher penalties for second offences with some imposing only imprisonment for a second offence. In the Oceanic region the penalties for a breach of an order are as follows. All impose terms of imprisonment or fines. In Vanuatu the penalty is up to 2 years imprisonment, a fine of 50,000 vatu or both, in New Zealand the penalty is up to 6 months imprisonment or a fine not exceeding \$5,000, in Australia the penalties range from in the state of Victoria for a first offence a fine of up to \$24,000 or 1 years imprisonment and for a subsequent offence up to 2 years imprisonment. In New South Wales and South Australia the penalty is up to 2 years imprisonment and/or a fine. In Queensland the penalty is up to one year imprisonment or a fine. In Tasmania and the Northern Territory the penalty is up to 6 months imprisonment and/or a fine although in the Northern Territory a second offence requires a term of imprisonment. In the Australian Capital Territory the penalty is a fine or up to 2 years imprisonment for a first offence and a fine or up to 5 years imprisonment for a second offence (the highest penalty anywhere). In Western Australia the penalties range from 6 months imprisonment to 18 months imprisonment and a fine of \$2,000 to \$6,000 depending on whether it is an emergency order or a final protection order. Arguably these penalties are not severe and the appropriateness of a fine for a

135 M Kaye, J Stubbs & J Tolmie, *Negotiating Child Residence and Contact Arrangements against a Background of Domestic Violence, Families*, 2003, Law and Social Policy Research Unit, Griffith University, Queensland.

136 M Hester and L Radford, *Domestic Violence and Child Contact Arrangements in England and Denmark* (1996) 3.

137 G Douglas, "Balancing Rights," in A Bainham (ed), *The international survey of family law: 2001 edition* (2001, Family Law), 81 to 94, at 86; C Humphreys, "Judicial Alienation Syndrome - Failures to Respond to Post-separation Violence" [1999] *Family Law* 313; F Kaganas & S Day Sclater, "Contact and Domestic Violence: The Winds of Change?" [2000] *Family Law* 630.

138 UK Government White Paper, *Justice: the Government's Proposals on Domestic Violence* (Jun 2003, Cm 5847).



breach of an order is questionable, since this may indirectly impact upon the protected person and does not reflect the seriousness of the offence.

Mandatory Attendance at Rehabilitation and Educational Programmes

- 6.34 Another approach to enforcement is to require the abuser to attend a rehabilitation programme. In New Zealand a magistrate making a civil protection order must direct the abuser to attend such a programme. Such a measure, aimed at rehabilitation of the abuser and supported by research which indicates that such programmes can have positive outcomes, is however reliant on the existence of a well-resourced programmes for the court to refer the offender to. Unfortunately, in many Pacific Island countries, such programmes do not exist, and are unlikely to be available in the rural areas or outer islands.

Police Powers to Arrest

- 6.35 The police should be empowered to arrest and detain a perpetrator immediately upon any breach.

In the Cook Islands the Criminal Procedure Act 1965 provides that a police officer may arrest or take into custody without a warrant a person 'he finds committing, or whom he has good cause to suspect of having committed, any offence punishable by death or imprisonment for life or for three months or more.' This may be sufficient in the Cook Islands if a penalty of over 3 months imprisonment is imposed for breaches of protection orders. In countries where no arrest can occur without a warrant two approaches have been typically adopted. The first, as illustrated in the example of South Africa below, is to issue an arrest warrant at the time of issuing the protection order to enable the immediate arrest of perpetrator should any breach occur. As well as providing an expedient means of immediate response to any breach such a procedure signifies the importance and seriousness placed on the protection order. Alternatively the second approach, as illustrated in the example of the Model Domestic Violence Law below, the authority for arrest without a warrant can be explicitly provided in the legislation.



EXAMPLES

Pre-Issue of Warrant Domestic Violence Act 1998, s 8 (South Africa)

- (1) Whenever a court issues a protection order, the court must make an order-
- (a) authorising the issue of a warrant for the arrest of the respondent, in the prescribed form; and suspending the execution of such warrant subject to compliance with any prohibition, condition, obligation or order imposed in terms of section 7.
 - (b) The warrant referred to in subsection (1)(a) remains in force unless the protection order is set aside, or it is cancelled after execution.



