

FIJI LAW REFORM COMMISSION



Domestic Violence Reference

Summary of Key Issues Raised in the Discussion Papers on the Legal Response to Domestic Violence

This Summary is available in English, Hindustani and Fijian
For additional copies of this summary and copies of the three

Discussion Papers (English only) contact:

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Invitation to comment

The Fiji Law Reform Commission is pleased to issue for comment three Discussion Papers prepared to assist those who wish to contribute and participate in the consultation process for the review of laws relating to Domestic Violence in Fiji. This document is a summary of the issues raised in the three discussion papers and those who wish more detailed information contained herein may request the FLRC for a copy of the DPs.

These Discussion Papers has been prepared with an understanding of the Terms of Reference of the review, the recognition that domestic violence is a pervasive and lethal problem that challenges society at every level, a clear view of the role of the stakeholder Agencies, and the expected outcomes of the review gauged after the mini workshop held on 27th July, 2004. The topic is a sensitive one in which legal responses and solutions are only part of the greater issues.

This is not a final report. The purpose of the Discussion Papers and this Summary is to allow stakeholder Agencies and interested organizations and individuals the opportunity to consider these issues and to make their views known to the Commission. Any comments made to the Project Team or sent to the Commission by 30 November 2004 will be considered when the Commission determines its final recommendations, that it will make to the Attorney-General and Minister for Justice by 31 July 2005.

The readers attention is drawn to the Questions in each Discussion Paper. It would be helpful if comments would refer to these, where practicable, but commentators/submitters should feel free to address any issue as they see fit.

The Commission is grateful to Ms. Judy Harrison, Ms. Maria Dimopoulos and Ms. Litia Valesimede Roko, who were appointed by the Attorney-General in July 2004. We are also grateful to the 31 participants from 24 Government agencies and Community Organisations who attended the Commission's mini-workshop consultation on 27 July 2004 and to the 15 agencies represented on the Project Advisory Committee for this law reform project. I wish to also acknowledge the contributions made by Acting Principal Legal Officer Raijeli V. Tuivaga and Senior Legal Officer Vukidonu Qionibaravi from the Commission in the finalization of the Discussion Papers.

The Discussion Papers amply demonstrate and is evidence to the depth and comprehensiveness of the research, both legal research and extensive consultations with the stakeholder Agencies.

We are most grateful to the many individuals and particular Agencies who have assisted us in this area, with the release of particular information on procedures and guidelines and other assistance.

Written Submissions on these three Discussion Papers should reach the Commission by **Tuesday 30 November 2004**. Alternatively you make an oral/spoken submission to the Project Team when it visits your locality in October, 2004. The schedule of public hearings and community consultations will be made known in the newspapers from the first week of October 2004.



Alipate Qetaki
Executive Chairperson
Fiji Law Reform Commission

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Introduction to the review

The Fiji Law Reform Commission has received a reference by the Attorney General and Minister for Justice to review laws relating to domestic violence.

The Terms of Reference, issued on 15 December 2003, are below. These envisage that there must be reform of laws and procedures in this area.

Three **Discussion Papers** have been prepared to help encourage broad public participation in the review. These aim to raise issues and present possible options for reform. The Discussion Papers are:

- DP 1 Legal Response to Domestic Violence: Context and Approach
- DP 2 Legal Response to Domestic Violence: Criminal Justice System
- DP 3 Legal Response to Domestic Violence: Civil Law and Procedures

The Discussion Papers do not represent the final views of the Commission.

The Commission has also produced this **Summary of the Issues Raised in the Discussion Papers**. The Summary is available in English, Hindi and Fijian. The Discussion Papers are available in English only.

The Commission **invites public submissions to the inquiry**. In October 2004 the Commission will be holding consultations in different parts of Fiji. Information about how to make submissions is set out below.

Submissions will be taken into account by the Commission in preparing the **Final Report** to the Attorney-General and Minister for Justice. The Final Report, which will include draft legislation, is to be delivered by 31st July 2005.

Summary of Terms of Reference

The Terms of Reference issued on 15 December 2003 by the Attorney General to the Fiji Law Reform Commission state:

The review is to be holistic and must include consideration of the following:-

- **The nature and extent of domestic violence as a social and gender problem.**
- **The legal remedies available for complaints of domestic violence.**
- **Any changes to the law which may be necessary or desirable to bring greater protection of women and children and other victims of domestic violence.**

- **The need to give the Police and the Courts adequate powers to effectively protect women, children and others from domestic violence.**
- **The steps that may be taken to bring the problem of domestic violence to greater public awareness.**
- **Examination of relevant legislations in other jurisdictions and propose a suitable legislative arrangement on domestic violence for Fiji.**

The Reference envisages that there must be reforms and changes in the substantive and procedural laws in order to render the law appropriately responsive to community needs, values and aspirations and to protect victims of domestic violence, whilst at the same time attaining acceptable standard of treatment for offenders, victims and others affected by domestic violence.

Making a submission

Consultations are crucial due to the complex nature of the reference and the need to ensure that recommendations are practical, effective and workable for the unique environment that is the Republic of the Fiji Islands.

Submissions may be made to the review in person, by telephone or in writing. You can also ask that your submission be treated as confidential. **The closing date for submissions is Tuesday 30th November 2004.**

In person - during October 2004 the Commission will be conducting public hearings and private meetings in various locations in Fiji in the Central, Northern and Western Divisions. There will be advertisements on the radio and in newspapers before hand. If you would like to make a submission in person please contact us to book a 15-30min time slot. Translators will be available. Formal hearings will be recorded and later transcribed.

By telephone - you can make a verbal submission to the Commission by telephone. You will need to phone first to book a time.

In writing - submissions may be sent by post, fax or email to the Commission. Address your submission to:

Fiji Law Reform Commission
 Domestic Violence Reference
 P O Box 2194 Government Buildings, Suva, FIJI
 Fax to: (679) 3303 646
 Email to: DVREF@lawreform.gov.fj

DP1: Context and Approach

The Fiji Law Reform Commission's Report, *Family Law Report 1999: Making a Difference to Families* highlighted the need for more effective laws about domestic violence. Fiji has also been encouraged by United Nations bodies to take further steps to address domestic violence.

