FIJI LAW REFORM COMMISSION

Domestic Violence Reference

Discussion Paper Two: Legal Response to Domestic Violence: Criminal Justice System

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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 2

Legal Response to Domestic Violence:

Criminal Justice System

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 Chief Executive Officer, 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. Reforming the legal response to domestic violence

From the discussion that follows it will be seen that some of Fiji's laws that relate to domestic violence appear to reflect values and approaches of an earlier time. Reform of law and procedures may also be needed to correct unhelpful practices.

An effective legal response to domestic violence involves the criminal and civil justice systems. The law that is applied by each is an essential element. The law needs to operate on at least, two levels. That is:

- to provide a firm and effective legal response in individual cases, and
- to project a clear picture about how domestic violence is viewed to the community.

Modern legal responses to domestic violence

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

This Discussion Paper deals with the criminal justice system and Discussion Paper 3 deals with the civil justice response. Additional issues relevant to both are in Discussion Paper 1.

This Discussion Paper about the criminal justice response, looks first at existing law. It then moves onto each of the steps involved from the initial police response to an incident through to conviction and sentencing.

Note about the separate Penal Code and Criminal Procedure Code Review
The Fiji Law Reform Commission also has a separate reference to review the Penal Code and the Criminal Procedure Code.

This review will begin in December 2004. The objectives of the review are:

- to review the Penal Code and the Criminal Procedure Code (PC/CPC) to update and recommend changes in relation to offences, penalties/punishment, jurisdiction, defences and criminal procedures, and related matters, and
- to ensue fair trial and protection of the rights of people accused of a criminal offence and to ensure fair, effective, speedy and efficient procedures for investigation and prosecution of offences.

There is some overlap between the PC/CPC review and the current review in relation to domestic violence. However, the current review provides the opportunity to look at issues that *specifically relate* to domestic violence.

Examples of aspects of terms of reference for the PC/CPC review that are also relevant to the current reference so far as they relate to domestic violence are:

- the law relating to the competency and compellability of spouses
- penalties and sentences
- penalty options including community work orders and other types of sentences
- conduct of criminal investigations by police
- the use of technology to take evidence at a distance
- alternative dispute resolution, such as reconciliation and family group and victim/offenders conferences

The terms of reference for PC/CPC review are set out Attachment 1 to Discussion Paper 1- Legal Response to Domestic Violence: Context and Approach.

2. Domestic violence – how effective is Fiji's criminal law?

2.1 Introduction

In this Discussion Paper, and also in Discussion Papers 1 and 3, issues are raised that point to the likely need for improvement in ways that Fiji's criminal justice system currently responds to cases of domestic violence.

Research referred to in Discussion Paper 1 points to a high level of underreporting of domestic violence. That is, the indications are that the cases that are reported to police and those where charges are laid are only part of the overall picture.

Police statistics about domestic violence cases in the period 1993-1997 are set out in Discussion Paper 1, under *Nature and prevalence of domestic violence*. Those statistics show a spread of charges for offences against the person. However by far the majority of charges were for assault causing actual bodily harm (1548 charges), followed by common assault (429 charges) and acting with intent to cause grievous bodily harm (186 charges). No charges relating to property (e.g. property damage) were listed, perhaps due to statistical collation methods.

The FWCC Study involved sampling Police files at 10 Police stations for a five year period. The following table shows the outcomes of the domestic violence cases reported to Police in the sample for the period 1993-1997:[1]

Outcome	**Male perpetrators**		**Female perpetrators**		**Total**	
	Number	**%**	**Number**	**%**	**Number**	**%**
Reconciliation	559	45.5	20	32.8	579	44.9
Bail	201	16.4	12	19.7	213	16.5
Fine	177	14.4	5	8.2	182	14.1
Discharged	117	0.5	14	23.0	131	10.2
Imprisonment	102	8.3	6	9.8	108	8.4
Withdrawn	32	2.6	0	0	32	2.5
Unknown	41	3.3	4	6.5	45	3.5
TOTAL	1229	100	61	100	1290	100

The report stated that of the 559 cases of male offenders that had an outcome of 'reconciliation', 94 (17%) of them carried a sentence as well, such as a fine, or a custodial or suspended sentence. This means that in 464 (83%) of these cases that had an outcome of reconciliation, there was no penalty.

The FWCC also noted that the imprisonment category included suspended as well as custodial sentences and the bail category included cases still pending investigation or sentencing.

1 FWCC, 2001 p. 47

2.2 Penal Code - criminal offences

The Penal Code lists criminal offences and maximum penalties for each offence. The following are examples of criminal offences that may be committed in the context of intimate partner violence:

Offences against the person	Property offences
• common assault • assault causing actual bodily harm • grievous harm • unlawfully wounding • kidnapping, abduction • rape • abduction • indecent assaults • unnatural offences • criminal trespass • murder and manslaughter	• arson • burglary, house –breaking and similar offences • destruction, damage, vandalism of premises • stealing property offences

These examples also apply to offences that may be committed by another relative in the home, in boyfriend/girlfriend relationships, in carer and other household relationships.

A child may be present when an offence occurs or may be the direct victim. Examples of additional criminal offences that may be committed towards children in the home are:

- defilement
- incest
- failure to provide the necessaries of life
- infanticide

Additionally, s. 57 of the Juveniles Act (Cap 56) makes it a criminal offence for a person over the age of 17 who has the care of any juvenile to willfully assault, ill-treat, and neglect a juvenile causing suffering or injury.

There is currently no definition of 'domestic violence' in the Fiji Penal Code or the Juveniles Act and the words 'domestic violence' or similar do not appear.

As noted above, the statistics indicate that the most common criminal charges in matters that are committed in the context of domestic violence, in order of frequency are:

Assault causing actual bodily harm – this involves physical injury to the victim. The maximum penalty is five years in prison (Section 245 of Penal Code).

Common assault – this means hitting, punching, and beating, kicking, threatening or touching another person. There does not have to be bodily injury. The maximum penalty is one year in prison. (Section 244 of Penal Code)

Grievous harm – this is when a person unlawfully and maliciously harms another person causing serious injury. The maximum penalty is seven years in prison. (Section 227 of Penal Code).

2.3 Should there be a criminal offence of 'domestic violence'?

As noted above, there is currently no offence of 'domestic violence' in the Penal Code. It is also noted above that offences committed in the context of domestic violence that breach existing criminal law can be charged and prosecuted under existing criminal law.

There are however at least three measures that might be taken in relation to the Penal Code. That is:

- creating a criminal offence of breach of a domestic violence protection order
- inserting a definition of 'domestic violence offence' as a definitional reference point, and
- creating a specific criminal offence of 'domestic violence' with its own penalty.

Each of these possibilities are now discussed.

2.3.1 Criminal offence of 'breach of a domestic violence protection order'

Discussion Paper 3 deals with the possibility of introducing a Domestic Violence Act. This legislation would establish a simple and quick civil process for courts to make a 'domestic violence restraining order'.

These are restraining orders directing a person not to assault, threaten or harass another person with whom they are, or have been, in a family or domestic relationship.

This order may be made without criminal charges being laid or where criminal charges are laid. A domestic violence restraining order would provide clear boundaries for the perpetrator. If the perpetrator complied with the order there would be no penalty but if it is breached that breach would be a new criminal offence. That is, the new offence of 'breach of a domestic violence protection order'.

This new offence could be set out in the Domestic Violence Act or in the Penal Code. This is discussed further in Discussion Paper 3.

2.3.2 'Domestic violence offence' defined as a reference point

Separate to the suggested new criminal offence of 'breach of a domestic violence protection order', there are many reasons to consider adding a definition of 'domestic violence offence' to the Penal Code.

These are that a *definition* of 'domestic violence offence' would provide a reference point for any special measures that aim to relate specifically to criminal offences committed in the context of domestic violence. The definition of 'domestic violence offence' could list relevant sections of the Penal Code, and define those that are committed in the context of domestic violence as 'domestic violence offences'.

Example 1 - Penalty – Penal Code
If it was considered that further guidance was needed about matters to be taken into account by the court in determining the penalty to impose, the definition of 'domestic violence offence' could be the reference point.

The following is an example of how the definition of domestic violence offence could then be used:

> # Where a *domestic violence offence* is proved, the court must take into account the following in determining the penalty to be applied:
>
> a) Damage, injuries or loss suffered by the victim as a result of the offence
> b) Whether a child or children witnessed the offence
> c) The effect of the offence on the victim's emotional, psychological and physical well being
> d) Etc [the full provision would be drafted]

Example 2 – Reconcilable offences – Criminal Procedure Code
Section 163 of the Criminal Procedure Code (dealt with in detail below) provides that certain criminal offences, including assault causing actual bodily harm, are 'reconcilable'. This singles out the offences listed in the section for a particular approach by the court. If there was a decision that s. 163 should not apply to criminal offences committed in the context of domestic violence, or to insert additional provisions about these matters, the definition of 'domestic violence offence' could be the reference point.

The following is an example of how the definition could be used in drafting if the intended result was to stop s. 163 applying in domestic violence offences:

> "163A Section 163 does not apply in relation to a domestic violence offence as defined in section # of the Penal Code"

Example 3 – Police Powers – Criminal Procedure Code
Currently, police lack a clear statutory power to enter premises without a warrant where they believe on reasonable grounds that domestic violence is occurring. A way

of expressing this, as an amendment to the Criminal Procedure Code, is as follows:

> #A police officer may enter premises without a warrant where the officer believes on reasonable grounds that a *domestic violence offence,* is being committed, or is about to be committed, in the premises.
>
> # *Domestic violence offence* has the meaning given by section # of the Penal Code.

Example 4 – Police and Court Bail
Similarly, if specific provisions about bail are required, amendments could be made to the Bail Act again using the term 'domestic violence offence'. For example:

> #Where a person is charged with an offence that is a domestic violence offence the following additional considerations apply:

Example 5 – Guidelines of various kinds
Finally, a central definition of 'domestic violence offence' would provide for ease of reference for guidelines that are independently applied by a range of agencies. For example:

- Prosecution Guidelines
- Force Routine Orders (binding written orders to Police issued by the Commissioner of Police)
- Legal Aid Commission Guidelines
- Department of Social Welfare policies about a range of matters
- Interagency Protocols (e.g. between the Police and Department of Health).

2.3.3 Possible definition of 'domestic violence offence' as a reference point

The discussion above explains the use of a definition of 'domestic violence offence' as a reference point for various purposes.

This section provides a possible definition of 'domestic violence offence' to be added to the Penal Code. Words in this draft that are also defined are shown by underlining.

> "domestic violence offence" means:
>
> a) a personal violence offence committed by the offender against a person with whom the offender is or has been in a family or domestic relationship, or
>
> b) the offence of breach of domestic violence restraining order under section # of the Domestic Violence Act
>
> *"personal violence offence"* means any of the following offences: [relevant sections of the Penal Code would be specified here or reference would be made to a new schedule to the Penal Code. Examples of offences that would be included in the definition are: common assault, assault causing actual bodily harm, grievous harm, unlawful wounding, and rape]

"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.

"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

provided that, where the person against whom the offence was committed was or is the de facto spouse of another person the relationship of other family member is to be determined as if the de facto spouse relationship was or is a marriage relationship[2]

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

Questions:

1. What are your views about the possibility of a *definitional reference point* in the Penal Code for the term 'domestic violence offence'.

2. Is the draft definition of domestic violence offence' suitable? If not, what adjustments should be made? For example, does the definition adequately describe 'other family members'

2.3.4 Specific criminal offence of 'domestic violence' with its own penalty

As set out above, the Penal Code does not contain a specific *criminal offence* of domestic violence. However many offences against the person set out in the Penal Code can be committed in the context of domestic violence. Each offence in the Penal Code has a maximum penalty ascribed to it. Penalties increase in severity with the seriousness of the offence.

2 This drafting ensures that a de facto wife is attacked, for example by a relative of her de facto husband, would be covered by the provision. The effect of this provision is not to convert de facto marriages into marriages.

Additionally, the possibility of establishing a new criminal offence of 'breach of a domestic violence restraining order' has been noted and this is dealt with further in *civil justice responses to domestic violence*, below.

It is difficult to see how a new criminal offence of 'domestic violence' with its own penalty, could operate. This is because offences that are committed in the context of domestic violence range from common assault to murder. Adding an offence of 'domestic violence' with its own penalty is likely to cause confusion or have no practical value. The latter because offences can already be charged under other provisions.

Some might argue that having a specific criminal offence of 'domestic violence' would help to send a message to the community that domestic violence is wrong and it is a criminal offence. However, this can also be achieved by inserting a definition of 'domestic violence offence' (as discussed above) to provide a definitional reference point.

Questions:

3. Do you think that there should be a new criminal offence of 'domestic violence' in the Penal Code? If so, how would this operate and what should the penalty be?

2.4 Stalking offence

The FLRC made recommendations about the need to introduce an offence of stalking in the Reform of the Criminal Procedure Code and Penal Code – The Sexual Offences Report 1999.

In that Report the Commission noted that while section 330 of the Penal Code deals with criminal intimidation that specific forms of behaviour like loitering outside someone's house or following the person were not adequately covered by the section.

The Commission recommended that:

- the erotomaniac[3] must be dealt with by restraining order which should cover apprehended harassment as well,
- that a section prohibiting stalking should be inserted into the Penal Code with a maximum sentence of 3 years imprisonment[4]

3 a person who has a delusional believe that the subject (victim) loves them

4 ibid p. 70 & 72

The recommended changes have not yet been made and the issue of stalking is discussed again here in order to seek up to date input. The recommendation about restraining orders is taken up in Discussion Paper 3 while the following section deals with the proposed criminal offence of stalking.

In the 1999 Report the Commission noted that:

> The methods employed by people who stalk involve a series of actions which are in themselves unlawful, such as making obscene phone calls, using threatening language and committing acts of violence. On the other hand, stalkers frequently exhibit behaviour which is perfectly legal and socially acceptable in isolation. But this harmless conduct such as following someone or sending gifts can be intimidating if done persistently and against the will of another person. Taken together, and in the context of the relationship between the stalker and the subject, seemingly innocuous behaviour becomes wrongful and dangerous. Subjects of stalking can often suffer from emotional distress, anxiety and fear that seriously disrupt their day-to-day activities and enjoyment of life. As a result of stalking many subjects avoid public places and some lose their jobs or are eventually forced to move'[5].

Common examples of stalking are:

- repeated unwanted communication with another person,
- repeatedly following another person, and
- watching a person's home or workplace and threatening conduct

The frequency and magnitude of the conduct typically escalates and ultimately stalking may intensify to physical violence and homicide.

Ways of categorising stalking behaviour vary. One categorisation is as follows:[6]

> There are at least four categories of stalkers, although potential for aggressive behaviour may differ between individuals within categories and categories overlap. Some stalkers display two or more category profiles.
>
> - *erotomania* - erotomania is the presence of a persistent erotic delusion that one is loved by another
> - *borderline erotomaniacs* - borderline erotomaniacs have developed intense emotional feelings towards other individuals who they know do not reciprocate their feelings and they usually have some history of actual emotional engagement with the object of their attention.
> - *former intimate stalkers* - have an actual history of emotional dependence upon their target partner that is severed when the relationship is terminated.

5 p. 61, Reform of the Criminal Procedure Code and Penal Code – The Sexual Offences Report 1999, FLRC

6 B. A MacFarlane Q.C., People Who Stalk People, 31 UBC Law Review 37 (1997)

- *sociopathic stalkers* - in general, do not seek to initiate or maintain an interpersonal relationship with their victim and generally determine the characteristics of the "ideal victim", then seek out a person who fits the criteria selected.

In a study of the link between stalking and domestic violence, Douglas and Dutton found that:

> '…most stalkers who target ex-intimate partners are … similar to a type of batterer labeled "borderline/cyclical." Both domestic stalkers and borderline/cyclical batterers possess traits of Cluster B personality disorders. These traits include emotional volatility, attachment dysfunction, primitive defenses, weak ego strength, jealousy, anger, substance abuse, and early childhood trauma. Further, both groups have been observed to react with rage to perceived or actual rejection or abandonment'[7].

