



PARLIAMENT OF THE REPUBLIC OF FIJI

STANDING COMMITTEE ON FOREIGN AFFAIRS AND DEFENCE

REPORT ON THE HAGUE CONVENTION ON THE JURISDICTION, APPLICABLE LAW, RECOGNITION, ENFORCEMENT AND CO-OPERATION IN RESPECT OF PARENTAL RESPONSIBILITY AND MEASURES FOR THE PROTECTION OF CHILDREN ('1996 CONVENTION')



Parliamentary Paper No. 77 of 2016

June 2016

Published and Printed by the Department of Legislature, Parliament House, SUVA

Table of Contents

CHAIR'S FOREWORD	3
RECOMMENDATION:	5
1 INTRODUCTION	6
1.1 The Standing Committee on Foreign Affairs and Defence	6
1.2 Committee Members	6
1.3 Procedure and Program	6
2 '1996 CONVENTION'	8
2.1 Background	8
2.2 Becoming a State Party – signature and ratification or accession	8
2.3 What is the difference between a Contracting State and a State Party to a Convention?	9
2.4 What is habitual residence?	9
2.5 What is a competent authority?	10
2.6 What is parental responsibility?	10
3 COMMITTEE'S OBSERVATIONS AND AREAS OF CONCERN	15
3.1 Should Fiji accede to the 1996 Convention?	15
3.2 Article 2	15
3.3 Article 55	15
3.4 Gender Analysis	16
3.5 General Observation	16
3.6 Marriage	16
3.7 Conclusion	16
4 CONSIDERATION OF CONVENTION ARTICLE BY ARTICLE	21

CHAIR'S FOREWORD

I am pleased to present this Report of the Fiji Parliament Standing Committee on Foreign Affairs and Defence (SCFAD), which was assigned to review and examine the *Hague Convention on the Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* ('1996 Convention').

This report provides a summary and examination of written and oral submissions received by the Committee meetings commencing from 13th June 2016. The report is divided into four chapters:

Chapter 1 covers the role and responsibilities of the Standing Committee and the inquiry process in undertaking a review of the 1996 Convention.

Chapter 2 provides a brief overview of the 1996 Convention.

Chapter 3 details with the Standing Committee's observations and areas of concern; and

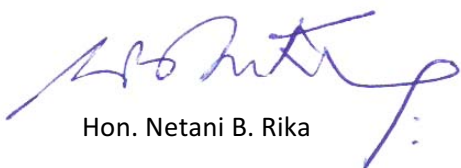
Chapter 4 provides a summary of the 1996 Convention.

The Constitution of the Republic of Fiji 2013 Section 70 and the Standing Order of the Parliament of the Republic of Fiji Chapter 10, Clause 109 (2) (c) and Clause 110 (1) (c) which stipulates the role and functions of Parliamentary Standing Committees in order to enhance transparency of, and accountability by, public agencies and officials. The SCFAD received public submissions in Ovalau (Eastern Division), Nabouwalu - Bua, Seqqa - Macuata, Savusavu and Labasa in the Northern Division. The committee heard submissions in the Western Division, from Sigatoka, Nadi, Lautoka, Ba, Tavua, and Rakiraki.

On behalf of the Honorable Members of the SCFAD, I would like to express my sincere appreciation to all the organizations, ministries and individuals who made a submission or attended public hearings.

I also wish to extend my appreciation to the Honorable Members of the SCFAD and the secretariat staff for the commitment and worthy contribution towards the completion of this bi-partisan report: the members who considered this convention were Hon. Ratu Isoa Tikoca (Deputy Chair), Hon. Alexander O'Connor (Member), Hon. Mataiasi Niumataivalu (Member), Hon. Mosese Bulitavu (Member), and the Alternate Members Hon. Jilila Kumar for Hon. Alexander O'Connor, Hon. Ratu Sela Nanovo for Hon. Ratu Isoa Tikoca, and Hon. Ro Kiniviliame Kiliraki for Hon. Mosese Bulitavu.

I commend this committee's report to the Parliament for its consideration.