The current reference can be seen as one that is in furtherance of Fiji's commitments to:

- Social development
- The well being of families
- The well being of children
- Women's rights
- Equality between men and women, and
- Human rights including due process, equality before the law, and the right to security of the person

Other themes that are involved in this review are:

- Social responsibility
- Education and attitudinal change
- Social supports
- Healthy relationships
- Leadership
- Coordination
- Due diligence
- Access to justice
- Quality of justice

Discussion Paper 1 Legal Response to Domestic Violence – Context and Approach contains information about nature and prevalence of domestic violence in Fiji. It compares domestic violence to other forms of violence, looks at theories about what causes domestic violence, the myths and the high cost of domestic violence to Fiji.

The statistics indicate that domestic violence is prevalent but the statistics probably substantially under estimate the extent of the problem because many victims of domestic violence do not report it. Figures clearly show that women are the main victims but also that many people see violence in their homes. When violence is directed towards children or children are present the effect can be dramatic. Many people don't yet understand the effect on children when they witness domestic violence. Also domestic violence plays a big role in the number of homicides that occur in Fiji. This includes adults and children who are killed. There are also indications that domestic violence contributes to the suicide rate.

The Discussion Paper notes that the law plays a fundamental role in addressing domestic violence but there are many other things that also might need to be done. The Discussion Paper asks for input particularly on the following matters:

What do we mean by ‘domestic violence’?

If we need to do better to address ‘domestic violence’ we all need to be clear about what this means.

- **What do you think about the following ‘working definition’ of domestic violence?**
 - *Domestic violence means physical violence, property damage, threats or intimidation by a person who is, or was, in a family or domestic relationship with the victim.*

- **Which of the following should be included when we talk about ‘domestic violence’?**
 - *Intimate partner violence?*
 - *Violence by another relative in the home?*
 - *Violence where a child in the home is the direct or indirect victim?*
 - *Violence in a boyfriend/ girlfriend relationship?*
 - *Violence in a carer relationship and in other household relationships?*

What principles should be used?

The principles that the legal response to domestic violence is based on should be clear. The same principles might also apply to all other measures to address domestic violence.

- **What do you think about the following draft of possible principles?**
 - *individuals have the right to be free from violence*
 - *all forms of domestic violence are unacceptable*
 - *acts of domestic violence that constitute a criminal offence must be dealt with as such*
 - *the safety and wellbeing of victims of domestic violence must be the highest priority in all responses*
 - *those who commit domestic violence must be held accountable for their behaviour and are expected to address their behaviour*
 - *individuals, families, communities, agencies and government all have responsibility for working towards prevention of domestic violence*

Do we need a national strategy?

This would be a plan that deals with many issues that need to be addressed. It would make out the improvements to be made and provide a way to report on progress. Should Fiji have a National Strategy to Address Domestic Violence?

How can we work in a common direction?

All of these have an important role in working to address domestic violence:

- families and friends
- advocacy by men
- advocacy by women
- churches and faith groups
- schools
- health system
- Department of Social Welfare
- crisis support and counselling
- emergency and ongoing accommodation
- Family Assistance Allowance and related payments

Do you think that improvements can be made how some or the people, agencies and other things on the list above are contributing to help victims of domestic violence be safe? and to helping those who are being violent to stop?

Are initiatives needed for particular groups?

- ***In working to address domestic violence, does special attention need to be given to:***

Ensuring that there is a multi-ethnic focus?

- ***can networks within particular ethnic groups play a larger role?***
- ***are there special issues about domestic violence that need to be understood and be addressed for particular ethnic groups***

People in rural and isolated areas?

- ***what help is available for victims of domestic violence?***
- ***what help is available for a person to stop their violence?***
- ***will any new laws to provide more protection for victims help?***

Young parents?

- ***does there need to be a particular focus on domestic violence and young parents?***
- ***are young mother's more at risk of domestic violence?***
- ***can families and friends give more support and what else can be done to help?***

People with a disability?

- ***are people with a disability another group that are at risk of domestic violence?***
- ***what forms does this take***
- ***what can be done about it?***

Other groups with special needs?

The Discussion Paper gives three examples, to explain that there might be particular issues. The examples given are domestic violence and military families, domestic violence and police families and domestic violence mining families.

- ***Are there particular groups where special strategies to address domestic violence are needed?***

Coordinating and interagency response

- ***What groups are operating to coordinate efforts to address domestic violence at a village and provincial level? For example to make sure that there is proper help when domestic violence happens?***
- ***Is more coordination needed and if so how can this be achieved?***

Legal system

- ***Do you think that more needs to be done in relation to any of the following so that there the legal system is extending more particularly to victims of domestic violence***
 - *Legal representation and legal aid?*
 - *Court support (someone to support at court)?*
 - *Being able to use the court locations?*
 - *Court facilities – safety at court, waiting areas?*
 - *Training for court staff, Magistrates' and Judges?*

Overarching issues: education, research and statistics

Education and training about domestic violence for:

- families and friends
- victims of domestic violence
- people who are still being violent
- people in the community who want to make a difference – community leaders
- people working in the legal system, including police
- health workers including doctors and nurses
- teachers
- church groups and religious leaders
- leaders of all kinds
- ***What kind of information is needed?***
- ***How could it be provided?***
- ***Who should do it?***

Research and statistics

Information about the nature and extent of domestic violence is not complete. Also special issues need to be better understood.

- ***What priorities should apply for further research?***
- ***Should a particular effort be made to improve collection of statistics?***

DP2: Criminal Justice System

Discussion Paper 2 – Legal Response to Domestic Violence – Criminal Justice System starts by noting that some of Fiji’s laws appear to reflect values and approaches of an earlier time. Reform of law and procedures may also be needed to correct unhelpful practices.

Modern legal responses to domestic violence place highest priority on the safety and protection of the victim, treat domestic violence as criminal when it breaches the criminal law, and aim to encourage rehabilitation.