Framing the offence

A recent study of variations in criminal anti-stalking legislation[8] has pointed to the problems that can be created by trying to provide sanctions that are based only on descriptions of what may constitute stalking (listing prohibited behaviours). This is because what constitutes stalking can vary substantially. Also, trying to prove the stalkers motive or intention is frequently difficult[9].

Additionally, laws that talk about the number of times that particular behaviour must be repeated (e.g. in terms of expressions about frequency) were identified as problematic.

> "Stalking laws differ not only with regard to what behaviours comprise stalking but also with regard to the minimum number of occasions required before a person's conduct is considered to constitute "stalking" and the issue of stalker intent. Some laws do not specify the minimum number of occasions (e.g., Nevada) whilst other laws prescribe that there must be at least two occasions (e.g., Colorado), three occasions (e.g., New York), or more than three occasions (e.g., Delaware). In England and Wales no intent is required but harassment is considered present "if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other[10]".

Blaauw, Sheridan and Winkel reviewed five studies from different countries (two from the USA and one each from Australia, Netherlands, and UK) that looked at features of stalking behaviour:

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7 Assessing the link between stalking and domestic violence, Douglas K.S.; Dutton D.G.
Aggression and Violent Behavior, A Review Journal, November 2001, vol. 6, no. 6, pp. 519-546(28) Elsevier Science

8 Designing Anti-stalking Legislation on the Basis of Victims' Experiences and Psychopathology
Blaauw E.; Sheridan L.; Winkel F.W. Psychiatry, Psychology and Law, 1 May 2002, vol. 9, no. 2, pp. 136-145(10), Australian Academic Press

9 ibid at p. 137: '..in California it is necessary to establish that the stalker intended "to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family". In Queensland it is necessary to establish that the stalker intended to make "the second person be aware that the course of conduct is directed at the second person" '

10 ibid p. 137

Table 1

Features of Stalking Behaviour (%) in Five Studies

STALKING BEHAVIOUR	BLAAUW et al., 2002	BREWSTER, 1997	HALL, 1998	PATHÉ & MULLEN, 1997	SHERIDAN et al., 2001
Telephone calls	86	90	87	78	88
Harassing letters	43	59	50	62	72
Surveillance of victim's home	75	54	84	—	—
Following	75	68	80	71	83
Unlawful entry in home	43	36	39	—	—
Destruction of property	71*	44	43	36	71*
Direct unwanted approach	93	—	—	79	74
Physical assault	61	46	38	34	38
Threats to harm or kill victim	45	53	41	51	—

Note: *Including theft of property.

The review recommended against limiting the description of behaviours, that may amount to stalking, only to 'core stalking behaviour'

> '…in rare cases victims are exposed to only relatively unusual stalking behaviours, such as abduction of pets, ordering of taxis, circumvention of alarms, et cetera, which would make their experiences non-enforceable if anti-stalking legislation prescribed only "core" behaviours'[11].

In relation to intent, Blaauw, Shreridan and Winkel recommended that anti stalking legislation should *not rely on proving intent* but rather include a provision to the effect that "if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other'.

The question of intent in relation to stalking has recently been considered by the NSW Law Reform Commission. The Commission recommended that the requirement of intent should be retained in NSW because the mental element was a standard aspect of criminal culpability[12].

In its 1999 Report, the Fiji Law Reform Commission recommended that the following provision be inserted into the Penal Code to establish a criminal offence of stalking:

Stalking
(1) A person who stalks another person:

a) with the intention of causing serious harm to the other person or a third person; or
b) with the intention of causing the other person or a third person apprehension or fear of serious harm

is guilty of an offence.

Maximum penalty: 3 years

11 ibid p. 139 & 142

12 NSW Law Reform Commission - Report 103 (2003) Apprehended violence orders. See Chapter 12 Stalking and Intimidation Available online at http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r103chp12

(2) A person stalks another if on at least two separate occasions that person:

a) follows the other person; or
b) loiters outside the place of residence of the other person or some other place frequented by the other person; or
c) telephones the other person; or
d) enters or interferes with property in the possession of the other person; or
e) gives or sends offensive material to the other person, or leaves offensive material where it will be found by, given to or brought to the attention of the other person; or
f) keeps the other person under surveillance; or
g) acts in a way that could reasonably be expected to arouse the other person's apprehension of fear.

Question:

4. Given the difficulties that can arise in trying to prove why a stalker has been stalking the victim, should a new Penal Code offence of stalking require proof of intention?

5. As an alternative to proof of intention, should the new law instead place emphasis on the effect of the behaviour on the victim and whether the accused should reasonably have known that the behaviour could arouse the victim's apprehension of fear?

6. Should there be a reference to the number of times the behaviour must happen before the offence can be proved or is it sufficient that the accused should reasonably have known that the behaviour could arouse the victim's apprehension of fear?

2.5 Compellability of spouses in domestic violence cases

It is noted that the competence and compellability of spouses in criminal matters will also be considered by the FLRC as part of its reference on the Penal Code and Criminal Procedure Code that begins in December 2004.

The purpose of the discussion that follows is to seek input about whether the current law, that provides that a married person is not a compellable witness against their spouse in criminal proceedings, should be changed so that the victim spouse can be compelled to give evidence in criminal proceedings.

It is important to note, that this section is only dealing with whether the current legal bar should be lifted. This is a separate question to whether a victim spouse should be compelled to give evidence in a particular case. The latter issue is dealt with under Hard or Soft 'No Drop' Prosecution, below.

Current law

Under common law the general rule was that a spouse was not competent as a witness for or against the other spouse[13]. The confidential nature of the marital relationship is the reason given for the rule. However a clear exception to the common law rule was criminal charges involving personal violence by the accused against the spouse. In these cases the victim spouse was *competent* to give evidence (that is, was legally able to do so) but the victim spouse could still not be compelled to do so (be required to give evidence).[14]

Section 138 of the Criminal Procedure Code provides that 'in any inquiry or trial the wife or husband of the person charged shall be a competent witness for the prosecution or defence without the consent of such person…' where:

- the spouse can be called as a witness under another law
- the charge is for an offence against morality[15]or for bigamy, or
- the charge is for an offence committed against the person or property of the spouse or the children of either of them.

However, while this section makes a spouse competent it does not follow that a spouse is compellable.[16]

Additionally, in relation to marital communications, section 145 of the Criminal Procedure Code provides that:

> 'nothing in this section shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made by her to her husband during the marriage'

The effect of these provisions is that where a person is charged with a criminal offence involving domestic violence against their married spouse:

- the victim spouse can choose to give evidence but can not be *required* to give evidence, and
- the victim spouse can not be *required* to give evidence about marital communications.

Also in proceedings under the Matrimonial Causes Act where a married couple are the parties they are competent and compellable witnesses in *the proceedings* and competent and compellable to disclose communications made between them during the marriage.[17] However, section 5 of the Matrimonial Causes Act provides that

13 Bentby v Croke (1784) 99 ER 729; Davis v Dinwoody (1792) 100 ER 1241

14 See for example: Cross on Evidence, 6th edition, Chapter 7 Competence and Compellability of Witnesses

15 That is an offence under Chapter VXII of the Penal Code, examples are rape, indecent assault, defilement, unnatural offences, and incest

16 Leach v R [1912] AC 305 at 311

17 s. 94 Matrimonial Causes Act. There is a similar provision in s.188 of the Family Law Act 2003

where there are proceedings under the Act and the court has adjourned proceedings to enable the parties to consider reconciliation:

> "Evidence of anything said or of any admission made in the court of an endeavour to effect a reconciliation under this Part is not admissible in any court or in proceedings before a person authorized by law, or by consent of the parties, to hear and examine evidence"[18]

Section 5 covers two situations, first where there has been an adjournment for the parties to discuss reconciliation themselves and second where there has been an adjournment and the court has nominated a welfare officer or other suitable person to assist the parties to discuss reconciliation. Under the Family Law Act 2003 privilege relates only to the second of these.[19] This means that subject to possible argument about the common law concerning parties to a marriage, statements made to discuss reconciliation between the parties themselves will not be subject to privilege.[20]

For completeness, it is also noted that in proceedings under the Maintenance and Affiliation Act 'with respect to deserted wives', the wife and husband are competent and compellable to give evidence on their own behalf and for or against the other.[21]

Examples of approaches to addressing compellability

Many jurisdictions have addressed the issue of spouse compellability.[22] The following are examples of the range of approaches:

Compellable – blanket provision e.g. Queensland and Northern Territory

In criminal proceedings in Queensland and the Northern Territory the husband or wife of the accused is competent and compellable generally and in relation to communications between the husband and wife during the marriage.[23]

Compellable – list of offences approach e.g. Western Australia & UK

Section 9 of the Evidence Act 1906 (WA) provides that the spouse or ex-spouse of the accused in criminal cases is compellable to give evidence on behalf of the prosecution if the defendant is charged with a specified offence. The list of specified offences includes assaults and a wide range of offences against the person. The spouse is also

18 s.5 Matrimonial Causes Act

19 s.13 Family Law Act 2003

20 In this regard it is noted that there is judicial authority to the effect that marital privilege does not exist in common law, that it was created by particular statutes and is limited to circumstances contained in statute. Shenton v Tyler [1939] Ch 620, 635 (Greene MR); 652 (Luxmoore LJ); Ruping v DPP [1964] ACT 814; [1962] 3All ER 256. Also see Cross on Evidence, Chapter 13 – Privilege particularly at [25200]

21 s. 28 Maintenance and Affiliation Act

22 For a general discussion see Spousal competence and compellability in criminal trials in the 21st century, Wendy Harris, [2003] QUTLJJ 23 Web: http://www.austlii.edu.au/au/journals.OLD/QUTLJJ/2003/23.html

23 s.8(5) Evidence Act 1977 (Queensland); s. 9(5) and (6) Evidence Act (NT)

compellable if the defendant is charged on the complaint of the spouse in respect of the spouse's property.

Section 80 Police and Criminal Evidence Act 1984 (UK) provides that in criminal proceedings spouses are competent and compellable to give evidence for the prosecution in cases that involve: an allegation of violence against the spouse or a person under the age of 16; an alleged sexual offence against a person under the age of sixteen years; or attempting, conspiring or aiding and abetting, counselling and procuring to commit the offences in the categories above.

Compellable subject to order of the court – e.g. New South Wales, South Australia, Victoria, Tasmania, Commonwealth Evidence Act

Legislation in New South Wales[24], South Australia[25], Victorian[26], Tasmania[27] and federal legislation,[28] contains similar provisions to the effect that in a criminal matter a spouse, as well as others in a close personal relationship with the accused, is a compellable witness for the prosecution unless the court orders otherwise.

For example, section 18 of the NSW Evidence Act 1995 provides that in criminal proceedings where a person is to be called as a witness for the prosecution, the person may object to giving evidence or object to giving evidence of a communication between the person and the defendant, if at the time they are called to give evidence they are the spouse, de facto spouse, parent or child of the defendant. Where an objection is made the person must not be required to give the evidence if the court finds that:

> "(a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the defendant, if the person gives the evidence, and
>
> (b) the nature and extent of that harm outweighs the desirability of having the evidence given."[29]

The section goes on to provide matters that the court must take into account in deciding if the person will be required to give evidence. This includes: the nature and gravity of the offence; the importance of the evidence that might be given by the person; the nature of the relationship between the defendant and the person; and, whether the giving of evidence would involve the person disclosing something that was received in confidence from the defendant.[30]

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24 s.18 Evidence Act 1995 (NSW)

25 s.21 Evidence Act 1929 (SA)

26 s.400, Evidence Act 1958 (VIC)

27 s.18 Evidence Act 2001 (TAS)

28 s.18 Evidence Act 1995 (Cth)

29 s.18(6) NSW Evidence Act 1995 No. 25

30 s.18(7) NSW Evidence Act 1995 No. 25

Arguments about compellability of married spouses in criminal matters involving domestic violence

Arguments for making the married victim of domestic violence a compellable witness for the prosecution:

- where the prosecution is dependant on the victim's evidence (e.g. there was no one else present when the offence took place and the defendant has not made admissions) and the victim declines to give evidence, lack of compellability means that the prosecution will fail and there is nothing that the court or the prosecution can do about it. This includes situations where the offence was very serious and where it appears that the victim continues to be at risk.
- in most relationships involving domestic violence there is a power imbalance and the offender is likely to have substantial influence over the victim. Removing the decision about whether to testify from the victim enables the victim to 'break away' from the perpetrator's control because the decision is not one for the victim alone.
- by removing the choice from the victim, the police and prosecution may consider that there is more point in proceeding because a prosecution will be more likely. That is police and prosecutors may respond more effectively in domestic violence cases.

Arguments against making the married victim of domestic violence a compellable witness for the prosecution

- the law should leave the choice about whether to testify to the victim spouse. To avoid the possibility of a victim spouse being compelled the rule against compellability should not be changed,
- if victims of domestic violence think that the choice about whether to testify and whether the prosecution will proceed will be removed from them, victims may not seek assistance from police in the first place or cooperate with the offender being charged,
- the parties may be working towards reconciliation and despite the criminal act the victim may not want the prosecution to proceed. The victim's wishes should be respected. Because there is no circumstance in which the wishes of the victim should be overridden by the prosecution the bar on compelling the victim spouse to testify should remain.

Questions

7. Should the law be changed so that a victim of domestic violence who is married to the alleged offender can be required to give evidence for the prosecution against the defendant?

8. If so, should this be done by:

- ***a blanket approach* i.e. husbands and wives would be compellable witnesses for the prosecution if their spouse is charged with a criminal matter**

- ***a list of matters approach*** **i.e. compellable but only in certain kinds of matters. That is, criminal matters where a spouse is the victim of an offence against the person committed by their spouse.**

- ***compellable subject to order of the court*** **i.e. subject to the court deciding otherwise in a particular case. This would involve setting out a list of matters that the court should take into account in making a decision**

2.6 Criminal defences

2.6.1 Provocation

Section 203 of the Penal Code provide that where a person unlawfully kills another and the circumstances would constitute murder but the act which causes death is done 'in the heat of passion caused by sudden provocation. and before there is time for his passion to cool' he is guilty only of manslaughter.

Provocation is defined in s. 204 to mean:

> ".. except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.
>
> When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault'.

Cases where the defendant has killed in the context of a domestic violence and relies on the defence of provocation to reduce the offence to manslaughter are based on the key concept of how an 'ordinary person' would respond. That is whether an 'ordinary person' would also be 'deprived of the power of self-control' (etc. as per s. 204 above). The defence of provocation in cases involving domestic homicides tends to produce assertions such as:

- that an ordinary man hearing that his wife has committed adultery may in the particular circumstances loose control and respond in the way that the defendant did[31]

31 In State -v- Anand Dinesh Mani & Anr. HAC005 of 2000S, the defendant was sentenced to six years imprisonment for manslaughter on the ground of provocation. In that case the provocation was that the offender discovered that his girlfriend had another boyfriend, a fight resulted in the course of which the defendant killed the boyfriend with a knife. The Judge said that in this case 'the provocation was not minimal'.

- that an ordinary man whose wife refuses to serve him dinner and then talks back to him may in particular circumstances loose control and respond in the way that the defendant did[32]

The requirement in s. 203 that the act must occur 'in the heat of passion caused by sudden provocation, and before there is time for his passion to cool' applies a small 'window' in which the defence of provocation operates. That window is based on a 'male' response to provocation.

This was accepted, for example, in New South Wales in 1982 when provisions that were similar to s. 203 and 204 were replaced. The lead up to these reforms included a number of cases where women had killed their violent and abusive spouses after a long history of abuse against them and/or their children[33]. These cases highlighted that provocation could occur though a series of acts over a period of time and that the *time for the passion to cool* was not necessarily a short period just after the most recent event.

Section 23 of the NSW Crimes Act is as follows:

23 Trial for murder—provocation

(1) Where, on the trial of a person for murder, it appears that the act or omission causing death was an act done or omitted under provocation and, but for this subsection and the provocation, the jury would have found the accused guilty of murder, the jury shall acquit the accused of murder and find the accused guilty of manslaughter.
(2) For the purposes of subsection (1), an act or omission causing death is an act done or omitted under provocation where:
  (a) the act or omission is the result of a loss of self-control on the part of the accused that was induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused, and
  (b) that conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased, whether the conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.