EXAMPLES

Police Powers to Arrest without Warrant Model Domestic Violence Law 1999, s 65

A police officer may, without warrant, arrest a person if the police officer is satisfied the person is the defendant named in any of the following orders and is contravening or has contravened a domestic violence order

Discharge or Variation of Orders

6.36 The ‘variation’ of an intervention order refers to the court approving an application by one or all of the parties to change the terms of the order. The ‘revocation’ of an order means its cancellation. It is important that the circumstances in which an order can be varied or revoked (other than through whatever expiry regime is determined as discussed in ‘Duration of Orders’ above) are specified to ensure the safety of the protected person. Some countries require that before any revocation or variation of order can be considered, there must have been a substantial change in the relevant circumstances since the order was made or last varied.¹⁴⁰ Typically, the court is required to consider specific grounds in deciding whether or not to vary or revoke an order. These include the applicant’s reasons for the variation or revocation, the safety of the protected person, the wishes of the protected person and whether or not the applicant is legally represented. A good practice approach is

to require that it can be revoked only if the court can be satisfied that it is no longer necessary for the protection of the applicant.¹⁴¹

Compensation

6.37 Compensation has been proven to have ‘therapeutic’ benefits in assisting the recovery of victims from the medical, psychological, cultural, vocational and relational consequences of domestic violence. It can provide a route to some economic freedom and independence for the victim¹⁴² including the means to access counselling and other rehabilitative services and the opportunity to secure safe housing options.¹⁴³ In General Recommendation 19(24) (i), the CEDAW Committee states that remedies including compensation should be provided for victims of gender-based violence. In its views to a recent Communication under the Optional Protocol the CEDAW Committee further stated that ‘effective and sufficient’ remedies should be provided to victims of gender-based violence and

¹⁴⁰ See *Domestic Violence Act 1994 (SA) s 12(1a)*. (South Australia, Australia)

¹⁴¹ *Domestic Violence and Protection Orders Act 2001 (ACT) s 31(3)* (Australian Capital Territory, Australia)

¹⁴² See J Conaghan, “Tort Litigation in the Context of Intra-familial Abuse” (1998) 61 *Modern Law Review* 132.

¹⁴³ See I Freckelton, “Compensating the Sexually Abused” in P Easteal (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (Sydney: Federation Press, 1998) 191 at 196.



that any reparation 'should be proportionate to the physical harm undergone and to the gravity of the violation of her rights.'¹⁴⁴ There are different approaches to compensation that can be adopted. They include; i) state-funded criminal injuries compensation schemes such as that adopted in all Australian states and territories,¹⁴⁵ ii) compensation provisions in either criminal or civil law legislation which enable the court to award damages to the

victim which are payable by the abuser such as in the examples of India and Malaysia below,¹⁴⁶ and iii) the establishment of a support fund for domestic violence victims administered by the state as provided by the example of Ghana below. Whilst the Ghana example does not include contributions by perpetrators this could easily be added to provide another source of funding.



EXAMPLES

Compensation Fund Domestic Violence Act 2007 (Ghana)

29. There is established by this Act a Victims of Domestic Violence Support
31. The moneys of the Fund shall be applied
 - (a) towards the basic material support of victims of domestic violence,
 - (b) for training the families of victims of domestic violence,
 - (c) for any matter connected with the rescue, rehabilitation and reintegration of victims of domestic violence,
 - (d) towards the construction of reception shelters for victims of domestic violence in regions and districts, and
 - (e) for training and capacity building of persons connected with the provision of shelter, rehabilitation and reintegration.
32. The moneys for the Fund include
 - (a) voluntary contributions to the Fund from individuals, organizations and the private sector;
 - (b) moneys approved by Parliament for payment into the Fund, and
 - (c) moneys from any other source approved by the Minister responsible for finance.

