FIJI LAW REFORM COMMISSION

Domestic Violence Reference

Discussion Paper Three: Legal Response to Domestic Violence: Civil Law and Procedures

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Invitation to comment

The Fiji Law Reform Commission is pleased to issue for comment three Discussion Papers contained herein. Their summary and the Hindustani and Fijian translations of the summary will be available at a later date around the end of first week of October, 2004. The topic is a sensitive one in which legal responses and solutions are only part of the greater issues.

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.

This is not a final report. The purpose of these Discussion Papers 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/submittees 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

DISCUSSION PAPER 3
Legal Response to Domestic Violence:
Civil Law and Procedures

Preface

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. It is also important to note that the review is intended to be *holistic* and will include consideration of the steps that may be taken to bring the problem of domestic violence to greater public awareness.

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 Discussion Papers are being disseminated widely by the Commission with help from Government Departments, Agencies and a broad range of stakeholders. A Summary of the Discussion Papers in English, Hindi and Fijian is also being disseminated.

Many people are likely to hear about this reference in the media or through groups in which they participate. The Commission encourages all interested groups and individuals to help promote discussion and input to the inquiry.

The Commission now **invites public submissions to the inquiry**. In October 2004 the Commission will also 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.

i. The Review

Terms of Reference

On 15 December 2003 the Attorney-General and Minister for Justice Hon. Senator Qoriniasi Bale issued **Terms of Reference** to the Commission, under Section 5(2) of the Fiji Law Reform Commission Act, for the review of Fiji's Domestic Violence laws. In April 2003 Cabinet approved inclusion of the review of laws relating to domestic violence in the Commission's work program for 2004-2005.

The Terms of Reference are as follows:

> Pursuant to subsection (2) (a) of Section 5 of the Fiji Law Reform Commission Act (Cap. 26) (the Act), I hereby refer the laws relating to Domestic Violence in Fiji, for review by the Fiji Law Reform Commission in accordance with subsection (1) of Section 5 of the Act.
>
> 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 Commission is to carry out consultations in accordance with its procedures.
>
> 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.
>
> The Commission is to submit its report with recommendations and draft legislation to the Attorney-General and Minister for Justice before or on the 31st day of July 2005.

Timetable for the review

This Review is funded by the New Zealand Government through NZAID and the Government of Fiji. Additionally, the Fiji Ministry for Women has committed funds to assist with consultations.

The key steps in the review are highlighted below:

Terms of Reference received by FLRC	15 December 2003
FLRC began work on the reference	January 2004
Recruitment of consultants began	March 2004
Consultants appointed	16th July 2004
Backgrounder circulated to key agencies	24 July 2004
Preliminary _ day workshop (Suva)	27 July 2004
Follow up meetings (Suva)	28 July 2004
Discussion Papers released / call for submissions	20 September 2004
Promotion through media and by stakeholders	September – November 2004
FLRC Consultations in locations around Fiji	October & November 2004
Closing date for submissions	30 November 2004
Drafting of final report begins	November 2004
Final Report	by 31st July 2005

Role of the FLRC and Executive Chairperson

Role of the FLRC

Fiji is a plural society with a colonial legal history. The laws presently on Fiji's statue books, including some relevant to the current reference, reflect this colonial history, the values, norms and institutions. The traditional institutions or customs were superseded by formal written laws and a substantial amount of common law.

The common law is law developed by Judges in areas of law that are not covered by legislation. The common law that applies in Fiji can be hard to find and hard to apply because much of it is based on old decisions by Judges in England and other common law countries.

The above is true of some of the law that is relevant to the current reference.

Fiji's society has changed enormously and the social changes not only affect moral values and institutions but also the conditions of every day life. Substantive law has failed to keep up with these developments. This has resulted in many of Fiji's laws being inappropriate, unfair, outdated, uncertain and expensive.

The Fiji Law Reform Commission exists to address anomalies in Fiji's laws and to help update the law.

Current review
FLRC Executive Chairperson Alipate Qetaki is managing the current review and he will open each of the public consultations.

The Final Report will be submitted by the FLRC to the Attorney-General and Minister for Justice.

Project Advisory Committee

The Project Advisory Committee (PAC) steers and monitors the review to ensure that it achieves its work plan and the objectives stated in the Terms of Reference. The PAC consists of representatives of the following:

- Solicitor General
- Commissioner of Police
- Chief Executive Officer, Ministry of Justice
- Director of Public Prosecutions
- Chief Magistrate
- Chief Executive Officer, Ministry of Fijian Affairs, Culture, Heritage & Regional Development
- Chief Executive Officer, Ministry of Multi-Ethnic Affairs & Reconciliation
- Chief Executive Officer, Ministry of Health
- Chief Executive Officer, Ministry of Women, Social Welfare and Poverty Alleviation
- Director, Department of Social Welfare
- Secretary/ Chief Executive Officer, Fiji Law Society
- Fiji Human Rights Commission
- Manager, New Zealand Agency for International Development (NZAID) Suva
- UNICEF
- UNIFEM

Consultants and staff

On 16th July 2004, in accordance with Section 3(6) of the Fiji Law Reform Commission Act, the Attorney General and Minister for Justice appointed Maria Dimopoulos (domestic

violence expert), Judy Harrison (legislative expert) and Litia R Valesimede (domestic violence expert) to consider and advise the FLRC in relation to the Terms of Reference.

FLRC staff working on the review are:

Project Manager	Alipate Qetaki, FLRC Executive Chairperson
Acting Principal Legal Officer	Raijeli Tuivaga
Acting Senior Legal Officer	Vukidonu Qionibaravi
Clerical Officer	Kenneth Gortz

Role of Community Focus Points

The Commission is partnering with various officials and NGO workers at community level to help distribute this Discussion Paper, give information on the public hearings and consultations and assist those who wish to make submissions. This network includes the Roko Tui (Chief Executive Officer) of the 14 Provinces, District Officers, District Advisory Councillors, as well as Women's Interest Officers and community workers from the NGO's affiliated to the National Council of Women, the Fiji Women's Crisis Center Network and Soqosoqo Vakamarama officials in the Provinces.

The Department of Women has a network of 24 Women's Interest Officers (WIO) who work at a regional level across Fiji. For this reference, the WIOs will help distribute the Discussion Paper to community organizations and members of the public in their area. They will help raise awareness about the issues, help coordinate public hearings in their area and help people who want to make a submission.

Preliminary Workshop 27th July 2004

The FLRC invited 33 key agencies to attend a Preliminary Workshop in Suva on 27th July 2004 to raise awareness about the review and to receive preliminary input to help inform the development of the Discussion Paper. The FLRC expresses its appreciation to the Minister for Women, Hon. Adi Asenaca Caucau for opening the Workshop and to each of the following who participated:

1. The Fiji Police Force, Inspector Unaisi Vuniwaqa
2. The Chief Executive Officer, Ministry of Justice, Mr. Sakiusa Rabuka
3. The Chief Magistrate, Mr. David Balram
4. The Director for Public Prosecutions, Office of the DPP, Mr. Josaia Naigulevu & Ms. Pauline Madanavosa
5. Office of the Solicitor-General, Ms. Noleen Karan, Legal Officer
6. Ministry for Health, Ms. Railala Ligabalavu, Legal Officer

7. The Ministry for Women, Social Welfare, Mrs. Kiti Makasiale (Acting Director); Mrs Karalaini Bradburg, DWIO Eastern; Mrs Eseta Tuinabua, DWIO Central & Ms Makelesi Domonakibau, WIA Lomaiviti; Mrs. Alisi Qaiqaica (Acting Principal Research Officer); Mrs. Merewalesi Baleinavutoka (Acting Principal Assistant Secretary)
8. Ministry for Reconciliation & Multi-Ethnic Affairs, Mr. Nemani Bainivalu
9. Social Welfare Department, Mr. Iliki Naikatini, Senior Welfare Officer
10. Legal Aid Commission, Ms. Barbara Malimali, Principal Legal Officer
11. Fiji Human Rights Commission, Ms. Deveena Herman, Legal Officer
12. Manager, NZ AID, Ms Nicki Wrighton
13. United Nations Children's Fund (UNICEF), Ms. Holly Doel-Mackaway, Child Rights Legal Officer
14. United Nations Development Fund for Women (UNIFEM) Pacific, Ms. Amelia Siamomua, Regional Program Manager
15. The President, Fiji National Council for Women, Ms. Titilia Naitini
16. Young Women's Christian Association, Mrs. Ecelini Weleilakeba
17. The Coordinator, Fiji Women's Crisis Centre, Ms. Shamima Ali
18. The General Secretary, YMCA, Mr. John Lee
19. Men as Partners Project (UNDP), Mr.Apete Naitini
20. Salvation Army, Captain Makereta Serukalou, Court Officer, Suva
21. Fiji Council of Churches, Father Ifereimi Cama, Acting General Secretary
22. Dorcas Welfare Society, Rev. Aca Tuisamua, Director, Seventh Day Adventist Youth Division
23. Regional Rights Resource Team, Mr. Apolosi Bose & Mr. George Tavola, Resource Trainers
24. Fiji National Council of Disabled Persons, Ms. Kush Devi Prasad, Executive Officer

Invitations were also extended to the following who were unable to attend:

1. The Chief Executive Officer, Ministry for Education
2. The Chief Executive Officer, Ministry of Information
3. The Director, Institute of Justice and Applied Legal Studies
4. Methodist Church
5. The Director, Fiji Council of Social Services
6. Executive Committee, Soqosoqo Vakamarama
7. The Coordinator, Fiji Women's Rights Movement
8. The President, Stri Sewa Sabha

Consultations and making submissions

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. The closing date for submissions is 30th November 2004.

In person - during October 2004 the Commission will be conducting consultations in various locations in Fiji. This will see the Commission visiting the Central, Northern and Western Divisions and holding public hearings and private meetings.

A month before the Commission visits a special effort will be made to ensure that the Discussion Paper is received by contact organisations who will act as local focus points for this information.

Advertisements will be placed beforehand on the radio and newspapers that will enable agencies, organisations and interested individuals to book a 15-30 minute time slot.

Formal hearings will generally be conducted at the Town Council Chambers or District Offices. Translators will be available. Formal hearings will be recorded and later transcribed.

The Commission recognises that special arrangements may be needed for some to express their views. We are particularly conscious of the possible needs of individuals and families where there has been domestic violence or there is a current risk of violence.

The Commission requests that agencies and individuals alert us in advance where there are special needs.

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:

The Executive Chairperson
Fiji Law Reform Commission
Domestic Violence Reference

Post to: P O Box 2194 Government Buildings, Suva, FIJI

Fax to: (679) 3303 646

Email to: DVREF@lawreform.gov.fj

Confidential submissions

You may request that the Commission treat your submission as confidential. If you wish to make a confidential submission in person, you should notify the Commission in advance so that we can arrange to hear your submission privately.

Similarly if you wish to make a confidential submission by telephone or by teleconference you should notify us. If you wish to make a confidential written submission, please mark this clearly on your letter, fax or email.

Where the Commission's Final Report refers to confidential submissions, identifying information will not be included.

1. Domestic violence – how effective is Fiji's civil law?

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.

In the FLRC *Family Law Report 1999*, the Commission found that Fijian law does not provide clear jurisdiction to make specific family protection or non-violence orders and that such a law was needed. In that report the Commission primarily focused on family law. The Government subsequently accepted the Commission's recommendations and has passed the Family Law Act 2003 which will come into effect on 1 January 2005.

In accordance with the Commission's recommendations the Family Law Act 2003 contains provisions for the granting of injunctions for personal protection. However the Commission regarded these provisions as transitional and recommended that 'separate legislation is clearly necessary, making family protection an independent or stand-alone action[1].

This Discussion Paper:

- reviews the current civil laws that relate to or can be used in some way for the protection of victims of domestic violence
- reviews what protection will be available under the Family Law Act 2003
- considers new domestic violence restraining order legislation for Fiji, and
- considers several other aspects of civil law that relate to domestic violence.

1 p. 70 Fiji Law Reform Commission, Family Law Report 1999

2. Restraining orders under current law

This section deals with four ways that a victim of domestic violence might seek protection under current civil law. It should be noted at the outset that the Matrimonial Causes Act and the Maintenance and Affiliation Act will both cease when the new Family Law Act 2003 comes into effect.

2.1.1 Matrimonial Causes Act – non-molestation order

Section 107 of the Matrimonial Causes Act (MCA) provides:

> 107. The court exercising jurisdiction under this Act may grant an injunction, by interlocutory order or otherwise (including an injunction in aid of the enforcement of a decree), in any case in which it appears to the court to be just or convenient to do so and either unconditionally or upon such terms and conditions as the court thinks just.

The limitations of non-molestation orders under the MCA are:

- the MCA applies only to 'parties to a marriage'. This means that a victim can only apply under s. 107 if they are married and the order sought is against their spouse. The Police can not apply under the Act for an order to protect a victim,
- an application can only be made under s. 107 if there are other proceedings under the Act on foot. This means that a victim may be forced to commence proceedings, for example proceedings for judicial separation or divorce to provide a foundation for an application for a non-molestation order,
- when a non-molestation order is made this is a civil order between parties. The police do not have the power to enforce these orders,
- if a non-molestation order is breached, unless the action is also a breach of the criminal law, the police will be unable to act. If the protected person wants to enforce the order the protected person has to apply to the court to enforce it,
- the MCA does not contain enforcement provisions applicable to non-molestation orders. This problem is compounded by lack of a clear power for the Magistrates' Court to punish for contempt of its own civil orders. A victim who needs to enforce a non-molestation order made by a Magistrate, consequently applies to the High Court. This may include an application for the respondent to be dealt with for contempt,
- the procedures outlined are cumbersome, complicated and expensive and the burden at each stage is on the victim.

Questions:

1. How frequently are non-molestation orders currently being made under the Matrimonial Causes Act?

2. What are the advantages and disadvantages of this procedure for the protection of victims of domestic violence?

2.1.2 Maintenance proceedings to prompt undertakings

It is understood that a method used by some victims of domestic violence to attempt to obtain protection, is to commence a maintenance case and withdraw it if the other party promises to stop the abuse. Maintenance proceedings can be commenced under the *Maintenance and Affiliation Act* (married and single people) or the *Matrimonial Causes Act* (married people only).

In relation to this practice the following are noted:

- there is no provision in the Maintenance and Affiliation Act that enables a Magistrate to make a non-molestation order for the protection of a person in a de facto relationship and the Matrimonial Causes Act does not apply to de facto relationships,
- resort to a maintenance application as a device to attempt to pressure the respondent to stop threatening or hurting the victim and/or the children points to the serious inadequacy of other legal options for the protection of victims of domestic violence.

Questions

3. To what extent have maintenance applications been used as a lever to try to obtain guarantees from the perpetrator that they will stop threatening or hurting the victim?

4. What have been the effects of the use of this procedure in terms of maintenance orders made and maintenance received?

2.1.3 Injunction to restrain a tort – trespass against the person, property or nuisance

A 'tort' is a civil wrong or injury where the law provides redress. Torts include trespass (trespass to the person: assault, battery, false imprisonment; trespass to property or chattels)

and nuisance. Nuisance generally relates to interference with property rights but may extend to interference with a right to occupy property.[2]

A personal suit arising from tort can be commenced in the Magistrates' Court[3] or the High Court. The Court's power extends to making injunctions to restrain a tort.[4] For example in Sobhna v Prasad the plaintiff applied to the High Court for an injunction to restrain her neighbour from making abusive remarks about her and from making a nuisance.[5]

The drawbacks of this legal remedy in cases of domestic violence, where the victim is seeking an order for personal protection are:

- the suit can only be commenced by the victim – the police can not apply,
- it is arguably the case at present that a married person who has not obtained a decree of judicial separation can not apply, 6
- sections 28 and 29 Magistrates' Court Act, about the court promoting reconciliation applies and this may result in an approach that removes the focus from the safety of the victim,7
- the action is based in common law - the law is old and complicated,
- if the court is satisfied that the victim's claim is made out, the orders that can be made are an injunction and an award for damages,
- issues about ownership of property may constrain the court from making orders such as restraining the respondent from entering the home, restraining the respondent from removing certain property or requiring the respondent to return certain property,
- if the court grants an injunction and this is breached, the breach is a civil matter. Police will not have the power to intervene unless the breach constitutes an offence under criminal law,
- if the court orders are breached nothing will happen unless the victim applies to the court to enforce the orders. Enforcement may take the form of an application that the respondent be dealt with for contempt and/or that penalties be imposed,
- in the light of a lack of clear power for the Magistrates Court to punish for contempt of its own civil injunctions, enforcement action may have to be taken in the High Court8
- the procedures listed above are slow and expensive.

2 See generally - Fleming JG, The Law of Torts (9 ed, Sydney: LBC, 1998)

3 In these cases the jurisdiction of a resident Magistrate is limited, unless parties consent, to suits where the value of the property or the debt, amount or damage claimed is not more than fifteen thousand dollars Section 2(a)(ii)(c) Magistrates' Court (Civil Jurisdiction) Decree 1988

4 Section 2(2)(f) Magistrates Court (Civil Jurisdiction) Decree 1998

5 [2001] FJHC 20; HBC0018.01 (25th April, 2001) http://www.paclii.org/fj/cases/FJHC/2001/20.html

6 Section 42 (1) Matrimonial Causes Act provides that 'While a decree of judicial separation is in operation, either party to a marriage may bring proceedings in contract or tort against the other party'. This will be widened when the Family Law Act 2003 comes into effect. Section 208 of the Family Law Act provides that 'either party to a marriage may bring proceedings in contract or tort against the other'.

7 Section 28 of the Magistrates' Court Act provides: "In civil causes Magistrates and their officers shall, as far as there is proper opportunity, promote reconciliation among persons over whom such Magistrates have jurisdiction, and encourage and facilitate the settlement in an amicable way and without recourse to litigation of matters in difference amount them." Section 29 relates to the court promoting reconciliation in pending civil proceedings.

8 S. 6 of the Magistrates' Court Act provides that that 'The High Court shall have the same power to deal with cases of contempt of its authority as the High Court of Justice in England, and such power shall extend to upholding the authority of the Magistrates' court'. Section 124 of the Constitution provides that the Supreme Court, Court of Appeal and High Court have powers to punish for contempt.

Question :

The ability to apply for an injunction to restrain the commission of a tort will continue once the Family Law Act 2003 comes into effect.

5. How frequently are applications being made by victims of domestic violence for an injunction based on the power of the Magistrates Court and the High Court to restrain the commission of a tort?

6. What is the experience of victims of domestic violence about the effectiveness of this remedy?

2.1.4 Binding over to keep the peace – s. 42 Criminal Procedure Code

Under Section 42 of the Criminal Procedure Code, a Magistrate can order that a person must enter a bond to keep the peace to be of good behaviour. The Magistrate can order that the bond be for up to 12 months, with or without sureties.[9]This procedure relates to any situation in which a breach of the peace is feared, it is not limited to cases of domestic violence and it is not specifically designed for domestic violence cases.

These proceedings can be commenced by the victim or by another person (e.g. Police) concerned about the victim's safety. The Magistrate initially receives sworn evidence[10]. Where this is given in the absence of the defendant the Magistrate can issue a summons or warrant for the person to show cause why they should not be bound over to keep the peace[11].

If the Magistrate orders that a bond to keep the peace be entered and the bond is later breached, nothing will happen unless an application is made to enforce. If an application is made to enforce if the breach is proved the Magistrate can order the forfeiture of the bond[12].

Problems with the s. 32 procedure in domestic violence cases are:

- there is no power to make an urgent interim order. This means that days or weeks may pass before the court hears the application,

9 Section 32 Criminal Procedure Code

10 ibid

11 Section 38 Criminal Procedure Code

12 Section 116 Criminal Procedure Code

- although, once an application for an order is lodged, Magistrates have the power to issue a warrant for Police to arrest the respondent and bring the respondent before the court[13], the Magistrate can only make an order that the respondent be bound over to keep the peace if the respondent is present in person or represented by a lawyer when the matter is heard[14].
- if a respondent enters a bond and the bond is breached it will be up to the applicant to apply again to the court for the bond to be forfeited.

Question :

The power to bind over to keep the peace in s. 42 of the Criminal Procedure Code will continue once the Family Law Act 2003 comes into effect.

7. How frequently are applications being made by:

(i) victims of domestic violence?

(ii) police for the protection of victims of domestic violence?

8. What is the experience about the effectiveness of this remedy for the protection of victims of domestic violence?

2.1.5 Summary of position under current law

- the onus is on the victim to seek protection
- only married victims can apply for a non-molestation order under the Matrimonial Causes Act. The only children who can be protected under that Act are children of a marriage
- there is no protection equivalent to a non-molestation order under the Matrimonial Causes Act for victims who are not married to the offender or for children who are not 'children of a marriage'
- it takes too long to get an order
- if an order is made and then breached, the breach is not a criminal offence and the victim has to take further court action to enforce the breach
- where a breach occurs, unless the action is also a criminal offence under ordinary law, the Police are not likely to have the power to act, and
- breach action is generally slow and expensive

13 Section 38 Criminal Procedure Code

14 Section 40 & 41 – Criminal Procedure Code. This also arises because the only final order that the Magistrate can make is one directing the respondent to enter a recognizance. A recognizance is entered by the respondent signing the recognizance papers prepared by the court.

2.1.6 Family Law Act 2003 – restraining orders and limitations

Under the Family Law Act 2003 that will come into effect on 1 January 2005 there will be three ways in which a restraining order (non-molestation order) can be made. That is:

1. Injunctions in proceedings relating to children – s. 118

- under s. 118[15] the Court can make a non-molestation order (called an injunction) for the personal protection of a child
- an application can be made just for an injunction (e.g. where no other proceedings are on foot and the applicant does not want to start other proceedings at that time). Where other proceedings are on foot, an injunction can be sought as an additional application.
- the focus of the section is on children. This means *all children* whether or not their parents have married.
- an application for an injunction can be made by any of the following: either or both of a child's parents (married or not); a lawyer appointed by the court to provide separate representation for the child; a grandparent of the child; or, any other person concerned with the care, welfare or development of the child.[16] The last point is broad enough for an application to be made by a concerned relative, neighbour, police, Department of Social Welfare or a non-government agency.
- in general terms the Court has power to make all or any of the following orders:
    - (i) an injunction for the personal protection of the child,
    - (ii) an injunction for the personal protection of a person who has an existing residence, contact or specific issues order in relation to the child
    - (iii) an injunction restraining a person from going near or entering or remaining where the child lives, work or goes to school
    - (iv) (iv) the same kind of order as (iii) relating to a person referred in (ii)

15 Section 118 of the FLA provides:

118 – (1) If proceedings are instituted in a court which has jurisdiction under this Part for an injunction in relation to a child, the court may make such order or grant such injunction as it considers appropriate for the welfare of the child, including –

an injunction for the personal protection of the child;

an injunction for the personal protection of –

(i) a parent of the child;

(ii) a person who has a residence order or a contact order in relation to the child; or

(iii) a person who has a specific issues order in relation to the child under which the person is responsible for the child's long-term or day-to-day care, welfare and development;

an injunction restraining a person from entering or remaining in –

(i) a place of residence, employment or education of the child; or

(ii) a specified area that contains a place of a kind referred to in subparagraph (i); or

an injunction restraining a person from entering or remaining in:

(i) a place of residence, employment or education of a person referred to in paragraph (b); or

(ii) a specified area that contains a place of a kind referred to in subparagraph (i).