Hon. Netani B. Rika

Chairman

LIST OF ACRONYMS

AL	Applicable Law
AOG	Assemblies of God Church
APSF	Arya Pratinidhi Sabha of Fiji
CA	Central Authority
CMF	Christian Fellowship Mission
CRC	Convention on the Rights of the Child
FDPF	Fiji Disable People's Federation
fLp	femLINKpacific
FL	Family Life
FM	Family Mediation
FNCDP	Fiji National Council for Disable People
FPF	Fiji Police Force
HC	Hague Convention
HR	Habitual Residence
ISS	International Social Service
iTLTB	i-Taukei Land Trust Board
MCF	Methodist Church of Fiji
MM	Marital Mediation
MoE	Ministry of Education
MOFA	Ministry of Foreign Affairs
MoY	Ministry of Youth & Sports
MoW	Ministry of Women, Children and Poverty Alleviation
MoD	Ministry of Defence, National Security & Immigration
MTA	Ministry of I'Taukei Affairs
PDF	Pacific Disability Forum
PR	Parental Responsibility
SCFAD	Standing Committee on Foreign Affairs and Defence
SDA	Seventh Day Adventist Church
SGO	Solicitor General's Office
VKB	Vola ni Kawa Bula (Register of Native Landowners)

RECOMMENDATION:

The Committee recommends that

The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation In Respect of Parental Responsibility and Measures for the Protection of Children be acceded with reservation on:

- a. Article 55, which recognizes the child's habitual country of residences' jurisdiction about children's property. An issue to consider in this regard would be Native land or other collectively held property under the iTaukei Land Trust Board (ITLTB). This is to ensure that a foreign court is not able to make orders in relation to traditional land interests of a child in Fiji. However, this provision of Article 55 may be applicable where it does not concern Native land or property with collectively held interests.

1 INTRODUCTION

The committee undertook a review of the proposal by the Government of the Republic of Fiji to accede to the *Hague Convention on the Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of parental Responsibility and Measures for the Protection of Children*.

1.1 The Standing Committee on Foreign Affairs and Defence

The Committee is a standing committee established under Standing Order 109(2)(e) of the Parliament of the Republic of Fiji. The committee is mandated to look into matters related to Fiji's relations with other countries, development aid, foreign direct investment, oversight of the military and relations with multi-lateral organizations.

Under SO 110(1)(e) the committee is also tasked with reviewing international treaties and conventions ratified by the Government and monitor their implementation.

The Committee comprises five Honourable Members drawn from both the Government and the Opposition parties.

1.2 Committee Members

The members of the SCFAD are:

- Hon. Netani Rika MP (Chairman)
- Hon. Ratu Isoa Tikoca MP (Deputy Chairman)
- Hon. Mosese Bulitavu MP (Member)
- Hon. Alexander O'Connor MP (Member)
- Hon. Mataiasi Niumataiwalu MP (Member)

At this juncture, the Committee wishes to acknowledge the immense contribution and legal advice provided by the Hon. Roko Tupou Draunidalo during her tenure as a Member of the Standing Committee.

During the Standing Committee's meetings, the following alternate membership arose pursuant to Standing Order 115(5):

- Hon. Jilila Kumar MP (Alternate Member for Hon. Mataiasi Niumataiwalu)
- Hon. Ratu Sela Nanovo (Alternate Member for Hon. Ratu Isoa Tikoca)
- Hon. Ro Kiniviliame Kiliraki (Alternate Member for Hon. Mosese Bulitavu)

1.3 Procedure and Program

The SCFAD met in the Parliament Complex from Tuesday 7th June 2016 to discuss and plan their strategy for receiving public submissions.

The Committee placed advertisements in the local newspapers, Fiji Sun and Fiji Times. The advertisement was also placed on the Parliament website (www.parliament.gov.fj).

The Committee met in the Parliament Complex between 13th May and 1st June 16, 2016 to hear oral submissions on the 1996 Convention.

The Committee received oral submissions on the 1996 Convention in the Eastern Division between the 9th and 11th July 2016, in the Northern Division between Tuesday 12th July and 15th July 2016, and the Western Division from Wednesday 27th July to Friday 29th July 2016.

2 1996 CONVENTION

2.1 Background

On 2nd June 2016, the 1996 Convention was referred to the SCFAD Committee for its deliberation. Under section 51 of the Constitution, “an international treaty or convention binds the State only after it has been approved by Parliament.”

The 1996 Convention provides for international cooperation between convention countries to recognise protective measures for children. According to the New Law Journal, the 1996 Convention does not aim to create a uniform international law for child protection or change the substantive law on child protection of any signatory state. Instead, the 1996 Convention’s function is to improve the protection of children in international situations by providing an integrated system of co-operation, recognition and enforcement. It aims to avoid legal and administrative conflicts and to build the structure for effective international co-operation in child protection matters between the different countries and legal systems.