¹⁴⁴ See *A.T v Hungary* at para 9.6 I(b) and para 9.6 II(g).

¹⁴⁵ C Forster, "Good Law or Bad Lore? The Efficacy of Criminal Injuries Compensation Schemes for Victims of Sexual Abuse: A New Model of Sexual Assault Provisions" (2005) 32(2) *University of Western Australia Law Review* 264; C Forster & V Jivan "Opportunity Lost: In Search of Justice for Victims of Sexual Assault" (2005) 28(3) *University of New South Wales Law Journal* 758.

¹⁴⁶ See *A de Brouer, Supranational Criminal Prosecution of Sexual Violence (Mortsel: Intersentia nv: 2005)* at 383.



EXAMPLES

Compensation order Domestic Violence Act 2005, S 26, 22 (India)

In addition to other reliefs as may be granted under this Act, the Magistrate may on an application being made by the aggrieved person, pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed by that respondent.

Domestic Violence Act 1994 s 10 (Malaysia)

1. Where a victim of domestic violence suffers personal injuries or damage to property or financial loss as a result of the domestic violence, the court hearing a claim for compensation may award such compensation in respect of the injury or damage or loss as it deems just and reasonable.
 2. The court hearing a claim for such compensation may take into account--
 - (i) the pain and suffering of the victim, and the nature and extent of the physical or mental injury suffered;
 - (ii) the cost of medical treatment for such injuries;
 - (iii) any loss of earnings arising therefrom;
 - (iv) the amount or value of the property taken or destroyed or damaged.
- (iv) necessary and reasonable expenses incurred by or on behalf of the victim when the victim is compelled to separate or be separated from the defendant due to the domestic violence, such as
- (a) lodging expenses to be contributed to a safe place or shelter;
 - (b) transport and moving expenses;
 - (c) the expenses required in setting up a separate household which, subject to subsection (3) may include amounts representing such housing loan payments or rental payments or part thereof, in respect of the shared residence, or alternative residence, as the case may be, for such period as the court considers just and reasonably necessary.



Recommendations of the Cook Islands Consultation – Domestic Violence

1. To incorporate a comprehensive definition of domestic violence modelled on the New Zealand provision but including economic abuse and full definitions of the different forms of domestic violence.
2. To include a broad range of protected persons – spouses, de facto partners, persons intimate person relationships, family members, persons in a care relationship, a child who resides with the other person, anyone who is or has been a member of the other persons household.
3. To include protection orders, emergency protection orders and occupation orders.
4. Protection orders should be available to all protected persons if domestic violence has occurred or if it is likely to occur.
5. Protection orders can be applied for by any protected person and by any other person who is authorised to apply for the order by the protected person. A person can apply without the consent of the protected person if there are extenuating circumstances.
6. Protection orders should have mandatory conditions which accord with the definition of an act of domestic violence.
7. Emergency protection orders should be immediately available at all times. They can be issued by the police, by Justices of the Peace and the court. They can be applied for by phone, short wave radio, email and in person. They can be issued without notice to the offender.
8. Occupation of the shared residence should be potential condition of every protection order. A presumption should apply in favour of the protected person. If the protected person lives with extended family the court can order that the protected person has the exclusive use of part of the home regardless of who has legal title to the residence.
9. The protection order should also facilitate access to personal property for either party with police protection if necessary.
10. A police-office should be obligated to investigate all domestic violence complaints and should advise the protected person of their right to apply for a protection order. The group did not consider that it should be obligatory for a police officer to either issue or apply for a protection order.
11. An emergency protection order should remain in effect until a hearing to determine whether a protection order should be issued.
12. A protection order should remain in effect until discharged by the court.
13. Protection orders should explicitly take precedence over parenting orders.
14. Strong enforcement is necessary for protection orders. The group recommended fines and imprisonment.
15. The protected person or the respondent can apply for variation or the discharge of the protection order. The court should vary or discharge an order only an act of domestic violence is no longer likely.
16. Compensation payable by the respondent to the protected person should be available.