(2) A court exercising jurisdiction under this Act (other than in proceedings to which subsection (1) applies) may grant an injunction in relation to a child, by interim order or otherwise, in any case in which it appears to the court to be just or convenient to do so.

(3) An injunction under this section may be granted unconditionally or on such terms and conditions as the court considers appropriate.

16 Section 127(2) FLA

- in an appropriate case the Court has the power to make the above orders urgently and without notice to the respondent. The Court can also make orders urgently after the respondent has received notice of the application. Temporary and ongoing orders can be made and the orders can last indefinitely.
- where an injunction for personal protection is force under s. 118 and a police officer believes on reasonable grounds that the respondent has breached the order 'by causing, or threatening to cause, bodily harm to the protected person or by harassing or molesting that person' the police officer may arrest the respondent without a warrant.[17] Where this happens police must normally take the person before the Court that made the order within 48 hours and take all reasonable steps to ensure that the person who applied for the injunction is aware that the respondent will be taken before the Court[18].

Limitations of s. 118

Although s. 118 makes a substantial advance on the *Matrimonial Causes Act* and the *Maintenance and Affiliation Act* in relation to the power to make injunctions for personal protection, section 118 also has significant limitations. These are:

- s. 118 can not be used unless the application relates at least partly to a child. If there is no child an order can not be made,
- although police can arrest a person who they believe has breached an injunction made under s. 118 and hold them in custody until they are brought before the court, breach of the order is not a criminal offence that can be prosecuted by police.
- unless the person who originally sought the order makes an application that the respondent be breached, the Court has to release the respondent from custody and the Court can not deal with the breach at all.
- if an application that the respondent be dealt with for breach is made, the person who makes that application (usually the victim) has the onus of proving the breach
- penalties that can be applied for breach will be set out in the Rules.[19] Also, a court exercising jurisdiction under the Act will have the power to punish a person for contempt in the face of the court or willful disobedience of any order of the court. A person found to be in contempt can be punished by committal to prison, a fine or both[20].

2. Injunctions in other proceedings – s. 202

Section 202[21] contains two additional injunctive powers, one in s. 202(1) and the other in s. 202(3).

17 Section 119 FLA

18 Section 203(2) and 203(5)

19 The Rules are not yet available and consequently at the time of preparing this Discussion Paper it is not possible to outline what these penalties will be.

20 Section 196

21 202 (1) In proceedings of the kind referred to in paragraph (f) of the definition of 'matrimonial cause' in section 2(1), the court may make such order or grant such injunction as it considers proper with respect to the matter to which the proceedings relate including -

(a) an injunction for the personal protection of a party to the marriage;

(b) an injunction restraining a party to the marriage from entering or remaining in the matrimonial home or the premises in which the other party to the marriage resides, or restraining a party to the marriage from entering or remaining in a specified area, being an area in which the matrimonial home is, or the premises in which the other party to the marriage resides, are, situated;

- the power in s. 202(1) can only be exercised *in proceedings between parties to a marriage* for an injunction. This can be initiated without any other application being before the court or as an additional application in other proceedings.
- the court can grant 'such order or injunction as it considers proper' and there is then a list of six particular injunctions that the court may also make, that is:

    - personal protection
    - entering or remaining in a specified area
    - entering the place of work of the other party
    - protection of the marital relationship
    - relating to the property of a party to the marriage, and
    - use and occupation of the marital home[22].

- under s. 202(3) the Court has an additional power, when exercising jurisdiction under the Act to make an order or grant an injunction 'in any case in which it appears .. to be just or convenient to do so…'
- although s. 202(2) applies only to parties to a marriage, s. 203(3) is not limited in this way. Where proceedings can be instituted by a person who is not a party to a marriage, an application for an injunction can also be made under s. 202(2). The circumstances in which a person who is not a party to a marriage can institute proceedings are limited to:

    - parenting orders – residence, contact and specific issues orders
    - child maintenance including paternity
    - injunction under s. 118 in relation to a child, and
    - enforcement of the above orders

- where the court considers it necessary injunctions can be made urgently on an interim basis under s. 202 without notice to the respondent. Although s. 202 does not apply any limits to the length of injunctions, case law in Australia in relation to identical provisions suggests that these injunctions will normally be of a temporary nature.
- if an injunction is made under s. 202(1) or (3) the effect of the order is the same as described above for an injunction made under s. 118 and breach, the procedure to enforce is the same.

(c) an injunction restraining a party to the marriage from entering the place of work of the other party to the marriage;

(d) an injunction for the protection of the marital relationship;

(e) an injunction in relation to the property of a party to the marriage; or

(f) an injunction relating to the use or occupancy of the matrimonial home.

(2) In exercising its powers under subsection (1), the court may make an order relieving a party to a marriage from any obligation to perform marital services or render conjugal rights.

(3) A court exercising jurisdiction under this Act in proceedings other than proceedings to which subsection (1) applies may grant an injunction, by interlocutory order or otherwise (including an injunction in aid of the enforcement of an order), in any case in which it appears to the court to be just or convenient to do so and either conditionally or upon such terms and conditions as the court considers appropriate'. Also note: paragraph (f) of the definition of 'matrimonial cause' in s 2(1) reads "proceedings between the parties to a marriage for an order or injunction in circumstances arising out of the marital relationship'

22 This section is identical a provision in the Australian Family Law Act 1975 that has been interpreted in the way indicated. Murkin and Murkin (1980) FLC ¶90-806 at p 75,082; Aldred and Aldred (1984) FLC 91-510 at p 79,153; F and F (1989) FLC 92-031 at p 77,463.

Limitations of s. 202

- for a victim of domestic violence who is married to the offender, s. 202(1) and (3) elaborate on the range of injunctions that can be sought.
- however s. 202(1) does not help victims who are in a de facto relationship and the power in s. 202(3) probably adds nothing in what is provided by s.118. The effect is that a victim of domestic violence who has not been married to the offender can only obtain an order if there is also concern about a child (s. 118).
- the limitations listed above in relation to s. 118 about the means of enforcement also apply.

3. New domestic violence restraining order legislation

3.1 Overview

Fiji does not yet have specific civil laws to provide fast, inexpensive, and effective *protection* to victims of domestic violence. These laws are now common in countries around the world. For example, laws of this kind are already in effect in New Zealand, each Australian State and Territory, all Canadian provinces, all States in the USA, most South American countries, South Africa, most European countries. [23]

Fiji's current civil laws in this area are based on law that has already been modernized in the UK. However, having modernized, the UK is now reforming again with a Crime and Victim's Bill referred to as 'the biggest overhaul of domestic violence laws in 30 years'.[24]

Civil laws for protection for victims of domestic violence provide for the making of a 'domestic violence restraining order'. The name given to the orders vary e.g.: 'protection order' (New Zealand, South Africa and the Australian Capital Territory); intervention order (Victoria); apprehended domestic violence order (New South Wales); 'domestic violence order' (Queensland).

However the effect of the orders is the same. That is, the orders specify things that the respondent is prohibited from doing and may also require the respondent to do certain things. A breach of one of these orders is a criminal offence which is charged by the police and prosecuted in the same way as any other criminal charge. The penalties for breach vary but in all jurisdictions the maximum penalty for a first offence includes a term of imprisonment. The penalty for a subsequent breach is often higher.

In our region, Vanuatu has provision for a 'claim' for a domestic violence protection order. This is set out in Division 4 – Domestic Violence of the Civil Procedures Rules. Also, a draft of domestic violence restraining order legislation was prepared in 2001.

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23 For a table of Worldwide Legislation on Violence Against Women by Country and a summary of the number of countries with domestic violence legislation, see Not a Minute More: Ending Violence Against Women, UNIFEM, 2003 p. 89-94 & p. 39-40; For a partial listing of world wide domestic violence legislation see Annual Review of Population Law which provides web links to the civil domestic violence laws of about 30 countries, online at: http://annualreview.law.harvard.edu/population/domesticviolence/domesticviolence.htm The American National Council of Juvenile and Family Court Judges provides a searchable data base of domestic violence legislation for all US States. This is online at: http://www.ncjfcj.org/dept/fvd/statutesfvd/ Australian State and Territory domestic violence legislation (principal Acts only) are available online through the Australian Domestic Violence Clearinghouse: http://www.austdvclearinghouse.unsw.edu.au/states.htm Additionally, Health Outcomes International, Improving Women's Safety, Partnerships Against Domestic Violence, Commonwealth of Australia, 2004, Appendix D, Legislative Review; R Alexander, Domestic Violence in Australia, 3rd edition, Federation Press.

24 Putting Victims First: The Domestic Violence, Crime and Victims Bill, Press release by UK Home Secretary David Blunkett, 14 June 2004

In Fiji, the need for additional legislation was highlighted in the Law Reform Commission's Family Law Report 1999 and the Family Law Act 2003 anticipates that there will be domestic violence restraining order legislation. The FLA contains a definition of "family violence order" that means 'an order (including an interim order) made under a written law to protect a person from family violence"[25]

Note about examples from other jurisdictions
In this Discussion Paper the examples given from other jurisdictions are mainly from New Zealand, Australian States and Territories and South Africa. The reasons for this are that the New Zealand Domestic Violence Act 1995 is generally considered to be comprehensive with innovative features, particularly in the use of standard conditions. The Australian States and Territories are useful first for the variations between them, which throws up options about different approaches, and secondly because of the continuing activity to refine these laws. The South African Domestic Violence Act 1998 is referred to because this is recent legislation in simple modern style. It is also aspirational and has some special features such as provisions about the duties of police.

3.2 Stand alone legislation or amend existing legislation?

As set out above, the primary purpose of the new legislation would be to enable the court to make domestic violence restraining orders. Assuming that this follows the pattern of overseas examples, breach of a domestic violence restraining order would be a new criminal offence. The new restraining order legislation might also contain provision for urgent orders about children, urgent monetary relief, compensation and other matters.

The new provisions could be set out in stand alone legislation or could be established by amendment of other existing legislation. A further option would be to have the civil provisions in new stand alone legislation but the new criminal offence of breach of a domestic violence restraining order in the Penal Code.

Whether or not the new criminal offence was in the stand alone legislation or in the Penal Code, the criminal offence would be charged and prosecuted in the normal way by the police or DPP.

Also, whether the new legislation should be stand alone or be introduced by amending existing legislation is a separate question to which courts would exercise jurisdiction. This is because the new legislation can specify which courts have jurisdiction. For example, if the new provisions were enacted by amendment to the Family Law Act 2003, it could be specified, that a court hearing *any proceedings* or hearing *particular proceedings* (e.g. under the Juveniles Act or Penal Code) could also exercise jurisdiction under the new legislation in those other proceedings. The same provisions could be included in stand alone legislation.

25 Definition in s. 42 in Part VI of the Act. This Part relates to children.

If the new domestic violence restraining order provisions were established by amending existing legislation, a decision would be needed about which legislation to amend. The Penal Code and Criminal Procedure Code are possibilities but these deal with criminal offences and criminal procedure whereas the proposed legislation is mainly about providing civil law remedies.

Another possibility would be to amend the Family Law Act 2003. The FLA applies to parties to a marriage, although provisions about children apply to all children. If the new provisions for domestic violence restraining orders apply to a *broader set of relationships* than marriage relationships and de facto relationships where there are children (e.g. if the new provisions extend to: de facto relationships where there are no children; violence by in-laws towards a wife or husband; violence by a child or adult towards a frail relative in the home), the new provisions will be different in kind from those covered by the Family Law Act. Also if the new provisions encompass *domestic relationships* that are *not family relationships* (e.g. carer relationships) the connection with the *Family* Law Act becomes more distant.

The likely advantages of new stand alone legislation are:

- the legislation would be visible,
- the relevant provisions would be easy to refer to and easy to find, and
- community awareness raising and training could be undertaken focusing on a single piece of legislation.

While most jurisdictions have chosen to enact stand alone legislation, New South Wales is an example of a jurisdiction that amended existing legislation. In NSW the Crimes Act was amended to insert civil domestic violence restraining order provisions. This was done to make a point that domestic violence is either criminal behaviour (whether or not a charge has been laid) or at risk of becoming criminal behaviour. The restraining order provisions were inserted in Part 15A of the Crimes Act which is about _ of the way through the legislation. The provisions start at s. 562A of the Crimes Act. However, there are some definitions in the general definition section in s.4 of the Act. This means that if a person wants to read the domestic violence restraining order provisions in NSW that it is not a matter of looking at one relatively small piece of legislation.

Questions:

9. **If new domestic violence restraining order legislation is introduced in Fiji should the legislation be :**
    - **new stand alone legislation?**
    - **new provisions inserted into the Family Law Act 2003?**

- **new provisions inserted into the Penal Code and/or Criminal Procedure Code?**

10. In addition to these possibilities listed in the previous question are there other options that you would suggest?

3.3 Purposes or objects of the legislation

3.3.1 Expressing purposes or objects?

While the new legislation, whether stand alone or introduced by amendment to existing legislation, does not have to contain a statement of purposes or objects, it is usual for this kind of legislation to have such a statement. Where a statement is included the reasons for doing so are normally:

- 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.

The following are some examples from other jurisdictions:

New Zealand Domestic Violence Act 1995 – s. 5 Object

(1) The object of this Act is to reduce and prevent violence in domestic relationships by

(a) Recognising that domestic violence, in all its forms, is unacceptable behaviour; and

(b) Ensuring that, where domestic violence occurs, there is effective legal protection for its victims.

(2) This Act aims to achieve its object by

(a) Empowering the Court to make certain orders to protect victims of domestic violence;

(b) Ensuring that access to the Court is as speedy, inexpensive, and simple as is consistent with justice;

(c) Providing, for persons who are victims of domestic violence, appropriate programmes;

(d) Requiring respondents and associated respondents to attend programmes that have the primary objective of stopping or preventing domestic violence;

(e) Providing more effective sanctions and enforcement in the event that a protection order is breached.

(3) Any Court which, or any person who, exercises any power conferred by or under this Act must be guided in the exercise of that power by the object specified in subsection (1) of this section.

New South Wales Crimes Act Part 15A Division 1A Apprehended Domestic Violence Orders - s. 562AC Objects of Division

(1) The objects of this Division are:

(a) to ensure the safety and protection of all persons who experience domestic violence, and
(b) to reduce and prevent violence between persons who are in a domestic relationship with each other, and
(c) to enact provisions that are consistent with certain principles underlying the Declaration on the Elimination of Violence against Women.

(2) This Division aims to achieve its objects by:

(a) empowering courts to make apprehended domestic violence orders to protect people from domestic violence, and
(b) ensuring that access to courts is as speedy, inexpensive, safe and simple as is consistent with justice.

(3) In enacting this Division, Parliament:

(a) recognises that domestic violence, in all its forms, is unacceptable behaviour, and
(b) recognises that domestic violence is predominantly perpetrated by men against women and children, and
(c) recognises that domestic violence occurs in all sectors of the community.

(4) A court that, or person who, exercises any power conferred by or under this Part in relation to domestic violence must be guided in the exercise of that power by the objects of this Division.

South Africa - Preamble to the Domestic Violence Act 1998

RECOGNISING that domestic violence is a serious social evil; that there is a high incidence of domestic violence within South African society; that victims of domestic violence are among the most vulnerable members of society; that domestic violence takes on many forms; that acts of domestic violence may be committed in a wide range of domestic relationships; and that the remedies currently available to the victims of domestic violence have proved to be ineffective;

AND HAVING REGARD to the Constitution of South Africa, and in particular, the right to equality and to freedom and security of the person; and the international commitments and

obligations of the State towards ending violence against women and children, including obligations under the United Nations Conventions on the Elimination of all Forms of Discrimination Against Women and the Rights of the Child;

IT IS THE PURPOSE of this Act to afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide; and to introduce measures which seek to ensure that the relevant organs of state give full effect to the provisions of this Act, and thereby to convey that the State is committed to the elimination of domestic violence.

Questions:

11. Should the proposed domestic violence restraining order legislation contain a statement of purposes, objects or a preamble?

12. If so, should this be one or more of the following:

- **a statement that outlines the effect of the legislation?**
- **an aspirational statement?**
- **a statement that guides the exercise of powers under the legislation?**

13. The objects of the New Zealand and NSW legislation and the preamble to the South African legislation are set out above. Do you have any comments about the suitability of these as a model for objects or a preamble for the proposed Fijian legislation?

3.3.2 Protection – the relevance of 'reconciliation'

The issue of reconciliation is raised at this early stage because, depending on the position taken, it may be relevant to any statement of purposes of objects in the new legislation.

Section 28 of the Magistrates' Court Act provides:

Reconciliation
Courts to promote reconciliation

28. In civil causes Magistrates and their officers shall, as far as there is proper opportunity, promote reconciliation amount persons over whom such Magistrates have jurisdiction, and encourage and facilitate the settlement in an amicable way and without recourse to litigation of matters in difference amount them.

Further, s. 29 provides that a magistrate 'may promote reconciliation among the parties… and encourage and facilitate the amicable settlement..' where a civil suit or proceedings is pending.

Section 28 and 29 will apply to the civil provisions of the new domestic violence restraining order legislation, unless the legislation contains a provision that states that they do not apply.

It is accepted in other jurisdictions that the purpose of domestic violence restraining order legislation is to ensure the safety of those who are at risk of domestic violence. The applications that are made under the legislation will, in most cases, relate to violence that has occurred very recently, for example within the last two days. The application for a restraining order is an expression of the victim's level of fear and of the risk to the victim.

While the possibility of the court recommending or ordering attendance at counselling or education programs are discussed below, provisions of this kind in the New Zealand Domestic Violence Act 1995 are aimed at ensuring safety from the violence and stopping the violence. The programs are not aimed at reconciliation to preserve the relationship or at reconciliation as a way of stopping the violence.

If the protected person wishes to have discussions with the person restrained, this could be taken into account in framing the restraining order. For example, the order could provide:

i. That the respondent is prohibited from approaching within 200 metres of the applicant and from contacting the applicant in any way except for the purpose of attending one or more counselling meetings facilitated by an independent third party chosen by the applicant in circumstances where the applicant is also willing to attend.

ii. That the respondent may not contact the applicant in any way to discuss whether the applicant is agreeable to attending such a meeting. If the applicant is willing to attend this must be communicated to the respondent formally by the independent third party chosen by the applicant to facilitate the meeting.

Questions:

14. Do you agree that the primary purpose of the proposed domestic violence restraining order legislation should be to ensure the safety of those at risk of domestic violence?

15. To what extent, if any, should the proposed domestic violence restraining order legislation promote reconciliation of the parties relationship (resumption of cohabitation)?

16. Are there circumstances in which promotion of reconciliation (resumption of cohabitation) by this proposed legislation is likely to be an effective strategy to stop the violence or reduce the risk to the victim?

17. If you think that the proposed legislation should promote reconciliation in some circumstances, what are these circumstances and what role should the court be expected to play in this regard?

3.4 Duties of police

3.4.1 Duty to assist and inform victim of their rights

As outlined in Discussion Paper 2, the Commissioner of Police has issued a Force Routine Order that sets out a 'no drop' policy. This is binding on police and it requires police to investigate domestic violence complaints and charge where there is sufficient evidence.

It is also noted that there have been calls for the duties of police to be legislated and various options are canvassed in Discussion Paper 2.

An option that is presented here, is for the duties of police to be specified in the proposed domestic violence restraining order legislation. South Africa has taken this course. Section 2 of the South African Domestic Violence Act 1998 requires police to render assistance when an incident of domestic violence is reported and to inform the victim of their rights. That is:

> 2. Any member of the South African Police Service must, at the scene of an incident of domestic violence or as soon thereafter as is reasonably possible, or when the incident of domestic violence is reported--
>
> a) render such assistance to the complainant as may be required in the circumstances, including assisting or making arrangements for the complainant to find a suitable shelter and to obtain medical treatment;
>
> b) if it is reasonably possible to do so, hand a notice containing information as prescribed to the complainant in the official language of the complainant's choice; and
>
> c) if it is reasonably possible to do so, explain to the complainant the content of such notice in the prescribed manner, including the remedies at his or her disposal in terms of this Act and the right to lodge a criminal complaint, if applicable.

It could be argued that it is not necessary to set these matters out in the legislation because they are already covered by Force Routine Orders. Also, that inclusion might heighten expectations to an unreasonable level.

On the other hand, because (a) is at least partly covered by the 'no drop policy' (a Force Routine Order), it does not seem to be a big step to express it in legislation. Also (b) and (c) are good practices that may be expected already by the Commissioner of Police.

Advantages of including a general statement about the duties of police are also: to assist with police training; clarify public understanding of the role and responsibilities of police, and encourage police to feel associated with and comfortable with the new legislation.

Questions:

18. Should the new domestic violence restraining order legislation include a provision about the general duties of police in domestic violence matters?

19. If so, does the South African example given above provide a suitable model?

3.4.2 Instructions to police by the Commissioner

The South African Domestic Violence Act 1998 requires the Commissioner of Police to issue National Instructions to police. These are instructions with which police must comply in the execution of their functions under the Domestic Violence Act. The instructions must be published in the Gazette. This measure ensures that the instructions are made public[26].

In Fiji, the Commissioner of Police issues Force Routine Orders that can set out instructions that are binding on police in the same way as the South African National Instructions. This power also existed in South Africa prior to the enactment of the Domestic Violence Act.

If the legislation includes a new criminal offence of breach of a domestic violence restraining order, alleged breaches would be investigated by police, charged and prosecuted in the normal way. This is, unlike the situation that applies at present when a civil non-molestation order is breached. Under the new legislation it would not be up to the protected person to take the matter back to court.

An argument for including a provision like the South African example about Instructions being issued by the Commissioner of Police and the requirement that the Instructions (or Force Routine Orders) be gazetted, is to make clear the expectation that comprehensive instructions will be issued, that police will play a full role and that the public should know the instructions that police are operating under.

An argument against including the provision in the proposed legislation is that it is unnecessary because the Commissioner of Police already has the power to issue Force Routine Orders (FRO), the police have already demonstrated a willingness to work

26 The National Instructions that have been issued are detailed. They can be read online at http://www.acts.co.za/dom_viol/index.htm

effectively particularly through the establishment of the 'no-drop' policy, and the Commissioner of Police can make FROs public.

Questions

20. Having regard to arguments for and against, would it be useful to include a provision in the proposed legislation that requires the Commissioner of Police to issue comprehensive Force Routine Orders, or other binding instructions, to police about the role of police in relation to domestic violence matters?

21. Although the Commissioner of Police can already make Force Routine Orders about domestic violence public, would it be useful to require that these be made public?

3.5 Who should be protected ?

The new legislation would need to set out *who may be protected* by a domestic violence restraining order.

3.5.1 Which relationships?

Discussion Paper 1 – Legal Responses to Domestic Violence: Context and Approach (DP 1), outlines options about what *might* be encompassed by the term 'domestic violence'. Five situations were listed. These are:

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*

DP 1 also asks whether the term 'domestic and relationship violence' is preferred to 'domestic violence' taking into account, for example, that a relative may not live in the home but instead visit frequently or occasionally. Also many a boyfriend/girlfriend relationships do not involve living together.

The question to be addressed in this section is about the relationship between the victim and the perpetrator. For example should the relationships that are covered by the new legislation be limited to 'intimate partners' (number 1 above), include all five situations or only some?

South Africa and New Zealand are examples of jurisdictions that cover all 5 in their domestic violence legislation. The do this through the definition of 'domestic relationship'. Three examples of broad definitions of 'domestic relationship' follow.