32 In Baram Deo v The State (May 1990) Court of Criminal Appeal No 10 of 1998 on appeal from the High Court (Labasa) the Fiji Court of Appeal heard an appeal against conviction and sentence on 4 counts of murder and 1 count of causing grievous harm. The deceased were the appellant's four young children and the count of grievous harm related to his wife (reduced from attempted murder). He had been sentenced to life imprisonment on each of the 4 counts of murder. The appellant contended that he was drunk and he got uncontrollably angry when his wife refused to dish out food to him and when he asked her to leave the house she told him that the house and everything in it belonged to her. He then poured kerosene on the floor of the house and lit it. The four children died in the fire and the wife was injured when she tried to stop the husband and her clothes caught alight. The appeal was based on several grounds including provocation. In relation to provocation the appellant argued that ' the impact of refusal to serve food to the appellant by the wife when he was in a state of intoxication ought to have been stressed to the assessors'. The Court of Appeal examined the summing up and directions given by the Judge at the trial. This included the following statement by the Judge: "However if you consider that the accused might have been insulted by wife's refusal to dish out his meal coupled with her insulting remarks that he serve himself if he wanted to eat and that the house and its contents were all hers and he could leave if he wished then you may accept that there was an act of provocation". The Judge also noted that the wife denied that she has refused to dish out dinner or made the alleged insulting remarks and went on to state that if the accused was believed and he was insulted by his wife's remarks ' then was that an insult of such a nature as to be likely when done to an ordinary person to cause him to lose his self control and do what the accused did?' The Court of Appeal held that there was no error in the summing up and the appeal failed on all grounds.

33 R Graycar & J Morgan, The Hidden Gender of the Law, Federation Press, NSW, 1990

(3) For the purpose of determining whether an act or omission causing death was an act done or omitted under provocation as provided by subsection (2), there is no rule of law that provocation is negatived if:
   (a) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission,
   (b) the act or omission causing death was not an act done or omitted suddenly, or
   (c) the act or omission causing death was an act done or omitted with any intent to take life or inflict grievous bodily harm.

(4) Where, on the trial of a person for murder, there is any evidence that the act causing death was an act done or omitted under provocation as provided by subsection (2), the onus is on the prosecution to prove beyond reasonable doubt that the act or omission causing death was not an act done or omitted under provocation.

(5) This section does not exclude or limit any defence to a charge of murder.

Provocation is dealt with in section 169 of the New Zealand Crimes Act 1961 in a similar way to that in NSW.

Writing about the 'old' law of provocation that still applied in some Australian jurisdictions in 1994, the Australian Law Reform Commission in its report on Equality Before the Law stated (relevant footnotes included):

> 12.5 A person may be partially excused for killing another because of the doctrine of provocation. To establish provocation at common law a defendant must establish that she/he had a sudden and temporary loss of control caused by the victim's acts or words, that is, she/he acted in the heat of passion[34]. The classic situation in which provocation has been raised is where a man kills either his wife or her lover because of her adultery[35]. Submissions criticised the formulation of the defence to partially excuse men who kill their partners, even where they have deliberately acquired weapons. By contrast, provocation may not apply to a woman who because of fears for her safety waits until her partner is asleep or drunk before she takes action[36].

Questions

9. Is the defence of provocation operating satisfactorily in Fiji in cases where:

- **a married or de-facto husband kills in a domestic context**
- **a married or de-facto wife kills in a domestic contact**

10. If you consider that s. 203 and 204 of the Penal Code should be reformed, does s. 23 of the NSW Crimes Act provide a useful model?

34 See for example R v Duffy (1949) 1 All ER 932; R (1981) 28 SASR 321 at 321-322 per King CJ. The requirement of suddenness has been specifically removed by legislation in NSW - see s 23 Crimes Act 1900. The law of provocation is under review by the NSW Law Reform Commission Discussion Paper 31 Provocation, diminished responsibility and infanticide NSWLRC 1993

35 It has been stated that for a man to find his wife in the act of committing adultery will always amount to provocation at law. See P Gillies Criminal law 2nd ed Law Book Company Sydney 1990, 349 citing a number of cases including Parker v R (1963) 111 CLR 610 at 653 per Windeyer J.

36 Equality Before the Law: Justice For Women, Report No. 69, Australian Law Reform Commission, 1994, Chapter 12, Violence and Criminal Law.

2.6.2 Self defence

Self defence is a complete defence to a criminal charge. The response must however be reasonably proportionate to the threat taking into account all the circumstances, including whether retreat was reasonably possible.

The standard concept of self defence relates to a situation where a victim has the strength and ability to fight back. Women are generally physically weaker than men and consequently there are relatively few cases involving women being charged as a result of fighting back while an attack is occurring. As a result the law about self defence has mainly developed from cases involving violence between men.

2.6.3 Battered Women Syndrome

Women's advocates have highlighted difficulties with standard concepts of provocation and self defence in cases where battered women kill the abuser. This generally relates to cases where the woman attacks or kills the abuser after years of abuse[37].

Where women in this situation kill, it may occur when the abuser is asleep or appears to pose no immediate physical threat. The ability to retreat takes on a different dimension when applied to many battered women. In these cases, expert evidence is generally essential to substantiate the nature and extent of the abuse that the woman has suffered usually over many years. In the case of self defence the evidence needs to address how a reasonable person in the circumstances of the victim could consider that the deceased did pose an immediate threat, and why in the particular circumstances the response was reasonably proportionate to the threat.

In State v Litia Leba in the High Court in Suva in February 2004, was a sentencing matter when the wife (Litia Leba) pleaded guilty to manslaughter. The deceased was her husband. On sentencing Judge Shameem found that on the morning after the husband had come home drunk and the parties had argued, the husband woke up, the argument continued and the husband tried to assault the wife. She went outside picked up a pot of boiling water and threw it over him causing burns to 45-50% of his body. He died 6 days later of septicemia as a result of the burns becoming infected.

The Judge found that the wife had been assaulted frequently during the marriage but never reported it to the police because of fear and shame. He found that before the husband died he forgave her. In accordance with the wife's evidence the court treated the matter as one of loss of control. The Judge referred to the level of provocation by the husband and mitigating circumstances ('your justifiable anger about the deceased's cavalier treatment of you, his infidelities and continuous violent conduct').

37 For example Graycar & Morgan ibid. pp. 404-409

The Judge also stated 'undoubtedly you knew of the assault that was about to be inflicted on you' and also referred to her remorse, guilty plea, previous good character and that she was responsible for supporting her 10 year old son. The Judge then went on:

> 'Finally, I consider the fact that your act of violence was committed after years of emotional and physical abuse in the hands of the deceased. There is no expert evidence before me as to whether your case falls into the category often referred to by criminologists as 'the battered wife syndrome'. However I find in your case that some of the characteristics, usually present in cases of victims of abusive relationships are present. The characteristics usually found are:
>
> 1. the victim is ashamed and afraid of reporting the abuse;
> 2. the victim tends to relive her experiences and if put in fear, her thinking may not be clear and rational,
> 3. the victim is acutely aware of any signal of danger from her partner,
> 4. the victim stays in the abusive relationship because she fears that the partner will find her or take revenge
> 5. the victim may believe that she will one day be killed by her partner. (Osland v The Queen (1998) HCA 75 High Court of Australia)

The defendant received a prison sentence of 18 months suspended for 2 years.

Questions:

11. To what extent is expert evidence about the effects of battering on a victim of domestic violence being led in cases where a victim kills or commits another serious criminal act?

12. Is the law operating fairly in these cases and if not, what are the problems and what can be done to address it?

2.7 Penalties for criminal offences involving domestic violence

2.7.1 The relevance of reconciliation to penalty – general

'Reconciliation' is a factor that may be relevant in a wide range of criminal matters under current law. However, due to a section 163 of the Criminal Procedure Code, dealt with below, it is particularly emphasised in relation to four offences including common assault and assault causing actual bodily harm.

This section deals with the relevance of reconciliation in cases where section 163 does not apply.

The normal way that reconciliation may be relevant in criminal law in Fiji is in relation to the *question of penalty*. That is, after a criminal offence is proved the Judge or Magistrate considers what penalty to impose. The nature of the offence and any

other matters that are relevant to penalty are taken into account. In deciding on a penalty in a particular criminal case, the objectives to be addressed are usually accepted to be to:

- protect the community including the victim/s
- punish the offender
- deter the offender from offending again
- deter others in the community from offending
- rehabilitate the offender

The weight that is given to each objective depends on the circumstances of the particular case. In a case where the offender has made amends, or tried to make amends, this may indicate that the offender has accepted responsibility and is less likely to re offend. Also, it may indicate that the impact of the offence on the victim has somewhat, or mainly, been addressed.

In other countries with English criminal law, the words *contrition* and *restitution* are generally used. Contrition is about whether the offender is *contrite*, that is, remorseful or sorry about the offence. Restitution refers to whether the offender has tried to put right the injury, loss or damage that the offence caused. The term 'reconciliation' used in Fiji is based on similar concepts that is, whether the offender is sorry and has made amends [38]

The expectation and/or acceptance that reconciliation should be considered in relation to penalty, also relates to *i bulubulu.* This is the traditional Fijian ceremony in which an individual or community asks for forgiveness from the victim or from the victim's family. Following that, if accepted, reconciliation takes place.

Decisions about the penalty can also be affected by the court's understanding of the level of community concern or community expectations. Sometimes legislative amendments are made to ensure that policy objectives about penalty are implemented.

Penalty setting is also affected by parity considerations (what penalties are usually imposed in this kind of case).

Case examples about the general relevance of reconciliation to penalty

In Samate v State (17th March, 1997), the defendant appealed against the severity the sentence of 12 months imprisonment imposed when he pleaded guilty to larceny of cattle. On appeal the defendant gave evidence that reconciliation had been affected with the owner of the cattle. That being that the defendant would pay back the owner

38 These concepts are also found in restorative justice practices. See below Sentencing options including restorative justice.

or give him one of his own cattle. The court also took into account the defendants family circumstances and reduced the sentence.39

In Prasad v State 17th March, 1997), the appellant had been convicted of obtaining money by false pretences. On appeal the sentence was reduced because the Magistrate 'omitted to refer to the reconciliation effected between the parties and the compensation paid to the complainant'[40]

In Navunicagi v State (18 July 2001), a 20 year old man pleaded guilty to breaching s. 270 (a) of the Penal Code (larceny in a dwelling house) when he stole property worth $600 from his mother. He was sentenced to 2 years imprisonment and then appealed against severity. The High Court allowed the appeal after finding that he had returned the property to his mother, that she had forgiven him and that she wanted him home because in his absence she was supporting family, including his wife. The Judge stated that:

"It is correct that larceny is not a reconcilable offence[41]. It is for that reason, that reconciliation and reparation are not defences to the offence of larceny. However, both reconciliation and reparation are relevant to the mitigation of sentence, and may in appropriate cases justify a more lenient sentence then would normally be passed.

> Reconciliation and reparation provide evidence to the court, that the offender is remorseful and truly regrets what he has done. Where the offender has taken the trouble to sincerely make amends for the great wrong he has done his victim, by apologising, by compensating him/her for the loss, and by doing so without prompting from the court, the court is entitled to accept that he is remorseful. Reparation and reconciliation, concepts which are important components of Pacific culture, may justify leniency of sentence because they reflect remorse and a genuine attempt to correct the harm done by the offending".[42]

However, the court must be satisfied that reconciliation has actually occurred and that it has been accepted by the complainant (victim).

In Mosese Guanavou v State (25th February 1999), the High Court heard an appeal against severity of sentence in the case of a husband who had pleaded guilty to the offence of committing an act intended to cause grievous bodily harm. The victim was his wife. The husband told the court that there had been a reconciliation but there was no other evidence of this before the court. The Judge stated:

> At this juncture it ought to be noted that if a court is minded to accept reconciliation as a mitigating factor then it is duty bound before acting upon such

39 [1997] FJHC 36; HAA0001j.97b (17th March, 1997) Web: http://www.paclii.org/fj/cases/FJHC/1997/36.html

40 [1997] FJHC 35; HAA0002d.97b (17th March, 1997) Web: http://www.paclii.org/fj/cases/FJHC/1997/35.html Mani v State [1997] FJHC 58; Haa0021j.97b (21st May, 1997) is a similar case relating to larceny where the High Court found on appeal that insufficient weight had been given to the fact of reconciliation and return of the property (bullocks) Web: http://www.paclii.org/fj/cases/FJHC/1997/58.html

41 Note: the term 'reconcilable offence' is a reference to s. 163 of the Criminal Procedure Code which is dealt with below.

42 [2001] FJHC 62; Haa0038J.01S (18th July, 2001) Web: http://www.paclii.org/fj/cases/FJHC/2001/62.html

> a plea to personally verify its authenticity and acceptance by the complainant and to record the same in the court record. Unilateral declarations from an accused person are wholly unsatisfactory and ought to be disregarded.[43]

Reconciliation will only be mitigating if it has actually helped to resolve or remedy the damage to the victim:

In Biu v State (14th November, 2000), the High Court heard an appeal against the severity of a 9 year term of imprisonment for one count of rape and one of unnatural offence. The victim was the defendant's 11 year old niece. The court noted that

> 'The Appellant has a number of previous convictions, some involving violence. He is a 35 year old man with four children. He said that he and his sister (the complainant's mother) have now reconciled in the traditional way and that he had four children to look after. He expressed remorse'.

The Judge found that 'Unhappily such reconciliation cannot help the complainant [the niece] in her recovery after the attempted rape'. The term of imprisonment was not reduced[44].

2.7.2 Reconcilable offences – s. 163 Criminal Procedure Code

The relevance of reconciliation is taken to a further level by s. 163 of the Criminal Procedure Code in relation to the four specific criminal offences to which it applies. This 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],[45] or ... [s. 244 i.e. common assault][46] or..[s. 245 i.e. assault causing actual bodily harm] or..[s. 324 (1) malicious damage to

43 [1999] FJHC 8; Haa0043j.98b (25th February, 1999) Web: http://www.paclii.org/fj/cases/FJHC/1999/8.html

44 [2000] FJHC 121; HAA0085j.00s (14th November, 2000) Web: http://www.paclii.org/fj/cases/FJHC/2000/121.html

45 197.-(1) Any person who-

(a) enters into or upon property in the possession of another with intent to commit an offence or to intimidate or annoy any person lawfully in possession of such property:

Provided that the Minister responsible for Fijian affairs may certify that a person or persons are lawfully in possession of native land;

(b) having lawfully entered into or upon such property unlawfully remains there with intent thereby to intimidate, insult or annoy any such person or with intent to commit any offence; or

(c) unlawfully persists in coming or remaining upon such property after being warned not to come thereon or to depart therefrom:

is guilty of a misdemeanour, and is liable to imprisonment for three months.

If the property upon which the offence is committed is any building, tent or vessel used as a human dwelling, or any building used as a place of worship, or as a place for the custody of property, the offender is liable to imprisonment for one year.

(2) Any person who enters by night any dwelling-house, or any verandah or passage attached thereto, or any yard, garden or other land adjacent to or within the cartilage of such dwelling-house, without lawful excuse, is guilty of a misdemeanour, and is liable to imprisonment for one year.

46 S.244 and 245 are summarised earlier in the Discussion Paper

property[47]] 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."[48]

Section 30 of the Magistrates Court Act also points to s. 163 but does not add anything further. That is:

> "30. In criminal causes a Magistrate may promote reconciliation in the cases and in the manner provided in the Criminal Procedure Code. (Cap. 21)"

From the outline that follows it will be seen that section 163 results in increased emphasis on reconciliation in cases involving domestic violence where the charge is one of the four set out in the section. Also, that in these cases, the word *reconciliation* tends to take on a further aspect where the Magistrate or Judge is inclined to put on a 'marriage counsellor hat' and adopt an additional objective of preserving family relationships.