The Discussion Paper looks at police statistics that show that the most common criminal offences about domestic violence are: assault causing actual bodily harm, common assault and acting with intent to cause grievous bodily harm.

However domestic violence can also result in charges for murder, rape and sexual offences – in fact any kind of offence against the person. Also domestic violence does result in criminal charges for property damage including arson.

2.1. Offences

Definition of ‘domestic violence offence’ in the Penal Code?

The Penal Code does not refer to domestic violence but many offences involving domestic violence are charged under the Penal Code. If a definition of ‘domestic violence’ was included in the Penal Code then special measures could be applied to a charge for a criminal offence involving domestic violence. A definition could provide a reference point for other special measures e.g. in relation to police powers, bail, and when sentencing.

- ***Should a definition of ‘domestic violence offence’ be added to the Penal Code?***

New criminal offence of breach of a domestic violence restraining order?

This is mainly discussed in DP 3 where it is proposed to establish new legislation so that the court can make domestic violence restraining orders. As long as the order is complied with, there would be no penalty. But, if the order is not complied with it would be a criminal offence.

- ***Should there be a new criminal offence of breach of a domestic violence restraining order?***

Specific offence of domestic violence?

The problem here is that domestic violence can already be charged under the Penal Code. If there was a specific offence of ‘domestic violence’ with its own penalty, how would it operate where the charge is ‘murder’, or ‘criminal trespass’ or ‘common assault’.

- ***Should there be a specific criminal offence of domestic violence with its own penalty?***

Criminal offence of stalking?

The Penal Code does not include the offence of stalking. Common examples are: following, watching a person's home or workplace, repeatedly contacting and threatening conduct. In the case of stalking, it can be hard to prove intention. Intention is a normal element of any criminal offence.

- ***For a new criminal offence of stalking - should it be enough to prove the effect of the behaviour on the victim and that the accused should reasonably have known that the behaviour could arouse the victim's apprehension of fear?***

Married spouse to be compellable in domestic violence cases?

Under current law where a person is charged with a criminal offence against their spouse, including a criminal offence arising from domestic violence the victim spouse can choose to give evidence but can not be *required* to give evidence, and the victim spouse can not be *required* to give evidence about marital communications. A victim might decline to give evidence because they have been pressured by the offender.

- ***Should the law be changed so that a married spouse is compellable:***
 - *in all criminal proceedings?*
 - *in a list of criminal proceedings (e.g. offences of personal violence against the victim spouse)? or*
 - *in all criminal proceedings subject to the court being able to order otherwise in a particular case?*

Recognition of battered women in law about provocation and self defence?

Standard concepts of provocation and self defence do not work well when battered women kills the abuser often after years of abuse. Women may kill when the abuser is asleep or appears to pose no immediate physical threat. The ability to 'retreat' takes on a different dimension when applied to many battered women.

Provocation: Under the Penal Code where a person unlawfully kills another and this would be murder, but the act which causes death is done 'in the heat of passion caused by sudden provocation, and before there is time for his passion to cool', the person is guilty only of manslaughter.

New Zealand and New South Wales are examples of jurisdictions that have changed 'provocation' so that it is not limited to an act 'in the heat of passion' and the question is whether an ordinary person in the position of the accused would also have lost self-control and acted in the way that the accused did.

- ***Should the defence of provocation in the Penal code be change so that the law is like that in NSW and NZ?***

Provocation and self defence: In cases where battered women kill their abuser expert evidence about the nature and extent of the abuse suffered by the woman is critical. For self defence the

evidence needs to address how a reasonable person in the circumstances of the victim could consider that the deceased did pose an immediate threat, and why in the particular circumstances the response was reasonably proportionate to the threat.

- ***Is expert evidence being called when it is needed?***
- ***If not, why and what can be done so that this evidence is presented?***

Changes to s. 163 (reconcilable offences) for domestic violence cases?

In criminal law in Fiji ‘reconciliation’ is relevant to the question of penalty. The court must be satisfied that reconciliation has actually occurred and that it has been accepted by the complainant (victim). Also, reconciliation will only be mitigating if it has actually helped to resolve or remedy the damage to the victim.

The relevance of reconciliation is taken to a further level by s. 163 of the Criminal Procedure Code. This applies to criminal trespass, common assault, assault causing actual bodily harm or malicious damage to property (referred to in practice as ‘reconcilable offences’). In cases that are ‘substantially of a person or private nature’ and which are ‘not aggravated in degree’ Magistrate may promote reconciliation and encourage and facilitate the settlement in an amicable way of the proceedings. The settlement can include ‘terms of payment of compensation or other term approved by the court’ and in cases that have so settled, the Court may then order the proceedings to be stayed or terminated.

- ***What policy objectives should be applied in framing criminal law that deals with domestic violence? For example should the main policy objectives be one or more of the following: deterrence, rehabilitation, punishment of the offender, reconciliation of the parties?***
- ***Should s. 163 be amended to exclude cases of domestic violence or to make it clear that ‘reconciliation’ refers to whether the defendant has accepted responsibility for the offence, is regretful, has tried to make amends and is willing to take responsibility for reforming the behaviour?***
- ***Should it be made clear that it is not the role of the court in criminal proceedings relating to domestic violence to attempt to reconcile the parties i.e. encourage or facilitate resumption of cohabitation?***
- ***Would the establishment of Guidelines help avoid problems in the way that the court applies s. 163 in domestic violence cases?***

2.2. Penalties

Are criminal penalties for domestic violence too light?

Statistics for the 5 year period 1993-1997 indicated that 44.9% of criminal charges relating to domestic violence had the outcome of ‘reconciliation’. In 83% of these cases there was no penalty imposed while in 17% there was a sentence as well as a fine, or a custodial or suspended sentence.

- ***Do people get lighter penalties when a criminal offence arises from domestic violence?***

- **What principles should apply to penalties for criminal offences arising from domestic violence? Should the principle be:**
 - *that the penalties should be the same (no reduction of penalty because it was domestic violence)?*
 - *that the penalty should be lower (a reduction of the penalty because it was domestic violence)?*
 - *that the penalty should be higher (a more severe penalty because it was domestic violence)?*

Sentencing guidelines for domestic violence cases?