The 1996 Convention intends to have a broader scope than the 1980 *Hague Convention and the Civil Aspects of International Child Abduction* and the 1993 *Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption*. In particular, the convention helps countries to:

- determine which country can take measures to protect a child or the property of a child (that is, a person up to the age of eighteen years)
- determine which laws should be applied when taking measures to protect a child
- allow for other countries to recognize and enforce child protection measures made overseas
- take urgent measures to protect a child or a child's property
- take measures relating to displaced or refugee children who do not have a home country
- establish cooperation between the signatory countries to achieve these purposes.

According to the *Practical Handbook on the Operation of the 1996 Child Protection Convention* (the Handbook) the children who could benefit from an implementation of the 1996 Convention include, amongst others:

- those who are the subject of international parental disputes over custody or access/contact;
- those who are the subject of international abduction (including in those States which are not able to join the 1980 Hague Child Abduction Convention);

- those who are placed abroad in alternative care arrangements which do not come within the definition of adoption and are therefore outside the scope of the 1993 Hague Intercountry Adoption Convention;
- those who are the subject of cross-border trafficking and other forms of exploitation, including sexual abuse;
- those who are refugees or unaccompanied minors;
- those who relocate internationally with their families.

2.2 Becoming a State Party – signature and ratification or accession

Any State may become a State Party to the Convention. However, there are different ways in which they are required to do so. The Handbook outlines that a State, which was a Member of the Hague Conference on 19 October 1996, may sign and ratify the Convention. Other States wishing to become a Party to the Convention may accede.

“Accession” is when a State becomes a party to a treaty or convention already negotiated and signed by other States. It has the same legal effect as ratification. Accession usually occurs after the treaty has entered into force.

The Convention provides that for an acceding State the Convention will enter into force nine months after the date of accession. Within the first six months of that nine-month period, any other Contracting State may raise an objection to the accession. The Handbook advises that the Convention will not enter into force between the acceding State and the State, which has raised the objection, until such time as the objection is withdrawn. Nevertheless, the Convention will enter into force between the acceding State and all other Contracting States, which have not raised an objection.

2.3 What is the difference between a Contracting State and a State Party to a Convention?

The Vienna Convention on the Law of Treaties of 23 May 1969 gives the followings descriptions. Article 2 (1)(f) defines “contracting State” as “a State which has consented to be bound by the treaty, whether or not the treaty has entered into force”; (g) “party” means “a State which has consented to be bound by the treaty and for which the treaty is in force”.

2.4 What is habitual residence?

The role of habitual residence in the 1996 Convention is generally to assess which State’s authorities have jurisdiction to take measures of protection and whether their decisions should be recognised and enforced in other States. Establishing the child’s habitual residence is often an important stage in the assessment of a child’s situation.

The Handbook states that the concept of “habitual residence” is the common primary connecting factor in all of the modern Hague Children’s Conventions. However, a formal definition is not provided.

Habitual residence has to be determined by the relevant authorities in each case on the basis of factual elements. The Handbook states

“it [habitual residence] is an autonomous concept and should be interpreted in light of the objectives of the Convention rather than under domestic law constraints.” (Chapter 13, p173).

The Handbook goes on to explain different approaches taken to determining habitual residence in various courts. Some courts take into account the ‘parental intention’, others focus on the factual reality of the child’s life for example, location of education, social interaction, family relationships etc.

According to Article 6 where a child is a refugee or displaced from their own country, the country in which the child is physically present will have jurisdiction. If habitual residence cannot be established the state in which the child is present will have jurisdiction over the child.

According to Article 7 of the 1996 Convention if a child has lived in a State for a year and is settled there, that child will normally become habitually resident in that State providing that no person or body has made a valid claim for the child to be returned. If a child has been moved from one State to another without the consent of a person or body with rights of custody, their habitual residence will not change.

2.5 What is a competent authority?

No definition is provided in the 1996 Convention as to what constitutes a “competent authority”. However, the handbook suggests that it is the authority, which, under the law of the particular Contracting State, has competence to take the action required by the 1996 Convention.

A dictionary definition of the competent authority is a “Person or organization that has legally delegated or invested authority, capacity, or power to perform a designated function”.

2.6 What is parental responsibility?

Parental Responsibility is defined in Article 1 of the 1996 Convention as including parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child. All mothers and fathers have legal rights and responsibilities as a parent and will have greater powers than any other including the State over the child – known as Parental Responsibility. Your most important role as parent is to:

- Build an excellent child – parent relationship. This relationship to be fostered on love and respect for human dignity. The parent will provide everything at their disposal for the upbringing of a well-balanced child in spirit, soul and body.