Example 1 – South Africa

> South African Domestic Violence Act 1998
> "domestic relationship" (s. 1)
>
> means a relationship between a complainant and a respondent in any of the following ways:
>
> a) they are or were married to each other, including marriage according to any law, custom or religion;
>
> b) they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;
>
> c) they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);
>
> d) they are family members related by consanguinity[27], affinity[28] or adoption;
>
> e) they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or
>
> f) they share or recently shared the same residence

Example 2 – New Zealand

New Zealand's Domestic Violence Act uses a similarly broad definition of 'domestic relationship' that also covers all five situations. That is[29]:

> (1) For the purposes of this Act, a person is in a domestic relationship with another person if the person
>
> (a) Is a partner of the other person; or
>
> (b) Is a family member of the other person; or

27 Means a blood relationship

28 Means by marriage

29 s. 4 Domestic Violence Act 1995, New Zealand

(c) Ordinarily shares a household with the other person; or

(d) Has a close personal relationship with the other person.

The NZ definition goes on to state that a person should not be regarded as sharing the same household *only* by reason of the fact that there is a landlord/tenant relationship, an employee/employer or employer/employee relationships. Also, that a person should not be considered to have a close personal relationship with another person *only* because of an employer/employee or employee/employee relationship. The legislation lists matters that should be considered in determining if there is a 'close personal relationship. That is:

(a) The nature and intensity of the relationship, and in particular

(i) The amount of time the persons spend together:

(ii) The place or places where that time is ordinarily spent:

(iii) The manner in which that time is ordinarily spent;

but it is not necessary for there to be a sexual relationship between the persons:

(b) The duration of the relationship[30].

Example 3 – simplified draft based on the above examples

The following definition covers all five situations listed earlier

"family or domestic relationship" means the relationship of:

a) spouse
b) other family member
c) person who normally or regularly resides in the household or residential facility
d) boyfriend or girlfriend,
e) person who is wholly or partly dependent on ongoing paid or unpaid care or a person who provides such care.

The term spouse would be defined to include de facto spouse and 'other family member' would be defined in terms of blood, marriage and customary relationships.

Option of two categories of relationships

30 s. 4(4) Domestic Violence Act 1995, New Zealand

Some jurisdictions have established two categories of relationships. Those that are 'domestic relationships' (which may be defined broadly or narrowly) and everyone else (no particular relationship required). Under current law in Fiji no particular personal or family relationship is required to apply for an order a keep the peace order (s. 42 Criminal Procedure Code) or to apply under common law for an injunction to restrain a tort.

Under schemes that have two categories of relationships in restraining order legislation, *domestic relationships* are covered by the domestic violence restraining order provisions and *everyone else* is covered by separate legislation or separate provisions that give identical protection. New South Wales and the Australian Capital Territory have both taken this course. However in doing so, both have taken a broad approach to the definition of 'domestic relationship' for their domestic violence restraining order legislation.

In these jurisdictions, examples of situations where a 'non-domestic-relationship' restraining order is sought are: a person who has been threatened by a neighbour, a person who is has been threatened at work (e.g. by a customer, a client, a patient, or work colleague), and a juvenile who is being severely bullied at school.

In NSW an order that relates to a 'domestic relationship' is called an 'apprehended domestic violence order' and an order that relates to anyone who was not in a domestic relationship with the victim is called an 'apprehended personal violence order'.

These schemes typically provide that if an application is made under the wrong legislation, or the wrong part of combined legislation, that it will be treated as an application under the provisions that actually apply in the particular situation.

The advantage of the 'two categories' approach is that anyone who needs a restraining order for their personal protection will be able to get one while at the same time the features that are special about domestic relationships are singled out in the legislation that relates to these relationships.

Questions:

The proposed new domestic violence restraining order legislation would include a list of relationships. The victim and perpetrator would need to be in, or have been in, one of these relationships for an order to be made under the legislation for the protection of the victim.

22. Which of the following relationships should be included in the list of relationships in the proposed new legislation:

- **spouse – married and de facto**

- **other family member**
- **person who normally or regularly resides in the household or residential facility**
- **boyfriend or girlfriend,**
- **person who is wholly or partly dependent on ongoing paid or unpaid care or a person who provides such care.**

23. If all five were included, should they be referred to together by the term 'domestic relationship', 'family and domestic relationship' or some other term?

24. If some but not all five were included, should the remaining relationships and any other needs for a restraining order be covered by additional legislation under which a restraining order for personal protection could also be made?

3.5.2 How should 'family' be defined?

The examples given above each name the relationship of 'family member'. That is, if the perpetrator is a 'family member' of the victim's, a domestic violence restraining order could be made against the perpetrator.

The term 'family member' or 'other family member' (if 'spouse' is listed separately), would need to be defined.

Like other cultures in Pacific Island countries, in Fiji the concept of family involves the extended family. This includes grandparents, parents, siblings, aunts, nieces, nephews, in laws, and cousins. The extended family may occupy one household and other family members may come to visit frequently or occasionally.

Assuming that 'spouse' was listed separately as a relationship (as in example 3 above), the following is a draft definition of 'other family members'

"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

In this draft 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. This means that if a de facto wife was assaulted by her de facto husband's brother, that relationship would be covered in the definition of 'other family member' and the de facto wife could seek a restraining order even though the relationship with the perpetrator does not arise by blood or by marriage.

Questions:

25. If the proposed legislation provides that a restraining order can be made against a 'family member,' what relationships should be covered by that term?

26. Considering the draft above, which lists spouse separately and then defines the term 'other family member':

- **are there relationships listed that should not be included?**
- **are there relationships that should be included that are missing?**

3.6 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.

3.6.1 NZ example

In the New Zealand definition, the conduct that is the basis for making a restraining order is set out in the definition of 'domestic violence'. Although ways of describing the conduct vary, the New Zealand definition like many others aims to take a broad approach. That is:

New Zealand definition – section 3 Domestic Violence Act 1995

> 3. Meaning of ``domestic violence"---(1) In this Act, ``domestic violence", in relation to any person, means violence against that person by any other person with whom that person is, or has been, in a domestic relationship.
>
> (2) In this section, ``violence" means---
>
> (a) Physical abuse:
> (b) Sexual abuse:
> (c) Psychological abuse, including, but not limited to,---
> (i) Intimidation:
> (ii) Harassment:
> (iii) Damage to property:
> (iv) Threats of physical abuse, sexual abuse, or psychological abuse:
> (v) In relation to a child, abuse of the kind set out in subsection (3) of this section.
>
> (3) Without limiting subsection (2) (c) of this section, a person psychologically abuses a child if that person---
>
> (a) Causes or allows the child to see or hear the physical, sexual, or psychological abuse of a person with whom the child has a domestic relationship; or
> (b) Puts the child, or allows the child to be put, at real risk of seeing or hearing that abuse occurring;---
> but the person who suffers that abuse is not regarded, for the purposes of this subsection, as having caused or allowed the child to see or hear the abuse, or, as the case may be, as having put the child, or allowed the child to be put, at risk of seeing or hearing the abuse.
>
> (4) Without limiting subsection (2) of this section,---
>
> (a) A single act may amount to abuse for the purposes of that subsection:
> (b) A number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.
>
> (5) Behaviour may be psychological abuse for the purposes of subsection (2) (c) of this section which does not involve actual or threatened physical or sexual abuse.

It is noted that this definition is wide enough to cover stalking without needing to prove the intention of the stalker and where no verbal threat has been made.

3.6.2 Draft of simplified description of conduct

The draft below is a simplified description of conduct that would provide grounds for making a domestic violence restraining order:

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

Questions:

In relation to the conduct that would be the basis for making a restraining order, two examples are given above. One is from the NZ legislation and the other a simplified description.

27. Is the conduct that should be the basis for making a restraining order properly covered:

- **in the NZ example?**
- **in the simplified draft?**

28. Is there any conduct that should be included in the simplified draft that should be omitted?

29. Is there any conduct missing from the simplified draft that should be included?

3.7 Who should be able to apply?

3.7.1 Specifying who can make an application

Who should be able *to make an application* for a domestic violence restraining order is different from who should be able *to be protected by it*. For example in all jurisdictions that have this kind of legislation a parent can apply for an order for their own protection and /or for the protection of their children.

All Australian legislation provides that an application can be made by a police officer and by an adult seeking protection for themselves or for a child in their care. Some jurisdictions specify a broader group. That is in addition to police and an adult victim being able to apply:

- in the Australian Capital Territory an application can be made by the Community Advocate as the next friend of a person with a legal disability, an 'agent' of a victim and by a child on their own behalf,[31]
- in Victoria an application can be by any person with the written consent of the person to be protected and by a guardian where an order is in place under the Guardianship and Administration Act (incapacity),[32]
- in Queensland the provision is similar to Victoria but a person who holds an enduring power of attorney can also apply[33].

In New Zealand an application can be made by:

- an adult who seeks an order on their own behalf

31 s. 11 & s.12(2) Protection Orders Act 2001, Australian Capital Territory

32 s. 7 Crimes (Family violence) Act 1987, Victoria

33 s. 14 Domestic and Family Violence Protection Act 1989, Queensland

- a minor through a representative
- a person on behalf of another who lacks capacity to make or communicate decisions about their personal care or welfare
- a person on behalf of another who is unable to do so because of physical incapacity, fear of harm or other cause[34]

In South Africa an application may be brought on behalf of the complainant by any other person, including a counsellor, health service provider, member of the South African Police Service, social worker or teacher, who has 'a material interest in the wellbeing of the complainant'. Where an application is brought by a person other than the complainant (the victim) the person applying must have the complainant's written consent except if the complainant is a minor, 'mentally retarded', unconscious or the person is unable to provide the required consent.[35]

Example of a broad approach for Fijian domestic violence restraining order legislation
If a broad approach was taken, it might be carried through to a provision in the legislation to the following effect:

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

(a) an adult, by

(i) the person themselves

(ii) another person who normally cares for, or is currently caring for, the person

(b) a child, by

(i) a parent or guardian of the child

(ii) an adult with whom the child resides (either usually or on a temporary basis)

(iii) 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

34 s. 2,9,11& 12 Domestic Violence Act 1995, New Zealand

35 s. 4 (3) Domestic Violence Act 1998, South Africa

(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.

Questions:

The draft above takes a broad approach to who should be able to make an application for a domestic violence restraining order. This includes the possibility of an application being made by another person for the protection of the victim.

30. Looking at the draft above, are there people listed who should not be able to apply? If so, who should be removed from the list and why.

31. Looking at the draft above, are there people who should be able to apply who are not listed? If so, who else should be listed and why?

3.7.2 Should police have a duty to apply?

Other jurisdictions

In the Australian and South African examples given above about *who can apply*, the police are specifically listed. This is also possible in New Zealand but the police are not specifically listed.

Jurisdictions have taken different approaches about the role of police in commencing applications for a domestic violence restraining order. Some jurisdictions, for example, the Australian Capital Territory, have not expected police to be the primary applicants. In the case if the ACT this is mainly because this is a small geographic area with one court complex and a free legal aid service for applicants for domestic violence orders in the court building.

The Victorian Police Code of Practice for the Investigation of Family Violence *requires police to apply* for an intervention order 'when ever the safety, welfare or property of a family member appears to be endangered by another'. The Code goes on to note that this may mean making an application without the agreement of the victim[36].

In Queensland the *obligation of police to apply* is set out in the domestic violence legislation. That is, the Queensland legislation provides that when police take a person into custody, where the officer has reasonable grounds for suspecting that an act of domestic violence has been committed and there is a danger that the person will personally injure the victim or the victim's property, police are then *required to apply* for a protection order. Further, police are required to take the defendant before a court to make the application, or if that is not practical, then apply immediately by telephone for a temporary protection order[37].

Police also have an obligation to apply in NSW. Section 562C (3) and (3A) of the Crimes Act 1900 provides that

> (3) A police officer must make a complaint for an order if the police officer suspects or believes that any of the following offences has recently been or is being committed, or is imminent, or is likely to be committed, against the person for whose protection an order would be made:
>
> (i) a domestic violence offence[38],
>
> (ii) an offence against section 562AB[39],
>
> (iii) an offence under section 227 (Child and young person abuse) of the *Children and Young Persons (Care and Protection) Act 1998* (but only if the person is a child under the age of 16 years).
>
> (3A) A police officer need not make a complaint for an order in the circumstances referred to in subsection (3) if the person for whose protection an order would be made is at least 16 years of age at the time and the police officer believes:
>
> (a) that the person intends to make the complaint, or
>
> (b) that there is good reason not to make the complaint.
>
> However, if the police officer believes that there is good reason not to make the complaint, the police officer must make a written record of the reason

The NSW Law Reform Commission has recently recommended that

---

36 p. 38, Victoria Police, Code of Practice for the Investigation of Domestic Violence, August 2004

37 s. 71 Domestic and Family Violence Protection Act 1989, Queensland

38 Domestic violence offence is defined in s. 4(1). It means a 'personal violence offence' committed by a person against another with whom they are or have been in a defined family or personal relationship. 'Personal violence offence' is defined to refer to 37 criminal offences under the Crimes Act and to attempts to commit these offences. The offences include: manslaughter; malicious wounding; assault occasioning actual bodily harm; common assault; sexual assault; indecent assault; maliciously destroying or damaging property with intent to injure a person or to endanger life; threatening to destroy or damage property; contravening an order.

39 s. 568AB deals with stalking

- s. 562C(3A) be amended to provide that the victim's reluctance to make a complaint is not in itself a good reason for the police not to make a complaint in situations where the violence has occurred, there is a significant threat of violence or the victim is a person with an intellectual disability who has no guardian[40], and
- the legislation also be amended to make it clear that police must apply for a order where the defendant is charged with a 'domestic violence offence' unless a domestic violence restraining order is already in place[41]

New South Wales Police Standing Orders instruct police they *must apply* for an apprehended domestic violence order where an officer suspects that domestic violence has recently been committed or is imminent[42]. By 2001 approximately 60% of apprehended violence orders that were sought in NSW were applied for by police.[43]

Benefits of Fiji police applying

Benefits of police applying for a domestic violence restraining orders for the protection of victims are:

- this is far less onerous for the victim than the victim trying to apply themselves,
- applications can be prepared as part of the police attendance and follow up on a domestic violence incident,
- police have established processes for bringing matters to court,
- in many locations Legal Aid will not be available because there is no Legal Aid presence and/or resources are not sufficient,
- by making applications police will also get a firm sense of the seriousness with which the court views domestic violence matters which in turn should reinforce good practice by police.

The following figures that show the number of Police Stations, Police Posts and police personnel were provided by Fiji Police in August 2004:

Division:	Southern	Eastern	Western	Northern	Total
Police Stations	12	4	10	5	31
Police Posts	36	14	27	15	92
Manpower	664	161	551	216	2084*

* in addition to the Divisions there are 95 members at Headquarters and 397 members at Other Headquarters included in this total.

40 NSW Law Reform Commission, Report 103 (2003) Apprehended Violence Orders, Recommendation 21

41 ibid. Recommendation 22

42 NSW Police Service Domestic Violence Policy and Standing Operating Procedures, April 2000, p. 27

43 figure quoted by Alexander, R, Domestic Violence in Australia, 3rd edition, Federation Press, 2002, p. 93

Arguments against police applying for domestic violence orders could be that:

- it is not the role of the Fiji Police,
- police do not have sufficient resources,
- the infrastructure is not adequate e.g. telecommunication problems

If police were expected to apply for domestic violence restraining orders, this could be confirmed in Force Routine Orders and/or in legislation. Queensland and New South Wales are examples of jurisdictions that have elected to include it in legislation.

Questions:

32. Should police have a duty to apply for a domestic violence restraining order for the protection of a victim?

33. 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?**

34. If there should be a duty to apply, should this be set out in Force Routine Orders and/or in the new domestic violence restraining order legislation?

3.8 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.

The orders that can be made fall into two categories: orders that prohibit the respondent from doing certain things and orders that compel the respondent to do certain things.

The orders that are outlined in this section can be summarised as follows:

The restrained person must not:

- assault, threaten, harass
- damage or threaten to damage property
- remove property
- contact the protected person/s
- enter
- watch
- follow
- have weapons

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
- 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

3.8.1 General orders that can be made

Standard conditions

The New Zealand Domestic Violence Act 1995 lists the following as *standard conditions* of every protection order. This means that these conditions apply unless the court orders otherwise:

Standard restraints: [these apply in all cases]

The respondent must not:

- Physically or sexually abuse the protected person; or
- Threaten to physically or sexually abuse the protected person; or
- Damage, or threaten to damage, property of the protected person; or
- Engage, or threaten to engage, in other behaviour, including intimidation or harassment, which amounts to psychological abuse of the protected person; or
- Encourage any person to engage in behaviour against a protected person, where the behaviour, if engaged in by the respondent, would be prohibited by the order[44].

Standard non-contact restraints: [these apply at all times subject to the exception at the beginning of the list]

44 s. 19 Domestic Violence Act 1995, New Zealand

- Except with the express consent of the protected person:

  - watch, loiter near, or prevent or hinder access to or from, the protected person's place of residence, business, employment, educational institution, or any other place that the protected person visits often; or follow the protected person about or stop or accost the protected person in any place; or

  - enter or remain on any land or building occupied by the protected person; or

  - enter any land or building or remain there when the protected person is also on the land or in the building;

  - make any other contact with the protected person (whether by telephone, correspondence, or otherwise), except such contact: that is reasonably necessary in any emergency; or is permitted under any order or written agreement relating to custody of, or access to, any minor; or is permitted under any special condition of the protection order; or is necessary for the purposes of attending a ``family group conference'' (as defined in the Children, Young Persons, and Their Families Act 1989).

Standard conditions relating to weapons [these apply in all cases]

The respondent must not:

- possess or have any weapon under their control[45],
- hold a firearms licence,
- surrender any weapons and any firearms licence to police within 24 hours Police.[46]

Also:

- on the making of an interim protection order any firearms licence is suspended and on the making of a final order it is revoked

The court can vary standard conditions relating to weapons where the court is satisfied that the conditions are not necessary for the protection of the person/s covered by the protection order from further domestic violence[47]

45 A 'weapon' is defined in s. 2 as 'any firearm, airgun, pistol, restricted weapon, ammunition, or explosive, as those terms are defined in the Arms Act 1983'

46 s. 21 Domestic Violence Act 1995, New Zealand

47 s. 22 & 23 Domestic Violence Act 1995, New Zealand

Additional restraints and orders that compel
This section deals a range of other matters that can be included in a domestic violence restraining order in various jurisdictions that have not been mentioned above.

The following are dealt with in separate sections below.

- Custody, access, suspension and variation
- Occupation of the home
- Tenancy orders
- Emergency monetary relief
- Compensation
- Referral or order for attendance at a program

Additionally:

Use and possession of furniture, household appliances and household effects
The New Zealand legislation includes specific provisions for the court to make orders about possession and use of furniture, household appliances and household effects. When a person applies for an order about occupation of the home or a 'tenancy order' (both are dealt with separately below) the court can make an 'ancillary furniture order' – that is, the order is ancillary to the occupation or tenancy order. Where a person applies for a protection order but does not seek an occupation order or a tenancy order, the person can still apply for a 'furniture order'.

A furniture order can only be sought where the parties lived in the same home. The order can be made where the court is satisfied that the furniture, household appliances, and household effects are 'reasonably required to equip another dwelling house in which the applicant, or a child of the applicant's family, or both, are or will be living'[48] The order can also apply to anything that was removed from the home after the application for the order was lodged.

Additional provisions
The ACT legislation makes visible the power of the court to prohibit the respondent from taking possession of particular personal property that is reasonably needed by the victim or a child of the victim[49].

Orders that compel
The Queensland legislation contains clear powers to compel the respondent to do things in relation to property. That is, it includes powers to order that the respondent:

48 s. 67 (2) (b) Domestic Violence Act 1995 New Zealand

49 s. 42(3)(a) Protection Orders Act 2001, Australian Capital Territory

- to return property to the protected person
- to allow the protected person access to property
- to allow the protected person to recover property
- to do any act necessary or desirable to facilitate action mentioned above[50]

The South African legislation contains a specific power that enables the court to order that police must accompany the complainant to a specified place to assist with arrangements regarding the collection of personal property[51].

Questions:

35. The outline above has covered a large number of restraining orders that can be made in some other jurisdictions. Are there any orders listed above that you think should *not be included* in the proposed legislation?

36. Should the proposed legislation use the New Zealand model of applying a set of standard conditions to every restraining order?

37. If so, should all of the standard New Zealand conditions be included as standard conditions?

38. Taking into account the list of restraining orders above, and those covered in the balance of this section below, are there any other orders that prohibit or compel that should be included?

39. Should the proposed legislation include a provision that enables the court to order police to accompany the protected person to a home to collect possessions or that the police be present at a home or other location when personal possessions are to be made available for collection by the protected person?

Note: Additional restraining orders are listed below, and questions are asked separately about them below.

50 s. 25(4) Domestic and Family Violence Protection Act 1989 Queensland

51 s. 7(2) South African Domestic Violence Act 1998, South Africa

3.8.2 Automatic inclusion of children and extension to other people

Children

Where domestic violence has occurred and the court is satisfied that a domestic violence restraining order should be made for the protection of the primary victim (e.g. a mother), uncertainty can arise about whether the order should include protection for any children in the applicant's care. In some jurisdictions this uncertainty has been associated with assumptions that unless a child has been a primary victim that they are not at risk and they have not been affected.

Research about the effects of domestic violence on children, as direct or primary victims and as a result of being present or being aware of attacks is referred to in Discussion Paper 1.

To avoid doubt section 16(1) of the New Zealand Domestic Violence Act 1995 provides that:

> Where the Court makes a protection order, that order applies for the benefit of any child of the applicant's family

Other people – 'domestic relationship'

Additionally, sections 16(1) and (2) of the New Zealand legislation allow the court to extend the protection of the order to another person who is also at risk. For example, if the domestic violence restraining order would apply for the protection of the mother, she has started a new relationship and threats have been made by the respondent towards her new partner – the order can also protect the new partner. This provision avoids the need for the new partner to apply themselves in additional proceedings and it aims to avoid intimidation of the person protected by threats by the respondent towards another person.

The circumstances in which the court can extend protection, as described above, are when the applicant is in a 'domestic relationship' with another person and the court is satisfied that:

- If the respondent had been in a domestic relationship with that other person that the respondent's behaviour would amount to domestic violence,
- The respondent's behaviour towards that other person is due to the applicant's domestic relationship with the person,
- The making of a direction is necessary for the protection of that other person,
- Where practicable, that other person consents to the direction being made[52].

Questions:

40. Should the proposed legislation provide that where a court makes an order, the order *will* also apply for the benefit of any child of the applicant's family?

52 s. 16 (2) & (3) Domestic Violence Act 1995, New Zealand. 'Domestic relationship' is defined in s. 4 to mean: the partner of another person; a family member of the other person; ordinarily shares a household with the other person; has a close personal relationship with the other person

41. Should the court also have power of the kind in s. 16(2) and (3) of the New Zealand Domestic Violence Act, to extend the protection of a restraining order to a person with whom the applicant is in a domestic relationship?

3.8.3 Custody, access, suspension & variation

Where a court is considering an application for a retraining order by a parent, or by a person who has a child in their care, if the protection of the children is not automatic there will often be grounds for the order to also protect the child/ren. Additionally, there are likely to be cases where threats or abuse directly relate to a child or young person, where the order is sought only for the protection of the child or young person.

Questions about whether and how access to a child should occur will be unavoidable in domestic violence restraining order proceedings. This is because overseas experience clearly indicates that if it is not addressed, in a proportion of cases, access arrangements will result in further intimidation and abuse.