Offences that are listed in s. 163 and those left out

The following table shows the maximum penalty prescribed for a sample of offences that may be committed in the context of domestic violence. Only some of these are specified as 'reconcilable offences' in s. 163

Offence *(Penal Code unless indicated otherwise)*	*Max. penalty* *(imprisonment)*	*Reconcilable under s. 163*
• criminal trespass when a misdemeanor (s. 197(1))	3 months	yes
• criminal trespass of a dwelling house etc (s. 197(1))	1 year	yes
• common assault (s. 244)	1 year	yes
• criminal trespass entering dwelling house etc by night (s. 197(2))	1 year	no
• willfully assault a juvenile causing suffering or injury (s. 57(1) Juveniles Act)	2 years	no
• destroying or damaging property in general (s.324(1))	2 years	no
• criminal intimidation when a misdemeanor (s. 330)	2 years	no
• unlawfully wounding (s. 230)	3 years	no
• assault causing actual bodily harm (s. 245)	5 years	yes
• indecent assault on females (s.154(1))	5 years	no

47 324.-(1) Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and he is liable, if no other punishment is provided, to imprisonment for two years.

48 The current s.163 set out here was substituted by 18 of 1976 s. 5 (Cap 17). The previous section read 'In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault or for any other offence of a personal or private nature not amounting to felony and not aggravated in degree on terms of payment of compensation or other terms approved by the Court, and may thereupon order the proceedings to be stayed or terminated'

Elements of section 163
The elements of section 163 are that:

- it applies to cases of criminal trespass, common assault, assault causing actual bodily harm or malicious damage to property (referred to in practice as 'reconcilable offences')
- in these cases, that fit the other criteria in the section, the court *may* promote reconciliation etc. The word 'may' indicates that there is a discretion
- the section only applies to cases 'which are substantially of a person or private nature and which are not aggravated in degree'
- in these cases the Magistrate may promote reconciliation and encourage and facilitate the settlement in an amicable way of the proceedings,
- the settlement can include 'terms of payment of compensation or other term approved by the court'
- in cases that have so settled, the Court may then order the proceedings to be stayed or terminated[49].

Section 163 gives rise to the following issues in cases involving domestic violence:

Question: *What criteria will be applied by the court to decide if a particular case is suitable to 'promote reconciliation'?*

Issues:

- How will the court know if it is safe, for the victim and others who may be at risk, to promote reconciliation?

- How will the court know if the victim is being pressured by the defendant?

- How will the court know if the victim is being pressured by other circumstances e.g. the possible loss of the breadwinner? And, if present, will this affect the suitability of the case to promote reconciliation?

Question: *What is the court to understand by the word 'reconciliation'*

Issues:

- Does it mean reconciliation of the issues with the *victim* and/or with a broader group such as the *victim's family?* [50] This uncertainty risks situations being taken

49 There seems to be some uncertainty about whether 'reconciliation' is a defence to a charge to which s. 163 applies. This question arises from the statements of a single judge of the High Court in the matter of Navunicagi v State. This was an appeal following conviction for larceny (referred to above). That is, in this case the Judge commented: "It is correct that larceny is not a reconcilable offence. It is for that reason, that reconciliation and reparation are not defences to the offence of larceny." The better view, that is consistent with cases referred to below , is that 'reconciliation' in s.163 is not a defence that can be put forward by a defendant to argue that the court should find them 'not guilty' but rather a matter that may be taken into account on penalty. Further that it may be taken into account on penalty to the extent that the Court may order that the proceedings be stayed or terminated without a finding of guilt being recorded.

50 The Outcomes of the Pacific Regional Workshop on Strengthening Partnerships for Eliminating Violence Against Women held in Suva from 17-19th February 2003 pointed to the need to re-examine some practices based on culture and religion in order to address violence against women. It

into account where the victim has not been consulted or does not agree.

- Does it mean *resumption of the relationship* between the defendant and the victim? This risks putting emphasis on the defendant and /or the court trying to persuade the victim to resume cohabitation.

- Does it mean *the victim forgiving* the defendant? This risks putting emphasis on the defendant and/or the court trying to persuade the victim to forgive.

- Does it mean *whether the victim is happy with amends made by the defendant*? This risks putting emphasis on the defendant and/or the court trying to persuade the victim that amends offered should be accepted and the amends show that there has been a genuine reform.

- In relation to all of the above, will the court be concerned about whether the victim is making an independent decision?

Question: *Is it useful to single out cases that are 'substantially of a person or private nature' for an approach that emphasises reconciliation*

Issues:

- Research indicates that most domestic violence is not reported to police, that domestic violence is generally repeated, victims are often isolated and are unable to protect themselves. The violence most frequently happens in private.

- Further, research indicates that the offender's attitudes and other factors that lead to this kind of violence are generally deep rooted and are extremely hard to change. Encouragement towards reconciliation by a Magistrate or Judge risks the court unintentionally undermining the victim's attempts to live free from the violence. The court risks helping the defendant to escape punishment and 'regain control' of the victim.

- The position can be taken that in a criminal matter, if the defendant and/or the victim want assistance to consider or bring about a reconciliation (in any of the senses in which this might be intended or interpreted in s. 163), that this assistance should be available *but it should not be the objective of the Magistrate or the Judge*. That is, that while the Magistrate or Judge should be able to take into account reconciliation under normal principles for setting penalties (see above) that the role should not go further than this.

Question: *What is the court to understand by the term is 'not aggravated in degree' in relation to domestic violence matters given that s. 163 relates to four specific offences.*

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was suggested that traditional reconciliation practices can promote a culture of silence towards victims and protects the perpetrators of violence. Available online at: http://www.forumsec.org.fj/news/2003/Final%20Outcome.pdf

Issues:

- How will the court become aware of the total effect of the violence on the victim? This includes the psychological and emotional impact and the effects on the victim/s physical health?

- Further, will or should a court consider that an offence is 'aggravated in degree' if: (i) the victim was pregnant, (ii) children were present (iii) the victim had to leave her home as a result of the violence, and/or (iv) the defendant has committed a similar offence previously in relation to the same victim/s.

Question: *What role should the Court (e.g. Magistrate) play to 'promote reconciliation and encourage and facilitate the settlement in an amicable way of the proceedings?' And around the other way, what roles should not be played by the Court?*

Issues:
This has been dealt with in the questions raised above, above but additional issues include:

- If a Magistrate or Judge assumes a role of marriage counsellor towards the defendant from the bench, the dynamic is likely to result in the defendant agreeing to what ever is said or suggested. But does this serve a purpose? Is it likely to indicate genuine insight and reform on the part of the defendant?

- If a Magistrate or Judge invites a victim to come to court to confirm evidence from the defendant that there has been a reconciliation, the victim may feel pressured by the request. Apart from other effects the victim may be less inclined to report a subsequent offence to the police for fear of being called to court again.

Question: *How does a Magistrate decide whether terms of payment of compensation or other terms, are appropriate?*

Issues:

- In deciding what terms are appropriate, will the Magistrates main concern be for the victim?

- How will the Magistrate determine whether the willingness of a victim to accept terms is genuine or results from inappropriate pressure?

- What, if any role, does the court have to ensure that terms of payment of compensation or other terms of settlement are carried out?

Examples of the application of s. 163
There are a number of reported cases where a defendant has been convicted of *assault causing actual bodily harm* against his spouse (a reconcilable offence), sentenced by a

Magistrate and then appealed to the High Court arguing that *reconciliation* had not been properly taken into account by the Magistrate.

In these cases, appeal courts frequently cite this passage by the Chief Justice in Mosese Gaunavou and State (Crim. App. No. HAA0011J.96B):

> "It is always a concern for the court to try and help any family experiencing domestic difficulties to resolve its problems as much as possible. It is for that reason that this court believes that it would be in the best interest of this family if the appellant, the man of the house in this case, is not kept away from his family for too long[51]."

This was a case where the husband appealed against the severity of a sentence of 15 months imprisonment for acting with intent to cause grievous harm. The husband had attacked the wife with a stick and broken glass after an argument about money. The assault was stopped by the neighbours who came to help. The wife received multiple bruises on her back a deep cut on the back of her head, a cut to her right elbow, a bruise on her chin, a cut on her upper lip and her left ring finger was swollen.

On appeal the sentence was reduced to 9 months on the basis that the parties had reconciled, that the court accepted the husband's submission that he had rehabilitated himself and that he was genuine in his concern about his young family. Each of these findings appears to be based only on what the husband said to the court. There is nothing in the judgment to indicate that the wife was present in court and no reference to anything to corroborate the husband's statements.

Additionally, the Judge's statement about the concerns that the court will have in these case, are expressed as a general proposition rather than one limited to the Judge's assessment, based on the evidence, of what was appropriate in this particular case. The passage has been cited in other judgments relating to domestic violence, as authority for this general approach[52].

The following are examples of cases where the defendant was the husband or de facto partner of the victim, the husband was convicted of a reconcilable offence, and the High Court reduced the sentence or set aside the conviction on the basis of reconciliation.

> Bijay v State (16th July, 1997), Husband pleaded guilty to assault occasioning actually bodily harm. Magistrate imposed 4 months imprisonment. On appeal the High Court found that the 'case was eminently suitable for reconciliation. Reconciliation was in fact achieved.' The High Court set the sentence aside.

51 judgment p. 3

52 e.g. Chand v State; Singh v State both referenced below

The High Court also rejected the Magistrates call for guidelines in these cases as unhelpful 'because of the widely varying circumstances of each case'.[53]

Chand v State (28th August, 1997), Husband pleaded guilty to assault occasioning actual bodily harm. Described as a "bad case" of domestic violence, the injuries inflicted covered various parts of the wife's body. By the time the appeal came before the court the husband had spent 7 weeks in prison and the husband's evidence was that he and his wife had reconciled. The court found: "The wife wants the appellant to be released from prison and requests the Court to give him a suspended sentence of imprisonment. She says that she finds it very difficult to look after the children and that she is not even wanted at her brother's home. She said that if freed the husband will be able to harvest cane and earn some income to support them". The Judge referred to 'putting on my hat of a marriage officer' and admonished the husband for forgetting his marriage vows. The court determined that 'Bearing in mind the interests of the children and the need for the father to be with his family' that the sentence would be set aside and a sentence of 9 months' imprisonment suspended for 18 months was substituted[54].

Singh v State (28th August, 1997) the husband pleaded guilty to assault causing actual bodily harm and the Magistrate imposed a sentence of 6 months imprisonment. The appellant told the Court that he was 35 years old and has reconciled with his wife, they had two children aged 5 and 2 years, that he would not re-offend and that had *"suffered enough"* by being in prison. The State Prosecutor submitted that the fact of reconciliation had not been considered by the Magistrate and that the husband should have received a suspended sentence. The Court found that the Magistrate had not taken into account the reconciliation that had occurred, admonished the husband for breaking his marriage vows and ordered that he be released immediately[55].

Two further examples, relating to s.163 are given in a recent presentation about restorative justice by Dr Shaista Shameem, Director of the Fiji Human Rights Commission. That is:

> "In the first case in which the Commission was involved, we requested the court to impose a sentence of community work with an NGO in Suva, accompanied by anti-violence therapy. In the second case, the court was requested to send the offender back to his village for two years under the supervision of his uncle'.[56]

53[1997] FJHC 87; [1997] 43 FLR 144 (16th July, 1997) Web: http://www.paclii.org/fj/cases/FJHC/1997/87.html

54 [1997] FJHC 121; [1997] 43 FLR 217 (28th August, 1997)
Web: http://www.vanuatu.usp.ac.fj/Paclawmat/Fiji_cases/FLR_1997/Chand_v_State.html

55[1997] FJHC 119; Haa0035j.97b (28th August, 1997) Web: http://www.paclii.org/fj/cases/FJHC/1997/119.html

56 S. Shameem, Restorative Justice: Does it have a Role in Nation Building, presented at the Building a Nation on Shared Vision Consultation Forum Sponsored by the Ministry of National Reconciliation & Unity, 10-11 June 2004, p. 5

In these two examples, s.163 appears to have been used in a way that maintains the focus on the offender's conduct and the offender's responsibility for the conduct. It also indicates a further interpretation of 'reconciliation' which focuses on the offender working to achieve resolution by reforming their behaviour.

Should the reconcilable offences provision (s. 163) apply in cases of domestic violence?

Arguments for (should apply):

- reconciliation allows the parties to resolve their differences and repair the relationship and this may avoid adverse consequences such as conviction and penalties that may have an effect on the whole family (a fine, imprisonment of the offender),
- reconciliation is generally particularly important in cases involving family relationships and genuine reconciliation should be strongly encouraged,
- the emphasis on reconciliation may send a message to the defendant that the victim has suffered as a result of the defendant's criminal conduct and the defendant should make amends. In this way the emphasis on reconciliation could be said to help the victim because the reconciliation will only be taken into account if the victim has genuinely agreed,
- if there have been problems in the way that s.163 has been applied in some domestic violence cases these can be addressed by adjusting s. 163 to make the approach that should be taken very clear.

Arguments against (should not apply):

- allowing domestic violence cases to fall within s. 163, over-emphasises reconciliation. Reconciliation can be taken into account on penalty in any event under normal sentencing principles,
- criminal acts of domestic violence, should be treated at least as seriously as criminal acts committed in another context. Perhaps more seriously because of the trust relationship between the offender and victim or for public policy reasons (high levels of domestic violence, the need to send a message that it will not be tolerated etc),
- the emphasis on reconciliation is at odds with the 'no drop' policy implemented by the police and works against attempts to ensure that police do intervene and that prosecutions are brought,
- the emphasis on reconciliation sends a message to the defendant that punishment by the court may be avoided by persuading the victim to reconcile. In the absence of regulated processes, such as independently facilitated victim / offender conferences, the risks involved in emphasising 'reconciliation' are too great,
- if the emphasis on relationship reconciliation remained, referral of the parties to one or separate trained counsellors would be preferable. The counsellor could then be requested to provide a report to the court.
- the role of the Court in relation to reconciliation under s. 163 under current arrangements is so fraught with difficulties in relation to domestic violence cases that it should not apply to these cases.

Questions:

13. What policy objectives should be applied in framing criminal law that deals with domestic violence? For example should the main policy objectives be one or more of the following: deterrence, rehabilitation, punishment of the offender, reconciliation of the parties?

14. What effect is s.163 having in practice in relation to cases of domestic violence?

15. Given that reconciliation can be taken into account in criminal matters in relation to penalty, without s.163, is s. 163 serving any useful purpose?

16. Would either of the following adjustments to s.163 make it more effective in cases involving domestic violence? That is, amending it to:

- **exclude cases involving domestic violence from the operation of the section, or**
- **make it clear that 'reconciliation' refers to whether the defendant has accepted responsibility for the offence, is regretful, has tried to make amends and is willing to take responsibility for reforming the behaviour. Further, that the court must not encourage the parties to resume their relationship.**
- **provide that while the court may receive and take into account evidence of reconciliation that it is not the role of *the court* to attempt to bring about reconciliation**

17. Alternatively, would it assist if Guidelines were issued to assist Magistrates and Judges to apply s. 163 to domestic violence cases? If so, how could this be done?

2.7.3 Are criminal penalties for domestic violence too light?

Because there is currently no offence of 'domestic violence' in Fiji's Penal Code, where domestic violence breaches the criminal law the alleged offender will be charged under the relevant provision of the Penal Code. The maximum penalties for each offence are set out in the Penal Code.

Examples are:

Offence[57]	*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
• grievous harm (s.227)	7 years
• kidnapping (s. 249)	7 years
• criminal intimidation when a felony (s. 330)	10 years
• rape (s. 149)	life
• manslaughter (s. 198)	life
• murder (s. 199)	life

As noted above (under Domestic violence – how effective is Fiji's criminal Law), statistics for the 5 year period 1993-1997 indicated that 44.9% of criminal charges relating to domestic violence had the outcome of 'reconciliation' (presumably a reference to s. 163 of the Criminal Procedure Code). In 83% of these cases there was no penalty imposed while in 17% there was a sentence as well as a fine, or a custodial or suspended sentence[58].