- **Should guidelines be introduced that encourage the court to look more closely at criminal offences arising from domestic violence e.g. the extent of the damage, injury or loss suffered by the victim; whether a child witnessed the offence; the effect of the offence in terms of hardship, dislocation caused to the victim, whether the defendant has sought help to stop their violence or is willing to do so?**
- **Alternatively should these matters be set out in the Penal Code so that courts must take them into account in determining the penalty in these cases?**
- **Should a penalty premium apply in criminal matters that come under a definition of 'domestic violence offence'? That is, implement a method that increases the maximum penalty for an offence committed in the context of domestic violence and/or set minimums subject to consideration of individual circumstances?**

More sentencing options for domestic violence cases?

The options that apply in framing penalties for offences involving domestic violence are the same as those for the same offence committed in another context.

- **What if any additional penalty options are needed in domestic violence cases?**
- **Should courts order domestic violence offenders to attend a counselling, education or treatment program? If so, what if any safeguards should apply?**
- **Should the court be able to order a domestic violence offender to take part in a victim / offender conference? If so, in what circumstances and what safeguards should apply?**

More emphasis on compensation for victims of domestic violence?

When a court deals with a criminal charge, there is power to order compensation for the victim of the crime.

- **Are orders for compensation being made for criminal charges involving domestic violence? Are the financial circumstances of the offender resulting in few orders or low orders for compensation?**
- **Would it make a difference if legislation put more emphasis on the court making orders for compensation in these cases?**
- **Some countries have a government funded crime victim's compensation scheme. Fiji does not have this scheme. Would victims of domestic violence apply if it existed? Is this feasible for Fiji?**

2.3. Police

Should the police 'No Drop Policy' be improved and legislated?

Fiji Police have a 'No Drop Policy' for domestic violence cases whereby Police are required to investigate and, where there is sufficient evidence, to charge.

- **Are all Police implementing the 'No Drop Policy' or are there regions or local areas where Police have not implemented the Policy?**
- **Despite the 'No Drop Policy' are police discouraging victims of domestic violence from laying charges or attempting to reconcile the parties?**
- **Should the 'No Drop Policy' be far more detailed?**
- **Should the duties of police in relation to domestic violence matters be set out in binding Force Routine Orders (current position) or would it be better to:**
 - **set out the general duties in legislation?**
 - **set out the detailed requirements in Police Act Regulations?**
 - **require the Commissioner of Police to issue comprehensive Force Routine**
 - **Orders about domestic violence with these to be gazetted?**

Better police investigation in domestic violence cases?

- **Should the "No Drop Policy" set out what police should do at the scene when they attend a domestic violence incident?**
- **What if any problems happen now when police attend at the scene?**

Should police powers to arrest be increased / stronger arrest policies?

- **Should police be able to arrest without warrant in cases of common assault committed in the context of domestic violence?**
- **Should police arrest more frequently in domestic violence cases?**
- **Should the "No Drop Policy" that applies to domestic violence:**
 - **set out when police should arrest?**
 - **require the Police to arrest in all domestic violence cases?**
 - **require police of arrest if the victim is in continuing danger and it is not possible to arrange for removal of the offender from the home?**

Should police powers of entry be increased?

- **Should police have a clear power of entry without a warrant where police are concerned that an offence has just occurred and the victim or the offender are in the premises or an offence is in progress?**

Should police charging practices be improved?

- *Is use being made of all available charges in domestic violence cases?*
- *Are charges other than assault, assault causing actual bodily harm and grievous harm being laid in domestic violence cases?*
- *Are there problems with charging practices in domestic violence cases?*

Should bail laws include provisions about domestic violence?

- *Currently, the Bail Act contains no reference to domestic violence.*
- *Should the Bail Act be amended to deal with domestic violence? If so, should the Bail Act provide that:*
- *the presumption of bail does not apply?*
- *the paramount concern in considering bail is victim's safety?*
- *police may only grant bail if satisfied that the release of the accused would not pose a risk to the safety of the victim and if not satisfied the police must bring the accused before a court within 24 hours?*
- *the presumption against bail and paramountcy of the victim's safety also applies when the court is considering bail?*
- *in considering where the accused should reside while on bail that the accommodation needs of the victim have priority. Unless the victim is agreeable and it appears safe, the accused must be required to reside at another residential address while on bail?*
- *automatic conditions attach to bail i.e. that the accused not assault, threaten or harrass the victim?*
- *if bail is refused, granted or subsequently varied immediate steps must be taken by police to inform the victim of the terms and conditions of bail?*

2.4. Prosecution

Prosecution policies for domestic violence cases?

Prosecution of criminal offences about domestic violence can be difficult because: the victim is more vulnerable to pressure from the accused and /or from family members to withdraw the charge; the victim may fear for their safety or fear reprisals if they give evidence and the victim might be concerned about the consequences of successful prosecution e.g. imprisonment of the accused / loss of breadwinner

- *In domestic violence cases, what effect does s. 163 of the Criminal Procedure Code (reconcilable offences) and non-compellability of a married victim have on the prospects and outcomes of prosecution?*
- *Are there any problems with prosecution: charging practices; position on bail; liaising with the victim; presenting the prosecution case; presenting matters relevant to sentence?*
- *What training do prosecutors receive about prosecuting domestic violence offences?*
- *Are specific prosecution policies needed about prosecuting domestic violence cases?*
- *Should there be a pro-prosecution policy for domestic violence cases?*

- ***If so should this be a 'hard' or a 'soft' pro-prosecution policy? 'Hard' means that the prosecution will try to proceed regardless of the victim's wishes. 'Soft' means that the victim will be supported and encouraged but the victim's wishes will be taken into account in deciding whether to proceed.***

Presentation of expert evidence in domestic violence cases?