There are cases where access can expose children to risk and be used for attempts by the restrained person, who is generally the father, to have contact with the mother. The mother, or the mother and the children, are generally the ones protected by the restraining order.

In cases where the mother flees the home as a result of the violence and is unable to take the children with her, the father may subsequently refuse relinquish the children. In this situation an urgent order about the father relinquishing the children to the mother may be needed as one of several orders for the protection of the children.

Women who have separated following domestic violence often report that the violence, threats and intimidation does not end at separation. In overseas studies separated victims of domestic violence have reported intimidation, harassment, threats, physical violence and rape, at the access handover.[53]

Research by Radford and Hester[54] that compared one group of domestic violence victims in the UK with a second group in Denmark pointed to underestimation by mothers in both groups about the effects of domestic violence on their children. It indicated a strong tendency by the mothers to separate the risk to themselves from the risk to their children. That is, to

53 Radford L & Hester M, Domestic Violence and Child Contact Arrangements in England and Denmark, Bristol : Policy Press, 1996; Humphreys C & Thiara RK, Neither justice nor protection: women's experiences of post-separation violence, Journal of Social Welfare and Family Law, September 2003, vol. 25, no. 3, pp. 195-214(20), Routledge; Fleury, R.E, Sullivan, C.M & Bybee, D.I When ending he relationship does not end the violence, Violence Against Women, Vol 6, No 12 pp. 1363-1383

54 ibid. Radford and Hester

rationalise that the father was not a risk to the children and that it might help calm the situation if the father had access to the children. This was despite the fact that a high proportion of the mothers experienced emotional, psychological and physical abuse at the access handovers, often in front of the children.

Whether particular children are at risk and /or whether arrangements about their custody or access does pose a risk to the children, to the parent or person with whom they reside, will be a question to be determined in each individual case. In this regard it would assist if the court was aware of research about the effects of domestic violence on children (outlined in Discussion Paper 1).

How restraining orders may relate to arrangements for the children
'Custody' and 'access' refer to orders about children made under powers in the Matrimonial Causes Act, common law or the Maintenance and Affiliation Act. A 'custody' order deals with whom a child lives with and who has responsibility for day to day decisions regarding the child. An 'access order' deals with what access (visiting) with a child, another person may have.

The need for restraining orders for the safety of children may arise where:

- there are no custody or access order in place,
- there are proceedings pending before another court about custody or access but no orders have been made, or
- there is a custody or access order, made recently or a long time ago.

In the third situation, there are likely to be cases where the immediate need for protection (the restraining order) will conflict with an existing custody and access order.

In the first two situations above (where there is no current custody or access order), a court exercising powers under the domestic violence restraining order legislation could, for example, order:

(a) that the respondent is restrained from approaching within 200 metres of the children.

(b) that the respondent is restrained from attempting to contact the children by any means including through a third person

(c) that the respondent is restrained from taking any steps to remove the children from the applicant's care.

In this example restraining orders deal with matters relating to the children without the court needing to make a 'custody' or 'access' order.

However, where specific provisions are needed in a domestic violence restraining order, for example about visiting arrangements between the respondent and the children, additional powers would be required for the court to make these orders.

The New Zealand Domestic Violence Act 1995 contains this power. That is s. 27(1) and (2) provide that when the court makes a protection order the court may impose 'any conditions that are reasonably necessary' including a condition related to 'the manner in which arrangements for access to a child are to be implemented'. Additionally, this legislation provides that a court must not decline to make a protection order 'merely because of the existence of other proceedings…including …proceedings relating to custody or, or access to, a minor...'[55]

The provisions in the New Zealand legislation enable the court to deal with a range of situations when making a domestic violence retraining order. For example:

- If the court determines that the restrained person does not pose a risk to the children but access arrangements need to be specific, details about times for collection and return etc can be ordered.
- If the court determines that the restrained person does not pose a risk to the children but the arrangements for collection and return of the children should not bring the person restrained and the person protected into contact, this can be addressed by the court ordering handover arrangements that ensure that the parties will not come into contact. This generally involves the children being transferred between the parties by a third person.
- If the court determines that there is a risk to the children but this risk can be dealt with by someone supervising the access visits, the court can order supervision of the visits. The court can also specify the level of supervision that is required e.g. 'vigilant supervision', where the supervisor/s should remain very close throughout the visit, or 'general supervision' where the supervisor should remain in the general vicinity.

In some countries, including Australia, New Zealand, UK, USA and most provinces of Canada, there are government funded supervised parent / child access centres. These centres provide independent supervision of access handovers and can supervise access visits. The services are most commonly used in cases involving domestic violence. Fiji does not yet have supervised access centres[56].

Where domestic violence restraining orders may conflict with existing custody or access orders

Where there is a current custody or access order in place and a restraining order then needs to be made, the terms of the restraining order may or may not conflict with the custody or access order. The following are examples of where a conflict would and would not arise:

55 s. 15 Domestic Violence Act 1995, New Zealand

56 For further information about supervised access services, including services in other countries and operating procedures, see: Australian Children's Contact Services Association web site: http://www.accsa.org.au Also see the New Zealand Association of Children's Supervised Access Services web site: http://www.nzacsas.org.nz/ and web site for the USA/Canadian Supervised Visitation Network: http://www.svnetwork.net/

Examples of custody and access orders:

> Example 1: That the mother have custody of the children and the father have reasonable access
>
> Example 2: That the mother have custody of the children and the father have reasonable access including every second weekend from Friday at 5pm until Sunday at noon with the father to collect the children from the mother's home and return the children to the mother's home.

Examples of domestic violence restraining orders against the father for the protection of the mother (applicant) and the children:

> The respondent is restrained from:
>
> (a) assaulting, threatening or intimidating the applicant and the children
>
> (b) contacting the applicant by any means or through a third person
>
> (c) approaching within 200 metres of the applicant
>
> (d) approaching within 200 metres of the children.

It can be seen from comparing the two examples of custody and access orders with the four specific restraining orders, that some of the restraining orders conflict with the access orders while others do not.

The role of the Family Division

The Family Law Act 2003 which comes into effect in January 2005 will be the primary legislation that deals with custody and access (referred to in the new Act by new terms: 'residence' which means who the child resides with on a day to day basis and the word 'contact' which means 'access').

Normally, the Family Division, exercising power under the Family Law Act, will be in the best position to make orders about custody and access. The provisions of the FLA relating to children are detailed, the court will have specialist expertise and specialist processes such as the ability to order the preparation of reports about matters relevant to the best interests of a child.

However, where there is an application for a domestic violence restraining order under the proposed legislation, there will be cases that require immediate resolution on a temporary basis of arrangements for the safety of the children. This may arise in proceedings in before a court that does not have jurisdiction under the FLA.

Options about custody and access related powers in domestic violence restraining order legislation

The options about how domestic violence restraining order legislation deals with custody and access and related issues are:

1) the court would have *no power* in these proceedings to make orders on the basis that a separate application should be made under the Family Law Act to the specialist court that can determine these matters, or
2) the court *would have power* to make orders about how arrangements for access to a child are to be implemented, to make a custody or access order or to vary or suspend an existing custody or access order *for a time limited period*, or
3) the court *would have power* set out in 2. but orders made would continue *until that court or another court orders otherwise*.

In practice, option 1 would be workable if all applications for domestic violence restraining orders under the proposed legislation were dealt with by the Family Division of the Magistrates Court. However, while the Family Division might deal with a large number of applications under the proposed legislation, it is not likely to be able to deal with all of them.

This indicates that Option 1 is problematic. Option 2 applies for example, in all State and Territory jurisdictions in Australia. In these cases, when exercising jurisdiction under domestic violence restraining order legislation, the court can make, vary or suspend a custody or access order but this order lasts for a maximum of 21 days[57]. The process envisages that if the victim wants to seek a continuation of this part of the order that they should apply under the Family Law Act. This has the effect of putting the onus *on the victim* to make a further application under the FLA.

The ability to make an ongoing order that will not automatically lapse at the end of the specified time (Option 3), applies in New Zealand (see the discussion above) and in South Africa. Section 7(6) of the South African Domestic Violence Act 1998 provides:

> If the court is satisfied that it is in the best interests of any child it may
> a) refuse the respondent contact with such child; or
> b) order contact with such child on such conditions as it may consider appropriate.

Example of domestic violence restraining orders concerning children based on the powers in Option 3

The following is an example of a set of restraining orders that could be made, if there were powers as outlined in Option 3.

57 s. 68T Family Law Act 1975 Australia

Situation: Current custody and access order provides for the mother to have custody of the children and the father to have reasonable access. The father has assaulted the mother at home in front of the children. The father is suicidal and he has threatened to take the children:

Example of domestic violence restraining orders relating to the children:

1. That Order 2 made by [name of court] at Suva on [date] in proceedings numbered [insert] that provides that the respondent have reasonable access to the children is suspended.
2. The respondent is restrained from approaching within 500 metres of:
   (a) the children,
   (b) the children's home or any other place they are living,
   (c) the children's school, and
   (d) [any other place that the children often go to could be specified here]
3. The respondent is restrained from contacting the children in any way, either directly or through another person.
4. The respondent is restrained from assaulting, molesting or harassing the children.
5. The respondent is restrained from taking any steps to remove the children, or cause the children to be removed, from the applicant's care [or from the care of a specified person]
6. The respondent is restrained from removing, damaging or otherwise interfering with any property in the home [or the following property directly required for the children's care: their clothing, bedding, the parties motor vehicle and the furniture, household items and effects in the home]

If the father did not pose a risk to the children but conditions were required in relation to his access to the children, the court could vary the existing access order to make it more specific or alternatively suspend the order for 'reasonable access' and then make an order setting out specific access arrangements.

Questions:

There are three options about how domestic violence restraining order legislation could deal with custody, access and related issues:

Option 1: the court would have *no power* in these proceedings to make orders on the basis that a separate application should be made under the Family Law Act so that a specialist court can determine these matters,

Option 2: the court *would have power* to make orders about how arrangements for access to a child are to be implemented, to make a custody or access order or to vary or suspend an existing custody or access order *for a time limited period*, or

Option 3: the court *would have power* set out in 2. but orders made would continue *until that court or another court orders otherwise*.

42. Which of these options should apply to the proposed new domestic violence restraining order legislation?

43. In relation to Option 2, if the orders apply only for a specific time, how long after the orders are made should they cease to apply? (e.g. 21 days, 1 month, 3 months)

44. In relation to Options 2 and 3, should these powers be expressed to be available 'when the court considers that the safety and wellbeing of the children, or another person, requires that the orders be made'?

45. How frequently does the need for supervision of (i) access handovers and (ii) access visits arise?

46. What options for supervision of access handovers and for supervision of access visits are currently available?

3.8.4 Occupation of the home

In Fiji, there is power under the Matrimonial Causes Act and at common law for courts to make an order that the respondent is excluded from the home. This is not an order about ownership or division of property it is only an order about who can *occupy* the home.

However, the power to make an order about occupation of the home under the Matrimonial Causes Act only applies in relation to parties to a marriage. The common law, which is applicable to de facto relationships, is complicated and less likely to be used for this reason. When the new Family Law Act comes into effect the power to make an order about occupation of the home between parties to a marriage will continue. Additionally where there is a risk to a child, whether or not the parents were married, the court will have power to make an order about occupation of the home.[58]In cases where there are no children and the victim is not married to the respondent the common law will provide the only remedy.

When orders about the occupation of the home are needed they are often needed urgently. That is, if the order is not made quickly further harm will result and/or the victim will have to leave the home or having left the home, will have to arrange other ongoing accommodation.

58 S. 118 Family Law Act 2003

This section deals with powers to make orders about the occupation of the home. Tenancy orders are dealt with separately in the next section. Additionally, orders about furniture and household effects are dealt with above under *General orders that the court can make*.

In relation to occupation of the home, Australian studies have recently pointed to the substantial link between domestic violence and homelessness[59]. Homelessness on a short, medium or long term basis results in a wide range of additional negative effects for victims of domestic violence. These issues are explored further in Discussion Paper 1.

In Australia many women who need to leave their home as a result of domestic violence go to a women's refuge and then move on to government subsidised or low cost housing. This has come about partly because the law has not given priority to the accommodation needs of the victim over those of the perpetrator. Australian jurisdictions are now starting to consider the lead established by New Zealand in relation to standard conditions.

The New Zealand Domestic Violence Act provides for a standard condition of any protection order to the effect that the respondent is prohibited from entering or remaining on any land or building occupied by the protected person. This applies generally and the prohibition only ceases to apply during periods when the respondent has the express consent of the protected person to be in the home[60].

Additionally the New Zealand legislation contains specific provisions for a person to apply for an 'occupation order'. The court may make an occupation order only if it is satisfied that the order:

(a) is necessary for the protection of the applicant, or
(b) is in the best interests of a child of the applicant's family[61]

This order can be made whether or not the parties have ever lived in the same home or in the particular home and regardless of which party is living in the home at the time the order is made. However, in determining whether to make an occupation order the Court 'must have regard to the reasonable accommodation needs of all persons who may be affected by the order'.[62] This provision, about 'the reasonable accommodation needs of all persons' does not clearly state that the accommodation needs of the victim and the best interests of children should be given priority.

59Chung D, Kennedy R, OBrien B, Wendt S, Cody S, Home Safe Home: The link between domestic and family violence and women's homelessness, Partnerships Against Domestic Violence, University of South Australia, Social Policy Research Group, Women's Emergency Services Network, Department of Family and Community Services.

60 s. 19 (2)(c) Domestic Violence Act 1995 . This legislation uses the term 'dwellinghouse', is defined to mean any flat, townhouse, mobile home, caravan or other means of shelter placed or erected upon land and intended for occupation on that land (s. 2)

61 s. 53(2) Domestic Violence Act 1995, New Zealand

62 s. 53(3) & (4)

The Australian Office of the Status of Women has recently published a study, conducted under the national Partnerships Against Domestic Violence initiative, that inquired into Australian legislation and other measures to increase support for victims of domestic violence to be able to remain in their homes[63].

The study found that while all Australian State and Territory domestic violence legislation gives the court power to make orders about occupation of the home, and each contains a list of factors to be taken into account, that the factors do not give *clear priority* to the needs of the victim and any children. The study recommended reform of the law to give priority to the accommodation needs of the victim and any children at all stages of an application for a restraining order i.e. urgent ex-parte, interim, variation of interim, final orders, and variation of final orders.

The NSW Law Reform Commission has recently recommended amendment of provisions in the NSW domestic violence legislation relating to occupation of the home. The Commission recommended that the new provisions should provide that the paramount consideration in deciding whether to make an order should be the safety and protection of the applicant and any child directly or indirectly affected from domestic or personal violence. Also that in making the determination the court should consider:

(a) the effects and consequences on the safety of the person for whose protection the order would be made and any children living or ordinarily living at the residence if an order restricting access by the defendant to the residence is not made;
(b) any hardship that may be caused by making or not making the order, particularly to the person for whose protection the order would be made and any children;
(c) the accommodation needs of all parties and particularly the applicant and any children; and
(d) any other relevant matter[64]

The South African Domestic Violence Act 1998 attempts to give priority to the accommodation needs of the victim but the drafting is ambiguous. The provision is s. 7(1)(c) which specifies that the orders that the court may make include prohibiting the respondent from:

> entering a residence shared by the complainant and the respondent: Provided that the court may impose this prohibition only if it appears to be in the best interests of the complainant

In summary the options for consideration in relation to the proposed legislation are:

63 Health Outcomes International, Improving Women's Safety, Partnerships Against Domestic Violence, Commonwealth of Australia, 2004

64 op. cit, Recommendation 32

- Include a standard condition in every domestic violence restraining order that the respondent is not to approach, enter or be upon the a place that the protected person occupies without the protected person's express consent
- Include a provision that enables the court to make an occupation order with clear priority accorded to the accommodation needs and wellbeing of the protected person and of any children normally in their care
- Include a provision that enables the court to make an occupation order where the needs of the protected person and the person restrained are balanced

Questions:

47. Should the new legislation include power for the court to make an order about occupation of a home?

48. If so, should there be a standard condition in every domestic violence restraining order, that the respondent is not to approach, enter or be upon the a place that the protected person occupies without the protected person's express consent?

49. Additionally, should the legislation include:

- **a provision that enables the court to make an occupation order *with clear priority* accorded to the accommodation needs and well being of the protected person and of any children normally in their care (such as the provisions recommended by the NSW Law Reform Commission)? or alternatively**

- **a provision that enables the court to make an occupation order where the needs of the protected person and the person restrained are balanced (that is, without a clear priority being accorded to the protected person)?**

3.8.5 Tenancy orders

Accommodation needs have been referred to above under *Occupation of the home* and there is additional background in Discussion Paper 1.

Where the home in which the victim lives is rented the following are examples of problems that can arise:

- The perpetrator damages the home e.g. punches holes in the walls and the landlord wants to evict,
- The perpetrator has controlled the money and not paid the rent and the landlord wants to evict,

- The lease is in the perpetrators name and the perpetrator gives notice to the landlord that the lease should end even though the victim wants to continue to live in the home,
- The lease is in the perpetrators name or joint names and the perpetrator insists on a right to be in the home because of this

As a result, of these issues and recognition of the importance of stable accommodation for the victim and any children, some domestic violence restraining order legislation includes powers for the court to make orders about the tenancy agreement, subject to the rights of the landlord to be heard.

The New Zealand Domestic Violence Act 1995 gives the court power to make a 'tenancy order'. This is an order that transfers a tenancy agreement in relation to a home to the protected person. This can apply to a house, flat, town house, mobile home, caravan or other shelter on land. This order can be made where the tenancy is in the sole name of the person restrained or the joint names of the parties.[65] Before the court makes the order notice must be given to 'any person with an interest in the property'. This includes the owner[66].
The court can make the order only if satisfied that the order:

> 56(2)…
> (a) Is necessary for the protection of the applicant; or
>
> (b) Is in the best interests of a child of the applicant's family.
> (3) In determining whether to make an order under this section, the Court must have regard to the reasonable accommodation needs of all persons who may be affected by the order.

The court also has power to reverse the tenancy order and return the tenancy to its original state[67].

Despite s. 56(2) (b), the reference in s. 56(3) to 'the reasonable accommodation needs of all persons who may be affected by the order' does not place clear priority on the needs of protected person and of a child of the protected person's family. This point is also referred to above under *Occupation of the home*.

When a tenancy order is made under the New Zealand legislation there is also power to make 'ancillary furniture'. This is an order about the use of furniture, household appliances and household effects in a home[68].

Provisions in the Queensland in the Domestic and Family Violence Protection Act 1989[69] and the Residential Tenancies Act 1994[70] result in similar powers in domestic violence restraining order proceedings.

65 s. 56(1)

66 s. 74

67 s. 58

68 s. 62-64

As a result of recent research in Australia that has highlighted shortcomings in most State and Territory domestic violence legislation in relation to orders for occupation of the home and tenancy agreements, it is likely that the Queensland legislation will influence reform directions in other jurisdictions[71].

Questions:

50. Should the proposed new domestic violence restraining order legislation:

- **include powers, to make a 'tenancy order' similar to that in the New Zealand legislation?**
- **if so should this place clear priority on the needs of the protect person and any children in their care?**

51. Are there particular kinds of tenancy agreements or living arrangements that may require special consideration?

3.8.6 Emergency monetary order

There are examples of domestic violence restraining order legislation that give the court power to make urgent monetary orders. These provisions generally aim to:

- address the victim's needs for urgent or short term monetary relief,
- avoid the need for the victim to *immediately* commence other proceedings,
- avoid the perpetrator using urgent money issues to pressure, intimidate or punish the victim,
- stabilise the situation to aid the victim's recovery from the violence and the consequences of the violence

The aims listed above focus on the victim's *urgent living needs*.

Examples of pressing needs are:

- food for the victim and children
- other essentials e.g. money for fuel, electricity

69 s. 62A

70 s. 150, s. 118, s. 190

71 op. cit., Health Outcomes International, Improving Women's Safety; op. cit. Chung D, et al., Home Safe Home

- cost of moving somewhere safe and buying essentials to live (e.g. to cook, sleep)
- replacement of essentials damaged or taken by the respondent (e.g. clothes)
- payment of rent, board, loan or mortgage

The relationship between the victim and the perpetrator may be one of married or de facto spouse or parent and child. However, if the domestic violence restraining order legislation enables orders to be made in a broader range of circumstances, the relationship may be one of: brother /sister; boyfriend /girlfriend; carer/caregiver; or another relationship covered by the legislation.

While there are good reasons for urgent monetary issues to be addressed in domestic violence restraining order proceedings, the main purpose of this legislation is to ensure the safety of the victim/s. This means that restraining order proceedings are normally not seen as being suitable to determine detailed or ongoing financial arrangements between the parties. There are other laws that address ongoing financial arrangements. That is, the Family Law Act 2003 deals with child maintenance for all children and spouse maintenance and property settlement for married couples. Property settlement for de facto couples is dealt with by the common law.

When does the issue of urgent monetary relief arise in proceedings?
There are often two or three stages in domestic violence restraining order proceedings that is:

- Urgent hearing – in other jurisdictions this is often without notice to the respondent and takes place soon after the application is filed (e.g. the same day)
- Interim hearing – in other jurisdictions this may be several days or 2-3 weeks after the application is filed. Before the interim hearing the respondent is served with the documents including any temporary order made at an initial urgent hearing. The respondent may appear in court at the interim hearing and contest the application. If the respondent does not appear the court might make a final order at this point or adjourn the proceedings to a further date.
- Final hearing – in other jurisdictions this might take place months after the application was filed. The respondent might attend and contest the application. If the respondent does not appear the court will make the final orders sought by the applicant if satisfied that it is proper to do so, based on the considerations in the legislation.

The question of whether an urgent order for monetary relief should be made normally arises at the urgent or interim hearing stage. This is because the normal purpose of the power to make the order is to meet an urgent need and bridge the gap until the victim can reasonably be expected to take other action (e.g. commence proceedings for child maintenance or property settlement).

At the urgent hearing stage, the court may see the need for monetary relief but require that the respondent be notified before this part of the application is heard. Where the need is pressing the court may make an urgent restraining order for the victim's personal protection,

order that the respondent be served and allocate an early hearing date (e.g. 2-5 days later) for hearing of the application for urgent monetary relief.

Examples
Under s. 7(4) the South African Domestic Violence Act 1998 the court can make an order for 'emergency monetary relief' as a condition of a protection order.

Emergency monetary relief is defined in s.1 of the Act to mean:

> Compensation for monetary losses suffered by a complainant at the time of the issue of a protection order as a result of the domestic violence, including--
>
> a) loss of earnings;
>
> b) medical and dental expenses;
>
> c) relocation and accommodation expenses; or
>
> d) household necessities.

Additionally under s 7(3) of this legislation, where the court has made an order prohibiting the respondent from entering a shared residence, the court can also impose obligations on the respondent to pay the rent or mortgage payments. In doing so, the court must have regard to the financial needs and resources of the complainant and the respondent.

The Malaysian Domestic Violence Act contains a similar provision in a section dealing with compensation. That is, a court making a restraining order has the power to order that the respondent pay:

> (e) necessary and reasonable expenses incurred by or on behalf of the victim is compelled to separate or be separated from the defendant due to the domestic violence, such as-
>
> (i) lodging expenses to be contributed to a safe place or shelter;
>
> (ii) transport and moving expenses;
>
> (iii) the expenses required in setting up a separate household which, subject to subsection (3), may include amounts representing such housing loan payments or rental payments or part thereof, in respect of the shared residence, as the court considers just and reasonably necessary[72].