The Fiji Women's Crisis Centre has expressed concern that penalties for criminal matters involving domestic violence are too light. That is:

> 'domestic violence cases... that do reach the Court are rarely given custodial sentences. Most sentences for domestic violence are minimal, ranging from suspended sentences to six months – one year's imprisonment depending on the severity of the violence' [59]

Questions

18. Do offenders receive lighter penalties for criminal offences committed in the context of domestic violence compared to a charge for the same offence

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

58 ibid FWCC 2001, p. 47

59 ibid FWCC, 2001, p 3

committed in another context?

19. What principles should apply to the severity of penalties for criminal offences committed in the context of domestic violence compared to the same offence committed in another context? Should the principle be:

- **that the penalties should be the same (no reduction of penalty because it was domestic violence)**
- **that the penalty should be lower (a reduction of the penalty because it was domestic violence)**
- **that the penalty should be higher (a more severe penalty because it was domestic violence)**

2.7.4 Are penalty guidelines or similar needed for 'domestic violence offences'?

If there is a tendency for the Courts to give penalties for domestic violence cases that are:

- too light, and/or
- based on insufficient evidence, and/or
- based on problematic reasoning

would guidelines, to be applied by the Court when deciding on penalty, help address the problem?

For example, would guidelines such as the following assist:

Guidelines for considering penalty in criminal offences committed in the context of domestic violence

In determining the penalty that should be applied, in addition to other factors that may be taken into account, the court should consider the following matters so far as they are relevant in the particular case:

- Any relevant previous convictions or charges including proceedings that were stayed or terminated under s. 163 of the Criminal Procedure Code
- The extent of the damage, injuries or loss suffered by the victim as a result of the offence
- Whether a child or children witnessed the offence
- The effect of the offence on the victim's emotional, psychological and physical well being
- The effect of the offence in terms of hardship, dislocation or other difficulties caused to the victim

- Whether the defendant has sought and received personal counselling or other assistance since the offence or intends to do so
- The weight that can be accorded to any report submitted by a person who has counselled, assisted or treated the defendant since the offence was committed that deals with whether the defendant accepts responsibility for the offence and the steps that the defendant intends to take to ensure that there is no repetition
- Whether the defendant is willing to participate in personal counselling, an educational or other program if ordered by the Court.

It is noted that in the FLRC Reform to the Penal Code and Criminal Procedure Code - Sexual Offences Report 1999, adverse findings were made about the effectiveness of the Sentencing Guidelines issued in 1988 and 1990 by the Chief Justice in relation to sexual offence cases. The Commission found that despite these Guidelines, strong statements by members of the judiciary and vigorous submissions from lobby groups, the penalties for sexual offences remained low.[60]

In relation to domestic violence, other options might be:

- to set out matters to be taken into account in determining the penalty in the legislation, or

- to apply a penalty premium in criminal matters that come under a definition of 'domestic violence offence' (see above). That is, implement a method that increases the maximum penalty for an offence committed in the context of domestic violence and/or set minimums subject to consideration of individual circumstances.

Questions:

20. If it is considered that penalties that are being applied in domestic violence cases are too low, would guidelines or similar to be applied by the courts help to address the problem?

21. If so, what are the options about how 'guidelines' could be introduced and what would be the most effective way?

22. In relation to the example of guidelines given above, are these guidelines suitable or how could they be improved?

23. Would methods such as adding a premium to the maximum penalty for criminal offences committed in the context of domestic violence or minimum penalties subject to consideration of the circumstances of the individual case be preferable to guidelines? If so, what are the advantages and disadvantages you see in these two options?

60 p. 50

2.7.5 Sentencing options including restorative justice

This section looks at *the options* that are available to courts in framing penalties for criminal offences involving domestic violence. The primary question being considered here is whether there are *enough options* for the court to choose between in each particular case.

The term 'penalty' is used to mean, any orders that the court can make when an accused person pleads guilty or is found guilty. It includes discharging the offender without any penalty and structuring the penalty so that the offender is required to do, or refrain from doing, certain things.

It is noted that the terms of reference for the FLRC review of the Penal Code and the Criminal Procedure Code, which will start in December 2004, includes consideration of:

- (i) …the penalties and sentences in the Penal Code and other related laws (Minor Offences Act and Dangerous Drugs Act);

- (j) the need to review the scope of available penalties/ punishments, especially the practice for Magistrates to 'sentence' offenders to compulsory work regimes in lieu of imprisonment, the appropriateness of community work orders and other types of sentences, and

- (q) in relation to the Criminal Procedure Code, alternative dispute resolution, such as reconciliation and family group and victim/offenders conferences

Current options

The options that apply in framing penalties for offences involving domestic violence are the same as those that apply for the same offence committed in another context. This does not mean that the court will necessarily give the same penalties it simply means that the options that are available to the court to select between are the same. The options can be summarised as follows:

> *compensation* - any person convicted of an offence may be ordered to pay compensation to any person injured or who suffers damage to their property or loss as a result of the offence. This can be in addition to, or in substitution for, other punishment or sentence[61].
>
> *discharge unconditionally or on conditions* - the conditions may include that the offender is not to commit a further offence for a period up to 12 months, compensation, restitution or such other conditions 'as may be specified by the court'[62]

61 s. 160 & s. 163 Criminal Procedure Code; also see s. 44 Penal Code

62 s. 44(2)

fine with or without a further requirement (e.g. a bond or probation order)

bond - a written guarantee by the offender with or without sureties to be of good behaviour for a specified period[63]

probation order - an order requiring the offender to be under the supervision of a probation officer for a specified period of not less than 1 year and not more than 3 years.[64] The court can require the offender to comply with requirements to 'secure good conduct' or 'for preventing a repetition by him of the same offence or the commission of other offences'[65]

compulsory / community work order – an order that the offender undertake unpaid work to a specified number of hours over a specified period. This mechanism was established by the Community Work Act 1994 however resource issues have constrained implementation. Offenders who want to use this option have to try to find suitable work and a suitable supervisor.

suspended sentence – conviction for a further offence makes the offender liable for the suspended sentence to take effect[66]

custodial sentence

The statistics for domestic violence cases that went to court between 1993 and 1997 show outcomes as follows:

- a fine – a figure somewhat above 14.1%
- suspended sentence – % not known
- custodial sentence - 8.4%[67]

The Fiji Women's Crisis Centre report recommended that expert counselling should be made compulsory for all perpetrators of violence against women and children.[68] This is dealt with further below.

It is noted that in relation to custodial sentences, periodic detention (e.g. weekend detention) may have particular benefits in domestic violence matters. For example, where it is desirable for the offender to be able to keep working in order to maintain the family.

Reports

Before a court imposes penalty in a criminal matter, the Magistrate or Judge can request that a report be prepared about the offenders circumstances. This can include assessment of the willingness and suitability of the offender to undertake steps to address the problems that led to the offence. However, resource constraints limit the extent to which the Court's request reports. Also the Court can not order an offender to undertake forms of rehabilitation (e.g. programs) that are not actually available.

63 s. 41 Penal Code

64 Probation of Offenders Act [Cap 22]

65 s. 3(3) Probation of Offenders Act

66 s. 29 & 30 Penal Code

67 FWCC, 2001 p. 47

68 FWCC 2001, Recommendation 22

Additionally, although Fiji does not yet have legislation, like the New Zealand Victim Rights Act 2002 (dealt with below under Victim's rights) which establishes a system for the preparation and use of victim impact statements, the prosecution can present evidence about the effect of the offence on the victim in relation to the question of penalty.

Counselling, education or treatment programs for domestic violence offenders
In some other jurisdictions criminal courts can apply conditions to the penalty imposed for criminal offences involving domestic violence, that require the offender to undertake an education program specifically about domestic violence. This is most frequently done as a condition of a bond or suspended sentence. Where the court imposes a term of imprisonment and a domestic violence education program is available for prisoners, the courts can also recommend that the offender undertake the program while in prison.

However, evaluations of education programs or various kinds for domestic violence offenders point to how hard it is to actually address the attitudes that underlie domestic violence. Questions about the effectiveness of programs for perpetrators of domestic violence often results in active debate about whether the cost of establishing and providing these programs is the best use of scarce resources.

The World Report on Violence and Health noted that:

> "Research from the United States suggests that the majority of men (53-85%) who complete (these) treatment programs remain physically non-violent for up to 2 years, with lower rates for longer follow-up periods. These success rates, however, should be seen in the light of the high drop-out rate that such programs encounter: overall, between one-third and one-half of all men who enrol in these programs fail to complete them and many who are referred to programs never formally enrol….
>
> A recent evaluation of programs in four cities in the United States found that most abused women felt 'better off' and 'safe' after their partners entered treatment. Nevertheless, this study found that after 30 months, nearly half of the men had used violence once, and 23% of the men had been repeatedly violent and continued to inflict serious injuries, while 21% of the men were neither physically nor verbally abusive[69]'.

The report goes on to note that evaluations collectively suggest that treatment programs work best if they:

- continue for longer rather than shorter periods
- change men's attitudes enough for them to discuss their behaviour
- sustain participation in the program

69 op. cit. p. 106

- work in tandem with a criminal justice system that acts strictly when there are breaches of conditions of the program[70].

Restorative justice

Restorative justice refers to processes that aim to hold an offender accountable by encouraging the offender to take responsibility for their actions, as far as possible repair the damage caused, achieve resolution for the victim and the community and intensify aspects that result in reform and rehabilitation of the offender.

Restorative justice is currently receiving some attention in Fiji. Although restorative justice processes are not yet available as an adjunct to the criminal justice system in a formal way, issues are presented here to encourage consideration of how these processes might apply in relation to criminal offences involving domestic violence.

In a recent presentation, the Executive Chairman of the Fiji Law Reform Commission, Alipate Qetaki pointed to four key differences in ways that current court-based systems and restorative justice processes deal with criminal offences. That is[71]:

- *Guilt* – restorative justice focuses on offenders taking responsibility for their actions, while the Court focuses on the elements that constitute a criminal offence and proof beyond reasonable doubt. While a restorative program may focus on whether the offender accepts responsibility for the harm done, the court system asks whether they plead guilty or not guilty.
- *Emotion* – while the criminal justice system seeks to deal with crime dispassionately, restorative justice recognises the emotional effect of crime on victims, offenders and the community. Restorative justice seeks healing of the emotional effects of crime as an important part of putting right the wrong
- *Process*- current court-based systems place focus on procedures to establish criminal intent (the guilty mind) either by admission or trial. By changing the focus from guilt to responsibility, restorative justice provides a basis to establish alternative procedures.
- *Relationships* – court based justice systems give predominance to the State's role where the victim's primary roles are complainant and witness. Some cases proceed without any involvement of the victim. The State represents both the victim and the community. In restorative programmes, wherever possible, people present their views, feelings and positions in person, whether as victim, offender, community member or representative of the State.

Mr. Qetaki also noted that there are generally three stages at which formal restorative justice programmes are generally applied. That is pre –conviction (where the offender has indicated that they intend to plead guilty or not defend the charge); pre-sentence (once guilt has been admitted or proved the Court may refer the case to a restorative

70 For detailed discussion of the current state of research about the effectiveness of these programs and options about program design see Laing, L., Responding to men who perpetrate domestic violence: Controversies, interventions and challenges, Issues Paper No. 7, (2002) Australian Domestic Violence Clearinghouse. Online at: http://www.austdvclearinghouse.unsw.edu.au/PDF%20files/Issues_paper_7.pdf Also, Ending Domestic Violence? Programmes for Perpetrators, National Crime Prevention, 1999, Attorney-General's Department, Canberra

71 A Qetaki, Restorative Justice Does it Have a Role in Nation Building, presented at the Building a Nation on Shared Vision Consultation Forum Sponsored by the Ministry of National Reconciliation & Unity, 10-11 June 2004, p. 7-8

justice process such as victim-offender mediation); and, post-sentence[72].

Dr Shaista Shameem, Director of the Fiji Human Rights Commission has pointed out that any new restorative justice system should be consistent with provisions of the Constitution and conform to universally accepted human rights principles and standards[73].

New Zealand has taken a leading role in the implementation of restorative justice programs. Victim / offender conferences and family group conferences (used in New Zealand with juveniles) are two types of 'restorative justice' programs.

The United Nations Economic and Social Council passed resolutions about restorative justice programs in 2002. The Council stated[74]:

> " II. Use of restorative justice programmes
>
> 6. Restorative justice programmes may be used at any stage of the criminal justice system, subject to national law.
>
> 7. Restorative processes should be used only where there is sufficient evidence to charge the offender and with the free and voluntary consent of the victim and the offender. The victim and the offender should be able to withdraw such consent at any time during the process. Agreements should be arrived at voluntarily and should contain only reasonable and proportionate obligations.
>
> 8. The victim and the offender should normally agree on the basic facts of a case as the basis for their participation in a restorative process. Participation of the offender shall not be used as evidence of admission of guilt in subsequent legal proceedings.
>
> 9. Disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration in referring a case to, and in conducting, a restorative process.
>
> 10. The safety of the parties shall be considered in referring any case to, and in conducting, a restorative process.
>
> 11. Where restorative processes are not suitable or possible, the case should be referred to the criminal justice authorities and a decision should be taken as to how to proceed without delay. In such cases, criminal justice officials should endeavour to encourage the offender to take responsibility vis-à-vis the victim and affected communities, and support the reintegration of the victim and the offender into the community"

The resolution went on to highlight the need for guidelines and standards in the operation of restorative justice programs including the need for standards about the qualifications, training and selection of facilitators.

In New Zealand the Sentencing Act 2002 and the Victims Rights Act (referred to further under Victim's rights below) encourage victim / offender meetings to help

72 ibid. p. 6-7

73 S. Shameem, Restorative Justice: Does it have a Role in Nation Building, presented at the Building a Nation on Shared Vision Consultation Forum Sponsored by the Ministry of National Reconciliation & Unity, 10-11 June 2004

74 E/2002/INF/2/Add.2, 2002/12, Basic principles on the use of restorative justice programmes in criminal matters. Online at: http://www.restorativejustice.org/rj3/UNdocuments/ecosocresolution.pdf

resolve issues relating to the offence. These meetings are not compulsory for victims of crime. However, the Sentencing Act requires the Court to take into account any offer by the defendant or agreement to make amends and in doing so the Court must take into account the views of the victim about whether or not they accept any offer to make amends.

The application of restorative justice approaches, such as victim / offender conferencing to cases of domestic violence is contentious. For example[75]:

Arguments against

- victims of violence or sexual attacks are generally too fragile and the power imbalance between the offender and the victim is too great for the process to operate,
- victims of domestic violence and sexual abuse should not be expected to participate,
- the process itself risks psychological and emotional harm to the victim,
- the outcomes of these processes in terms of reforming the offender are not demonstrated.

Arguments for

- conferencing can be structured to support the victim and bring home to the offender the gravity and unacceptability of their offence,
- the process can also help the offender accept, if it is the case, that the relationship with the victim has finished,
- conferencing provides an option that may be culturally in tune
- even if it is only available or used in some cases, it is still worthwhile having the option.

75 for recent work that presents arguments for an against see Applying Restorative Justice to Domestic Violence, RestorativeJustice.org at http://www.restorativejustice.org/rj3/Feature/2003/september/domesticviolence.htm These issues have also been canvassed in New Zealand. For example see Restorative Justice- the Public Submissions, June 1998, Ministry for Justice, NZ at http://www.justice.govt.nz/pubs/reports/1998/restorative_justice/index.html

Questions

24. Of the penalty options that are currently available which are being used most frequently in domestic violence cases and why? Does this vary between court locations?

25. What if any additional penalty options are needed in domestic violence cases? In answering this question please take into account any options established by legislation that may not be available in practice.

26. Are courts able to obtain an assessment report in relation to the offender and/or the victim to assist the court in considering the penalty?

27. Should courts order domestic violence offenders to attend a counselling, education or treatment program? If so, what if any safeguards should apply?

28. Do courts have sufficient power with *each* of the current penalty options, to order the offender to undertake counselling, education or treatment to address domestic violence? If not, what powers are lacking in relation to which options?

29. Should the court be able to order a domestic violence offender to take part in a victim / offender conference? If so, in what circumstances and what safeguards should apply?