- ***How often does the prosecution present expert evidence about domestic violence?***
- ***When should the prosecution do this?***
- ***What can be done to address practical problems like cost and availability of this expert evidence?***

2.5. Victims of crime

Better treatment of victims of crime, including victims of domestic violence?

Good practice in the way that the justice system responds to victims of domestic violence, is a key theme of the current review. Fiji does not have a Code of Practice or legislation that deals with the rights of victims of crime.

The New Zealand Victim's Rights Act 2002 (VRA) is an example of legislation that deals with keeping the victim informed; victim impact statements; and, complaints.

- ***Should Fiji develop a Code of Victim's Rights or legislation similar to the New Zealand Victim's Rights Act?***
- ***Would a non binding Code or legislation be preferable?***

DP3: Civil Law and Procedures

Civil law responses to domestic violence are different from criminal law responses. While criminal law responses primarily aim to hold the offender criminally responsible, civil law responses mainly aim to provide early intervention and protection for victims. Civil law responses also deal with other matters such as the relevance of domestic violence to custody and access determinations and compensation.

Civil law provisions are not a substitute for criminal charges and criminal charges do not overcome the need for civil law measures.

Discussion Paper 3 reviews the current civil laws for protection of victims of domestic violence and what will be available under the Family Law Act 2003. The Paper considers new domestic violence restraining order legislation for Fiji and raises some issues about the new Family Law Act.

Problems with current civil law for protection of victims of domestic violence

The Discussion Paper notes that current civil laws put the onus on the victim to seek protection, the procedures are too complicated, people in a de facto relationship without children are particularly disadvantaged, it takes too long to get an order, enforcement of orders is up to the victim and breach of an order is not a criminal offence.

Many other countries have specific civil laws to provide fast, inexpensive, and effective *protection* to victims of domestic violence. Under these laws orders specify things that the respondent is prohibited from doing and also what the respondent is required to do. A breach is a criminal offence which is charged by the police and prosecuted in the same way as any other criminal charge.

3.1. New legislation – structure, purposes, duties

New legislation - stand alone or amend existing legislation?

The primary purpose of the new legislation would be to enable the court to make domestic violence restraining orders and breach would be a criminal offence. The new legislation might also contain provision for urgent orders about children, urgent monetary relief, compensation and other matters.

- ***Should the legislation be:***
 - ***new stand alone legislation?***
 - ***new provisions in the Family Law Act 2003, Penal Code and/or the Criminal Procedure Code?***

Expressing the purposes or objects?

A statement of purposes of objects might be included for educational and public information purposes, to make the values that underpin the legislation explicit, to provide an aspirational starting point, and to aid interpretation of the Act and consequently facilitate implementation in the intended way.

- ***Should the legislation contain a statement of purposes or objects?***
- ***Should the primary emphasis be on ensuring safety of those at risk of domestic violence?***
- ***Do you agree that an emphasis on reconciliation (resumption of cohabitation) is not appropriate for this particular legislation?***

Duty of police to assist the victim and inform the victim of their rights?

In South Africa the duty of police to assist a victim of domestic violence and to inform victims of their rights is in their Domestic Violence Act.

- ***Should the new domestic violence legislation include a similar provision?***

Requirement that the Police Commissioner issue Instructions to police?

The South African legislation also requires the Commissioner of Police to issue National Instructions about domestic violence to police. The instructions must be published in the Gazette. This measure ensures that the instructions are made public.

- ***Should the legislation require that the Commissioner of Police issue comprehensive instructions to police about domestic violence matters, with these to be gazetted so that they are public?***

3.2. *Who should be protected?*

Which relationships?

Discussion Paper 1 – outlines five situations that might be encompassed by the term ‘domestic violence’. That is:

1. *Intimate partner violence*
 2. *Violence by other relative in the home*
 3. *Violence where a child in the home is a direct or indirect victim*
 4. *Violence in boyfriend / girlfriend relationships*
 5. *Violence in carer and other household relationships*
- ***Should all of these relationships be referred to in the legislation so that domestic violence restraining orders can be made in all of these situations?***

'Family member' – how should this be defined?

In addition to any other relationships covered by the legislation it may apply to a 'family member'. If 'spouse' was listed separately – would the following properly define 'other family member' or are there relationships that are missing or some that should not be included?

"*other family member*" means any of the following:

- a) parent, grandparent, step-parent, father-in-law, mother-in-law
- b) child, grandchild, step-child, son-in-law, daughter-in-law
- c) sibling, half-brother, half-sister, brother-in-law, sister-in-law
- d) uncle, aunt, uncle-in-law, aunt-in-law
- e) nephew, niece, cousin
- f) clan, kin or other person who in the particular circumstances should be regarded as a family member

In determining the above relationships where the victim was or is the de facto spouse of another person the relationship of *other family member* is determined as if the de facto spouse relationship was or is a marriage relationship.

'*spouse*' includes a person who is or has been cohabiting as the husband or wife or de facto partner

Note: the reference to a person who is a de facto spouse being treated as if it was a marriage relationship aims to ensure that in-law relationships are covered as if the parties were married e.g. if a de facto wife was assaulted by her de facto husband's brother, that relationship would be covered.

Conduct that would be the basis for a restraining order

The legislation would also need to list *the conduct* that would be the basis for a restraining order.

The definition may include actions that breach criminal law so that a restraining order can be made in those cases whether or not a criminal charge is laid. However, the definition may also be broader and include conduct that may not be a criminal offence.

