THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 13

Affiliation Proceedings

Contribution by two or more Putative Fathers

REPORT

MARCH 1970

REPORT ON

AFFILIATION PROCEEDINGS

(Contribution by two or more Putative Fathers)

To: The HON. ARTHUR F. GRIFFITH, M.L.C.
MINISTER FOR JUSTICE

TERMS OF REFERENCE

1. As Project No. 13 of its first programme, the Committee was asked -

"To consider and report on whether in affiliation cases in which it appears from the evidence that there are two or more putative fathers, it is desirable that the law should provide for -

(a) contribution of maintenance by such persons; or

(b) additional or alternative relief for the mother."

EXISTING LAW IN WESTERN AUSTRALIA AND ITS EFFECTS

2. The maintenance of illegitimate children by their parents is governed in this State by the *Married Persons and Children (Summary Relief) Act, 1965-1967*. Section 17 places an obligation on the parents of an illegitimate child to provide for, or contribute towards, reasonable maintenance for the child. The section further provides that the mother of an illegitimate child may apply to the court for an order against the father of the child, and that the Director of the Child Welfare Department may apply for an order against either, or both, of the parents. Subsection (3) of the section empowers the court on being satisfied that a male defendant is the father of the child to order him to make such payments for the maintenance of the child, as the court considers reasonable. Section 96 provides that the court shall not make an order on the uncorroborated evidence of the mother, or if the mother was a common prostitute at the time of conception.

3. In a normal case, where the defendant admits his paternity, the mother has no difficulty in obtaining an order for the child's maintenance. If the defendant does not admit his paternity, the court must be satisfied, on the evidence before it, that the defendant is in fact the father of the child.

4. Where the woman has had sexual intercourse with more than one man during the possible period of conception she may have some difficulty in obtaining a maintenance order because she may not be able to prove who is in fact the father. If she applies for a maintenance order against one of the men she may be met with evidence from each of the others asserting that he too had had sexual intercourse with her during the relevant period. Applications in such circumstances however, are not common. The clerk of the Summary Relief Court at Perth can recall only one such case since the court was set up in 1966. The Clerk of the Children's Court at Perth estimates that there had been only a small handful of such cases in his court from 1956-1966, when jurisdiction was transferred to the Summary Relief Court. These estimates are at variance with that given by the Law Society (see paragraph 6 below), Of course, there may have been cases in which the woman has not commenced proceedings because of the unlikelihood of success.

5. Even where the woman has had sexual intercourse with one man only, his friends may testify to having had intercourse with her. The Committee has been informed by a Magistrate of the Summary Relief Court that attempts to introduce perjured evidence of this nature are very rare, though there is suspicion that a case recently heard was of this character. In that particular case the attempt, if it was one, was unsuccessful.

THE MOVEMENT FOR REFORM

6. The Law Society of Western Australia wrote to you as Minister for Justice on 14 July, 1966 (file No. CLD. 827/66), claiming that an application by the mother of an illegitimate child for an affiliation and maintenance order against the alleged father was frequently defeated on the evidence of male witnesses called by the respondent to testify that during the possible period of conception they also had had sexual intercourse with her. The Society expressed the view that unless the probability of a particular male tendering evidence of being the father was ruled out by scientific or other proof, all such males should be adjudged possible fathers and be made liable to contribute to the maintenance of the child.

7. The Women Justices' Association of Western Australia in a letter of 11 October, 1966, addressed to you as Minister for Justice (file No. CLD. 827/66), raised the question of pregnancy following a mass rape and asked what action is taken for the maintenance of the child and who is considered the responsible father.

8. The Crown Law Department studied the problems raised by the Law Society and the Women Justices' Association (see file No. CLD. 827/66). The Department suggested that a possible solution lay in the adoption of legislation along the lines of s.59 and 59a of the South Australian *Social Welfare Act, 1926-1965*, the only Australian legislation dealing with the situation. This legislation empowers the court to make an order against all the men who have testified to having had sexual intercourse with the woman, and who might possibly be the father of the child, to contribute to the child's maintenance. An order may also be made on the special application of the Minister of Social Welfare or an officer of his department against the known possible fathers. These orders apply only to males over the age of eighteen years.

9. The Magistrates of the Summary Relief Court, with some divergences of opinion on lesser points, were prepared to agree that legislation broadly along the lines of the South Australian Act should be adopted. A court officer of the Child Welfare Department also expressed approval.