2.7.6 Compensation in criminal proceedings for domestic violence victims

When a court deals with a criminal charge, there is power to order compensation for the victim of the crime[76]. Substantial emphasis is being placed on this in New Zealand since the introduction of the Sentencing Act 2002. Additionally in New Zealand a range of treatment services are available and some compensation for victims of sexual abuse is available from the Accident Compensation Corporation.

In Australia compensation for victims of crime can be in the form of compensation by the offender imposed as part of the penalty for the criminal offence, however the financial position of many offenders causes major limitations.

76 In Fiji, any person convicted of an offence may be ordered to pay compensation to any person injured or who suffers damage to their property or loss as a result of the offence. This can be in addition to, or in substitution for, other punishment or sentence s. 160 & s. 163 Criminal Procedure Code; also see s. 44 Penal Code

In common with many other countries, each Australian State and Territory has a statutory crime victim's compensation scheme[77]. Fiji does not have a statutory crime victim's compensation scheme.

Crime victim's compensation schemes are government financed schemes, established to provide some compensation for victims of violent crime. The schemes provide compensation up to a fixed amount[78].

The schemes exist for three main reasons. That is, because:

- the person who committed the criminal act may not have enough money or property to compensate the victim,
- there are cases where there has been a criminal offence but the perpetrator can not be found or a charge is not laid, and
- civil proceeding under the common law for compensation are generally complicated, slow and expensive. Under these crime victim's compensation schemes, the State provides a level of compensation to a victim and if the State decides to pursue the offender for reimbursement this is a matter between the State and the offender.

Fiji may or may not have the capacity to establish a crime victim's compensation scheme in the future. However if this did occur, and it followed a standard pattern, victims of domestic violence would be among those who could apply. In some jurisdictions that have these schemes there have been criticisms about inadequate access to the scheme for victims of domestic violence.[79]

Questions:

30. In relation to criminal charges arising from domestic violence, to what extent are offenders being ordered to pay compensation to the victim?

77 For information about schemes in 29 countries see: The International Crime Victim Compensation Program Resource Directory, US Department of Justice, Office of Justice Programs, Office for Victims of Crime, Crime Prevention, March 1999 Web: http://www.ojp.usdoj.gov/ovc/intdir/intdir.htm Examples: UK – Criminal Injuries Compensation Act 1995, administered by the Criminal Injuries Compensation Authority http://www.cica.gov.uk/; Canada each province has its own legislation and own Criminal Injuries Compensation Scheme. For example the Ontario scheme is established by the Compensation for Victims of Crime Act. and is administered by the Criminal Injuries Compensation Board

78 Although schemes vary, there is generally a requirement that the criminal act must have been reported to the police within a certain period after the offence occurred. A victim can claim whether or not the perpetrator is convicted. In the case of a homicide, often dependants of the homicide victim can claim. Schemes specify what can be taken into account in determining the amount of compensation. This often includes: pain and suffering, medical expenses, lost wages, loss of enjoyment of life, funeral expenses. Where compensation is paid by the fund, the fund may later seek to recover from the perpetrator. The payment to the victim is not dependant on recovery from the perpetrator.

79 For example: Linda Jurevic, Between a Rock and a Hard Place: Women Victims of Domestic Violence and the Western Australian Criminal Injuries Compensation Act, E LAW, Murdoch University Electronic Journal of Law Volume 3, Number 3 (July 1996); Criminal Injuries Compensation for Domestic Sexual Assault: Obstructing the Oppressed, Ian Freckleton published in International victimology : selected papers from the 8th International Symposium : proceedings of a symposium held 21-26 August 1994 Chris Sumner, Mark Israel, Michael O'Connell and Rick Sarre (eds.), Canberra: Australian Institute of Criminology, 1996. Web: http://www.aic.gov.au/publications/proceedings/27/freckelton.html

31. In relation to criminal proceedings arising from domestic violence, to what extent do the financial circumstances of the offender result in the court making no order for compensation or low orders for compensation?

32. To what extent could compensation for victims of domestic violence be improved if legislation placed more emphasis on courts making orders for compensation in criminal proceedings?

33. Given resource constraints that apply to government, what if any priority should be placed on establishing a government funded crime victim's compensation scheme?

34. What would be the advantages and disadvantages of allowing victims of domestic violence to apply under a crime victim's compensation scheme, if one were established in Fiji?

2.8 Police

2.8.1 Introduction

In 1995 Commissioner of Police moved to lift Police response in cases of domestic violence by introducing a 'No Drop Policy' under which Police are required to investigate and, where there is sufficient evidence, to charge.

Police have been actively involved in liaising with government agencies and with various groups in the community in relation to domestic violence.

In November 2003 the Commissioner of Police indicated that domestic violence and sexual assault would be two of the top four priorities for Police in 2004.

The role of the Police has been recognised to be pivotal in every jurisdiction that has considered how to reform its laws to establish a more effective response in cases of domestic violence. In considering what reforms may be necessary the following are relevant:

- police powers and duties under legislation
- police procedures, particularly as set out in binding directions issued to Police by the Commissioner of Police, and
- police practices that may be at variance with required procedures or may indicate the need for further written procedures.

The Fiji Women's Crisis Centre Report found that:

- there is a severe problem in under reporting of domestic violence to the Police

- about 27% of respondents who sought help from the Police found Police not to be helpful. The common reason given was that there was no follow up by Police and that Police forced them to reconcile or took the part of their partner
- despite the 'No Drop' policy, Police were still discouraging victims of domestic violence from laying charges
- Police had not had training in this area and mostly advocated reconciliation because of their own attitudes towards domestic violence and because it means less work for Police[80]

The FWCC Study made the following recommendations[81]:

- the 'No Drop policy' needs to be legislated and disciplinary action taken if breached by officers.
- regular gender-sensitivity training programmes should be carried out at all levels of the Police Force, especially among older and higher-ranking officers.
- police officers should attend the Regional Training Programme offered by FWCC.
- police officers also need to undergo anger-management and conflict resolution training.
- all Police Stations to have 'Women's Complaints Centre' with a view to establishing Women's Police Stations.
- for research purposes records need to be kept of the number of clients presenting with domestic violence and sexual assault cases.

2.8.2 International checklist

In 1996 the Special Rapporteur on Violence against Women presented Model Domestic Violence Legislation as part of her report on All Forms of Violence against Women in the Family to the UN Commission on Human Rights. The Special Rapporteur noted:

> "120. … It could be argued that there is no one model that would lead to the eradication of violence against women in all societies but there are important elements that must be included in any strategy to combat violence against women and that can be adapted to differing socio-cultural contexts[82].

While there are elements of the Model that may not be useful for Fiji, the Model does serve as a useful checklist of matters to be considered.

The Model contains provisions in relation to the duties of police, the role of police in ensuring that victims of domestic violence are aware of their rights, the duty to collect

80 FWCC 2001, p. 44

81 FWCC 2001, Recommendations 8 -13

82 Report by Special Rapporteur on Violence Against Women, to the 52nd Session of the Commission on Human Rights. E/CN.4/1996/53

data and Police training. Sections of the Model that relate to police are at Attachment 1.

While the Model is referred to below, there are other resources that can also be used as a checklist. For example in August 2004 the Victoria Police in Australia published their new *Code of Practice for the Investigation of Family Violence: Supporting an Integrated Response to Family Violence in Victoria*. This Code deals with the role of police in relation to family violence; what police do when family violence is reported to them; referrals; criminal options; civil options; and monitoring police response and investigation. The Code is about 60 pages. The length gives a good indication of the amount of detail that is in the Code about how police are required to respond at each step in the process.[83]

2.8.3 General powers and duties

s. 17 (1) of the Police Act provides that every Police officer must exercise the powers and perform the duties that are conferred or imposed by law on Police.

Also that each police officer has a duty to:

> 'prevent the commission of offences and public nuisances, to detect and bring offenders to justice and to apprehend all persons whom he is legally authorised to apprehend and for whose apprehension sufficient grounds exist'.[84]

In addition Police are bound to obey *directions* received from superiors in the Force. This includes directions received in the form of Force Routine Orders (FRO) issued by the Commissioner of Police[85]

Where Police are derelict in their duty disciplinary procedures apply and a range of penalties up to dismissal can be imposed.

2.8.4 Duty to investigate and charge –"No Drop Policy"

As noted above, in September 1995, the Fiji Police introduced a "No-Drop Policy." This is FRO 51/95. The substantive part of this policy is as follows:

> '..the conciliatory approach adopted by the police in previous years will be replaced by 'A No Drop Policy'. This would mean that every complaint coming under this definition: "Violence between heterosexual adults who are living together or have previously lived together as husband and wife ("conjugal relationship") will be fully investigated and offenders taken to court. This policy applies to police officers too and under no circumstances will police officers promote reconciliation in (DV) cases".

83 Available online at: http://www.police.vic.gov.au/document/ACF1A14.pdf A further example is the NSW Police Service, Domestic Violence Police and Standard Operating Procedures, 2000. This is a similar length to the Victorian Code and it deals with similar matters.

84 s 17(3) Police Act

85 s. 17(1) Police Act

It is noted that the above policy requires police to take two specific actions:

- to fully investigate domestic violence that comes within the definition, and
- to charge the offender (i.e. the offender is to be 'taken to court').

It should be noted that the Policy does not state that Police should consider arresting the offender.

On 12 September 2003 the Commissioner issued FRO 37/03:

> **NO DROP POLICY**
>
> "It appears that the no drop policy of the Commissioner of Police is not being adhered to. Please be reminded that any police officer who is found disobeying the order of the Commissioner of Police will be dealt with severely.
>
> The order is very clear, Police have no powers to initiate reconciliation and as such all matters must go to court whether it be minor, major or relating to Domestic Violence.
>
> Divisional /Formation Commanders are reminded to adhere strict compliance of this order".

While FRO 37/03 aims to reinforce the No Drop Policy, the reference to 'all matters must go to court whether it be minor, major or relating to Domestic Violence' caused some confusion.

On 7th November 2003 the Commissioner issued FRO 45/03:

> **NO DROP POLICY**
>
> The Domestic Violence and Sexual Crime Workshop was held at the Fiji Police Academy between October 2nd and 3rd, 2003.
>
> During the workshop the Domestic Violence Policy issued 1995 vide FRO 51/95 was discussed together with the reinforcement of the NO DROP POLICY issued on September 12th, 2003 vide FRO 37/03.
>
> Participants identified the rationale for the "NO DROP POLICY" as a reaction to community dissatisfaction with the perceived lack of response to gender based violence. They further discussed that the latest instructions on the NO DROP POLICY vide FRO 37/03, applies the no drop principal to all reported offences including domestic violence, giving rise to some confusion, and that the policy needs to be clarified and training be provided to implement the policy with a victim centred approach rather than producing every offender before the court.
>
> To clarify the NO DROP POLICY Divisional /Formation Commanders are to ensure:
>
> a) That all cases reported must be investigated thoroughly
> b) That no case will be classified without being thoroughly investigated
> c) The Police has no power to initiate (promote) reconciliation and as such the victims wish is to be respected

d) Should the victim wish the matter to proceed to court that it should go to court only after investigations revealed that there is sufficient evidence against the offender
e) Should the victim wish for the offender to be warned, the completed investigation file must be submitted to the Division Crime Officer of the Division for his perusal and advice.

Domestic Violence and Sexual Violence are two different issues and must be treated separately. Cases of Sexual Violence which falls under [section 149-163, 166-179] of the Penal Code Cap 17 must be thoroughly investigated. Should there be sufficient evidence against the accused, he/she must be produced before the court after carefully considering the provisions of each Section highlighted.

It must be noted that there is no form of reconciliation in sexual crime, and as such neither the victim nor the police or anyone else has the authority to bring about reconciliation outside court.

Divisional / Formation Commanders are to ensure the above instructions are complied without any confusion.

Background and effect of the 'No Drop Policy'

Before the No Drop Policy in 51/95 was introduced, there were problems with Police responding to complaints. When Police did respond it was normally to mediate and attempted to reconcile the parties for offences such as assault and assault occasioning actually bodily harm

Before the introduction of the policy, Police reluctance was based on:

- an expectation that the woman would not pursue the complaint
- an assumption that the parties may reconcile before or during the court process
- attitudes that domestic violence is family matter
- personal attitudes based on a belief that a man has a right to beat his wife to discipline her or perhaps she is considered to be his property

The introduction of the FRO 51/95 'No Drop Policy' aimed to correct these attitudes by directing Police to take action. This took into account that:

- investigating and charging confirms to the alleged offender, victim and the community that domestic violence breaches criminal law and is an offence and is unacceptable
- the desirability of sending a message to victims of domestic violence that they could rely on the Police.

The FWCC Study found that despite the 'No Drop' policy, Police were still discouraging victims of domestic violence from laying charges[86].

86 FWCC Study, 2001, p. 65

FRO 37/03 aimed to reinforce the No Drop Policy and FRO 45/03 aimed to clarify and expand on FROs 51/95 and 37/03.

Questions:

The 'No Drop Policy' was introduced in September 1995, reinforced in September 2003 and elaborated upon in November 2003.

35. What difference has the 'No Drop Policy' made to the way that Police respond to complaints in cases involving domestic violence?

36. Have any further changes happened since the policy was reinforced in September 2003 or elaborated upon in November 2003?

37. Are all Police implementing the 'No Drop Policy' or are there regions or local areas where Police have not implemented the Policy?

38. Despite the 'No Drop Policy are Police:

- **discouraging victims of domestic violence from laying charges?**
- **attempting to reconcile the parties?**

Is the 'No Drop Policy' clear and detailed enough?

It will be seen from the sections of the Model Legislation set out above (see International checklist) that the Model goes into detail about the steps to be taken by Police. While the Fiji 'No Drop Policy' FRO 51/95 clearly states that every complaint that comes under the definition of conjugal relationship will be fully investigated it does not explicitly set out what steps are considered to be a 'full investigation'. The Model on the other hand specifies matters such as:

- the priority that is to be assigned to these calls for assistance (clause 14)
- the circumstances in which police must attend at the scene (clause 15)
- that police must respond even if the person reporting is not the victim (clause 16)
- the precise steps to be taken to investigate the matter (clause 17)
- the circumstances in which police should exercise their powers to arrest the offender (clause 17(h))
- the steps to be taken by police to inform the victim of their rights (clause 21)
- the requirement that police complete a data collection report (clause 22-23)

In relation to arrest, Police have power under s. 21 of the Criminal Procedure Code to arrest without warrant a person who is suspected 'upon reasonable grounds' of having

committed an offence. The 'No Drop' Policy could go further on this aspect to list the circumstances in which the Police should arrest.

Police in many jurisdictions have implemented detailed policies along the lines set out in the Model. Examples are New Zealand, each Australian State and Territory, most States in the USA and Provinces of Canada. If police investigate a complaint involving domestic violence but decide not to charge, in many of the above jurisdictions, the officers are required to file a special report with a senior officer to explain why no charge was laid. The effect of this measure is that police are unlikely not to charge if there are grounds to do so. This aspect may be covered by paragraph (e) in FRO 45/03.

'Conjugal relationship' and 'violence'
The 'No Drop Policy' defines the relationships to which it applies as follows:

> 'Violence between heterosexual adults who are living together or have previously lived together as husband and wife ("conjugal relationship")'

The definition is targeting intimate partner violence. Intimate partner violence is the first of five situations that might be encompassed by the term 'domestic violence' set out in Discussion Paper 1 (see 'What does 'domestic violence' encompass?). It is noted above, that intimate partner violence occurs in heterosexual marriage and de facto relationships and in same-sex relationships[87].

The definition in the No Drop Policy does not require the same police response in the case of violence by other relatives in the home, where a child is the direct or indirect victim, between boyfriend and girlfriend, or in the case of carer and other household relationships.

In relation to children, the Fiji police No Drop Policy was commented on in a 1999 report to the UN Commission on Human Rights. That is:

> "the Special Rapporteur remains uncertain as to the extent to which this policy covers offences of domestic violence against children. She considers that an extension of its ambit in this way is essential[88].

Additionally, the definition in the No Drop Policy refers to 'violence'. It is not clear whether threats of violence (criminal intimidation[89]) and property damage are covered.