Chapter 7

DIVISION OF PROPERTY AFTER MARRIAGE OR RELATIONSHIP BREAKDOWN

Introduction

7.1 This chapter considers the law reform issues relating to property division after separation, divorce or the breakdown of a relationship. The CEDAW Committee has called upon States parties to ensure that women receive 'equal rights to property accumulated during marriage after dissolution.'¹⁴⁷ Property division after the end of marriage is governed in the Cook Islands by the Matrimonial Property Act 1976 (NZ). The Act, which was adopted from New Zealand,¹⁴⁸ is CEDAW compliant in many respects and for the most part provides a good practice framework. The property regime it creates is generally referred to as a deferred community property regime. This means that all property acquired during the course of the marriage by either party, with certain exceptions, is deemed on the breakdown of the marriage, to be the property of both parties regardless of legal title. The Act provides for equal sharing of the matrimonial home and chattels. The rest of the matrimonial property is to be shared equally unless one party's contribution is 'clearly greater than the other'. In such circumstances, when the decision about how to divide property is based on a consideration of the contributions of each rather than being based on a presumption of equality, the Act recognizes equally both financial and

non-financial contributions in accord with good practice. In this way, marriage is acknowledged as a partnership with both parties contributing equally but differently to the relationship and the family.

7.2 The major aspect of the legal framework governing property division in the Cook Islands that is currently non-compliant with CEDAW is the failure to extend protection to de facto couples. The CEDAW Committee in its Concluding Comments in 2007 called upon the Cook Islands 'to establish a system of equitable division of marital property upon dissolution of de facto marriages.' A second area that is non-compliant with CEDAW for consideration is that whilst the principle of equality is applied to the matrimonial home and chattels, the rest of the matrimonial property (which can include businesses, investments and any other property, and can be a substantial component of the matrimonial property) will not be determined on the basis of equality if one party's contribution to the partnership has 'clearly been greater' than the other. Such an approach has been shown to disadvantage the party whose contribution is non-financial and good practice requires that the principle of equality applies to all matrimonial property. Although the Matrimonial Property Act 1976 is largely CEDAW compliant and could be amended to achieve compliance, law reform in this area would be best achieved through the repeal of the Act and incorporation of the area into the new Family Law Bill. This would enable property division to be linked to spousal and child support and for the development of a clearer and more straightforward framework.

147 *Concluding Comments of the CEDAW Committee: Malawi (2010) 45th Session at para [43] (UN Doc CEDAW/C/MWI/CO/6); Lebanon (2008) 40th Session at para [45] (UN Doc CEDAW/C/LBN/CO/3).*

148 *Adopted as Cook Islands law by the Matrimonial Property Act 1991-1992, s 3. (Cook Islands).*



Who is Protected?

7.3 The Matrimonial Property Act 1976 which provides for the division of marital property after divorce protects married persons only, even though the original New Zealand Act that this is based on was extended to de facto couples, including same-sex couples, in 2001.¹⁴⁹ De facto couples in the Cook Islands must therefore rely on common law property rules to determine the division of property after separation, which particularly disadvantage women as non-financial contributions carry little weight under this regime. As discussed previously in relation to spousal support at para [5.5], international obligations of non-discrimination require that de facto unions be provided with the same protections as marriage. The provision of a statutory regime based on the equal sharing of property for de facto couples is of particular significance, since it is common for property and other assets to be in one partner's name (typically the male). The recognition of de facto relationships for the purpose of property division requires a legislative definition of a de facto relationship. An example of a good practice legislative definition

of de facto relationship was provided previously at para [5.6].

What Property is Part of the Settlement?

7.4 The Matrimonial Property Act 1976 divides property into 'matrimonial' property and 'separate' property. Only property defined as matrimonial property is deemed part of the settlement process. As illustrated in the example of New Zealand below (where property is divided on the same basis as the Matrimonial Property Act 1976, but is named 'relationship' property and 'separate' property instead), this provides a good practice approach. Relationship property includes the family home and chattels regardless of whether it was acquired before or after the marriage or union, and all other property including benefits and superannuation acquired during or directly before the marriage or union. Separate property is all property that is not relationship property and generally consists of property held by the parties at the commencement of the cohabitation/marriage.