Parents play an irreplaceable role in the lives of their children. This vital relationship positively impacts on a child’s physical, mental and emotional well-being. The right of parents to maintain a strong involvement in their children’s lives is very important.

Good parenting is a foundation of a successful family. But tragically the foundation of parenthood is being slowly eroded.

To secure the foundation of parenthood for this generation and the next it is important that legislation is put in place to explicitly protect the child-parent relationship from unreasonable intrusion from

outside the family institution. Legislation to address the rights of parents to raise their children will be a way forward for Fiji. The Constitution of the Republic of Fiji 2013 Chapter 2, Section 41 addresses the rights of children.

1925 U. S. Supreme Court Ruling – *Pierce v Society of Sister*, “The Child is not the mere creature of the State. Those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”

You’re also responsible for:

- Disciplining the child.
- Choosing and providing for the child’s education.
- Agreeing to the child’s medical treatment.
- Naming the child and agreeing to any change of name.
- Looking after the child’s property.

Parents have to ensure that their child is supported financially, whether they have parental responsibility or not.

2.6.1 Introduction

Nobody ever said that children were easy to raise. They don’t come with guidelines or instructions, and they certainly don’t come with pause button. What they do come with is a crucial set of physical and emotional needs that must be met. Failure of the parents to meet these specific needs can have wide-ranging and long-lasting negative effects.

The following outline provides eight essential responsibilities that parents must adhere to in order to foster their child’s physical and/or emotional well - being:

2.6.2 Provide an environment that is safe

- a. Keep your child free from physical, sexual and emotional abuse.
- b. Keep unsafe objects locked up or out of reach of your child.
- c. Get to know your child’s caregiver (background check).
- d. Correct any potential dangers around the house.
- e. Take safety precautions: use smoke and carbon monoxide detectors, lock doors at night, always wear seatbelt, etc.

2.6.3 Provide your child with basic needs

- a. Water
- b. Plenty of nutritious foods
- c. Shelter
- d. A warm bed with bed sheets, blankets, and pillows
- e. Medical care as needed/medicine when ill
- f. Clothing that is appropriate for the weather conditions
- g. Safe (A place where he or she can go to be alone.

2.6.4 Provide your child with self-esteem needs

- a. Accept your child's uniqueness and respect his or her individuality
- b. Encourage (don't push) your child to participate in a club activity or Sports
- c. Encourage proper hygiene
- d. Set expectations for your child that are realistic and age appropriate
- e. Use your child's misbehavior as a time to teach not to criticize

2.6.5 Teach your child morals and values

- a. Honesty
- b. Respect
- c. Responsibility
- d. Compassion
- e. Patience
- f. Forgiveness
- g. Generosity

2.6.6 Develop mutual respect with your child

- a. Use respectful language
- b. Respect his or her feelings
- c. Respect his or her opinion

- d. Respect his or her privacy
- e. Respect his or her individuality

2.6.7 Provide discipline which is effective and appropriate

- a. Structured
- b. Consistence
- c. Predictable
- d. Fair

2.6.8 Involve yourself in your child's education

- a. Communicate regularly with your child's teacher
- b. Make sure that your child is completing his/her homework
- c. Assist your child about school (What is being studied and any interesting events)
- d. Recognise and acknowledge your child's academic achievements

2.6.9 Get to know your child

- a. Spend quality time together
- b. Be approachable to your child
- c. Always ask questions
- d. Communicate, Communicate, Communicate

The following is a list of responsibilities that no parent should be expected to meet:

1. Supplying your child with the most expensive designer clothes or shoes available
2. Picking up after your child/cleaning your child's room
3. Dropping everything you're doing to give your child a ride somewhere
4. Providing for your child with a telephone, television, computer
5. Bailing your child out of trouble every time he or she does thing wrong.
6. Maintaining an limited supply of treats, chips, sodas, or junk foods for your child's unlimited consumption

7. Replacing toys or other items that your child has lost or misplaced
8. Welcoming any or all of your child's friends into your home for social or other activities.

The role of parents in education

Although a parent's role in their children's learning evolves as kids grow, one thing remains constant: we are our children's learning models. Our attitudes about education can inspire theirs and show them how to take charge of their own educational journey.

Be a role model for learning. In the early years, parents are their children's first teacher – exploring nature, reading together, cooking together, and counting together. When a young child begins formal school, the parent's job is to show him or her how school can extend the learning began together at home, and how exciting and meaningful this learning can be. Parents become their children's learning coach.