87 In relation to same-sex relationships it is noted that the FRLC reference to review the Penal Code and Criminal Code, which will begin in December 2004 includes review of the present laws governing homosexual conduct in Fiji, and the need to change or retain the same (Penal Code terms of reference (g)).

88 Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Ms. Ofelia Calcetas-Santos, with Addendum Report on the mission of the Special Rapporteur to the Republic of Fiji on the issue of commercial sexual exploitation of children to the Commission on Human Rights, Fifty-sixth session, E/CN.4/2000/73/Add.3, 27 December 1999

89 S. 330 Penal Code

Binding directions to police or legislation?

Whether or not the 'No Drop Policy' needs to be clarified or expanded, there is a further issue about whether it should be set out in legislation. This issue was raised by the FWCC study that recommended that the 'No Drop Policy' should be legislated and that disciplinary action should be taken if it is breached by police.[90]

As set out above Force Routine Orders issued by the Commissioner of Police are already binding on Police under s. 17(1) of the Police Act and disciplinary action can be taken for breach.

If there are problems with the current 'No Drop Policy' or in its implementation, it may be that the problems can be remedied by adjusting the Policy to make it more precise.

Four further options are:

- for the Minister to make regulations under the Police Act, to set out the 'No Drop Policy' in detail. It appears that this could be done under the power to make regulations that prescribe offences against discipline that are punishable under the Act[91],
- to add an additional section to the Police Act, perhaps a new section 17A that sets out the general duties of Police in domestic violence matters
- set out the general duties of police in the proposed new domestic violence restraining order legislation (dealt with in Discussion Paper 3)
- include provision in the proposed new domestic violence restraining order legislation, that the Commissioner of Police must issue comprehensive Force Routine Orders about domestic violence with these to be gazetted (dealt with in Discussion Paper 3).

Questions:

Having regard to the three parts of the No Drop Policy (the Policy introduced in September 1995 and the amendments in September and November 2003):

39. Are the provisions of the 'No Drop Policy' adequate? If not, what adjustments should be made?

40. Should the duties of Police in relation to domestic violence matters be set out in binding Force Routine Orders (current position) or would it be preferable to:

- **set out the general duty in legislation either the Police Act or the proposed new domestic violence restraining order legislation?**

90 FWCC 2001, Recommendation 8

91 This Regulation making power is s. 60(c)

- **set out the detailed requirements in Police Act Regulations?**

- **require the Commissioner of Police to issue comprehensive Force Routine Orders about domestic violence with these to be gazetted (to be introduced through the new domestic violence restraining order legislation.)?**

2.8.5 Adequacy of police investigation

The adequacy of the investigation by police directly affects the prospects of charging and prosecution. Important aspects in relation to investigation at the scene include:

- keeping the alleged offender separate from the victim to avoid intimidation
- taking statements from the alleged offender and the victim *and* any other witnesses
- collecting any physical evidence
- taking careful notes or photographs about relevant aspects of the scene
- supporting the victim and explaining their rights, and
- making notes as early as possible about what Police themselves heard or saw as they entered the scene.

Following on from the investigation at the scene it will normally be necessary to arrange a medical examination of the victim.

Questions:

41. At present, what steps do police take at the scene and afterwards when investigating a domestic violence complaint? Are police investigations in these cases effective?

42. What if any additional steps are required to ensure proper investigation of domestic violence cases?

43. Should the 'No Drop Policy' set out the ways that Police are to conduct an investigation in relation to domestic violence matters?

2.8.6 Powers of arrest and policy about arrest

Police have power to arrest without warrant under section 21 of the Criminal Procedure Code in a list of circumstances including when Police 'suspect on reasonable grounds' that a person has committed a 'cognizable' offence. 'Cognizable' offences are those listed in schedule 1 to the Code. This lists relevant offences but excludes common assault.

There is a further power in section 53. This provides that if a Police Officer can arrest without a warrant to if that is necessary to prevent an offence being committed.

As noted above the 'No Drop Policy' does not require Police to arrest the offender.

Many jurisdictions that have reformed criminal law and procedures in relation to domestic violence have introduced policy to either *encourage* or *require* Police to arrest where they have grounds for arrest without warrant.

These policies aim to ensure that Police act decisively and to send a strong message to offenders, victims and the community about the seriousness of domestic violence.

Policies that *require* arrest are referred to as 'mandatory arrest policies.' These are contentious because these policies remove Police discretion. Experience in jurisdictions that have implemented mandatory arrest policies indicates that it is generally necessary to specify that Police are to arrest 'the primary physical aggressor' to avoid situations where Police arrest the victim or the offender and the victim.

Clause 17(h) in the Model legislation (above) provides that Police *should* arrest the offender if the victim is in continuing danger *and it is not possible* to arrange for the removal of the offender from the home (clause 17(h)).

This policy states what would be normal police practice in any other case. For example, an assault between strangers in a bar or at a sporting match. In these cases if there is an ongoing risk the police will normally arrest.

In some jurisdictions the selected policy about arrest in domestic violence cases has been placed in binding written instructions to police (Force Routine Orders) and in others, particularly States in the USA that have adopted mandatory arrest, it has been stipulated in legislation.

Questions

44. Should police be able to arrest without warrant in cases of common assault committed in the context of domestic violence?

45. What are the current practices of police in relation to arrest, when called to intervene in a domestic violence incident? What are the circumstances in which police *do and do not arrest*?

46. Do you think that police should arrest more frequently in domestic violence cases? If so, in which cases should police arrest?

47. Should the "No Drop Policy' be adjusted to either:

- **set out the circumstances in which police should arrest, or**
- **require the Police to arrest in all cases.**

48. What is your view about a new policy that police *should* arrest the offender if the victim is in continuing danger *and it is not possible* to arrange for the removal of the offender from the home?

2.8.7 Powers of entry and search

Where police have reason to believe that a person to be arrested is on premises, police have power to enter if they have a warrant to arrest, authority to arrest, or permission to enter by someone who resides in, or is in charge of, the place. Where police can enter premises to arrest a search of the premises can also be conducted[92].

However, where police do not have a warrant or permission to enter, reliance on 'authority to arrest' is likely to create uncertainty. This includes the potential for uncertainty where police are concerned that an offence may have just occurred in the premises or where an offence is in progress. Police do have common law powers of entry but having to resort to these powers is not as satisfactory as a clear statutory power.

Questions

49. As indicated above police currently lack a clear statutory power to enter premises without a warrant. This includes situations where police are concerned that an offence has just occurred and the victim or the offender is still in the premises or where an offence is in progress.

50. Should the Criminal Procedure Code be amended to give police a clear power of entry in the circumstances just indicated?

51. Are there any further circumstances in relation to domestic violence cases where police should reasonably have a power to enter premises without warrant?

92 s.14 Criminal Procedure Code

2.8.8 Charging practices

The No Drop Policy FRO 51/95 directs police that offenders are to be taken to court. There is discussion above about whether police are complying with this direction (see Duty to investigate and charge).

The *types of charges* that are laid in domestic violence cases are also relevant. This is because particular behaviour may amount to a criminal offence under more than one section of the Penal Code and in these cases there is a choice about which section to charge under. For example in a case where the behaviour gives grounds for charging as common assault or for criminal intimidation the effect of charging for common assault is that the offence will attract the provisions of s. 163 of the Criminal Procedure Code and the maximum penalty is 1 year. On the other hand if the charge was for criminal intimidation, s. 163 does not apply and the maximum penalty is 2 years.

Further examples are:

- the choice between assault causing actual bodily harm on the one hand, where s. 163 applies and the maximum penalty is 5 years, and unlawful wounding on the other. The maximum penalty for unlawful wounding is 3 years but s. 163 does not apply.
- where a person assaults their son or daughter who is aged under 17, the choice between charging for wilful assault on a juvenile under s. 57 of the Juveniles Act on the one hand, where the maximum penalty is 2 years and s.163 does not apply or charging for assault occasioning actual bodily harm where the maximum penalty is 5 years and s. 163 applies.

In a case where a victim of domestic violence is not interested in reconciling and /or the Police are concerned to shield the victim from undue pressure, charging choices may be particularly important.

Questions:

52. To what extent are charges other than assault, assault causing actual bodily harm and grievous harm being laid in domestic violence matters?

53. What policies are applied by Police and/or the DPP in domestic violence cases to selecting the charge that is laid where two or more alternatives are available in a particular case?

2.9 Bail

2.9.1 Current law – Bail Act 2002

The law that applies to bail for criminal offences is set out in the Bail Act 2002. Like the Penal Code, the Bail Act currently contains no reference to criminal charges arising from domestic violence.

Under the Bail Act, after a person is charged police have limited powers to grant bail while courts have a general power to grant bail. In both cases, bail may be granted subject to conditions. Conditions specify where the accused is to reside and can stipulate that the accused is not to approach or interfere with witnesses connected with the case or a named person. In this way, bail conditions are often a very important mechanism that can help to protect the victim.

Where bail conditions are breached the court may issue a warrant for the police to arrest the accused. Additionally, police have the power to arrest a person release on bail without warrant if:

- police reasonably suspect that the accused is unlikely to appear at court on the designated day, or
- police 'reasonably believe' that the person is likely to break any of the conditions of bail or has broken any of those conditions'[93]

Where bail is breached penalties can be applied by the court and the court will consider any further application for bail in the light of the breach.

Where a person is placed on bail, the bail and conditions imposed continue until:

- bail is dispensed with or bail conditions are varied by the court, or
- the offence is dealt with (i.e. the accused pleads guilty or is found guilty).

Bail conditions can be varied, and varied repeatedly, prior to the offence being dealt with.

In relation to bail decisions for an accused charged with a criminal offence arising out of domestic violence the following are particularly relevant:

- whether the criteria that apply to bail place sufficient weight on the safety of the victim, and
- the extent of the liaison between police and the victim about bail decisions.

Police power to grant bail

93 s. 25 Bail Act 2002

The power of police to grant bail is limited to offences that are not *serious offences*[94]. A *serious offence* is one where the maximum penalty includes imprisonment for 5 years of more[95].

Police domestic violence crime statistics for 1993-1997 indicate that the most common criminal charges laid were assault causing actual bodily harm (maximum penalty 5 years imprisonment) and common assault (maximum penalty 1 year imprisonment)[96]. This means that police do not have power to grant bail where a person is charged with assault causing actual bodily harm but may grant bail where a person is charged with common assault.

Where police do not have power to grant bail or have the power but decline to grant bail, the police must take the person before the court within 24 hours[97].

Criteria that apply to considering bail
The Bail Act 2002 sets out the criteria to be applied in considering bail. The criteria are the same for bail by police (in cases where police can grant bail) and bail when considered by the court.

The criteria start with a presumption in favor of bail. This presumption is displaced where the person has previously breached bail or the person has been convicted and has appealed.[98]

Additionally:

- bail must be granted to a person under 18 years unless the person has previous convictions, has previous breached bail or the offence is a serious one,[99] and
- there is an entitlement to bail for summary and minor offences and those not punishable by imprisonment, except where the person has previously breached bail or needs protection (e.g. drunk)[100].

The criteria can be summarised as follows

- the primary consideration is the likelihood of the accused appearing in court to answer the charges[101]
- the accused person must be granted bail unless the opinion is formed that one of the following three elements applies: the accused is unlikely to appear in court; the interests of the accused will not be served though granting bail; or the

94 s. 8

95 s. 2(1)

96 See FWCC Study 2001 above

97 s. 9

98 s. 3(4). There are two exceptions i.e. conviction.

99 s. 3(4)

100 s. 5(1)

101 s.17(2)

granting of bail would endanger the public interest or make protection of the community more difficult[102].

- factors are listed as being relevant to each of these three elements and these must be considered. That is[103]:

Regarding the likelihood of appearing in court:
- the accused person's background and community ties (including residence, employment, family situation, previous criminal history)
- bail history
- the circumstances, nature and seriousness of the offence
- the strength of the prosecution case
- the severity of the likely penalty if the person is found guilty
- specific indications (e.g. whether the person voluntarily surrendered to the police)

Regarding the interests of the accused person:
- how long the person would have to stay in custody until the case is heard
- the conditions of that custody
- the need to obtain legal advice and prepare a defence
- the need for the person to be at liberty (e.g. employment, education, care of dependants)
- whether the person is under 18
- whether the person is incapacitated by injury or intoxication or otherwise in danger and in need of physical protection

Regarding the public interest and the protection of the community:
- any previous breaches of bail
- the likelihood of the person interfering with evidence, witnesses or any specially affected person
- the likelihood of the accused person committing an arrestable offence while on bail

A *specially affected person* means the victim, a close relative of the victim and any other person who warrants special consideration because of the circumstances of the case (s. 2(1))

- if bail is refused the police officer or court that made the decision to refuse must record the reasons in writing.

Residential address, bail undertakings and conditions

Section 16 provides that a person who is granted bail must give their residential address and must reside at their residential address until the hearing of the case. However, if the person wishes to reside elsewhere the bail undertaking can be varied accordingly.

102 s.19(1)

103 s.19(2)

In cases involving domestic violence, this provision may be highly problematic because it requires the accused to reside at home unless *the accused* applies and is granted permission to live elsewhere.

The standard bail undertaking is that the person will appear in court at the specified time. Additionally bail conditions can be required. These can include a requirement that the person enters an agreement to 'observe specified requirements as to his or her conduct while on bail'[104]. The legislation does not define 'specified requirements' or give examples.

If the legislation referred to domestic violence, the term 'specified requirements' could be defined to include standard conditions such as not to assault, threaten or harass the victim.

Prosecution opposing bail
The Prosecution Code 2003, issued by the Director of Public Prosecutions under s.76 of the Criminal Code, is binding on police and public prosecutors. The Code notes that the relevant principles for bail pending trial are whether the accused is likely to appear in court, fairness to the accused, the public interest and the protection of the community[105].

The Code sets out factors to be taken into account by prosecutors in deciding whether to oppose bail. These include: the likelihood of the accused appearing in court; previous failure to appear; circumstances, nature and seriousness of the offence; severity of the likely penalty if convicted; the behaviour of the accused during the investigation; the likelihood of the accused interfering with evidence or witnesses; the likelihood of the accused committing an offence while on bail[106].

The list of factors to be taken into account by prosecutors do not refer to and special considerations in relation to charges arising out of domestic violence.

2.9.2 Examples of jurisdictions with domestic violence bail provisions

As noted above, Fiji's Bail Act does not apply any special provisions in relation to domestic violence cases.

This contrasts with the position in other jurisdictions that have undertaken detailed reform of criminal law in relation to domestic violence.

Examples
New South Wales

104 s. 22(2)(a)

105 s. 13.2 Prosecution Code 2003

106 this is partial list of the factors in s. 13.1 of the Prosecution Code

The presumption in favor of bail does not apply in domestic violence cases. The Bail Act (NSW) 1978 provides that bail should not be granted for a domestic violence offence or breach of a domestic violence restraining order if police or the court is satisfied that the accused:

- has a history of violence and has been violent to the other person in the past (whether convicted or not), or
- has failed to comply with past bail conditions unless satisfied that he will comply in the future[107].

A domestic violence offence means a personal violence offence committed against someone with whom the accused had, or has, a domestic relationship[108].

Australian Capital Territory

The usual presumption in favor of bail does not apply in relation to the criminal offence of breach of a domestic violence protection order[109].

Where someone is charged with a domestic violence offence (similar definition to NSW and includes the offence of breaching a domestic violence protection order), the police may not grant bail unless satisfied on the balance of probabilities that the person poses no danger to the victim during the period of bail[110]. Police have to take into account the victim's need for protection where the victim has expressed concern about possible violence or harassment by the accused[111].