149 *Property (Relationships) Act 1976 (New Zealand)*.



EXAMPLES

Relationship Property Property (Relationships) Act 1976 (New Zealand)

- (1) Relationship property shall consist of—
- (a) The family home whenever acquired; and
 - (b) The family chattels whenever acquired; and
 - (c) All property owned jointly or in common in equal shares by the husband and the wife or by the partners; and
 - (d) All property owned by either spouse or partner immediately before their marriage, civil union, or de facto relationship began, if—
 - (i) the property was acquired in contemplation of the marriage, civil union, or de facto relationship; and
 - (ii) the property was intended for the common use or common benefit of both spouses or partners; and
 - (e) All property acquired by either spouse or partner after their marriage, civil union, or de facto relationship began; and
 - (f) All property acquired, after the marriage, civil union, or de facto relationship began, for the common use or common benefit of both spouses or partners, if—
 - (i) the property was acquired out of property owned by either spouse or partner or by both of them before the marriage, civil union, or de facto relationship began; or
 - (ii) the property was acquired out of the proceeds of any disposition of any property owned by either spouse or partner or by both of them before the marriage, civil union, or de facto relationship began; and
 - (g) the proportion of the value of any life insurance policy or of the proceeds of such a policy, that is attributable to the marriage, civil union, or de facto relationship; and
 - (h) any policy of insurance in respect of any property described in paragraphs (a) to (ee); and
 - (i) the proportion of the value of any superannuation scheme entitlements (as defined in section 2 that is attributable to the marriage, civil union, or de facto relationship; and
 - (k) any income and gains derived from, the proceeds of any disposition of, and any increase in the value of, any property described in paragraphs (a) to (k).



Basis of Property Division

7.5 The Matrimonial Property Act 1976 provides that the matrimonial home and family chattels shall be divided equally. The rationale for equal sharing is that marriage is a joint cooperative venture in which equal sharing of the couple's assets is fair and appropriate. In addition, having the court do an assessment on the basis of the respective contributions of each of the partners is highly subjective and often disadvantages a partner (who is usually female) whose primary contributions are non-financial.¹⁵⁰ The CEDAW Committee has stated that each party's contribution 'whether in running the home or funding it' should be given equal recognition without any reference to the 'economic value' of the contribution.¹⁵¹ Three exceptions to equal sharing are provided in the Act.

7.6 The first exception is if the marriage is of short duration, which the Act defines as less than 3 years, then some assets are excluded from equal sharing. These include any asset owned wholly or substantially by one spouse at the date of the marriage, or any asset that has been inherited or received by one partner as a gift. These assets will be divided on the basis of contributions discussed below at para [7.9]. Additionally, if the contribution of one spouse has clearly been 'disproportionately greater' than the other then the division is also determined on the basis of the contributions of the parties. The major criticism of allowing an exemption based on the short duration of the relationship is the arbitrariness of the 3 years rule

(which is especially apparent in light of the reality that many children are conceived or born during the first 3 years of a relationship or marriage).

7.7 The second exception relates to where there are extraordinary circumstances that would make equal sharing 'repugnant to justice'. In such circumstances the matrimonial home and family chattels is determined on the basis of contributions. A good practice approach would be to discard the 3 year rule and retain the exception of the 'repugnant to justice' which could exclude a marriage or a relationship of short duration if equal sharing appeared unjust in the circumstances.

7.8 The third exception is that that the balance of matrimonial property (ie other than the matrimonial home and chattels) which might include a business, a second home and other property, shares, insurance and superannuation is to be divided equally unless one spouse's contribution to the partnership has been 'clearly greater' than the other. A major criticism of this approach is that the exception is easily established and that the major portion of the matrimonial property is typically therefore determined on the basis of contributions (to the disadvantage of the non-earning partner) rather than on the principle of equal sharing. The CEDAW Committee has specifically criticized this approach.¹⁵² In 2001 New Zealand reformed the original Act that the Cook Islands Act is based on, and as is illustrated below, in a good practice measure has now designated all relationship property to be shared equally.