Tune into how your child learns

Many children use a combination of modalities to study and learn. Some learn visually making and seeing pictures, others through tactile experiences like building block towers and working with clay. Still others are auditory learners who pay most attention to what they hear. Pay attention to how your child learns.

Practice what your child learns at school

Many teachers encourage parents to go over what their young children are learning in a supportive way and to practice what they may need extra help with. This does not mean drilling them for success, but it may mean going over basic counting skills, multiplication tables or letter recognition, depending on the needs and learning level of your child.

There are other areas that need to be taken into consideration:

- Set aside time to read together
- Connect what your child learns to everyday life
- Connect what your child learns to the world
- Keep TV a minimum
- Learn something new yourself

3 COMMITTEE'S OBSERVATIONS AND AREAS OF CONCERN

3.1 Should Fiji accede to the 1996 Convention?

Fiji is not a signatory to the 1996 Convention therefore it cannot ratify the Convention as it is already in force. Fiji should accede to the 1996 Convention and comply with our international obligations for the following reasons:

- a. It expands the limited scope of the 1980 Convention, which only applies to children up to the age of 16. The 1996 Convention extends it further to 18 years of age
- b. The 1996 Convention allows right of access to the left-behind parent.

If Fiji accedes to the 1996 Convention it will determine who has jurisdiction, which laws will apply, and if there are any orders made, the recognition of those orders and how the central authorities can cooperate with other central authorities in terms of sharing information or even locating the child. Acceding to the 1996 Convention will also enhance the *Family Law Act 2003* and other relevant legislation in ensuring the protection of children in international access and residence disputes.

3.2 Article 2

Concern was raised with respect to the definition of a 'child' in Article 2 of the 1996 Convention. It was felt that the definition was not consistent with the definition of "child" in Section 163 of the Constitution which states that a "child" means an individual who has not reached the age of 18 years. The Constitution also interprets an "adult" as an individual who is 18 years of age or over. The Committee sought clarification from the Solicitor General's Office on whether Article 2 of the 1996 Convention supersedes the definition of a 'child' in our local laws or vice versa, and was advised that the definitions in our laws of 'child' and 'adult' are consistent with the Convention. While the wording is different, the fundamental intention is that the 1996 Convention applies until the age of 18 years.

3.3 Article 55

The Committee noted from submissions received that there were reservations in respect of Article 55. Officials from the Ministry of Foreign Affairs stated that Article 55 recognizes the habitual country of residences' jurisdiction about children's property. An issue to consider in this regard would be Native land or other collectively held property that would be subject to foreign jurisdiction. Allowing decisions by foreign jurisdictions in this area would undermine the principles in Native Land tenure systems, and the integrity of the framework administered by the iTaukei Land Trust Board in conjunction of the Vola ni Kawabula (VKB) – the Register of Native Land Owners. However, this provision may be applicable where it does not concern Native land or property with collectively held interests.

The Committee also heard from officials of the Solicitor General's Office that the Courts in our Jurisdiction cannot make orders relating to iTaukei land. In this regard, would we want another country to be making decisions on iTaukei Land?

A framework must be established under the Central Authority to allow the implementation and application of Articles 29-39. The framework is to set out the procedures on how domestic stakeholders cooperate and how Fiji's Central Authority cooperate with a Contracting State.

3.4 Gender Analysis

The Parliament of Fiji Standing Orders 110(2) specifically states that a committee shall ensure that full consideration will be given to the principle of gender equality so as to ensure all matters are considered with regard to the impact and benefit on both men and women equally.

The Committee is satisfied that the matters considered in this report impacts on both women and men equally and as such, ascension of the Convention will assist in upholding the rights of all Fijians.

3.5 General Observation

The committee recommends that proper facilities be constructed as safe houses which are secure and meet international standards for children waiting travel to their country of habitual residence.

3.6 Marriage

The SCFAD strongly recommends that special guidelines be established to assist married couples (male and female) achieve a solid marriage foundation. Marriage training/counseling to be carried out prior to marriage so couples understand the intricacies of marriage and how they can become good parents.

3.7 Conclusion

The SCFAD has been tasked with considering this convention. After the completion of our scrutiny, the SCFAD has put forward some observations and recommendations to be noted by the House. As a result, the committee encourages the Government to accede to the 1996 Convention with reservation on Article 55.

4 CONSIDERATION OF CONVENTION ARTICLE BY ARTICLE

The Committee considered the Convention Article by Article and agreed with the Articles as summarized below:

A copy of the Convention is attached as Appendix B.