- ***Does the following draft list conduct that should be covered? Is there anything missing or anything that should not be listed?***

Grounds for making a domestic violence restraining order

The following conduct constitutes grounds for making of a domestic violence restraining order when committed, directed or undertaken by a person ('the aggressor') towards another person ('the aggrieved') where the aggressor has or has had a family or domestic relationship with the aggrieved:

- a) causing or threatening to cause physical injury to a person
- b) damaging or threatening to cause damage to property of a person
- c) threatening, intimidating, harassing or psychologically abusing a person
- d) persistently behaving in an abusive, provocative or offensive manner towards a person

- e) causing the person apprehension or fear by:
 - (i) following a person
 - (ii) loitering outside a place frequented by the person,
 - (iii) entering or interfering with a home or place occupied by the person
 - (iv) interfering with property of the person
 - (v) keeping a person under surveillance
- f) causing another person to do any of the above acts towards a person
- g) engage in conduct that in the opinion of the court is sufficient to warrant making the order
- h) a person psychologically abuses a child if that person without reasonable excuse causes or allows the child to see or hear any of the conduct listed in this section towards a person with whom the child is in a family or domestic relationship,

“*property of a person*” means property of victim that the victim owns or property that the victim does not own but:

- a) used or enjoyed
- b) was available for the person's use or enjoyment
- c) was in the person's care or custody; or
- d) was at the person's home or place or residence

3.3. *Who should be able to apply?*

Broad range of people?

- ***Does the following draft cover who should be able to apply for an order? Is anyone missing or is there anyone listed below who should not be able to apply?***

(1) An application for a domestic violence restraining order may be made for:

- (a) an adult, by
 - the person themselves
 - another person who normally cares for, or is currently caring for, the person
- (b) a child, by
 - a parent or guardian of the child
 - an adult with whom the child resides (either usually or on a temporary basis)
 - the child provided the child has attained the age of 16 years
- (c) an adult or a child, additionally by:
 - (i) a police officer, where the police officer believes on reasonable grounds that domestic violence has recently been committed, is being committed or is likely to be committed

- (ii) the Director of Social Welfare or a Welfare Officer appointed under Section 37(2) of the Juvenile Act
- (iii) any other person where it appears to the court to be necessary for the safety or well being of the victim

(2) Where an application is made under section (1) for the protection of a person over 16 years and the applicant is not the person intended to be protected, the applicant must demonstrate to the satisfaction of the court that:

- (a) the applicant has the consent of the person to be protected to make the application, or
- (b) the person to be protected lacks the capacity to understand the proceedings and/or the nature and extent of the risk and the proceedings are necessary for the victim's safety or well being, or
- (c) it is not reasonable in the circumstances for consent to be required.

Should police have a duty to apply?

Some jurisdictions specify in their legislation that police have a duty to apply for a domestic violence restraining order for a victim of domestic violence in some circumstances. This generally helps victims because they do not have to do all the steps to apply themselves.

- ***Should the legislation specify that police have a duty to apply for a domestic violence restraining order for the protection of a victim?***
- ***If so:***
 - ***should this be limited to circumstances of urgency?***
 - ***should police have a duty to apply where a person is charged with a criminal offence arising from domestic violence?***
 - ***based on Fiji's geography and infrastructure, should police have a duty to apply in all cases where there are grounds and police believe on reasonable grounds that the victim's safety is at risk?***

3.4. Orders that could be made

The new legislation would need to list the orders that the court is empowered to make. The approach of other jurisdictions has been to list the orders that the court can make, expressed in general terms to provide broad coverage.

- ***Which of the following orders do you think the court should have the power to make?***

The restrained person must not:

- assault, threaten, harass
- damage or threaten to damage property
- remove property
- contact the protected person/s

The restrained person must:

- comply with new directions relating to the children (custody and access)
- leave the home
- give access to the home
- allow the victim to collect property

- enter
- watch
- follow
- have weapons
- return property
- leave furniture, household appliances and effects in the home
- give furniture, household appliances and effects for the use of the protected person and /or children
- transfer a tenancy
- provide emergency monetary relief
- provide compensation
- attend a program

Standard conditions in every order?

The New Zealand Domestic Violence Act 1995 lists *standard conditions* in every protection order. These provide that the respondent must not assault or threaten to assault, damage or threaten to damage property or engage in any other behaviour that is threatening, intimidating, harassing or psychologically abusing towards the victim.

Also that unless the restrained person has the express consent of the protected person that they may not contact the protected person in any way, be near their home or enter the protected persons home.

Standard conditions also apply to weapons. The restrained person must hand over weapons to police and any firearms license is suspended. The court can vary the firearms provision as long as the victim's safety will not be at risk.

- ***Should standard conditions such as those above apply to every domestic violence restraining order?***

Automatic inclusion of children and extension to other people?

- ***Should the legislation provide that where a court makes a restraining order that the order will also apply for the benefit of any child of the applicant's family?***
- ***Should the court also have power to extend the protection of a restraining order to a person with whom the applicant is in a domestic relationship?***

Custody, access, suspension & variation?

- ***When making a domestic violence restraining order:***
 - ***Should the court have no power to make orders about custody or access?, or***

- *Have power to make orders about implementing access arrangements or to temporarily make, vary or suspend a custody or access order?, or*
 - *Have powers to make, vary or suspend a custody or access order with this order to continue until that court or another court changed the order?*
- *How often does the need for supervision of (i) access handovers and (ii) access visits arise?*
 - *What options for supervision of access handovers and for supervision of access visits are currently available?*

Tenancy orders?

Where the home in which the parties have lived is rented the landlord might be wanting to evict because the home has been damaged during domestic violence or the offender controlled the money and has not paid the rent. Where a tenancy agreement is in the offenders name and the landlord is agreeable to the victim living there provided that the offender stays away, some other jurisdictions give the court power to make an order transferring the tenancy agreement to the victim.

- *Should the legislation to make a ‘tenancy order’ similar to that in the New Zealand legislation?*
- *Are there particular kinds of tenancy agreements or living arrangements that may need special consideration?*

Emergency monetary order?

- *Should the legislation include power for the court to make orders for urgent monetary relief for the needs of the victim arising from the violence?*
- *If so should this include the following or are there other expenses that should be listed?*
 - *medical expenses*
 - *living expenses (food, necessities)*
 - *accommodation expenses (rent, mortgage, loans, electricity /fuel bills)*
 - *relocation expenses*
 - *household necessities*
 - *any other expenses that the court considers reasonably necessary.*
- *If the power should not be limited in the way indicated in the previous question, should the court have power to make an order for urgent monetary relief for any victim in respect of whom a domestic violence restraining order is to be made under the legislation or only where there has been a spouse relationship or the offender is a parent of a child who is protected by the restraining order ?*
- *Should the legislation provide that any order for urgent monetary relief that involves ongoing payments (e.g. rent, weekly money for food) can only operate for a limited time or should it operate until that court or another court makes a different order?*

Compensation?