150 L Tee, "Division of Property Upon Relationship Breakdown" in *Family Law: Issues, Debates Policy* (ed) J Herring (Devon: Willan Publishing, 2001) 45 at 71.

151 UK Law Reform Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown. A Consultation Paper* (London: The Stationary Office, 2006) at 147.

152 Concluding Comments of the CEDAW Committee: Egypt (2010) 45th Session at para [50] (UN Doc CEDAW/C/EGY/CO/7).



EXAMPLE

Equal Division of Property **Property (Relationships) Act 1976, s 11(1)** **(New Zealand)**

On the division of relationship property under this Act, each of the spouses or partners is entitled to share equally in—

- (a) the family home; and
- (b) the family chattels; and
- (c) any other relationship property.

Determining Contributions

7.9 In the Cook Islands, as in many modern property division frameworks, there are circumstances when property division is determined on the basis of contributions rather than equality of division. In the Cook islands, as discussed above, a contributions approach is adopted if equal division would be ‘repugnant to justice’, if the marriage is less than 3 years duration, and in relation to all matrimonial (or ‘relationship’) property other than the matrimonial home and chattels. A contributions approach requires the assessment of the contributions of the two parties to the marriage or partnership. A good practice approach to deciding how the contributions of each partner should affect how property is to be

divided is to include a mandatory statutory list of factors for the court to consider, as detailed below. It is additionally important that the legislation explicitly states that non-financial contributions should be given equal weight with financial contributions.¹⁵³ In General Recommendation 21(32) the CEDAW Committee states that in relation to the division of marital property ‘financial and non-financial contributions should be accorded the same weight’. The Committee explains that non-financial contributions during a marriage such as raising children, caring for elderly relatives, and discharging household duties ‘enable a husband to earn an income and increase the assets of the marital relationship’.

153 UK Law Reform Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown. A Consultation Paper* (London: The Stationary Office, 2006) at 147; UN, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (Geneva: UN, 2003) at 500.



Checklist of Factors Did either Partner contribute to:

The care of any child of the marriage or relationship, any aged or infirm relative or dependant of either spouse or partner.

The management of the household and the performance of household duties.

The provision of money, including the earning of income, for the purposes of the marriage or relationship.

The acquisition or creation of relationship property, including the payment of money for those purposes.

The performance of work or services in respect of
(i) the relationship property or any part of that property; or
(ii) the separate property of the other spouse or partner or any part of that property.

The payment of money to maintain or increase the value of
(i) the relationship property or any part of that property; or
(ii) the separate property of the other spouse or partner or any part of that property.

The forgoing of a higher standard of living than would otherwise have been available:

The giving of assistance or support to the other spouse or partner (whether or not of a material kind), including the giving of assistance or support that
(i) enables the other spouse or partner to acquire qualifications; or
(ii) aids the other spouse or partner in the carrying on of his or her occupation or business.



Recommendations of the Cook Islands Consultation – The Division of Property

1. To retain the Matrimonial Property Act 1976 rather than repeal the legislation and incorporate it in the new Family Law Bill. This is because the law represents good practice apart from two factors which should be amended as follows
 - The Act should be amended to include those in de facto relationships
 - The Act should be amended so that all matrimonial property is subject to equal division



Glossary

accession

The act by which a State signifies its agreement to be legally bound by the terms of a particular treaty. It has the same legal effect as ratification, but is not preceded by an act of signature, since the treaty is already in force.

adoption

A legal process whereby all rights and responsibilities of the original parent or parents are transferred to a new parent or parents.

bill

A draft law that has not yet been passed by parliament.

burden of proof

The responsibility of proving a disputed charge, allegation or violation. In civil cases it refers to whether a complainant or the alleged violator (defendant) has to prove on the balance of probabilities whether a violation or breach has occurred.

care order

A court order that authorizes the state to remove the child from the home and obligates it to provide appropriate alternate services for the child such as placing the child in foster-care, with another relative or family friend or into institutionalized care.