THE REPORT OF THE ENGLISH LAW COMMISSION

10. However, new light was thrown on this matter in 1968, by the opinion expressed in the English Law Commission's report, "Blood Tests and the Proof of Paternity in Civil Proceedings" [Law Com. No. 16].

The report states -

> "One particular suggestion which has been made to us is that if it could be proved that more than one had sexual intercourse with the mother, within the possible period of conception, but it cannot be proved which of the men is the father of her child, then all the men concerned should be made to contribute towards the maintenance of the child."

The report then goes on to give what in the Commission's view are compelling reasons why provision along these lines should not be introduced into the law. The Commission adopted the views expressed in an article by Professor Arnholm, Professor of Law at Oslo University, about similar Norwegian legislation which had been repealed in 1956. The report quoted the following extract from Professor Arnholm's article -

> "The part of the Act (of 1915) which caused most criticism as time went by was that containing the rules providing for the establishment of a duty of support unconnected with paternity . . . The 1915 Act - much against the intention of the legislature - came to depress the social position of those children whose right of support was granted without the establishment of paternity. Such a decision involved an assumption of the sexual promiscuity of the mother during the period of conception and the scheme of support served to remind the child of this very fact during the whole of its adolescence. This means placing a severe psychological strain on the child. Experienced social workers affirm that children settle down more easily where no duty of support is imposed at all. The child can then find refuge in the thought that the mother has only had sexual relations with one man, who has deserted her and cannot be found. Against the scheme of imposing on several men the duty of supporting the same child particularly sharp criticism was forthcoming. From an economic point of view, of course, it might be advantageous to hold several persons jointly liable. But the advantage was dearly bought. It involved a particularly brutal reminder of the mother's lapse."

The Commission pointed out that Denmark, which had also earlier adopted joint contributors proceedings, had abolished them in 1960 for much the same reasons.

EXPERT OPINION IN WESTERN AUSTRALIA

11. The Committee has sought the views of some of the experts in this State on the possible psychological effects on the child of a maintenance order against more than one putative father. The Committee consulted Professor C.B. Kidd, Professor of Psychiatry, Professor W. B. Macdonald, Professor of Child Health, and Dr. W. Tauss, the Course Controller for the Diploma in Social Work, all of the University of Western Australia.

12. These three persons agreed with the English Commission's view that it would be harmful to the child if its maintenance were made up of contributions by several men who were possible fathers. The child would almost inevitably get to know of the situation in one way or another in the course of time. In Western Australia money due under a maintenance order is paid to the court and then transmitted to the mother, but the interposition of the court

between the mother and the contributors would not significantly lessen the likelihood that the child would sooner or later get to hear of the true position.

13. If the mother decides to keep the child but cannot obtain maintenance for it from the father, she may suffer financial hardship, but the Committee has been informed by the Child Welfare Department that the State readily gives financial assistance to unmarried mothers. They are thus not likely to be left entirely without financial support. The amount currently payable to a woman with one child is $21.50 weekly. In addition further payments are made in special cases.

14. The Committee is satisfied that the principle of joint contributors in affiliation cases should not be adopted in this State.

BLOOD TESTS

15. A possible alternative solution to the problem would be the requirement that the persons concerned submit to blood tests to assist the court in determining which of the men involved is the father.

16. As medical knowledge stands at present blood tests provide conclusive evidence only in a negative sense. That is, they can prove only that a man from whom a blood sample is taken could not, according to the biological laws of heredity, be the father of a particular child. To take a simple case, if the child's blood group is MM and the man's group is NN, it follows that he cannot be the father since the child must inherit one blood group factor from his father. As the man can only give N factors and the child has only M factors there is no possibility of the man being the father of the child. Where a person is wrongly accused of being the father there is about a 70% chance of establishing this fact, using all the blood and serum group typings available. This sort of exclusion could in some cases prove a positive conclusion by eliminating all possible candidates but one.

17. Moreover, though blood tests in themselves do not provide conclusive proof of paternity, in cases of rare blood groups, they could show that it is very likely that the man tested is the father. Even in cases of blood groups that are not so rare and where the degree of

probability would be lower, such probability, taken in conjunction with other evidence, could warrant the court coming to a similar conclusion.

Blood Testing - Joint Defendants

18. The English Law Commission in its working paper raised the question of introducing legislation enabling the mother to commence proceedings against all the putative fathers, and enabling one defendant to bring in others as parties to the proceedings. The court could be empowered then to order that the mother, the child and all the defendants take blood tests to help determine who was in fact the father.