- **Should legislation include provisions that enable the court to order that the respondent pay compensation to the victim/s (i.e. for the injuries caused, pain and suffering, loss of income, medical expenses etc)?**
- **Should this only apply to a person who has been protected by a domestic violence restraining order or should any victim of domestic violence be able to apply, whether or not a domestic violence restraining order was made for their protection?**
- **Should the legislation say that compensation can be sought at the time that a restraining order is sought or at a later time but apply a time limit that is the same as for torts (6 years from the time the cause of action arose)?**

Referral or order for attendance at a program?

- **Should the legislation:**
 - **Require the court to provide information to the victim and to the perpetrator about services and programs that are available for each of them?**
 - **Require a lawyer acting in these proceedings to provide the same information to their client?**
 - **Require that the court only provide information about certain services or programs that meet quality criteria? If so how could quality criteria be established and be implemented?**
 - **Give the court power to (i) recommend or (ii) require that the perpetrator undertake counseling, attend an education / rehabilitation or support program?**
 - **Give the court power to (i) recommend or (ii) require the victim to undertake counselling or another program**
 - **Stipulate that the court does not have the power to recommend or require a victim to attend counselling or another program jointly with the perpetrator?**
 - **Give the court power to make orders about payment for programs in individual cases? (e.g. require the perpetrator to pay when they have the financial capacity)**

3.5. Which courts?

Which courts should have jurisdiction?

- **Do you agree that the Magistrates' Court and High Court should have jurisdiction? This means that jurisdiction would not be limited to the Family Divisions or the Juvenile Court.**

Orders in other proceedings & by the courts own volition?

- **Should the court have power to make orders under the legislation in any other proceedings?**
- **If so, should this include a power for the court to make an order of its own volition and/or where requested by a party or another person?**

3.6. Urgent and ongoing orders

Application for orders by telephone including detaining to apply?

- **Should the legislation include provision for police to apply on an urgent basis by telephone and for police to be able detain the perpetrator for a limited period (e.g. 4 hours) for this purpose?**
- **Should the legislation provide that a respondent may appear by telephone from a specified location when this is technically possible?**

Urgent ex-parte and interim orders?

- **Where an urgent order is initially made without notice to the respondent the respondent would then be served with the temporary restraining order and would have the opportunity to object. Should there always be a further court date or should there only be a further court date if the respondent wants to object?**
- **If there isn't a further court date should the legislation say that the temporary order will become final after a certain time (e.g. 3 months)?**
- **At the first court date when the victim and the respondent are both at court, should there be a conference convened by a court officer (who is not a Magistrate or Judge) to see if there can be agreement about the terms of the order to be made. And, if so should the legislation say that the victim must not be required to be in the respondent's presence during this conference?**

Orders by consent including mutual orders?

- **Should the court to be able to make a domestic violence restraining order by consent of the parties? If so should this include a provision that an order can be made without the parties being present at court, without admission by the respondent and also that mutual orders can not be made unless the respondent has also filed an application?**

Final orders including duration?

- **Should a restraining order:**
 - **Last indefinitely until it is discharged by the court? or**
 - **Last for as long as the court orders it should last with no maximum period in the legislation?**
 - **Last only for up to the maximum period specified in the legislation? If this option, what should the maximum period be?**

Variation and discharge of orders?

- **Should there be special requirements about applications to vary or discharge orders when the application is made by the protected person or is supported by the protected person, to make sure that the protected person is not being pressured?**
- **Where an application for variation or revocation is made by the person restrained, should there be safeguards to ensure that these applications can not be made without grounds or as a way of harassing the protected person?**

Extension of final orders?

- *If final orders only last for a certain time (rather than lasting indefinitely) should the protected person be able to apply for an extension?*
- *If so, should extension be automatic unless the respondent proves that the orders are no longer necessary? Or should they be extended if the court finds that the victim is still in fear?*

3.7. Breach of a domestic violence restraining order

Criminal offence of breach?

- *Assuming that breach of a domestic violence restraining order was a new criminal offence, should it be made clear that conduct may constitute a breach whether or not that conduct occurred in Fiji?*

What should the maximum penalty be?

- *If a criminal offence of breach of a domestic violence restraining order is created, what should the maximum penalty be for a first offence?*
- *Should there be a higher maximum penalty for second or subsequent offence?*
- *What should the penalties should be?*

Should a breach offence be reconcilable – s. 163 Criminal Procedure Act?

- *Should s. 163 of the Criminal Procedure Code (reconcilable offences) be apply to an offence of breaching a domestic violence restraining order?*

Penalty options (education programs, community work etc)?

- *Should there be any additional penalty options for breach of a domestic violence restraining order?*

Breach - police powers?

- *Should police have power to arrest without warrant where a police officer has ‘good cause to suspect’ that the person:*
 - *has committed a breach of a domestic violence restraining order?*
 - *is likely to commit a breach of a domestic violence restraining order unless arrested?*
- *Should police have the power to enter and search premises and to remain on premises while reasonably necessary, where police suspect on reasonable grounds that:*
 - *a person who has committed a breach of a domestic violence restraining order is in the premises?*
 - *a person who is likely to commit a breach of a domestic violence restraining order is in the premises?*

Breach – duties of prosecutors?

- **Should the legislation:**
 - *require prosecutors to prosecute breaches and not withdraw a prosecution without permission?*
 - *require the Director of the DPP to issue prosecution guidelines that deal with prosecution of criminal charges arising from domestic violence including breach of a restraining order?*

3.8. Simple procedures

- **Do you have particular suggestions about how procedures under the proposed legislation can be as simple, quick and inexpensive as possible consistent with fairness and due process?**

Court fees?

- **Should filing fees apply in relation to applications under the proposed legislation?**

Early hearing?