Questions:

52. Should the proposed legislation include power for the court to make orders for urgent monetary relief?

72 s. 10(2)(e) Domestic Violence Act 1994, Malaysia

53. If so, should this focus on the urgent monetary needs of the victim arising from the violence?

54. If a power to order urgent monetary relief was included, should this include the following:

- **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.**

55. In relation to the previous question, are there other expenses that should also be listed?

56. Should the power to make an order for urgent monetary relief against a perpetrator *be limited* to situations where:

- **the perpetrator and the victim have been in a spouse relationship, or**
- **the perpetrator is the parent of a child who is protected by the restraining order?**

57. 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?

58. Should the legislation provide that any order for urgent monetary relief that involves ongoing payments (e.g. rent, weekly money for food) may operate only for a time stipulated by the court up to a maximum period stipulated in the legislation (e.g. 1 month, 3 months, 6 months)? Note: this would put the onus on the *protected person* to other steps for ongoing support e.g. by applying under the Family Law Act.

59. Alternatively should the legislation provide that any order for urgent monetary relief that involves ongoing payments, will continue until change by the court or by another court? Note: this would put the *onus on the perpetrator* to resolve financial issues through other means such as by an application under the Family Law Act.

3.8.7 Compensation

Issues about compensation for victims of domestic, as victims of crime, are outlined in Discussion Paper 2. This includes awards of compensation as part of the penalty relating to a criminal proceedings and the possible role of a crime victim's compensation fund.

Additionally, it is noted above that where a person has been assaulted or injured by another an action can be taken in tort to seek compensation (damages). It is also noted that section 208 of the new Family Law Act provides that 'either party to a marriage may bring proceedings in contract or tort against the other'[73].

The Family Law Act does not contain a specific power about compensation and once it comes into effect the only *civil procedure* for compensation for victims of domestic violence will be that under the common law. Apart from the complexity and cost of using the old common law, this is a separate legal action where evidence that may have been before a court in dealing with an application for a domestic violence retraining order has to be presented over again.

The overarching rule about compensation is that a person can not be compensated twice for the same thing. This means that a court considering an application for compensation in any proceedings will take into account what, if any, compensation has already been awarded or received.

Compensation provision in the new domestic violence legislation
There are examples of jurisdictions that have included compensation provisions in their domestic violence legislation.

As noted above, under *Emergency monetary relief*, s.7(4) the South African Domestic Violence Act 1998 enables the court to make an order for compensation that can include loss of earnings, medical and dental expenses, relocation and accommodation expenses or household necessities.

There is a more detailed provision in the Malaysian Domestic Violence Act 1994 Act. Section 10 provides:

> (1) Where a victim of domestic violence suffers personal injuries or damage to property or financial loss as a result of the domestic violence, the court hearing a claim for compensation may award such compensation in respect of the injury or damage or loss as it deems just and reasonable.
>
> (2) The court hearing a claim for such compensation may take into account-

73 As noted above, this will address a problem created by s. 42(1) of the Matrimonial Causes Act that appears to require a decree of judicial separation first.

(a) the pain and suffering of the victim, and the nature and extent of the physical or mental injury suffered;

(b) the cost of medical treatment for such injuries;

(c) any loss of earnings arising therefrom;

(d) the amount or value of the property taken or destroyed or damaged;

(e) necessary and reasonable expenses incurred by or on behalf of the victim if compelled to separate or be separated from the defendant due to the domestic violence, such as-

(i) lodging expenses to be contributed to a safe place or shelter;
(ii) transport and moving expenses;
(iii) the expenses required in setting up a separate household which, subject to subsection (3), may include amounts representing such housing loan payments or rental payments or part thereof, in respect of the shared residence, as the court considers just and reasonably necessary.

Section 10(2)(e) of the Malaysian legislation is also referred to above under *Emergency monetary relief*.

There are no provisions for compensation for injuries sustained or property damage in the New Zealand Domestic Violence Act or Australian State and Territory domestic violence legislation. However, in New Zealand there is strong emphasis on:

- compensation in the Sentencing Act 2002 for those charged with criminal offences, and
- provision of rehabilitation services to victims of crime and some provision for compensation from a government fund in the case of sexual abuse.

In each Australian State and Territory there is a separate government funded crime victim's compensation scheme and victims can apply for compensation at common law.

The advantages of including a power to order compensation in the new restraining order legislation are:

- that it would provide a statutory civil remedy where none currently exists,
- compensation could be ordered in a timely way where it will provide most help to the victim, and
- it would avoid the victim having to institute separate proceedings (i.e. may reduce costs and the call on court resources and contain the demands on legal aid)

The disadvantages are:

- in order to deal with a compensation claim properly from the point of view of the victim and the perpetrator, the court would need detailed evidence e.g. material about: pain, suffering

and the extent of short term or permanent impairment (including medical evidence); loss of earnings; the details and value of property taken or destroyed,

- the extent of the victim's loss may not be clear at the time that the domestic violence restraining order is sought. For example where there is an injury that may resolve over a period or alternatively may result in permanent impairment.
- compensation issues have the potential to slow down domestic violence restraining order proceedings and to complicate issues about whether a domestic violence restraining order should be granted,
- the victim may not have access to the necessary information or be able to focus on compensation when the immediate need is protection from the violence, and
- if few respondents have the capacity to pay compensation the provisions would not be used very often.

Many of the disadvantages listed above could be addressed by framing the legislation so that the victim could apply for compensation when seeking a domestic violence restraining order *or at a later time*. That is, the legislation could give both options.

Also where compensation is sought during restraining order proceedings and the court makes an award as a condition of a restraining order, the legislation could require the court to specify whether this is an interim or final order for compensation in relation to the matter. In the case of an interim order, or where the court does not specify if it an interim or final order, the legislation could provide that the victim may continue the claim for compensation at a later time.

Claims for compensation for personal injury or property damage normally have to be brought within a certain period. For example, the Limitations Act provides that actions based on tort must be brought within 6 years from the date on which the cause of action accrued[74]. The Limitation Act also deals detailed matters relating to limitations, for example when a person is; under age; suffering from a disability; seeks leave to proceed after the time limit has expired.

One option would be to specify that compensation actions under the proposed legislation will be deemed to be a tort for the purpose of the Limitation Act and provisions that apply to the limitation of tort actions will apply. This would avoid the need to go into lengthy detail about limitation arrangements in the domestic violence restraining order legislation.

Questions:

60. Should the proposed domestic violence restraining order legislation include provisions that enable the court to order that the respondent pay compensation to the victim/s.

74 S. 4(1) Limitation Act [Cap 35]

61. If so, do s.10(1) and (2) (a)-(d) of the Malaysian Domestic Violence Act provide a suitable model? (It is noted that (e) is dealt with separately under Emergency monetary relief, above)

62. Should compensation provisions in the new legislation 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?

63. Should compensation provisions in the new legislation allow:

- **an application for compensation to be made at the same time that a domestic violence restraining order is sought, with any award then becoming a condition of the restraining order?**
- ***partial* or *final* orders for compensation under the legislation at the time that the restraining order is sought with the court to specify which of these applies to a particular award?**
- **a person who was protected by a domestic violence restraining order to make an application for compensation under the legislation *at a later time?***
- **a person who was protected by a domestic violence restraining order who received an initial award when the restraining order was granted to *continue the application under the legislation at a later time* ?**

64. If compensation provisions allowed an application to be commenced or continued at a later time, should the time limit be the same as specified for torts under the Limitation Act [Cap 35]?

3.8.8 Referral or order for attendance at a program

Discussion Paper 2 outlines issues about the court ordering program attendance by an offender in criminal proceedings where the criminal offence involved domestic violence. It is noted there, that in order for this to be possible, there would need to be suitable programs available.

Availability of suitable programs and services (e.g. counseling, education or information programs and personal support) is also relevant to what information, referrals and orders will be practical in proceedings for a domestic violence restraining order.

Questions to be considered in relation to the proposed legislation are:

- Should the court be required to ensure that information is provided to the victim and to the perpetrator about services and programs that are available to each of them?
- Should a lawyer, representing a person in proceedings for a restraining order under the legislation, be required to do the same?
- Should the court have power to *recommend* or to *require* that the perpetrator undertake counseling, attend an education / rehabilitation or support program?
- Should the court have power to *recommend* or to *require* the victim to undertake counseling or another program *alone* or *jointly* with the perpetrator?
- Should the court have power to make orders about payment for programs in individual cases?

What kind of programs?

An outline of provisions in the New Zealand Domestic Violence Act 1995, in relation to programs for the victim/s and separately for the perpetrator, is given below. References in this legislation to programs, refers to programs of a specific kind.

That is, in the case of programs for the protected person they are programs that have the 'primary objective of promoting .. the protection of that person from domestic violence' or where the victim is a child they are programs that have 'the primary objective of assisting the child to deal with the effects of domestic violence'. In the case of programs for the respondent, they are programs that have 'the primary objective of stopping or preventing domestic violence on the party of the respondent..'[75]

The legislation also specifies which programs are 'approved' for these purposes. The approval process is contained in the Domestic Violence (Programme) Regulations 1996 made under the Domestic Violence Act.

The requirements for approval as an individual programme provider are in Regulation 15. These include that every applicant for approval:

- must have: knowledge and understanding of the nature and effects of domestic violence and the dynamics of violent domestic relationships; knowledge of, and skills and expertise in relation to, the client group for which the applicant wishes to provide a programme; where the application relates to the provision of a group programme, group facilitation skills; knowledge and understanding of culture and traditions of particular groups where the programme is for a particular group (e.g. Maori people)
- must disclose if the person has ever been restrained or protected by a domestic violence restraining order and if so demonstrate that that they have addressed the effects of domestic violence on their own life.

75 S. 2 Domestic Violence Act 1995, New Zealand

- must be rejected for approval if the person has had a domestic violence restraining order made against them, within 3 years before the application, or been convicted of a domestic violence offence
- must be a member of a professional body, or accountable to an organization that has the following in place: a code of ethics or practice, an effective complaints procedure, an appropriate level of continuing education and provision for peer supervision or peer review
- must ensure, to the greatest extent possible, the safety of every person during his or her attendance at programmes and undertake regular monitoring and evaluation of the effectiveness and presentation of the programmes

The above requirements highlight how seriously the New Zealand model treats the issues of suitability and quality.

Giving information, recommending and ordering

The New Zealand Domestic Violence Act deals with each of these aspects. There is a requirement that the court give information about available programs (e.g. brochures). The court does not have the power to order a victim to attend a program. The court can order, and in fact is *required to order*, a restrained person to attend a program.

In 1997, a working group of Commonwealth, State and Territory officials in Australia prepared a Discussion Paper on Model Domestic Violence Laws. This was against a backdrop that in Australia each State and Territory has its own domestic violence restraining order legislation and there were (and still are) substantial differences. The Model aimed to encourage jurisdictions towards best practice[76]. The Model recommended against inclusion of a power for courts, when making a domestic violence restraining order, to *order* attendance at a program. This was on the basis that it was questioned whether counseling under compulsion is effective. As a result the model enables the court to 'recommend that the defendant participate in prescribed counselling[77]' but there is no power to order participation or to order a victim to participate[78]. The term 'prescribed counselling' flagged that Regulations would be required to set out what kind of counseling was anticipated and probably how counseling services would be accredited for these purposes.

In Australia, concerns about the appropriateness of courts ordering attendance at counselling or other programs have continued. Most State and Territory domestic violence restraining order legislation does not refer to either. The legislation in the Australian Capital Territory does however contain a provision that enables the Magistrates Court to *recommend* that the respondent, the victim or another person take part in a 'program of counselling'[79]. The

76 Domestic Violence Legislation Working Group, Model Domestic Violence Laws Discussion Paper, November 1997, Australia

77 s. 5(1)(g) The Model Domestic Violence Legislation

78 op. cit p. 19

79 s. 39 Protection Orders Act 2001, ACT

Victorian legislation does give a power to the court to order that the perpetrator attend 'prescribed counselling.'[80]

Outline of provisions about programs in the New Zealand Domestic Violence Act 1995
The NZ Act contains the following provisions about attendance at programs:

For the victim and any children
(can not be ordered but a program can be made available)

> When a person applies for a protection order the court, and the person's lawyer if they have one, has to ensure that the person is aware of programs that are available. These are program whether education, information, support or otherwise that have the primary objective of protecting the person and any child involved from domestic violence.
>
> Where the court makes a protection order the applicant can request a Registrar to authorise provision of a program for the applicant, a child or another person. [81] Programs have to be approved and meet quality criteria in order to received referrals under these arrangements.
>
> The court can not *order* that the victim, or any children who are affected, attend a program. Program attendance is a voluntary matter for the victim and the children. Additionally a protected person can not be required to attend a program session at which the respondent is also present[82].

For the respondent
(court must order attendance)

> When the court makes a protection order the court is required to direct the respondent to attend a specified program unless there is good reason for not making this direction[83]. The program will be one that has the primary objective of stopping or preventing domestic violence on the part of the respondent.[84]
>
> When making this order the court has to state how frequently the respondent must attend the program, specify the date, time and location of the first session and the number of sessions that the respondent must attend. The cost of the program is payable out of public monies.[85]

80 s. 5(1)(g) Crimes (Domestic Violence) Act 1989 Victoria

81 s. 29

82 s. 31

83 s. 32

84 s. 2

85 s. 33 & 44

The above orders can be made on an application without notice to the respondent and the order takes effect from the time the respondent receives notice of the order. At that time the respondent can also apply to the court to vary the order if the respondent objects.[86]

The provider of a program that a respondent is required to attend has to notify the court if the respondent fails to attend. If this happens the court can issue an order that the respondent appear before the court in order to give the respondent a warning, or if there is cause to vary or discharge the condition requiring program attendance.[87]

Failure to attend a required program is a breach of the protection order and the respondent can be charged with breach. The maximum penalty for this breach is $5000 or 6 months imprisonment or both.[88]

Questions:

65. In relation to proceedings under the proposed domestic violence restraining order legislation:

i. Should the court be required to ensure that information is provided individually to the victim and to the perpetrator about services and programs that are available to each of them to assist?

ii. Should a lawyer, representing a person in proceedings for a restraining order under the legislation, be required to do the same?

iii. If so, what kinds of services or programs should be included in this information? Should it be limited to services and programs of a particular kind that meet quality criteria?

iv. How could quality criteria be established and be implemented?

v. Should the court have power to (i) *recommend* or (ii) *require* that the perpetrator undertake counseling, attend an education / rehabilitation or support program?

vi. Should the court have power to (i) *recommend* or (ii)*require* the victim to undertake counselling or another program

86 s. 36

87 s. 39 & 42

88 s. 49

vii. Should the court have power to (i) *recommend* or (ii) *require* a victim to attend counselling or another program jointly with the perpetrator?

viii. Should the court have power to make orders about payment for programs in individual cases? (e.g. require the perpetrator to pay when they have the financial capacity)

3.9 How could an order be made?

3.9.1 Which courts should have jurisdiction?

The question here is which courts should have jurisdiction to make orders for protection under the proposed legislation. Courts that have jurisdiction could exercise it when proceedings are commenced under the Act in the usual way, and they would have power to make orders in other proceedings (e.g. criminal proceedings or other civil proceedings) where the court is satisfied that a restraining order also needs to be made under the new legislation.

In deciding which courts should have jurisdiction the following will be relevant:

- the importance of ready access to a court so that an application can be made for protection,
- which courts already deal with matters where safety from domestic violence may arise,
- Fiji's unique circumstances including the number or courts, their location and how frequently circuit courts visit particular areas,
- the desirability of courts that are familiar with issues relating to domestic violence dealing with these matters.

Emphasis of the first three compared to the fourth will produce different results. The first three might lead to a conclusion that all magistrates (resident, second class and third class) and all High Court judges should have jurisdiction. The fourth might lead to the conclusion that only specialist courts such as the Family Divisions of the High Court and Magistrates' Court[89] and magistrates sitting as the Juvenile Court,[90] should have jurisdiction.

89 The Family Law Act 2003 establishes a Family Division of the High Court and a Family Division of the Magistrates Court. These Divisions will consist, respectively, of such judges as the Chief Justice determines and such resident magistrates as the Chief Magistrate determines (s. 15-21 FLA). The Family Divisions will exercise powers under the Family Law Act and have jurisdiction in 'any other matter in respect of which jurisdiction is conferred on it by a written law' (s. 17(1)(b) & s. 21(1)(b) FLA)

90 s. 16 of the Juveniles Act provides that a magistrate's court sitting for the purpose of hearing any charge against a juvenile or exercising any other jurisdiction conferred on juvenile courts by or under this or any other Act, is referred to as 'a juvenile court'

Ready access to the court, Fiji's unique circumstances and the fact that safety from domestic violence can arise in a range of proceedings before the Magistrates' Court and the High Court[91], point to the desirability of magistrates and High Court judges being able to make domestic violence restraining orders as needed.

Questions:

66. Which courts should have jurisdiction to make orders for protection under the proposed domestic violence restraining order legislation?

67. 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.

3.9.2 Application for orders by telephone including detaining to apply

This section raises issues about how restraining orders could be made if there is no magistrate close by.

In this regard it is noted that there re 31 Police Stations and 97 Police Posts spread throughout Fiji. Also that limitations apply in rural areas in relation to telecommunications including access to the telephone.

This section deals with two different situations that may provide a way to have restraining orders made, where a telephone or similar is available. That is:

- the possibility of police being able to apply to a magistrate for orders by telephone or similar, and
- the possibility of a magistrate hearing an application and conducting a hearing in proceedings between the parties by telephone

Police applying by telephone or similar

There are examples overseas of domestic violence legislation that permits police to make an urgent application to a magistrate for a domestic violence restraining order by telephone. These provisions aim to deal with the problems that arise when there is no magistrate close by and/or it is not reasonably possible for police to appear in person. For example, domestic violence restraining order legislation in New South Wales[92], Queensland[93], the Australian

91 Referred to below under 'Orders in other proceedings and of the court's own volition'

92 s. 562H Crimes Act 1900, NSW

Capital Territory[94], South Australia,[95] and the Northern Territory[96] include provision for these telephone applications. The normal requirement is that only police can apply in this way. This requirement aims to avoid unmeritorious and non-urgent applications.

Procedures vary somewhat but the Northern Territory legislation provides a good example. Under this Act a magistrate can deal with an urgent application, or an urgent application for variation of an existing order, by telephone where the magistrate is satisfied that it is ' not practicable for the ..[police officer]..in the circumstances of the case' to seek an order in person.

The procedure for an urgent application by telephone is:

- the police officer has to complete an application form before applying by telephone. If other matters are relied upon by the officer when the application is heard the police officer has to put this in writing and attached it to the application after the application is made,
- when the application is made, the magistrate also completes paperwork to record the application and the outcome and establish the court file,
- the magistrate must set the next court date which has to be 'as soon as practicable',
- where the magistrate makes an order, the magistrate writes out the order and signs it. The magistrate tells the order to the police officer who also writes it down,
- the police officer must serve a copy of the application and order on the defendant and forward a copy to the Clerk of the court for the court file,
- the application is deemed at this point to be a summons requiring the defendant to appear at court at the required time,
- if the defendant does not appear at the subsequent hearing the order can be confirmed as a final order. Alternatively the defendant can contest the continuation of the order.

Additionally, the Northern Territory legislation provides that where a police officer intends to apply for an urgent restraining order by telephone and the officer:

> 'believes on reasonable grounds that unless the person is removed a person in a domestic relationship with the person, for whose protection the order is to be sought, will be in imminent danger of suffering personal injury at the hands of the person or an aggravation of personal injuries already sustained'

the officer can enter any premises where they believe the person to be, use such force as is reasonably necessary, take the person into custody and take them to the nearest police station. Police may detain the person for up to 4 hours in order to make the application[97].

93s. 54 Domestic and Family Violence Protection Act 1989 Queensland provides that a police officer may apply for a temporary order by 'telephone, facsimile, telex, radio or other similar facility'

94 s. 63 Protection Orders Act 2001, ACT

95 s. 8 Domestic Violence Act 1994, South Australia

96 s. 6 Domestic Violence Act, Northern Territory

Where an urgent temporary order was made by telephone, the Police would then transfer the file to Police Prosecutions and for a prosecutor to appear in court on the next occasion. This may however place the respondent (the person restrained by the order) at a disadvantage if they want to be heard but they are unable to attend at the court. Where there is access to a telephone or similar, this situation might be remedied by allowing the respondent to appear by telephone from a specified location e.g. a Police Station or court house.

Other applications and hearings by telephone or similar
Where there is access to the technology, telephone applications by an individual (not a police officer) and telephone hearings of a disputed application, might be considered.

In some areas in Australia where court rooms are wired for teleconferencing the following are possible:

- Magistrate sitting in a court room in one location and parties each in separate court rooms in other locations (with the Clerk on the bench but no magistrate sitting)
- Magistrate sitting in a court room in one location with one party in court at that location and the party other in a separate court room at another location (with the Clerk on the bench but no magistrate sitting).

Questions:

68. Should the proposed 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?

69. If so:
- **what communication methods in addition to the telephone should be listed in the legislation?**
- **to what extent is it likely to be possible for police to apply by telephone or other means now and in the future?**

70. Should the legislation provide that a respondent may appear by telephone from a specified location when this is technically possible? If so:

- **what locations should be specified (e.g. police station, court)?**
- **to what extent is this likely to be technically possible now and in the future?**

97 s. 7 Domestic Violence Act 1989, Northern Territory

71. Should the legislation enable a court to hear an application by an individual (not a police officer), including a defended hearing, by telephone? If so to what extent is this likely to be technically possible now and in the future?

3.9.3 Orders in other proceedings & by the courts own volition

The need for a domestic violence retraining order may become apparent to a court in a wide range of proceedings. This includes when a court is dealing with:

- an application for bail, bail variation or breach of bail
- a criminal offence including juvenile matters
- proceedings under the Juveniles Act about the care, protection or control of a juvenile
- an application under the Family Law Act 2003
- proceedings under common law for property division between a de facto couple
- landlord and tenant matters under common law or legislation
- management of the affairs of a person who is incapacitated.

Examples of the use of the power to make a domestic violence restraining order under the proposed legislation, in other proceedings:

- Bail and criminal offences – by making a restraining order as well as imposing bail conditions or the final penalty, the court could address additional matters that promote the safety of the victim[98]
- Care, protection & control under the Juveniles Act - a restraining order may be an additional option for the protection of a child or young person who is the subject of care, protection or control proceedings under the Juveniles Act[99].
- Family Law Act – by making a restraining order under the new legislation the order will be easier to enforce, and more likely to be enforced, compared to an order under the FLA[100].
- De facto property proceedings – by making a restraining order when required in these proceedings, the time and cost of making a separate application will be avoided[101]
- Landlord and tenant – by making a restraining order that includes a requirement that a particular person pay for damage and / or rent arrears, the court may satisfy a landlord and avoid eviction of a victim from their home. This applies to a situation where a tenancy

98 Example of this in another jurisdiction: 562BF Crimes Act 1900, NSW. This actually goes further and requires a court to make a domestic violence restraining order when a person is before a court charged with breach of a domestic violence restraining order or a 'domestic violence offence'. A domestic violence offence is a criminal offence committed against a person with whom the person charged is in a 'domestic relationship' (defined very broadly).