CEDAW Committee

The CEDAW Committee was established by the Convention on the Elimination of all Forms of Discrimination against Women. The CEDAW Committee, elected by States parties to CEDAW, is made up of twenty-three experts on women's rights and is entrusted with the task of overseeing the implementation of the Convention by States parties. The Committee considers reports submitted by States parties in accordance with the reporting obligations laid down by the Convention and issues General Recommendations, which elaborate the CEDAW Committee's view of the treaty's obligations.

Chattels

An item of personal property that is movable.

civil union

A legally recognized union providing same-sex couples with the rights, benefits, and responsibilities similar (in some countries, identical) to opposite-sex civil marriage.

**complainant**

A person who lodges a complaint with a court or other decision maker.

Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW)

A multilateral agreement recognising the civil, political, economic, social and cultural rights of women. It was adopted by the General Assembly of the United Nations on 18 December 1979 and entered into force generally on 3 September 1981 in accordance with Article 27(1). The Convention sets out, in legally binding form, internationally accepted principles on the rights of women which are applicable to all women in all fields.

Convention on the Rights of the Child 1990 (CRC)

A multilateral agreement recognising the civil, political, economic, social and cultural rights of children. It was adopted by the General Assembly of the United Nations on 20 November 1989 and entered into force on 2 September 1990,

Convention on the Rights of Persons with Disabilities 2008 (CRPD)

A multilateral agreement recognising the civil, political, economic, social and cultural rights of persons with disabilities. It was adopted by the General Assembly of the United Nations on 13 December 2006 and came into force on 3 May 2008.

contact order

A court order that determines whether and in what circumstances a parent or other person shall have contact with a child. Contact orders typically permit reasonable contact but may specify the times, frequency and location of visits and may include a variety of forms of contact such as emails, letters or telephone calls.

corroboration

Independent evidence that supports a claim by the plaintiff.

custody

In family law the right to govern the day-to-day life of a child.

custom

A practice in society or a rule of conduct established by long usage, which binds those under it. Many customs are not legally binding. In order for a custom to constitute a valid law, it must date back to time immemorial, and be certain and obligatory. A custom can be general, particular or local.

de facto

As it applies to personal relationships, it describes an association which resembles a marriage, but which has not been formalized through a legal ceremony of marriage. It can include both heterosexual and same-sex relationships.

**de facto obligation**

As it pertains to international and human rights law, a requirement that the obligations of a State party to observe a convention or treaty are not merely reflected in the laws of the country but are implemented in practice with the intended results.

de jure obligation

As it pertains to international and human rights law, requiring the laws of the State party to accord with the obligations created by a convention or treaty.

defendant

A person sued in a civil proceeding or an accused in a criminal proceeding.

discrimination

Discrimination in general terms is the act of making prejudicial distinctions among individuals or groups by taking irrelevant matters into consideration resulting in unequal treatment. The definition of discrimination contained in Article 1 of CEDAW explicitly states that discrimination against women means any 'distinction, exclusion or restriction' made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

divorce

The decree or order that ends a marriage.

domestic registered partnerships

A legally recognized union providing same-sex couples with rights, benefits, and responsibilities similar (in some countries, identical) to opposite-sex civil marriage.

domestic violence

Past or present physical, sexual, psychological or economic violence between former or current intimate partners, adult household members, family members, or a parent and children.

formal equality

Formal equality is the requirement that legal rules should apply in the same way to all members of the community regardless of sex, race, sexuality or any other characteristic.

gender-based violence

Violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.



general recommendation

As it pertains to CEDAW, general recommendations are detailed commentary on the articles of CEDAW issued by the CEDAW Committee to assist States parties comply with the Convention. For example, at the 1989 session, the Committee discussed the high incidence of violence against women, requesting information on this problem from all countries. In 1992, the Committee adopted General Recommendation 19 which requires national reports to the Committee to include statistical data on the incidence of violence against women, information on the provision of services for victims, and legislative and other measures taken to protect women against violence in their everyday lives, such as harassment at the workplace, abuse in the family and sexual violence.

guardian

In relation to a child, a person with the right to make decisions about the long-term needs of the child, as opposed to the day-to-day care of the child. A guardian has responsibility for such matters as decisions about a child's religion or education.

guardianship

A legal arrangement where one person has been appointed to take care of another person or the property of another.

habitually resident

Regular physical presence in a country.