- **What if any difficulties might arise for the Magistrates' Court at its various locations, in order to hear urgent domestic violence restraining order applications on the day that they are filed or within 2-4 days of filing?**

Service of applications, interim and final orders?

- **Should the legislation provide that (i) the Clerk of the Court arrange or (ii) police must serve the respondent with the application and supporting documents and orders made by the court?**
- **Are there any matters that would need to be addressed for these arrangements to be implemented and work effectively in practice? (e.g. training, additional resources)?**

Copy of orders to be provided to the police?

The legislation would need to provide that the court promptly forwards a copy of each domestic violence restraining order to the police.

- **Would there be any difficulties in implementing this and also for police to establish a data base and give ready access to details of orders to police in the field?**

Order that the respondent attend / warrant?

- **Should the legislation give the court power to issue a warrant at any stage for the respondent to be brought before the court?**

Representation and assistance to the victim and perpetrator?

- **Should Legal Aid be available for domestic violence restraining order proceedings? And if so should Legal Aid Guidelines give priority to those whose safety is at risk?**
- **Because it is possible that many applicants would be unrepresented, should the legislation note that a non-lawyer may appear in proceedings for a party when permitted by the court and subject to any restrictions that the court considers appropriate in the particular case?**
- **What other steps should be taken, if any, regarding the possibility of non-lawyers appearing for a party (e.g. guidelines, training for workers in relevant services)?**

Evidence?

- **Do you agree with the following proposals relating to proceedings for a domestic violence restraining order under the new legislation:**
 - **the standard of proof should be the balance of probabilities?**
 - **that the rules of evidence should not apply and the Court should be able to receive 'any evidence that it thinks fit'?**
 - **evidence should be able to be given orally or in a sworn statement (affidavit) with the court having the power to give directions in individual proceedings?**
 - **a married spouse should be compellable in the proceedings although special issues may arise where a restraining order is to be made by a court dealing with a criminal charge against the respondent. Do you have any comments about this?**
 - **provision for the court may direct an unrepresented respondent who wishes to cross-examine a victim to put each question to the court (rather than to the victim directly) with the Magistrate then asking each question of the victim?**

Open or closed court?

- **Should an application for a domestic violence restraining order generally be held in open court or closed court? If in closed court should there be specific provision that allows each of the parties to have one or more people present for personal support?**
- **Do you agree that prosecutions for a criminal offence arising from domestic violence should continue to be dealt with in open court?**

Publication?

- **Should there be restrictions on publication of details about domestic violence restraining order proceedings under the proposed legislation?**
- **If so, should the restrictions that will apply to proceedings in the Family Division once the new Family Law Act 2003 comes into effect, apply also to an application for a domestic violence restraining order?**

Orders about costs?

- **Should the legislation provide that usually:**
 - **each party will bear their own costs and expenses? or**

- *the party who succeeds will have (i) their legal costs and expenses, if any, and (ii) personal costs of participating in the proceedings, paid by the other party?*
- *If the legislation provided that normally each party will bear their own costs unless the court orders otherwise, should the court be able to order that the applicant pay the respondents costs where the court finds that the application was frivolous or vexatious?*
- *Should there be special protection against costs being ordered against police or an officer of the Department of Social Welfare where they brought an application for the protection of another person? E.g. that costs may not be awarded against police or an officer of the Department of Social Welfare who brought the application unless it is demonstrated that it was known at the time that the application was made that the allegations were untrue?*

3.9. Family Law Act 2003

The Family Law Act 2003 (FLA) will come into effect on 1 January 2005. A very substantial amount of work is underway to prepare for the commencement of the legislation.

Parent / child contact and the risk to children

Provisions in the Family Law Act 2003 about parent / child contact are the same as those in the Australian Family Law Act. The provisions list factors to be taken into account by the court in deciding whether to order contact (access). Family violence is one of the factors to be taken into account.

The equivalent provisions in the Australian legislation have been criticised as failing to apply adequate criteria in cases where contact is likely to expose a child and a vulnerable parent to further violence.

The criticisms also point to the difficulties caused by the way that 'residence' is dealt with in the legislation. A residence order under the Australian legislation means only an order about who a child lives with. Unless additional orders are made, the person with whom the child resides does not have the responsibility or the right to make decisions about the child's day to day care, welfare and development. The same provisions are in the Family Law Act 2003. In Australia, in cases of intense parental conflict, including cases involving domestic violence, lack of clear boundaries for decision making can result in more difficulties and increased risk.

The provisions in the Family Law Act 2003 and the Australian Family Law Act stand in contrast to those in equivalent legislation in New Zealand. This is the Guardianship Act 1968 which places strong emphasis on detailed consideration of violence towards a child. Where violence is found proved the court *may not* make a custody order or an unsupervised access order in favour of the person found to have been violent.

An evaluation of these provisions considered with provisions about contact with children in the New Zealand Domestic Violence Act 1995, was undertaken in 1999. The study found that key informants believed the legislation had enhanced the safety of children in violent families.

- ***Should there be a stronger provision in the Family Law Act 2003 that is similar to the New Zealand provision i.e. where violence is proved that unsupervised contact may not be ordered?***
- ***Is it too early to be thinking about amending the Family Law Act 2003?***

Principles – safety from family violence

The principles that apply to all proceedings under the Family Law Act 2003 are set out in s. 26 of the Act. These are modelled on those in the Australian Family Law Act. The Australian legislation includes a principle that the court must be concerned about ‘the need to ensure safety from family violence’. This principle is not in the Family Law Act 2003.

- ***Should this principle be added? If so should this be done soon or after the legislation has been in operation for a reasonable time?***

Family Violence Strategy

The Family Court of Australia has recently released its Family Violence Strategy 2004-5 that addresses: information and communication; safety; training; resolving disputes; making the decision.

- ***Should the Family Divisions of the High Court and Magistrates’ Court aim to develop a Family Violence Strategy?***

4. Other issues

The Discussion Papers canvas many issues about the legal response to domestic violence.

- ***Are there other issues that you want to raise?***