99 Example of this in another jurisdiction: s. 3A Crimes (Family Violence) Act 1987, Victoria

100 This applies in New Zealand. It does not apply in Australia because of the federal system, the States and Territories have not referred their relevant powers to the Commonwealth to enable them to also be exercised when a court is exercising jurisdiction under the Family Law Act

101 Example of this in another jurisdiction: In Australia when de facto property proceedings to a specified value are generally heard in the Magistrates Court. The Magistrates Court also has jurisdiction under domestic violence restraining order legislation.

agreement has been breached because of domestic violence, the victim wants to stay in the home and wants the perpetrator to stay away[102].

- Management of the affairs of a person who is incapacitated - by making a restraining order in these proceedings, the time and cost of a separate application will be avoided. For example where the court is dealing with an application relating to the management of the financial affairs of a person and it becomes apparent that the person is at risk of violence or abuse[103].

The above examples indicate that there are a range of circumstances where it would be useful for a court to be able to make orders, under the proposed legislation, of its own volition or at the request of a party or another person during the proceedings.

Questions:

72. Should there be power for courts to make orders under the proposed domestic violence restraining order legislation in *other proceedings*?

73. If so, should this include a power for the court to make an order:

- **of its own volition?**
- **where requested by a party or another person?**

3.9.4 Urgent ex-parte and interim orders

Experience overseas indicates that there are usually two or three stages in domestic violence restraining order proceedings. That an:

- urgent ex-parte hearing,
- interim hearing and
- final hearing.

This section deals with the first two and the next section deals with final hearings.

Urgent initial hearing

Applications are most commonly filed shortly after an incident of domestic violence that results in immediate concern about the victim's safety. Considerations of fairness and due process normally require the respondent to be served. However, as in other areas of law,

102 Example of this in another jurisdiction: s.62A Domestic and Family Violence Protection Act 1989, Queensland and s. 150 Residential Tenancies Act 1994, Queensland

103 Examples of this in other jurisdictions: In Australia adult guardianship matters are generally dealt with in the Magistrates' Court which also has jurisdiction under domestic violence restraining order legislation.

circumstances arise where advance notice has to be balanced against the harm that may arise if a temporary order is not made immediately.

This need arises frequently in domestic violence restraining order matters in New Zealand, Australia, South Africa, England and other jurisdictions. It results in courts often listing applications for urgent interim hearing on the day the application is filed. The court considers the evidence presented by the applicant and makes a decision whether there are grounds to make an immediate temporary order even though the respondent has not been served with the application. This is called an ex parte order (that is, an order without notice to the other party)[104].

Examples

1. New Zealand: s.13 (1) and (2) of the Domestic Violence Act 1995

> 13. (1) A protection order may be made on an application without notice if the Court is satisfied that the delay that would be caused by proceeding on notice would or might entail
>
> (a) A risk of harm; or
>
> (b) Undue hardship
>
> to the applicant or a child of the applicant's family, or both.
>
> (2) Without limiting the matters to which the Court may have regard when determining whether to grant a protection order on an application without notice, the Court must have regard to
>
> (a) The perception of the applicant or a child of the applicant's family, or both, of the nature and seriousness of the respondent's behaviour; and
>
> (b) The effect of that behaviour on the applicant or a child of the applicant's family, or both.

2. South Africa: s. 5 Domestic Violence Act 1998

> 5. Consideration of application and issuing of interim protection order
>
> 1) The court must as soon as is reasonably possible consider an application submitted to it in terms of section 4(7) and may, for that purpose, consider such additional evidence as it deems fit, including oral evidence or evidence by affidavit, which shall form part of the record of the proceedings.
>
> 2) If the court is satisfied that there is *prima facie* evidence that--
>
> a) the respondent is committing, or has committed an act of domestic violence; and
>
> b) undue hardship may be suffered by the complainant as a result of such domestic violence if a protection order is not issued immediately,

104 For an Australian example of domestic violence legislation that includes an explicit power to proceed ex parte are: s. 8 Crimes (Family Violence) Act 1987, Victoria

> the court must, notwithstanding the fact that the respondent has not been given notice of the proceedings contemplated in subsection (1), issue an interim protection order against the respondent, in the prescribed manner.

Interim hearing

Where an order is initially made on an urgent ex parte basis there is usually a further court date which will be the date for an interim hearing. Where no urgent application was made the interim hearing date is the first date in court. Prior to this date the respondent will have received a copy of the application and any orders made initially.

However, in New Zealand there will only be further hearing dates, after an urgent ex parte order is made, *if the respondent requests it.* This streamlined procedure enables the respondent to contest but it also allows the respondent to consent to the indefinite continuation of the order by simply not responding. Likewise, for the applicant, this procedure avoids the need to unnecessarily return to the court. If the respondent does not request a hearing an order made initially without notice will become final 3 months from the date it was made.[105].

In Australian States and Territories, the New Zealand procedure does not apply and instead the court fixes a date for an interim hearing.

The interim hearing is an opportunity for the respondent to contest or to apply to vary the orders that have been made. It may also be an opportunity for a conference about the orders sought because the parties may both be present at court. In the Australian Capital Territory there is a formal conference process involving the parties, and their lawyers if they are represented. This is convened by a Deputy Registrar of the Magistrates' Court. The victim is not required to be in the presence of the respondent. The focus stays on the restraining order and the safety of the victim. Many matters are resolved by agreement in this way resulting in the respondent consenting to final orders.

If the interim hearing proceeds this is a short hearing only. If substantial issues need to be determined a date for a final hearing is assigned.

What ever the particular procedure, in each jurisdiction the court has power to extend an interim order until the hearing date. Alternatively, the legislation may provide that the original order continues unless it is discharged or varied.

Questions:

74. Section 13 of the New Zealand Domestic Violence Act allows an application for a restraining order to initially proceed without notice to the respondent. This applies only in urgent circumstances. Should a provision similar to s.13 be included in the proposed

105 s. 13 & s. 45 Domestic Violence Act 1995, New Zealand

legislation?

75. The New Zealand legislation also provides that where an urgent order has been made without notice to the respondent, that the respondent must be served and the respondent then has the opportunity to object. If the respondent does not object and notify the court that an interim hearing is required the urgent order becomes a final after 3 months.

- **should this process be included in the proposed legislation? or**
- **should the process be that the court will set further court date and will encourage or require the respondent to attend?**

76. In some jurisdictions, for example the Australian Capital Territory, the Deputy Registrar of the Magistrates Court convenes a conference about the domestic violence restraining order application on the first substantial court date. At no stage during the conference is the victim required to be in the presence of the respondent. Should this process be includes as part of the normal procedure under the proposed legislation?

77. The New Zealand legislation also provides that once an order is made, whether originally without notice to the respondent or as the result of an interim hearing, that the order will continue until it is varied or discharged by the court. Should this provision be included in the proposed legislation?

3.9.5 Orders by consent including mutual orders

Under s. 86 of the New Zealand Domestic Violence Act 1995, in any proceedings under the legislation the court may make an order by consent of all of the parties. However, this can not include mutual orders (that is orders also against the applicant) unless the respondent has filed an application seeking orders against the applicant.

To make the situation very clear the legislation in the Australian Capital Territory provides that orders can be made by consent: whether or not the parties have attended at any stage before the court; whether or not any ground for making the order has been made out; and, without proof or admission of guilt[106].

Question

78. Should the court to be able to make a domestic violence restraining order by consent of the parties?
79. If so should this provide that:

- **the order can be made without the parties being present at court?**

106 s. 29(2) Protection Orders Act 2001, ACT

- **the order can be made without a finding that there are grounds and without admission by the respondent?**
- **mutual orders may not be made unless there is an application on foot by the respondent against the applicant?**

3.9.6 Final orders including duration

As outlined above under *Urgent exparte and interim orders*, domestic violence restraining order proceedings usually involve urgent and interim stages and there may be a final hearing.

Experience overseas is that few domestic violence restraining order matters involve a final hearing because most matters result in final order being made either by consent or because the respondent makes no objection and does not participate in the proceedings.

However, where a final hearing is held evidence is presented, witnesses can be questioned and the court makes a final decision.

Legislation overseas takes one of three different approaches about the length of the final domestic violence restraining order. That is:

- where the final order will not operate beyond the date *specified in the legislation*. For example in the Australian Capital Territory and Queensland unless there are 'exceptional circumstances' (ACT) or 'special reasons (QLD) the maximum period of a final order is 2 years. At this point the order ceases to operate unless a further order is sought and obtained.
- where a final order will cease to operate at a time *specified by the court* without any maximum period specified in the legislation. Examples: Northern Territory, South Australia, Tasmania, Victoria, Western Australia and New South Wales.[107]
- where a final order will operate indefinitely, that is, until discharged by the court. Examples: New Zealand, [108] South Africa.[109]

Additionally legislation in Western Australia and New South Wales provides that where the duration of a domestic violence restraining order is not specified in an order that the order lasts for 2 years (WA) or 6 months (NSW)[110]. These provisions aim to avoid the possibility that the order will be unenforceable due to uncertainty or void for lack of power. Another way to deal with this problem is to specify in legislation that the order will continue for the

107 This accords with the recommendation of the Partnerships Against Domestic Violence, Model Domestic Violence Laws, Report of a Working Group of Commonwealth, State and Territory Officials, Canberra, 1999; See: Health Outcomes International, Improving Women's Safety, Partnerships Against Domestic Violence, Commonwealth of Australia, 2004, Appendix D, Legislative Review p. 270

108 Section 45 (2) Domestic Violence Act 1995, New Zealand

109 s. 6(7) Domestic Violence Act 1998, South Africa

110 The NSW Law Reform Commission has recently recommended that this be increased to 12 months: Recommendation 28, Report 103 (2003) Apprehended violence orders.

maximum period specified in the legislation, unless the court makes an order to the contrary. Alternatively, if the legislation does not specify a maximum period, that the order continues until discharged by a court.

The position taken by New Zealand and South Africa is the top of the range in terms of the length of final orders, that is, the orders continue until they are discharged by the court. This method can also help ensure that courts do not make short orders where this is unsatisfactory in the particular case. However, this approach does involve the need to make a further application to the court for the order to be discharged.

Orders that continue for a limited time (i.e. to the maximum prescribed in the legislation or a date specified by the court) may result in the victim becoming unprotected at a time when the protection needs to continue. However, the advantage of these orders is that they do not require a further application to the court for the order to end.

The New Zealand legislation that applies standard non-contact provisions to domestic violence restraining orders, which are in effect at all times other than when the protected person gives express consent to contact, provide flexibility that is likely to reduce the need for an application to discharge the order if it no longer needed. Most jurisdictions do not provide this flexibility and the order is in effect regardless of whether the protected person is willing to give specific consent to contact by the restrained person. There have, for example, been situations in Australia where women protected by a domestic violence restraining order have been charged or threatened with a charge of aid and abet breach of an order in circumstances where the parties had reconciled but the order had not been discharged.

If the new legislation in Fiji does not have the flexibility of the New Zealand legislation, easy access to the court will be needed for applications to vary or discharge. If this does not occur problems will arise about how orders are viewed where the respondent and the protected person 'walk away' from the order even though it is still in effect.

Orders are more likely to be discharged when this should happen if police are primarily responsible for making applications, including applications to discharge or the procedure to discharge is simple and legal aid or paralegal assistance is available.

Questions:

80. There are three options about the duration of final orders. Which option should be included in the proposed legislation and why?

- **Option 1: Final orders will cease to operate once the *maximum period specified in the legislation* is reached or on an earlier date if specified by the court**

- **Option 2: Final orders will cease on *the date specified by the court* without any limit in the legislation about the maximum period**

- **Option 3: Final orders will continue *until they are cancelled by the court* (i.e. order lasts indefinitely and it will be stopped only if there is an application to the court to cancel it)**

81. In relation to option 1, what should the maximum period be (e.g. 1 year, 2 years, more years)?

82. In relation to option 2, to avoid uncertainty a provision should be included in case a court forgets to specify the length of the order. Should this provide that the order will:

- **continue until discharged by the court?**
- **continue for a specified period only (e.g. 6 months, 1 year, 2 years, more years)?**

3.9.7 Variation and discharge of orders

Domestic violence restraining order legislation needs to include provisions for variation and discharge in case circumstances change.

A power to vary would include power to change or end part of the restraining order and to add additional conditions.

Variation or discharge where sought by the person protected
In relation to both it will be important for the court to ensure that where an application is made by the victim, or is supported by the victim, that this is not the result of the victim being pressured.

This is dealt with in section 10 of the South African Domestic Violence Act 1998. This provides that a complainant or a respondent may apply to vary or set aside a protection order and the court may grant the application 'if satisfied that good cause has been shown'. However, this is subject to the condition in s. 10(2) that:

> the court shall not grant such an application to the complainant unless it is satisfied that the application is made freely and voluntarily.

Concern about the safety of the victim is reflected more strongly in revocation provisions in s. 36(2)-(4) of the Domestic and Family Violence Protection Act, Queensland. That is:

(2) In considering the application [for revocation] the court must have regard to—
(a) any expressed wishes of the aggrieved; and
(b) any current contact between the aggrieved and respondent; and
(c) whether any pressure has been applied, or threat has been made, to the aggrieved by the respondent or someone else for the respondent; and
(d) any other relevant matter.

(3) The court may only revoke the order if the court considers the safety of the aggrieved or a named person would not be compromised by the revocation.
(4) If the court refuses to revoke the order, the court may vary the order in a way it considers does not compromise the safety of the aggrieved and a named person.

Variation or discharge where sought by the restrained person

Provisions could also aim to ensure that the person restrained can not apply to vary or discharge the order as a way or harassing the victim.

Examples

South Australia - Section 12(1a) Domestic Violence Act 1994

(1a) An application for variation or revocation of a domestic violence restraining order may only be made by the defendant with the leave of the Court and leave is only to be granted if the Court is satisfied there has been a substantial change in the relevant circumstances since the order was made or last varied.

New South Wales – s. 562F (4A) Crimes Act 1900

(4A) The court may decline to hear an application for variation or revocation of an order if the court is satisfied that there has been no change in the circumstances on which the making of the order was based and that the application is in the nature of an appeal against the order.

Questions:

83. Where an application is made by, or with the support of, the protected person to vary or revoke an order, should there be safeguards similar to those that apply in South Africa and Queensland to ensure that the person is making a free choice and the variation or revocation will not endanger their safety?

84. Where an application for variation or revocation is made by the person restrained, should there be safeguards such as those that apply in South Australia and New South Wales to ensure that these applications can not be made without grounds or as a way of harassing the protected person?

85. Are there any other safeguards that you consider necessary and practical when an application for variation or revocation is made:

- **by a protected person?**
- **by a person who is restrained by the order?**

3.9.8 Extension of final orders

If a final order will last for a limited time (e.g. 6 months, 12 months, 2 years) there will be cases where the victim needs the order to continue.

A difficulty here is that if the order has had the intended effect and there has not been further violence, the victim may have difficulty satisfying the court that the order needs to continue. The chance of this problem arising can be reduced by the court making final orders that last for a long time and it can be avoided by a provision that the order will apply until discharged by the court.

If the order does operate for a limited time, the focus moves onto the grounds for extension. Options include:

- reversing the onus of proof – i.e. on an application to extend the order, the order will be extended unless the respondent demonstrates that the respondent no longer poses a risk to the victim.

- criteria focusing on whether the victim continues to be *in fear* and not on whether the fear is objectively reasonable (i.e. no requirement that it be demonstrated as 'reasonable' by evidence)

- applying criteria such as 'special reasons' (Queensland) or 'exceptional circumstances' (ACT) but ensuring that these are focused on the respondent's conduct that gave rise to the original order. Also, by focusing on whether, the victim continues to be in fear regardless of whether the fear is objectively reasonable.

Questions:

86. If orders operate for a specified time and before the order ends the victim wants to apply to extend the order, what criteria should apply when the court considers the request to extend?

87. For example, should the grounds be:

- **automatic extension unless the respondent proves they no longer pose a risk to the victim?**
- **whether the victim continues to be in fear (regardless of whether the fear is objectively reasonable)?**
- **'special reasons' or 'exceptional circumstances' focusing particularly on the respondent's original conduct and whether the victim is still in fear?**
- **something else?**

3.10 Breach

3.10.1 Criminal offence of breach

A standard feature of this legislation is that breach of an order is a criminal offence[111].

The offence of breaching a domestic violence restraining order could be charged whether or not the conduct that constituted the breach constitutes another criminal offence. Where a criminal charge is also laid, (e.g. assault causing actual bodily harm), both charges proceed. That is, the charge of breach of domestic violence restraining order is not treated as a 'back up' charge to the assault charge or vice versa.

In other jurisdictions there has sometimes been uncertainty about whether a domestic violence restraining order is breached if the breach occurs in another jurisdiction.

Example: restraining order made in Suva while the victim and the respondent are in Fiji. The order provides that the respondent is restrained from approaching within 200 metres of the victim or contacting or communicating with the victim by any means.

- the person restrained goes to Vanuatu for a meeting. While there the person restrained writes a threatening letter to the protected person or telephones the protected person. The person restrained then returns to Fiji.
- the person restrained goes to Vanuatu for a meeting. Separately the protected person goes to Vanuatu to visit friends. The person restrained goes to the house where the where the protected person is staying and makes a threat. The parties each subsequently return to Fiji.

111 examples are given below under Criminal offence – what should the maximum penalty be?

In other jurisdictions even though the conduct occurred outside the country, the charge of breach of a restraining order could be laid in Fiji.

Questions:

88. Should breach of a domestic violence restraining order be a criminal offence?

89. Should it be made clear that conduct may constitute a breach whether or not that conduct occurred in Fiji?

3.10.2 Criminal offence- what should the maximum penalty be?

The penalty on conviction for the criminal offence of breaching a domestic violence restraining order would be specified in the legislation or in the Penal Code. The maximum penalty would be specified and unless the penalty is expressed otherwise, a court could impose any lesser penalty. Also normal penalty options would be available (fine, bond, suspended sentence etc).

The information provided below about the penalty levels in some other jurisdictions is for general information only. The financial penalties are not comparable for Fiji.

Following the normal pattern with this kind of legislation, s. 49 of the New Zealand Domestic Violence Act 1995 makes contravention of a protection order a criminal offence. The maximum penalty is 6 months imprisonment or a fine not exceeding $NZ5000. Where the person has been convicted at least twice in the previous three years of contravening a protection order the maximum penalty is 2 years imprisonment.

In 1999 the Australian report on Model Domestic Laws[112] recommended that maximum penalty for a first offence be imprisonment for 1 year or a fine of $AUD 24,000 and for subsequence offences, a maximum penalty of 2 years imprisonment.

Penalties for breach of a domestic violence restraining order currently vary substantially between Australian jurisdictions. For example, the maximum financial penalty for a first offence varies from $AUD1000 in Tasmania to $AUD24,000 in Victoria and the maximum term of imprisonment varies from 6 months (Tasmania and the Northern Territory), to 12 months (Western Australia and Queensland) and 2 years (Victoria, South Australia, New South Wales and the ACT)[113].

112 Model Domestic Violence Laws Report, Partnerships Against Domestic Violence, Canberra, April 1999

113 op. cit., Health Outcomes International, Improving Women's Safety

Only three Australian jurisdictions have a higher penalty for the second and subsequence offence. Queensland has a higher penalty for the third and subsequent offence[114].

In South Africa the maximum penalty for breach of a protection order is a fine or imprisonment for 5 years or both[115]

Fiji – maximum penalties for other offences
The table below shows maximum penalties for some criminal offences under the Penal Code. These are examples of offences that may be committed in a range of contexts, including domestic violence:

Offence[116]	*Max. penalty (imprisonment for period indicated)*
• criminal trespass when a misdemeanor (s. 197(1)) *	3 months
• criminal trespass of a dwelling house etc (s. 197(1)) *	1 year
• common assault (s. 244) *	1 year
• criminal trespass entering dwelling house etc by night (s. 197(2))	1 year
• destroying or damaging property in general (s.324(1)) *	2 years
• criminal intimidation when a misdemeanor (s. 330)	2 years
• unlawfully wounding (s. 230)	3 years
• assault causing actual bodily harm (s. 245) *	5 years
• indecent assault on females (s.154(1))	5 years

A detailed draft of possible domestic violence legislation prepared by the Fiji Women's Crisis Centre in 1998 provided that the penalties for breach of a domestic violence restraining order should be:

- for a first conviction – a maximum penalty of a fine not exceeding $250 or imprisonment for a not exceeding 6 months or both
- for a second or subsequent conviction – a fine not exceeding $500 or imprisonment for a term not exceeding 1 year, or both.

Questions:

90. If a criminal offence of breach of a domestic violence restraining order is created, what should the maximum penalty be for a first offence?

91. Should there be a higher maximum penalty for second or subsequent offence?

92. What do you think the penalties should be?

114 op. cit. Health Outcomes International, Women's Safety p. 271

115 s. 17 Domestic Violence Act 1998, South Africa

116 Note: * indicates this is a reconcilable offence under s. 163 of the Criminal Procedure Code

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

Section 163 of the Criminal Procedure Act is referred to in detail in Discussion Paper 2 where issues are outlined about whether s.163 should apply to the four criminal offences specified in the section, if the offence arises from domestic violence.

The section is as follows:

> "RECONCILIATION
> *Promotion of reconciliation*
>
> 163. In the case of any charge or charges brought under any of the provisions of .. [s. 197 (1) i.e. criminal trespass], or ..[s. 244 i.e. common assault] or..[s. 245 i.e. assault causing actual bodily harm] or..[s. 324 (1) malicious damage to property] of the Penal Code the court may, in such cases which are substantially of a person or private nature and which are not aggravated in degree promote reconciliation and encourage and facilitate the settlement in an amicable way of the proceedings, on terms of payment of compensation or on other term approved by the court, and may thereupon order the proceedings be stayed or terminated."

The purpose here is not to re-canvass issues raised in Discussion Paper 2.

If s. 163 was not amended and continued to be applied in cases involving domestic violence - should also apply to the criminal offence of breach of a domestic violence restraining order? Section 163 would not apply to this offence unless it was amended to apply.

An argument against amending s.163 to apply to breach of a restraining order, is that in a high proportion of cases the conduct that led to the restraining order would have been a criminal offence. In some cases the accused will have been charged and convicted of that offence and in others there will have been no charge, or a charge without the matter concluding in conviction. In either event there is a pattern of behaviour.

Additionally, the effect of a restraining order is to give the accused a serious warning. That is, that if the order is breached that criminal prosecution will follow.

Put another way it could be argued that s.163 should not apply because:

- the situation is 'aggravated' within the meaning of s.163, or
- the charge is not of a 'person or private nature' because the charge is one of breaching a court order, or
- s.163 should not apply because of the background of the matter (including that the accused was on a warning by virtue of the restraining order).

The arguments in favor of s163 applying to a charge of breach of a restraining order would be that:

- the attempt to promote reconciliation should continue,
- the breach does involve matters of a 'person or private nature' between the accused and the victim
- where the breach arises from one of the offences to which s.163 applies the breach should also attract the operation of s.163.

The last point highlights a further issue. That is, where a person is charged with the offence of breach of a domestic violence restraining order ('breach charge') and the conduct that gives rise to that charge also results in a further charge e.g. assault causing actual bodily harm (ACABH), s.163 will apply to the charge of ACABH but will not apply to the breach charge.

This may cause difficulty in practice. This is because it is likely that the charges would proceed together and a Magistrate would arguably be in a position of being required to take a different approach to the two charges. That is, apply s.163 to the ACABH charge and not apply s.163 to the breach charge.