Inheritance

The practice of passing on property, titles, debts, and obligations upon the death of an individual to designated beneficiaries.

litigation

The act or process of taking a case to court.

maintenance

The provision of financial support for a minor or adult.

mandatory prosecution

Obligatory prosecution of an accused in a criminal proceeding (i.e. where police discretion to prosecute or not prosecute is removed).

minor

A child who has not attained the age of having full legal capacity.

**no-fault divorce**

A no-fault divorce is the legal ending of a marriage, upon application to the court by either party, without the requirement that the applicant show fault on the part of the other party.

occupation order

An order issued by the court enabling a person (e.g., a victim of violence) to retain possession of their home, to the exclusion of any other party.

parenting order

An order made by the court dealing with whom a child will live with, the contact between a child and other persons and any other aspect of parental responsibility.

parenting plan

A written agreement between parents and other relevant persons that deals with any matter relating to parental responsibility.

party

One of the participants in a legal proceeding who has an interest in the outcome. Parties include the plaintiff (person filing suit), defendant (person sued or charged with a crime), petitioner (files a petition asking for a court ruling) or respondent (usually in opposition to a petition or an appeal).

precedent

A prior reported judgment of a court which establishes the legal rule (authority) for future cases on similar facts or the same legal question. It is also a legal principle or rule created by one or more decisions of a higher court. These rules provide a point of reference or authority for judges deciding similar issues in later cases. Lower courts are bound to apply these rules when faced with similar legal issues.

prohibited degrees of relationship

A relationship between a person and another person related to her or him by blood or marriage such that a marriage is prohibited by law between the parties.

prohibited steps order

A court order that prevents a particular decision being made without returning to the court for permission or, alternately, without permission from the other parent.

protection order

An order from a court directing one person not to do something, such as make contact with another person, enter the family home etc. It tells one person to stop harassing or harming another.

**public order**

An order from the court that directs the state to take certain actions.

ratification

The adoption or confirmation by a State of a convention or treaty. Ratification places an obligation on a State party to the convention to comply with its provisions and principles.

repeal

The deletion, omission, or reduction in scope of an existing law by a subsequent law.

relationship property

Family home and chattels regardless of whether it was acquired before or after the marriage or union, and all other property including benefits and superannuation acquired during or directly before the marriage or union.

remedy

The means available at law to prevent the infringement of a right or to receive compensation or redress for the infringement of a right.

residence order

A court order that determines where a child is to live and who has the day to day care of the child.

respondent

A person or entity required to answer a petition for a court order. It is also a party to court proceedings against whom relief is claimed by an applicant, complainant or appellant. It is analogous to the term 'defendant'.

separation

A description of two parties who have severed a marriage or de facto partnership

separate property

All property that is not relationship property and generally consists of property held by the parties at the commencement of the cohabitation/marriage.

specific issues order

A court order that details who will make a particular decision or how a particular decision will be made. Examples of topics that might be included in a specific issues order include who is responsible for decisions about the child's medical treatment, holidays or religious education.

**standard of proof**

The level of proof required in a case, established by assessing the associated evidence. In civil matters this is the balance of probabilities, in criminal matters this is beyond reasonable doubt.

state party

A country that has ratified or acceded to a particular convention or treaty and is therefore legally bound by the provisions in the instrument.

statute

A law passed by parliament and enacted.

substantive equality

Substantive equality refers to real or actual equality. Whereas formal equality merely requires the equal application of rules, substantive equality requires equality of access, equal opportunity and crucially, equality of results.

supervision order

A court order that authorizes the state to play a supervisory role in a child's life, for example, by undertaking regular scheduled visits or ensuring that the child attends school.



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