19. Although initially attracted to such a scheme, the Commission in its final report recommended against its adoption. In the Commission's view there were several objections one of which was conclusive, namely, the possibility that the purpose of the proceedings would be defeated by a tactical refusal to be tested on the part of two or more of the joint defendants. The Commission was against enforcing submission to blood tests by physical compulsion or by treating the refusal to submit as a contempt of court. The only remaining sanction would be to permit the court to draw an adverse inference from a defendant's refusal to undergo a test. But, as the Commission pointed out, if more than one defendant refused, the most that could be inferred would be that each of those who refused thought he might be the father. This however, would not help the court to decide which of them was in fact the father.

20. The Commission therefore decided not to recommend extending the scope of affiliation proceedings to include more than one defendant. It did however, recommend that the court be empowered to order blood group tests on the parties in the traditional type of affiliation proceedings where only one defendant is involved. The Commission recommended that the court should be empowered to draw whatever inference it thought proper from the refusal of a party to comply with the order. These recommendations were adopted and the United Kingdom Parliament last year passed the *Family Law Reform Act*, which included the recommendation. (see Part III).

Blood Testing - Witnesses

21. In 1968 the New Zealand Parliament, as part of a review of its maintenance legislation, introduced a provision empowering the court in affiliation proceedings to order not only any party, but also any **witness** who testifies that he is or may be the father, to undergo a blood test. If the witness refuses, the court is empowered to disregard his evidence [*Domestic Proceedings Act, 1968*, s.50].

22. The Committee assumes that this would enable a court to refuse to admit the evidence of such a witness and not merely to take the refusal into account in assessing the weight to be accorded his evidence. But the witness may be telling the truth when he says he had sexual intercourse with the mother. It would not forward the interests of justice to disregard his evidence if he refuses, as well he might, to undergo a blood test.

THE COMMITTEE'S VIEWS

23. If legislation were introduced to provide for joint defendants and to empower the court to order them to undergo blood tests, some sanction would need to be imposed for failure to comply with the order to make such testing effective.

24. However, because of the limited value of the blood group testing, and the possibility that compulsory testing of joint defendants (in the sense of imposing punishment for failure to comply), may be unacceptable to some, possibly substantial, sections of the community, the Committee has refrained from making any recommendations regarding joint defendants or compulsory testing.

25. There is not the same objection to the introduction of legislation empowering the court to order blood tests in the traditional type of affiliation proceedings where only one defendant is involved. Indeed the introduction of such a provision would be a very useful addition to the court's powers. The provision would, of course, empower the court also to order that the mother and the child undergo blood tests on the application of the defendant. An exclusion result would dispose of the application, and a non-exclusion result could, depending on the rareness of the blood groups involved, provide the court with useful evidence. Failure of a

party to undergo a blood test when ordered could be taken by the court as evidence corroborating the evidence of the other party.

26. The Committee considers there would also be some value in including in the legislation a provision empowering the court to order a witness who testifies that he is or may be the father, to undergo a blood test. The court should be empowered to take a witness' refusal into account in assessing the weight to be accorded his evidence. This is different from the New Zealand solution (see paragraph 21 above) which empowers the court to refuse to admit his evidence.

FACILITIES AND COST

27. The Committee has been informed by the Director of Public Health Laboratory Services that there are sufficient facilities in this State for the making of blood group tests. He advises that only certain prescribed laboratories should be allowed to carry out the work.

28. The Director has also told the Committee that the cost of the complete series of tests would be between $50 and $60. The cost of the test should, the Committee considers, be placed initially on the party applying for the tests, but should become costs in the proceedings and so be subject to an order of the court at the conclusion of the hearing. If the party applying is legally aided, the Legal Aid Scheme would bear the cost initially, but it may recoup the costs if the assisted party is successful.

RECOMMENDATIONS

29. The Committee recommends -

(1) that the law be *not* amended to provide for contribution for the maintenance of a child from two or more putative fathers;

(2) that the law be *not* amended to extend the scope of affiliation proceedings to include more than one defendant to one complaint;

(3) that the law be amended to empower the court on the application of a party to order blood tests in the traditional type of affiliation proceedings where only one defendant

is involved, the sanction for the refusal of a party to submit being the adverse inference the court may draw from the refusal;

(4) that the law be amended to empower the court, on the application of a party, to order a witness who testifies that he is or may be the father to undergo a blood test, and that the court should be empowered to take into account his refusal in assessing the weight to be given his evidence.

The Committee has consulted a number of people on various aspects of the problem, and it did not think it necessary to issue a working paper.

CHAIRMAN

MEMBER

MEMBER

17th March 1970