However, if s.163 was amended to list a breach charge as a charge to which it applies it may dampen charging practices in relation to criminal offences that arise out of the same incident. For example where grievous harm could be charged, the charge of ACABH might instead be laid to bring both matters within s. 163. This, to avoid a conflict in approach that would otherwise result for the court, prosecution and the defendant.

Questions:

93. Should s. 163 of the Criminal Procedure Code (reconcilable offences) be amended:

- **to exclude a criminal offence that arises out of the same incident that has resulted in a charge of breach of a domestic violence restraining order? or alternatively**
- **to include the proposed criminal charge of breach of a domestic violence order?**

3.10.4 Penalty options (education programs, community work etc)

The possibility of conditions of a domestic violence restraining order, requiring a respondent to attend an education, counselling or treatment program are dealt with above.

If breach of a domestic violence restraining order is a new criminal charge the penalty options that apply to this are likely to be the penalty options that are available generally for other criminal matters.

Penalty options for criminal charges involving domestic violence, including breach of a domestic violence restraining order, are dealt with in Discussion Paper No. 2.

However, some may consider that there are additional options that should apply specifically to a conviction for breach of a domestic violence restraining order. For example, should the court be *required to make an order* that the offender attend a domestic violence counselling or education program. It is noted that this could only work if there were suitable counselling or education programs available in the community and in prisons.

Question

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

3.10.5 Bail for a charge of breach

Bail, whether considered by the police or court, in relation to criminal charges arising from domestic violence or a breach of a domestic violence restraining order are dealt with in Discussion Paper No. 2.

That Discussion Paper canvasses the possibility of amending the Bail Act so that it applies specific requirements in relation to bail in these cases.

3.10.6 Breach - police powers

Police power to arrest without warrant
Police powers of arrest in domestic violence cases are referred to in Discussion Paper 2.

A person who is bound by a domestic violence restraining order will breach the order if any of the conditions of the order are disobeyed. For example, if a person has been ordered not to contact the victim and they do so.

There will be situations where the conduct that constitutes a breach is not a physical attack or another offence under the Penal Code. For this reason, additional police powers in relation to a suspected breach of a domestic violence restraining order should be considered.

Section 50(1) of the New Zealand Domestic Violence Act 1995 gives police the power to arrest without warrant where a protection order is in force and a police officer has 'good

cause to suspect' that the person has committed a breach of the order. This power does not apply to a failure to attend a program that may have been a condition of the order.

The matters that police must take into account in deciding whether to arrest are set out in s. 50(2). These are:

- the risk to the safety of the protected person if the arrest is not made;
- the seriousness of the alleged breach;
- the length of time since the alleged breach occurred; and,
- the restraining effect on the person liable to be arrested or other persons or circumstances.

However, section 50(1) does not give power of arrest without warrant in a situation where police have good cause to suspect that a person is about to breach a domestic violence restraining order, but the breach has not yet occurred.

Entry and search

Police powers of entry and search are referred to in Discussion Paper 2.

Where police have good cause to suspect that a breach of a domestic violence protection order has occurred or is about to occur in premises, a clear power to enter and search premises and remain on premises for as long as is reasonably necessary, would help ensure police action.

In deciding whether to exercise these powers criteria similar to those in s. 50(2) of the New Zealand Domestic Violence Act, referred to above, could be applied.

Questions:

95. 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?**

96. If so, does s. 50(2) of the NZ Domestic Violence Act, outlined above, provide a good model?

97. 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?**

98. If so, are the criteria in s.50(2) a good model about the considerations that should apply?

3.10.7 Breach – duties of prosecutors

Discussion Paper 2 raises issues about the role of the prosecution in criminal charges arising from domestic violence.

This section deals with whether there should be *specific and additional* requirements for prosecution of the change of breach of a domestic violence restraining order.

For example, the South African Domestic Violence Act 1998 provides that:

- a prosecutor may not refuse to institute a prosecution or withdraw a charge in relation to breach of a domestic violence restraining order unless authorised 'whether in general or in any specific case' by the Director of Public Prosecutions or a person authorised by the Director,[117] and
- the Director of Public Prosecutions must 'determine prosecution policy and issue policy directives regarding any offence arising from an incident of domestic violence[118].

Because the offence of breach of a domestic violence restraining order does not yet exist, it is a matter of conjecture whether there is likely to be any hesitancy on the part of prosecutors in relation to these matters. That is, it could be that a legislative provision, that requires prosecution and no withdrawal unless authorised, is not needed because there is not likely to be a problem.

It could also be argued that if the South African example expresses good practice and this would be followed in any event by prosecutors in Fiji, that it helps to promote public awareness for a provision of this kind to be included in legislation.

117 s. 18(1) Domestic Violence Act 1998, South Africa

118 s. 18(2) Domestic Violence Act 1998, South Africa

In relation to the legislative requirement that the Director of the DPP *determine and issue policy directives* regarding 'any offence arising from an incident of domestic violence' it is noted that this applies not only to breach of a domestic violence restraining order but also to any offence arising from domestic violence.

Similar considerations to those outlined above, about whether there should be a legislative requirement about prosecution of breach of an order, apply. The key issues are whether a legislative requirement is worthwhile in terms of:

- improving prosecution practices, or
- increasing public awareness of prosecution practices

Question:

99. Should legislation that introduces domestic violence restraining orders contain a provision that:

- **requires 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?**

3.11 Procedures

This section discusses the procedures that might apply to applications for a domestic violence restraining order. The discussion is based on the proposition that procedures should be as simple as is possible consistent with the requirements of fairness and due process.

3.11.1 Simple procedures

Section 5(2)(b) of the New Zealand Domestic Violence Act states that an aim of the Act is to ensure that 'access to the Court is as speedy, inexpensive, and simple as is consistent with justice'. This objective is adopted by all jurisdictions that have this type of legislation, whether or not the objective is stated in the legislation.

Key matters relating to procedure are generally specified in the legislation. The court also makes rules to establish simple procedures.

For example, courts normally introduce simple application forms that make it easy for an unrepresented applicant to commence proceedings. These are typically tick-a-box style. The grounds in the legislation are repeated on the application form so that the applicant can tick which grounds they are relying upon. The orders that are commonly made are often set out as well so the applicant can tick which orders they are seeking, with space to write in any other orders sought.

Some further points about procedures are dealt with below.

Questions

100. 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?

3.11.2 Court fees

Court fees are fees that are collected by a court when documents are filed (for example, filing an application, a reply, notices of various kinds). Court fees are set out in a schedule to legislation or in Rules. There are also waiver provisions for cases of financial hardship.

In relation to domestic violence restraining orders it could be argued that special circumstances apply and there should be no filing fees for these matters. The special circumstances are that the application will be filed in order to seek protection.

Additionally, it is foreshadowed above that police and other government agencies may lodge applications to seek an order for the protection of a particular person.

Questions:

101. Should filing fees apply in relation to applications under the proposed legislation?

102. If so, should special latitude be given in determining hardship for fee waiver purposes?

3.11.3 Early hearing

Because domestic violence restraining order applications are made where there is a risk to safety, the applicant usually seeks an urgent interim order to start with. In other jurisdictions these applications are often heard on the day that they are filed.

If the matter is less urgent but the applicant is seeking an interim order, in other jurisdictions the application is generally listed for interim hearing within 2-5 days of filing.

The South African legislation includes a provision that requires the court to consider an application for an interim protection order 'as soon as reasonably possible'[119]

Questions:

103. 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**
- **within 2-4 days of filing**

104. Should a provision similar to that in the South African legislation be included in the proposed legislation to make it clear that early hearing of these applications is anticipated?

3.11.4 Service of applications, interim and final orders

The normal rule in civil matters is that the applicant is responsible for arranging service of the application, all documents filed and orders made, on the other party. In other civil proceedings although the applicant arranges to serve the initial application and supporting documents the respondent frequently participates in the proceedings from the beginning. Court rules in civil proceedings generally provide that once the respondent has filed a response or a 'notice of address for service' that documents can be served on the respondent by posting them to that address. This means that service requirements are generally not onerous.

However, in domestic violence restraining order proceedings requirements about service of documents are generally different. The first difference is that legislation normally provides that every order has to be personally served on the respondent and as a result the service requirements can be onerous.

119 s. 5(1) Domestic Violence Act 1998, South Africa

In these proceedings courts are normally particularly concerned to minimise the number of steps that the applicant is required to take. The court will also be concerned to ensure that the respondent understands the proceedings and that any orders made, including orders that are made in the respondent's absence. An advantage of service by police is that the orders can be explained to the respondent personally by a person in authority.

As noted above, (see *Should police have a duty to apply*?), in some jurisdictions, police are required to apply for a domestic violence restraining order when a person is at risk. Where the police make the application, the police also serve the application and any orders.

Additionally, regardless of who applies, restraining order legislation normally provides that the Clerk of the Court[120] has to arrange service on the respondent or the police[121] have to serve the respondent.

Where the police serve the respondent, the rationale is:

- police are based at numerous locations which generally results in relatively fast personal service on the respondent,
- there may be risk at the point of service,
- at the point of service police can explain the application and the effect of any order to the respondent, including making sure that the respondent understands the consequences of breach, and
- the process helps reinforce a message that the State has intervened and has taken a stance against the conduct.

Orders for the protection of a victims of domestic violence that can be made under Fiji's current laws are discussed above under *Restraining orders under current laws*. Under current laws, the procedures about serving the respondent do not normally involve the Clerk of the Court or the police. As a result, if the new domestic violence restraining order legislation requires the Clerk of the Court or the police to serve the respondent this will be a new role. It is assumed that, between the two options, police are better placed to undertaken the role.

120 e.g. s. 6(5) Domestic Violence Act 1998 South Africa; Rule 43, Domestic Violence Rules 1996, New Zealand; 562J Crimes Act 1900, NSW (service of orders); s. 4(7) Domestic Violence Act NT (service of orders) ; s. 17 Crimes (Family Violence) Act 1987, Victoria (service of orders); s33. Protection Orders Act 2001, Australian Capital Territory (service of non-emergency orders). A study of 335 domestic violence restraining order files conducted in New Zealand found that of the orders in the file study, 45% were served by court bailiffs, 28% by private servers, and 19% by police; 3% were unable to be served and the means of service was unclear in 4% of files: Barwick, H., Gray, A., Macky, R., Domestic Violence Act 1995: Process Evaluation, Ministry of Justice, New Zealand, 2000

121 e.g. s. 47(4) Domestic and Family Violence Protection Act 1989, Queensland; s. 74 & s. 99 Protection Orders Act 2001, Australian Capital Territory (emergency orders to be served by police; Magistrates Court may direct police to serve documents)

Questions:

The proposed legislation is likely to require that certain documents, including court orders, be served personally on the respondent.

105. Should the proposed legislation provide that, unless ordered otherwise, (i) the Clerk of the Court or (ii) police must serve the respondent with:

- **the application and supporting documents**
- **orders made by the court**

106. 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)

3.11.5 Copy of orders to be provided to the police

Where the court makes, varies or discharges a domestic violence restraining order, regardless of whether the police were involved in making the application or will be involved in serving it, a standard practice in other jurisdictions is that the Clerk of the Court must forward a copy of the orders promptly to the police[122].

This ensures that police have a copy of all domestic violence restraining orders made under the legislation. Police need a copy so that they know what the orders provide in the event of a request for assistance by the protected person or a breach.

Police in turn establish arrangements so that there is a data base of restraining orders made under the legislation and police in the field can quickly get accurate information about a particular order.

Questions:

107. What, if any, difficulties would be involved in implementing a requirement that the court promptly forwards a copy of each domestic violence restraining order to the police?

108. What if any difficulties would be involved in police:

122 e.g. s. 88 Domestic Violence Act 1995, New Zealand; s. 33 Protection Orders Act 2001, Australian Capital Territory; Domestic and Family Violence Protection Act 1989, Queensland; s 562J(3) Crimes Act 1900, NSW

- **establishing a data base of domestic violence restraining orders?**
- **providing ready access to accurate information about the terms of orders to police in the field?**

109. In relation to both of the above, how could any problems be addressed?

3.11.6 Order that the respondent attend / warrant

Where an application is made for a domestic violence restraining order it would normally issue in the form of a summons. However, there are likely to be circumstances where the court will need power to issue a warrant for the respondent to be arrested and brought before the court. These will be situations where the respondent appears to pose a substantial and immediate risk to the victim and the court considers it preferable, in order to ensure the safety of the victim, for the respondent to be brought before the court.

Additionally, at any time after proceedings have commenced additional circumstances may arise where by the risk posed by the respondent indicates to the court that a warrant should be issued.

Also, where the respondent is not before the court on a hearing date and it appears on the evidence before the court that the respondent may flout the orders the court may want to issue a warrant to bring the respondent before the court so that the seriousness of the orders that the court intends to make are clearly understood.

Queensland and New South Wales are examples of jurisdictions where domestic violence legislation provides wide powers for the court to issue a warrant to cause the respondent to be brought before the court.[123]

Questions:

110. Should the proposed domestic violence restraining order legislation give the court power to issue a warrant at any stage for the respondent to be brought before the court?

123 e.g. s. 39(4) Domestic and Family Violence Protection Act 1989, Queensland; 562AF Crimes Act 1900, NSW

3.11.7 Representation and assistance to the victim and perpetrator

Legal Aid

The benefits of representation for victims and perpetrators of domestic violence are referred to generally in Discussion Paper 1. It is noted that resources for legal aid are however very limited. Discussion Paper 1 seeks comment on the current Legal Aid Commission guidelines. These do not refer to domestic violence or give explicit priority to cases involving risk to safety.

In domestic violence restraining order proceedings the key issue is what if any orders are needed to ensure the safety of the victim. In jurisdictions overseas where legal aid resources are limited and choices have to be made; priority in these proceedings is given to the person whose safety appears to be at risk.[124]

Assistance by non-lawyers

Discussion Paper 1 refers to the examples of assistance at court by non-lawyers, particularly for victims of domestic violence.

This may be an important issue in relation to the proposed legislation, particularly if most of the applications are brought by individuals rather than by police and it is not possible for Legal Aid to provide representation.

Where a person who is a party to legal proceedings has a lawyer, the lawyer has the right to appear on their client's behalf before the court. Where a person is not represented by a lawyer the court can decide whether it will allow another person to speak on behalf of the person and advocate for them in court. In these circumstances the court is generally concerned to balance:

- the objectives of the proceedings - primarily the safety of a person who is at risk
- the objectives of fair hearing and proper process,
- the needs of the parties - lack of legal representation, difficulty speaking for themselves, difficulty presenting their case, and
- any difficulties that might arise from granting the request.

The court will generally be concerned to determine whether a particular non-lawyer advocate is suitable i.e.:

- that they do not have an interest that is contrary to the party they wish to assist,

124 For example, in the Australian Capital Territory and Northern Territory of Australia, the Legal Aid Commissions provide staff lawyer representation to victims seeking a domestic violence restraining order. Low priority is accorded to a respondent to an application for a domestic violence restraining order on the basis that most applications are for personal protection (i.e. that the respondent not assault, harass the victim), if this order is made the respondent suffers no loss or prejudice other than an increased risk that a criminal charge will be laid if the order is breached. Additionally, Legal Aid Commission Guidelines relating to criminal charges give priority to those who are at risk of loosing their livelihood or receiving a term of imprisonment.

- that they will focus on issues that are relevant and avoid unnecessarily lengthening or complicating the proceedings, and
- that they will avoid inflaming the proceedings

Questions:

111. Should Legal Aid be available for domestic violence restraining order proceedings?

112. If so, should Legal Aid Commission Guidelines give priority to those whose safety is at risk?

113. Given the possibility that a large number of applicants may be unrepresented in proceedings, should the proposed 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?

114. 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)

3.11.8 Evidence

Standard of proof

In other jurisdictions the civil standard of proof (the balance of probabilities) applies to an application for a domestic violence restraining order125.

The criminal standard of proof (beyond a reasonable doubt) applies to the criminal charge of breach of a domestic violence restraining order.

Rules of evidence

In tune with the emphasis on simple procedures, domestic violence restraining order legislation generally provides that the rules of evidence do not apply. For example the New Zealand Domestic Violence Act provides that the Court may receive 'any evidence that it thinks fit, whether or not it is otherwise admissible in a court of law[126]'.

Oral evidence and evidence by affidavit

125 e.g. S. 85 Domestic Violence Act 1995, New Zealand; s. 4 Crimes (Family Violence) Act 1987, Victoria; s. 19 Protection Orders Act 2001, ACT

126 s. 84 Domestic Violence Act 1995, New Zealand; s. 12 Domestic Violence Act, Northern Territory (court may receive hearsay evidence);

In other jurisdictions evidence in domestic violence proceedings can be given orally or in a sworn statement (an affidavit)[127]. Where an affidavit is relied upon the normal rules about cross-examination apply. Where an urgent interim order is sought in the absence of the respondent courts normally require the applicant (or the person to be protected if that person is not the applicant) to give oral evidence. This can be their primary evidence or a time for the court to question the person if their primary evidence is in an affidavit.

Insistence by the court on affidavits in these proceedings is generally counter productive. This is because it increases the amount of work and time involved in filing an application and increases the need for lawyers. It can also result in delay in various steps in the proceedings.

However, refusal by the court to allow the primary evidence of each of the parties and witnesses to be provided in an affidavit can also be counter productive. This is because one or both of the parties or witnesses may be very nervous and find it difficult to give complete oral evidence.

Competence and compellability

Competence refers to the ability of a person to give evidence in proceedings where as compellability refers to whether a person who is competent witness can be required to give evidence where they are refusing to do so. With some limited exceptions everyone is competent to give evidence can be compelled to give evidence by being called as a witness and being required to answer questions.

As outlined in Discussion Paper 2, under current law in Fiji a married spouse is competent to give evidence but can not be *compelled* to give evidence against their spouse *in criminal proceedings*.

Discussion Paper 2 raises issues about whether this should be changed for criminal charges arising out of domestic violence. This issue also applies to a criminal charge of breach of a domestic violence restraining order. Please refer to that Discussion Paper for the background to this rule and options for reform.

The compellability of a married person is relevant to proceedings for a domestic violence restraining order where the proceedings are bought on behalf of the person, for example by police or by an officer of the Department of Social Welfare. That is, where there is concern about the personal safety of a married spouse and an application is bought for their protection it is likely that there will be exceptional cases where although there are good reasons for the restraining order, the victim spouse is not willing to cooperate by giving evidence.

The Family Law Act 2003 puts the matter beyond doubt in relation to proceedings *under that Act*. That is s. 188 provides:

127 e.g. s. 5(1) Domestic Violence Act 1998, South Africa

"188 (1) The parties to proceedings under this Act are competent and compellable witnesses.

(2) In proceedings under this Act, the parties to a marriage are competent and compellable to disclose communications made between them during the marriage.

(3) Subsection (2) applies to communications made before, as well as to communications made after, the date of commencement of this Act'

Although s. 31(3) of the Civil Evidence Act 2002 applies the same provision that is in s. 188(2) generally to civil proceedings (that is, a husband or wife can be compelled to disclose any communication made to him or her by his or her spouse during the marriage), it does not squarely deal with the issue of compellability. That is there is no provision in the Civil Evidence Act that parallels s. 188(1) of the Family Law Act to provide for general competence and compellability of parties to a marriage in civil proceedings.

Given that restraining orders for personal protection can be made in some circumstances under the Family Law Act 2003, it seems appropriate that a provision similar to s.188 be included in the proposed domestic violence restraining order legislation in order to put the question of competence and compellability beyond doubt in these proceedings.

However, separate arrangements may need to apply where a court is dealing with a criminal matter (for example a bail application or imposing penalty after conviction) and is considering, in those proceedings, whether to also make a domestic violence restraining order. This is because while ever the law provides that a married spouse can not be compelled to give evidence against their spouse in criminal proceedings; to compel the married spouse (victim) in relation to the intended domestic violence restraining order may result in prejudice to the defendant in the criminal proceedings.

This could be dealt with in three ways:

- Change the law so that a married spouse is a compellable in criminal proceedings against their spouse arising from domestic violence including a criminal charge of breach of a domestic violence restraining order
- Make an exception to the compellability of a married spouse (victim) in proceedings for a domestic violence restraining order dealt with in conjunction with criminal proceedings against their spouse. The victim spouse would not be compellable in this situation.
- Place the onus on the safety of the victim, and make no exception in relation to compellability even though this may prejudice the other spouse in the criminal proceedings.

Questions:

115. In relation to evidence in proceedings for a domestic violence restraining order do you agree that:

- **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' (the NZ model)?**
- **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?**

116. In relation to compellability of a married spouse, do you agree that in *civil proceedings* for a domestic violence restraining order that a provision similar to s. 188 of the Family Law Act 2003 should apply?

117. In relation to criminal proceedings for breach of a domestic violence restraining order, do you think that a married person should be a compellable witness against their spouse (the defendant) in these proceedings?

118. Where a court is considering making a domestic violence restraining order at the same time that it is dealing with criminal proceedings, should a married spouse (victim) be a compellable witness where the restraining order would be made against their spouse who is also the defendant in the criminal matter?

3.11.9 Unrepresented respondent questioning the victim

In proceedings for a restraining order, the court must accord procedural fairness to the respondent and proceed on the basis of the evidence. As usual the applicant and respondent will have the right to lead evidence and to question witnesses. Where the respondent is unrepresented (does not have a lawyer) the respondent will be entitled, if they wish, to question the applicant, that is, to cross examine the applicant.

This can pose substantial risk of intimidation and harassment of the victim by the respondent in the guise of the proceedings. Recognising this problem, section 6(3) of the South African Domestic Violence Act 1998 allows the court to intervene to require that the respondent put each question to the court. The Magistrate then asks the question of the victim. That is:

> (3) The court may, on its own accord or on the request of the complainant, if it is of the opinion that it is just or desirable to do so, order that in the examination of witnesses, including the complainant, a respondent who is not represented by a legal representative-

a) is not entitled to cross-examine directly a person who is in a domestic relationship with the respondent; and

b) shall put any question to such a witness by stating the question to the court,

and the court is to repeat the question accurately to the respondent.

This method substantially reduces the respondent's ability to intimidate or harass the victim through cross-examination. It encourages the court to rule on whether particular questions will be allowed and results in questions being put to the victim by the Magistrate rather than the respondent.

Questions:

119. Should the proposed legislation include a provision that enables the court to direct that questions that a self representing respondent wishes to put to the victim in cross-examination must be put to the court with the Magistrate then asking each question of the victim?

120. Are any other measures required in relation to the court's control of the proceedings, to avoid abuse or harassment of the victim during the course of the proceedings?

3.11.10 Open or closed court

Under the Constitution the general rule is the hearings of courts and tribunals must be open to the public[128]. However, the Constitution states that this does not prevent laws relating to the determination of family or domestic disputes in a closed court[129]. Additionally, although the parties and their lawyers have the right to be present, it does not prevent the exclusion of other people from particular proceedings. Circumstances include: where this is in the interests of justice, public morality, and the welfare people under 18 years, and personal privacy[130].

Criminal courts are open subject to the power of the presiding judge or magistrate to order in a particular case that the public generally or any particular person may not remain in court or in the building used by the court.[131] This applies to all criminal matters including criminal charges that arise out of domestic violence.

128 s.29(4) Constitution

129 s.29(5)(a) Constitution

130 s.25(5)(b) Constitution

131 s.67 Criminal Procedure Code

While there is a general rule that civil proceedings are heard in open court, proceedings under the new Family Law Act will, subject to the Regulations and Rules[132], be heard in closed court.[133] This provision is different to that which applies under the existing Matrimonial Causes Act where the general rule is the proceedings will be heard in open court unless there are special circumstances 'that make it desirable in the interests of the proper administration of justice'.[134]

In relation to de facto couples, applications relating to their children will be dealt with under the new Family Law Act and consequently will be heard in closed court. However applications for property division between a de facto couple are not covered by the legislation and these will be dealt with under existing law, that will continue to apply, in open court.

Proceedings in the Juveniles Court, which deals with criminal charges against juveniles and juvenile care, protection and control matters, are closed subject to the court's power to authorise a person to be present in particular proceedings.[135]

Domestic violence restraining orders

As noted earlier, there are powers in the new Family Law Act for the court to grant restraining orders in some circumstances. The FLA provision about the court being closed will apply to these applications.

The following are examples of how some other jurisdictions have approached the issue in relation to their domestic violence restraining order legislation:

- closed court: in New Zealand proceedings under the Domestic Violence Act 1995, other than criminal proceedings, are heard in closed court but the parties to the proceedings may each nominate 'a reasonable number of people' to attend the hearing to provide personal support for the person.[136]
- open court: proceedings for a restraining order under domestic violence restraining order legislation in each Australian state and territory are heard in open court, with the court having discretion in individual cases to order that particular people not be present or that the court be closed. Restrictions on identifying publication also apply[137]. Criminal proceedings for breach of a domestic violence restraining order are heard in open court.

132 The Regulations and Rules are currently being prepared and are not yet available.

133 s. 185 Family Law Act 2003

134 s.105 Matrimonial Causes Act

135 s. 17 Juveniles Act (Cap. 56)

136 s. 183 Domestic Violence Act 1995. For a further example of a provision in domestic violence restraining order legislation that permits a supportive person to be present see 562ND Crimes Act 1900, NSW

137 see generally Alexander, R., Domestic Violence in Australia: The Legal Response, 3rd edition, Federation Press, 2002

These examples show different approaches to whether the court should be open or closed in relation to an application for a domestic violence restraining order. However in all of these examples there are restrictions on identifying publication and criminal charges of breach of a domestic violence restraining order are heard in open court.

The examples show different approaches to resolving the following considerations in relation to applications for domestic violence restraining orders:

- the importance of the public being aware of the legislation, understanding this kind of proceeding, seeing that it is fair and that magistrates and judges remain accountable
- the importance of ensuring that victims of domestic violence are not deterred from using the legislation out of concern about their privacy
- the concern that each of the parties is able to have someone with them for personal support. This can happen automatically where the court is open and it is stated specifically in the NZ legislation although the court is otherwise closed.

In Fiji it is also relevant to take into account the decision to be made about which courts will be able to exercise jurisdiction under the Act. That is, if restraining orders can be made under the new legislation by the Family Division and the Juveniles Court, the proceedings in these courts, under their primary legislation is closed. On the other hand if restraining orders are made or can also be made under the new Act by a magistrate in:

- criminal proceedings (for example as an adjunct to a bail order or as an additional order at the conclusion of the proceedings)
- civil proceedings that do not come under the Family Law Act, for example proceedings between a de facto couple for property division.

these proceedings are heard in open court.

Two alternative approaches that take into account the normal practices of the relevant courts, are that proceedings for a restraining order under the new legislation will, subject to the discretion of the court in individual cases:

- be dealt with in *open court*, except when the proceedings are ancillary to proceedings before the Family Division or the Juvenile Court, or
- be dealt with in *closed court*, except where *a domestic violence restraining order* is being considered in criminal proceedings to which the Criminal Procedure Code applies

The question about whether publication should be restricted is dealt with separately below.

Question:

121. As a general rule, should an application for a domestic violence restraining order be dealt with in open or closed court?

122. If you think that these proceedings should generally be heard in *open court*, should this apply if the application is ancillary to proceedings before the new Family Division and the Juvenile Court?

123. If you think these proceedings should generally be heard in *closed court:*

- **should this apply if a Magistrate or Judge is considering whether to make a domestic violence restraining order against the defendant in criminal proceedings?**

- **should there be a specific provision that allows each of the parties to have one or more people present for personal support?**

124. Do you agree that prosecutions for a criminal offence arising from domestic violence should continue to be dealt with in open court?

3.11.11 Publication

There are many examples of domestic violence restraining order legislation that restrict publication of identifying details about the parties or give the court special guidance.

The Family Law Act 2003 will change the position that has applied under the Matrimonial Causes Act[138]. Section 210 (1) of the Family Law Act makes it an indictable offence to publish or otherwise disseminate *without the permission of the court*:

> … any account of any proceedings, or of any part of any proceedings, under this Act that identifies –
>
> a) a party to the proceedings
> b) a person who is related to, or associated with, a party to the proceedings or who is, alleged to be, in any way concerned in the matter to which this matter relates; and
> c) a witness in the proceedings

138 subject to any contrary order by the court, s. 106 of the Matrimonial Causes Act permits publication of the names, addresses and occupations of the parties and witnesses, a 'concise statement of the nature and grounds of the proceedings .. in support of which evidence has been given', submissions on the law, the decision of the court .

The provision goes on to ensure that court transcripts can be provided to people concerned in the proceeding, legal professional disciplinary bodies, legal aid (to enable a decision to be made about the provision of legal aid), law reports.

Examples in domestic violence legislation

Section 125 of the New Zealand Domestic Violence Act 1995 is in similar terms to s. 210(1) of the new Family Law Act.
There are a number of additional exceptions in the Australian Capital Territory Protection Orders Act 2001.[139] That is, that the non-publication requirement does not prevent:

- a party to a proceeding for a protection order from telling someone else about the contents of a protection order made in the proceeding
- information from being given in proceedings under the Family Law Act
- information being provided to the Director of Public Prosecutions or a police officer in relation to the exercise of their functions
- information being used in any other legal proceedings
- the court ordering that material may be circulated because it is in the public interest, will promote compliance with the protection order or is necessary or desirable for the proper operation of the Act[140]

In Victoria there are restrictions on publication in cases involving children[141] and a similar provision applies in NSW[142].

Questions:

125. Should there be restrictions on publication of details about domestic violence restraining order proceedings under the proposed legislation?

126. If so, should the restrictions be the same as those in s.210(1) of the Family Law Act 2003?

127. Should the additional points listed above that relate to the Protection Orders Act 2001, ACT also be included?

128. Are there any other restrictions on publication that you consider appropriate?

139 s. 101

140 There is a similar provision in s. 82 of the Domestic and Family Violence Protection Act 1989, Queensland

141 s. 24 Crimes (Family Violence) Act 1987, Victoria

142 562NA Crimes Act 1900, New South Wales

3.11.12 Orders about costs

This section deals with the position that might be taken in the proposed legislation about legal costs and expenses, if any, and other costs to a party involved in participating in the proceedings. This section does not deal with the expenses that relate to particular orders that the court might make (e.g. the cost of the respondent attending a domestic violence program, the cost of the victim relocating, the cost of supervision for visits between the respondent and the children).

The normal rule in civil proceedings is that 'costs follow the event'. This means that the reasonable legal costs of the party who succeeds are paid by the other party.

Costs in domestic violence restraining order proceedings
However, domestic violence restraining order legislation often takes a different approach. Australia and South Africa the normal rule is that each party bears their own legal costs and legal expenses. This position has probably been taken to emphasise that the proceedings are intended to be simple. It also follows the pattern of family law legislation in these jurisdictions.

In jurisdictions where domestic violence restraining order legislation provides that each party will pay their own costs, there are normally provisions that enable the court to make an exception. Where there is an exception it is generally:

- to provide criteria for a court to apply if the application for a restraining order is unsuccessful and the respondent applies for costs, and/or
- to deal with the high costs to the applicant of participating in the proceedings (e.g. travel and accommodation).

Examples

- New South Wales – costs may not be awarded against the applicant unless the court is satisfied that the complaint was frivolous or vexatious. An order for costs may not be awarded against a police officer who made an application for the protection of a person unless the court finds that it knowingly contained matters that were false or misleading[143].
- Queensland – the court can not award costs unless an application is dismissed and the court finds that the application was 'malicious, deliberately false, frivolous or vexatious[144].
- Australian Capital Territory - if the court is satisfied that an application was frivolous, vexatious or has not been made honestly and someone other than the applicant has been put to expense, the court may order that the applicant to pay the amount considered reasonable to the person put to expense. These costs can include legal fees. Costs so awarded are debt owed by the applicant and are enforceable as a civil debt[145].

143 s. 562 N, Crimes Act 1900, NSW

144 s. 61 Domestic and Family Violence Protection Act 1997, Queensland

145 s. 95 Protection Orders Act, Australian Capital Territory

- Northern Territory – costs are not to be awarded against an applicant whose application was unsuccessful unless the Court is satisfied that the application was 'unreasonable and in bad faith'[146]
- South Africa - the court may only make an order as to costs against any party if it is satisfied that such party has acted frivolously, vexatiously or unreasonably[147].

In New Zealand, where the court calls a witness, appoints a lawyer for a party or for a child, or makes and order about program attendance the court can order that these costs be paid out of public money[148].

Costs under the Family Law Act 2003

The position taken by the FLA in relation to costs is also relevant to this discussion. This is because the FLA also contains some restraining order provisions.

The FLA provides that each party will bear their own costs[149]. However the court can make an order that one party pay the other's costs if there are circumstances that justify this in interim or final proceedings. Factors to be taken into account by the court are listed. These include:

- the financial circumstance of each of the parties;
- the terms of any grant of legal aid that applies to a party;
- the conduct of the parties in relation to the proceedings including compliance with procedural requirements;
- whether the proceedings arose from the failure by one party to comply with previous orders;
- whether any party has been wholly unsuccessful; whether a party made an offer to settle and any other matters the court considers relevant.

Questions:

129. Should the proposed 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?**

130. 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?

146 s. 15 Domestic Violence Act, Northern Territory; also s. 69 Restraining Orders Act 1997, Western Australia

147 s. 15 Domestic Violence Act 1998, South Africa

148 s. 82, s. 81, s. 44 Domestic Violence Act 1995, New Zealand

149 s 205

131. 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?

132. If so, should this provide 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?

3.11.13 Registering the restraining order in / from another jurisdiction

The registration of domestic violence restraining orders made in Fiji in other countries would help ensure the safety of victims of domestic violence when overseas without the need for a further application to the court in the overseas jurisdiction. Also, recognition of overseas domestic violence restraining orders by Fiji would reduce the need for victims of domestic violence who come to Fiji to apply in Fiji for a new order.

For example, arrangements of this kind are in place between:

- Australia and New Zealand;
- each of the Australian States and Territories;
- the States of the USA

In the USA these provisions are referred to as 'full faith and credit'. This means that a domestic violence restraining order made in one State of the USA will be given full force in each of the others.

Registration of Fiji domestic violence restraining orders in other jurisdictions
Arrangements for registration of domestic violence restraining orders made in Fiji could be established with other countries where similar legislation applies. These matters could be dealt with in regulations made under the Fiji legislation but would be dependent on the willingness of other countries to recognise Fijian orders for registration and enforcement.

Registration of domestic violence restraining orders made in other jurisdictions
The domestic violence restraining order legislation could contain provision for the registration of similar orders made in other jurisdictions. The effect of registration would be to make the order enforceable in Fiji. For example, breach would be a criminal offence in the

same way that breach of a domestic violence restraining order made under Fiji law would be a criminal offence[150].

The legislation could:

- specify jurisdictions in the region that have similar legislation where orders can be registered through an administrative process (i.e. lodging the order for registration with the Clerk of the Magistrates' Court. Examples are New Zealand each Australian State and Territory. When Pacific Island countries establish domestic violence restraining order legislation, these countries could also be specified.
- allow all other requests for registration to be made to a magistrate. If satisfied that the order is a domestic violence restraining order made under legislation of a similar kind to that which applies in Fiji where breach of an order is a criminal offence, the magistrate could approve registration of the order.

Questions:

133. Should the proposed domestic violence restraining order legislation make provision for registration in Fiji of similar orders made in other jurisdictions?

134. If so:

- **should orders made in New Zealand and Australia be eligible for 'automatic' registration? Are there any other countries that currently have similar domestic violence legislation in the region that should also be listed?**

- **should there be provision for an application for registration that can not be dealt with 'automatically' to be determined by a magistrate?**

135. Should Fiji take steps, once the proposed legislation is in place to establish registration arrangements for orders made in Fiji with other countries with similar legislation?

136. If so, which are the key countries and what priority should this receive?

150 For an example of the uniform provisions that apply in Australia see. Part 3 of the Domestic Violence Act, Northern Territory; also Part 5 - Domestic Violence Act 1995, New Zealand

3.12 Other issues

Section 3 of the current Discussion Paper has canvassed issues relating to the proposed domestic violence restraining order legislation.

Questions:

137. Are there other issues specifically relating to the proposed legislation that have not been canvassed in section 3 of this Discussion Paper?

138. If so, what are the issues and how should they be addressed?

4. Domestic violence and other civil laws and procedures

This section refers briefly to issues about the rights of victims of crime, the Family Law Act 2003 and invites comment about other areas of civil law that are considered particularly relevant to the legal response to domestic violence.

4.1 Victims rights

Discussion Paper 2 notes that Fiji currently does not have legislation or statement of intention about the rights of victims of crime. If a written commitment or legislation about the rights of victims of crime was established, this would include victims of domestic violence where the conduct is an offence under criminal law.

Questions about these issues are raised in Discussion Paper 2.

4.2 Family Law Act 2003

4.2.1 Background

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.

Once the Act commences the community and the legal profession will become more familiar with how the Act operates.

Several matters relating to the new Act so far as it relates to domestic violence are highlighted below. It is noted that the new Act, is largely modeled on the Australian Family Law Act at it was at the time that the 2003 legislation was drafted.

The Family Law Act 2003 contains definitions of 'family violence' and 'family violence order'. These definitions only apply to *Part VI – Children* of this Act.

The definitions are as follows:

> "family violence" – means conduct, whether actual or threatened by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family to fear for, or to be apprehensive about, his or her personal well-being or safety"
>
> "family violence order" means an order (including an interim order) made under a written law to protect a person from family violence"

As indicated above, the definitions are relevant only to Part VI of the Act which relates to children. The reference to 'family violence' is carried through in Part VI in the following ways:

- *In determining what is in a child's best interests* – s. 121 lists matters that the court must take into account in determining what is in the best interests of a child. Abuse or family violence is referred to in sub paragraphs (g), (i) and (j). These are:

  > (g) the need to protect a child from physical or psychological harm, caused, or that may be causes, by-
  >
  > (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
  > (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person
  >
  > (i) any family violence involving the child or a member of the child's family
  >
  > (j) any family violence order that applies to the child or a member of the child's family

- *Duty to inform the court of a family violence order* – s. 123 provides that a party to proceedings or another person who is aware of a family violence order relating to the child or a member of the child's family must inform the court about the order.

- *Risk of family violence* – s. 124 provides as follows:

  > 124(1) In considering what order to make, the court must, to the extent that it is possible to do so consistently with the child's best interest being the paramount consideration ensure that the order –

(a) is consistent with any family violence order; and
(b) does not expose a person to an unacceptable risk of family violence.

4.2.2 Parent / child contact and the risk to children

Part VI – Children in the Act begins with a statement objects and principles. The objects and principles are in s. 41.

> (1) The objects of this Part are –
>
> (a) to ensure that children receive adequate and proper parenting to help achieve their full potential; and
> (b) to ensure that parents fulfil their duties and meet their responsibilities concerning the care, welfare and development of their children.
>
> (2) The principles underlying these objects is that, except where it is or would be contrary to a child's best interests-
>
> (a) children have the right to know and be cared for by both their parents regardless of whether their parents are married, separated, have never married or have never lived together;
> (b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development;
> (c) parents share duties and responsibilities concerning the care, welfare and development of their children; and
> (d) parents should agree about the future parenting of their children

These objects and principles are the same as those in the Australian legislation. It is noted that Para 41(2)(b) refers to the right of the child to regular contact with both of their parents but this is subject to the words at the commencement of sub section (2), 'except where it is or would be contrary to a child's best interests'.

The Australian equivalent of s. 41(2)(b) has been heavily criticised on the basis of the effect on the safety of victims of domestic violence. The criticism relates to the level of emphasis on contact and that this is highly problematic where there is an ongoing risk to safety[151].

The equivalent of s. 124 (see above), in the Australian Family Law Act, is s. 68K which is in identical terms. Section 68K has 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.

151 Helen Rhoades, Reg Graycar, and Margaret Harrison, The Family Law Reform Act 1995: The first three years Final Report; Helen Rhoades, Reg Graycar, and Margaret Harrison The Family Law Reform Act 1995: Can changing legislation change legal culture, legal practice and community expectations? Interim Report, April 1999. Both are available on the Family Court of Australia web site at http://www.familycourt.gov.au Also see Kaye, M., Stubbs, J., and Tolmie, J. (2003) Negotiating Child Residence and Contact Arrangements Against A Background of Violence: Family Law Research Unit Working Paper No. 4. available at http://www.gu.edu.au/centre/flru

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 whom 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.

Section 16B provides that where an allegation is made in custody or access proceedings that a party has been violent towards a child, the court must as soon as practicable determine on the evidence presented whether the allegation of violence is proved. If the allegation is proved against a party to the proceedings the court shall not:[152]

> 16B (4) (a) Make any order giving the violent party custody of the child to whom the proceedings relate; or
>
> (b) Make any order allowing the violent party access (other than supervised access) to that child,
>
> unless the Court is satisfied that the child will be safe while the violent party has custody of or, as the case may be, access to the child.
>
> (5) In considering, for the purposes of subsection (4) of this section, whether or not a child will be safe while a violent party has custody of, or access (other than supervised access) to, the child, the Court shall, so far as is practicable, have regard to the following matters:
>
> (a) The nature and seriousness of the violence used:
>
> (b) How recently the violence occurred:
>
> (c) The frequency of the violence:
>
> (d) The likelihood of further violence occurring:
>
> (e) The physical or emotional harm caused to the child by the violence:
>
> (f) Whether the other party to the proceedings

152 S. 16B (4)

(i) Considers that the child will be safe while the violent party has custody of, or access to, the child; and

(ii) Consents to the violent party having custody of, or access (other than supervised access) to, the child:

(g) The wishes of the child, if the child is able to express them, and having regard to the age and maturity of the child:

(h) Any steps taken by the violent party to prevent further violence occurring:

(i) Such other matters as the Court considers relevant.

(6)Notwithstanding subsection (2) of this section, where, in any proceedings to which this section applies,

(a)The Court is unable to determine, on the basis of the evidence presented to it by or on behalf of the parties to the proceedings, whether or not the allegation of violence is proved; but

(b)The Court is satisfied that there is a real risk to the safety of the child,

the Court may make such order under this Act as it thinks fit in order to protect the safety of the child.

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.[153]

Questions:

139. Do you wish to make any comments about the provisions outlined above in the Family Law Act 2003 so far as they relate to domestic violence?

140. Do you think that it is too early to consider these possible amendments to the Family Law Act 2003 i.e. that any amendments should be left until the Act has been in operation for a reasonable time?

141. Do you consider that the approach of the New Zealand Guardianship Act 1968 to violence against children outlined above, is preferable to the approach in the Family Law Act 2003?

153 Chetwin. A., Knaggs, T., Young, T., The Domestic Violence Legislation and Child Access in New Zealand, Ministry of Justice, New Zealand, May 1999 Available at: http://www.justice.govt.nz/pubs/reports/1999/domestic_violence/acknowledge.html

4.2.3 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 as follows:

> s. 26. A court exercising jurisdiction under this Act must, in the exercise of that jurisdiction, have regard to:
>
> (a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;
>
> (b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while the family is responsible for the care and education of dependent children;
>
> (c) the need to protect the rights of children and to promote their welfare;
>
> (d) the means available for assisting the parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to the children of the marriage;
>
> (e) the Convention on the Rights of the Child (1989) and the Convention on the Elimination of all Forms of Discrimination Against Women (1979).

Principles (a) to (d) are the same as those in s. 43 of the Australian Family Law Act 1975. However, s. 43 of the Australian Act was amended in 1996 to add an additional principle namely:

> (a) the need to ensure safety from family violence

The principles in the Australian Family Law Act do not include principle (e) that is in the Fiji legislation. The Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women can be used in aid of the proposition that the Family Law Act 2003 should have include an overarching principle in s. 26 of ensuring safety from family violence.

Questions:

142. Would it be desirable at some point for s. 26 of the Family Law Act 2003 to be amended to include a principle about the need to ensure safety from family violence?

143. What priority should be placed on this?

144. Do you think that it is too early to consider this possible amendment to the Family Law Act 2003 i.e. that any amendments should be left until the Act has been in operation for a reasonable time?

4.2.4 Family Violence Strategy

The Family Court of Australia has recently released its Family Violence Strategy 2004-5. The strategy notes that

> Many provisions of the Family Law Act refer to aspects of family violence, and particularly to the responsibilities of the Court to protect children from its consequences. At a more general level, the Court is required to have regard to the need to protect individuals from harm and family violence. Such a provision acknowledges the close connection between family breakdown and violence, and recognises that the period surrounding and following separation may be particularly dangerous for adults and children. Empirical evidence shows that separation does not eliminate violence, nor does it provide protection from fear. It may in some cases, exacerbate abusive behaviour[154]

The Strategy notes the effects of family violence on children and on adults.

The Guiding principles of the Strategy are:

1. *Primacy of safety*
   All who attend court and work on its premises should be safe.

2. *Recognition of the impact of family violence*
   Family violence may occur prior to, during and after separation and may impact on clients' capacity to effective participate in court events.

3. *Recognition of the impact of violence on children*
   Family violence has a significant impact on the well being of children.

4. *Recognition of the diversity of court clients*
   The court is committed to ensuring that it continues to be responsive to the range of specific needs of diverse client groups.

5. *Risk assessment approach*
   A risk assessment approach to the conduct of all court events is required to support a safe environment.

6. *Importance of information provision*
   Relevant, accurate and comprehensive information on the court's responses to family violence should be widely available and produced in a range of formats to

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meet the need of the Court's diverse client base.

7. *Community partnership approach*
   Partnerships between the Court and a wide range of organisations, agencies and community groups is essential for the success of the Family Violence Strategy.

8. *Importance of development programs*
   Ongoing support to judicial officers and staff through the provision of development programs and access to current research on family violence issues is an important factor in assuring the success of the Family violence Strategy.

The strategy addresses each of the following key areas:

1. *Information and communication* – this deals with providing information to the community about how the Court deals with family violence, safety issues at court, court support and liaison with community reference groups.

2. *Safety* – this deals with the management of security including in and around court buildings, listing practices and security awareness for staff including Judges

3. *Training* – this deals with the development of a family violence training plan for new and existing staff including issues that relate to particular groups in the community.

4. *Resolving the dispute* – this deals with the conduct of dispute resolution services in cases involving family violence and, screening methods

5. *Making the decision* – this deals particularly with expert evidence about domestic violence being available in court proceedings and case management of cases involving serious allegations of partner violence.

Questions:

145. Should the Family Divisions of the High Court and Magistrates' Court aim to develop a Family Violence Strategy?

146. If so, what matters in addition to those that are dealt with in the Australian example given above should be included?

147. What, if any, matters dealt with in the Australian example should not be included?

4.3 Other civil legislation and procedures

This Discussion Paper has canvassed issues relating to the civil justice response to domestic violence. There are two other Discussion Papers in relation to this reference:

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

Questions:

148. Are there additional issues relating to the civil justice response to domestic violence that you wish to raise?