If police do grant bail in relation to a domestic violence offence, the officer has to take reasonable steps to tell the victim/s as soon as possible about the decision and the bail conditions.[112]

New Zealand

Under the Bail Act 2000 where a person is charged with breaching a domestic violence protection order or a condition of a domestic violence protection order under the Domestic Violence Act:

- the usual presumption in favor of bail does not apply[113]
- the need to protect the victim of the alleged offence is the paramount consideration[114]

107 s. 9A Bail Act (NSW) 1978

108 ibid. s. 4

109 s.9B(iv) Bail Act (ACT) 1992

110 ibid. s. 9D(4) & 9F

111 ibid. s. 23A

112 ibid. s. 16(5)

113 s. 7(2) New Zealand Bail Act 2000

114 s. 8(4)

- police may not release the person on bail within 24 hours of arrest but this does not affect the obligation of police to bring the person before the court as soon as possible. If the person is not taken before the court within 24 hours police may grant bail[115] subject to the fact that the presumption against bail in these cases applies and that the paramount consideration in relation to bail is the need to protect the victim[116]

The overseas bail laws that are outlined above, are examples of ways that bail laws can be adjusted so that the special risks that often apply in domestic violence cases *must be* considered.

In considering possible adjustments to Fiji's Bail Act, the rights of the accused must also be taken into account.

Questions

There are no special provisions about domestic violence in the Bail Act.

54. To what extent are police and the courts currently placing priority on the safety of victims of domestic violence when determining bail?

55. At present the Bail Act does not treat common assault committed in the context of domestic violence as a 'serious offence'. The result is that the police may grant bail. Should all offences committed in the context of domestic violence, including common assault, be treated as serious offences where the police may not grant bail and instead must take the accused before the court?

56. Should the Bail Act be amended to contain other specific provisions about criminal charges that arise in the context of domestic violence and breach of a domestic violence restraining order?

57. If so, what should the Bail Act say about bail in these circumstances? For example, should the Bail Act provide that:

- **the presumption of bail does not apply**
- **the paramount concern in considering bail is victim's safety**
- **police may only grant bail if satisfied that the release of the accused would not pose a risk to the safety of the victim and if not satisfied the police must bring the accused before a court within 24 hours**
- **the presumption against bail and paramountcy of the victim's safety also applies when the court is considering bail**

115 s.23 New Zealand Bail Act 2000

116 s. 21(2)

- **in considering where the accused should reside while on bail that the accommodation needs of the victim have priority. Unless the victim is agreeable and it appears safe, the accused must be required to reside at another residential address while on bail**
- **automatic conditions attach to bail i.e. that the accused not assault, threaten or harass the victim**
- **if bail is refused, granted or subsequently varied immediate steps must be taken by police to inform the victim of the terms and conditions of bail**

2.10 Prosecution

2.10.1 Prosecution policy - overview

Criminal prosecutions are undertaken by a police or public prosecutor. Public prosecutors are those employed by the Office of the Director of Public Prosecutions ('DPP'). The DPP generally undertake prosecution of more serious charges and matters in higher courts where as police prosecutors undertake most criminal prosecutions in the Magistrates Court.

While a criminal prosecution can be commenced by anyone, police have the main role and 'private prosecutions' (that is, prosecutions commenced by a private individual) are rare.

Prosecution Code 2003

Section 76 of the Criminal Procedure Code provides that prosecutions, whether undertaken by police or public prosecutors, are subject to the direction of the Director of Public Prosecutions.

The Prosecution Code 2003 has been issued by the Director of Public Prosecutions under s. 76 and it is binding on police and public prosecutors. The Code provides an essential framework for all prosecutions and while it refers to whether an offence is serious or of a minor nature, it does not single out any offences by name.

Among other things the Code provides:

- that it is the duty of prosecutors to prosecute fairly,
- prosecutions are undertaken where there is sufficient evidence and it is in the public interest,
- many factors are relevant to whether a prosecution is in the public interest and this must be determined individually in each case,
- public interest factors in favor of prosecution include: seriousness; whether a weapon was used or violence was used or threatened; whether the victim has

been in fear or suffered personal attack; whether the defendant has previous convictions; whether the alleged offence happened while the defendant was on bail, a suspended sentence or other order of the court; whether there are grounds to believe the offence is likely to be repeated; whether the offence is widespread in the area in which it was committed,[117]

- public interest factors against prosecution include: where the court is likely to impose a very small or nominal penalty; the loss or harm was minor and was the result of a single incident; a prosecution would have a bad effect on the victim's physical or mental health; the accused has compensated the victim (but the accused must not avoid prosecution simply because they can pay compensation); the parties have reconciled (although this should not prevent prosecution in serious cases),[118]
- the interests of victims must be weighed as an important factor in deciding where the public interest lies but the public interest remains the test,
- selection of charges should be based on: reflecting the seriousness of the offending; allowing the court adequate sentencing powers; enabling the case to be presented in a clear and simple way and adequately reflect the true criminality of the offenders conduct,
- prosecutors should not continue with more charges than are necessary and should never lay a more serious charge just to encourage a defendant to plead guilty to a lesser charge,
- where the defendant has pleaded guilty the prosecutor must ensure that all facts that support every ingredient of the charge are placed before the court and by reference to any aggravating or mitigating features, provide a comprehensive factual basis for sentencing,
- that prosecutors must endeavour to keep victims informed of the progress of the case and have their views considered by prosecutors and investigators and bring their views before the court. Further that prosecutors should be sensitive to the interests and needs of the victim and appraise the court of the extent of harm, physical, psychological and financial that the offence has had on the victim. Where a victim has suffered some injury, particularly a permanent injury or disability, a suitable medical report should be supplied to the Court before sentencing,
- on conviction the prosecution must inform the court of any facts that may affect the assessment of sentence whether mitigating or aggravating.

As noted above, the Code provides an essential general framework for prosecution. The Code does not refer to charges arising from domestic violence and neither does it refer to charges arising in other circumstances.

Questions:

58. What approach is currently taken by police and public prosecutors to prosecutions for charges arising out of domestic violence?

59. What, if any, particular difficulties are experienced by prosecutors in

117 this is a summary and partial list of factors in favour of prosecution set out in s. 7.2 of the Prosecution Code 2003

118 this is a summary and partial list of factors against prosecution set out in s. 7.3 of the Prosecution Code 2003

relation to these prosecutions?

60. Is there are greater tendency for the prosecution to be withdrawn in prosecutions for charges arising out of domestic violence? If so, why is this the case?

61. How effective are police and public prosecutors in prosecutions for charges arising out of domestic violence? This includes: charging practices; the position taken on bail; liaising with the victim during the prosecution; presenting the prosecution case; presenting matters relevant to sentence?

2.10.2 Prosecuting domestic violence cases – special features

The prosecution of criminal offences committed in the context of domestic violence can involve particular difficulties including:

- the victim is likely to be more susceptible to pressure from the accused and /or from family members to withdraw the charge
- the victim may fear for their safety
- the victim may fear reprisals if they give evidence
- emotional strain on the victim of the prosecution
- concern about the consequences of successful prosecution e.g. imprisonment of the accused / loss of breadwinner

The prospects of successful prosecution in cases involving domestic violence are affected by each of the following factors which are generally interlinked:

- *Prosecution policy* – that is, what guidelines have been set out for the prosecutor in DPP prosecution policy? This can include a wide range of matters such as whether the police 'no drop' policy is carried through to a 'no drop' prosecution policy. At a broader level it includes whether the victim can obtain a review if there is a decision not to prosecute and whether the victim views are to be taken into account before there is a decision to drop a prosecution.
- *The state of the law* – this has a direct bearing on what can realistically be included in prosecution policy. For example, in relation to charges to which it applies, prosecution policy has to take into account the reconcilable offences provision in s. 163 of the Criminal Procedure Code (dealt with above) and the inability of the prosecution to *compel* a married victim to give evidence against their spouse.
- *Whether the victim will give evidence* – this relates to whether the victim is protected from the accused during and after the prosecution (bail conditions, availability of domestic violence restraining orders) and whether the victim can be *compelled by* the prosecution to give evidence.
- *Other evidence available* – this relates to the quality of the police investigation (dealt with above) and whether the prosecution will take the initiative to present

expert evidence about domestic violence where this will assist. The availability of expert evidence and the cost of bringing this evidence are also factors.

- *Prosecutor expertise and suitability* – this relates to whether those who will prosecute criminal matters involving domestic violence have the knowledge and skills to deal with these particular prosecutions. This is linked to what internal arrangements apply to domestic violence prosecutions (file identification, specialist prosecutors, mentoring / supervision by specialist prosecutors) and whether prosecutors have received training in relation to domestic violence prosecutions.

Whether the victim is properly supported – this relates to factors as broad as the attitude of the community and other family members to the offender being held criminally accountable.

However it also includes how the prosecutor's office deals with the victim during the stages of the prosecution (is the victim kept informed? is personal support provided? what attitude to the prosecution is projected by the prosecutor's office?).

Questions:

62. What effect do the following have on the prospects of prosecution in criminal charges arising from domestic violence:

- **s.163 of the Criminal Procedure Code (reconcilable offences)?**
- **the inability of the prosecution to compel a victim, who is married to the defendant, to give evidence for the prosecution against the defendant?**

63. Does the prosecution ensure that victims of domestic violence are properly supported while the prosecution is underway? What steps are taken and how effective are they?

64. What approach does the prosecution currently take if a victim does not wish to give evidence? For example, does the prosecution proceed where a conviction is likely, based on other available evidence (e.g. medical evidence, evidence of other witnesses, and/or defendant's admissions).

65. What training do police and public prosecutors receive in relation to prosecution of criminal charges arising from domestic violence?

66. What, if any, improvements are needed in relation to training and how could this be implemented?

2.10.3 Hard or soft 'no drop' prosecution

As noted above, prosecution policy is currently generic. Domestic violence cases are not singled out for particular attention.

In other jurisdictions that have looked at how to improve the criminal justice system's response to domestic violence, prosecution policy has been considered. This has typically resulted in a policy shift where by prosecution policy is adjusted to reinforce the fact that the prosecution is responsible for the decision about whether a prosecution will proceed, rather than the victim.

This shift aims to:

- reduce or remove the rationale for the defendant or others to attempt to pressure the victim not to proceed (e.g. by causing the victim to ask that the prosecution be dropped or for the victim to refuse to give evidence),
- acknowledge that the State has a duty to protect victims of domestic violence who may not be able to protect themselves due to pressure from the defendant or others
- increase the accountability the of prosecutors for a decision not to proceed in criminal charges arising out of domestic violence
- follow through with police 'no drop' policy and pass a message back to police that there is a point in charging because these charges will not be dropped lightly by the prosecution
- align prosecution policy with an overall approach that aims to reduce domestic violence by passing a strong message to the community that these criminal offences are not less serious because they are 'domestic violence'.

Prosecution policy that is adjusted in these ways is often referred to as *pro-prosecution* policy. 'Pro-prosecution' names the intended policy shift. That is, a shift away from these prosecutions being dropped more frequently to a new approach where by they are dropped no more frequently than criminal charges that arise in another context. The key purpose is to 'normalise' these prosecutions taking into account the special dynamics that often apply in domestic violence cases.

Hanna points out that pro-prosecution policies can be characterised as either 'hard' or 'soft' no drop policies.

> Under 'hard' policies, cases proceed regardless of the victim's wishes when there is enough evidence to go forward. In Duluth, Minnesota, for example, prosecutors subpoena all victims to testify and have standard procedures for dealing with uncooperative victims. Many more cases are prosecuted as a result of this hard no drop policy. The San Diego approach is to pursue every provable felony case, regardless of the victim's wishes. Under this city's hard no drop policy, the prosecutor can request [an adjournment] and a bench warrant when a

victim fails to appear or cooperate if the case cannot be proved without her testimony. [119]

Hanna, writing in 1996 about the United States, noted that most jurisdictions that give special attention to domestic violence case employ 'soft' no drop policies. Under these policies the victim is supported and encouraged. Victims will not be made to give evidence if they do not wish to do so but the prosecution will normally proceed if the charge can be proved without the victims evidence for example, by relying on other witnesses including medical evidence and/or admissions made by the defendant.

Questions:

67. Is there a need for specific prosecution policies about criminal charges that arise from domestic violence?

68. If so, should this be based on an expectation that in domestic violence cases prosecutions will proceed (a 'pro-prosecution' policy)?

69. If a pro-prosecution policy should be implemented should this be a 'hard' or a 'soft' pro-prosecution policy?

2.10.4 Raising judicial awareness through expert testimony

In a report released in March 2004, the Crown Prosecutors office of the UK recommended that the prosecution call expert evidence about domestic violence to address the 'fact finder's view' in the following cases: [120]

119 Cheryl Hanna, No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions, Harvard Law Review, June 1996, p.1860-65 . Available online at http://cyber.law.harvard.edu/vaw00/hanna1.html

120 p. 7, Michelle M Dempsey, The Use of Expert Witness Testimony in the Prosecution of Domestic Violence, Crown Prosecutors Office, United Kingdom, March 2004 http://www.cps.gov.uk/publications/equality/index.html

Cases	Fact finder's view:
• Cases where the victim retracts prior statements;	• If she does not want to proceed why should we?
• Cases where the victim minimizes the severity of the defendant's crime;	• It can't have happened as X says, so why is she lying? Better/safer/right to acquit.
• Cases where the victim has made inconsistent statements regarding defendant's crime;	• She is either lying or too unreliable to be a witness.
• Cases where the victim refuses to testify against the defendant;	• She must really love him and it is her relationship.
• Cases where the victim goes missing prior to trial;	• It is obviously of no significance to her or she does not want to do anything so why should we?
• Cases where the victim withdraws support for the prosecution; and states she does not want him to be remanded or imprisoned	• It can't be that serious or she would want him prosecuted/imprisoned.
• Cases where the victim remains in a relationship with the defendant;	• What is the point of us dealing with him if she only goes back to him – why won't she leave? • It's a waste of court time.
• Cases where there are diversity/equality issues regarding the victim and/or the relationship.[27]	• It's part of their culture and we shouldn't interfere; • The offender usually is her carer, he must have got fed up with all the pressure; • In gay relationships they like it rough;
• Cases where there are complex other problems	• It's because of the drugs/alcohol/mental illness.

Questions:

70. To what extent is expert evidence about domestic violence currently presented by the prosecution in relation to criminal charges arising from domestic violence?

71. In what circumstances should the prosecution aim to adduce expert evidence?

72. What practical measures could be implemented to address issues such as the cost and availability of expert evidence, if these present a barrier?

2.11 Victim's rights

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

Example of a Code

The UK Home Office is currently developing a Criminal Justice System Victim's Code of Practice, which is envisaged in the Domestic Violence, Crime and Victims Bill. This Code of Practice represents the minimum level of service to be provided to victims of crime by a wide range of organisations in England and Wales. While the Code will not create legal liability, it does contain complaint procedures.

The full range of criminal justice agencies is included in the Code e.g. Courts, Prosecution, Police, the Prison Service, Parole Board, Probation Boards, and Youth Offending Teams. The Code sets out the services that should be provided to victims of crime by all services covered by the Code and also highlight the needs of particularly vulnerable victims, including victims of domestic violence and sexual assault[121].

Example of legislation
The New Zealand Victim's Rights Act 2002 (VRA) is an example of legislation that aims to ensure the rights of victims of crime.

The New Zealand VRA aims to improve provisions for the treatment and rights of victims of criminal offences. The Act applies to victims of personal or property crime and it contains 3 guiding (but not enforceable) principles. These are:

- a person who deals with a victim (e.g. judicial officer, lawyer, member of court staff, police) should treat the victim with courtesy and compassion and respect the victims dignity and privacy (s. 7)
- a victim or member of a victim's family who has welfare, health, counselling, medical, or legal needs arising from the offence should have access to services that are responsive to those needs (s. 8)
- judicial and court personnel, lawyers, probation offices and prosecutors should encourage a meeting between the victim and offender to resolve issues relating to the offence if (and only if) the victim and the offender agree, a suitable person is available to facilitate the meeting, the resources available to hold the meeting are available and 'the holding of a meeting of that kind is otherwise practicable, and is in all the circumstances appropriate (s. 9).

The Act deals with:

- *keeping the victim informed*: agencies that come into contact with a victim of crime must give the victim information about the programmes, remedies, or services available to the victim through the agency (s. 11). Also that police and court staff and must give the victim or a support person for the victim, full and detailed information about each step in the prosecution including bail conditions, next court dates, the nature of proceedings on particular court dates, how the accused pleads and the outcome (s. 12 & 14). Additionally prosecutors must make reasonable efforts to ensure that the views of the victim about bail are ascertained and put the victims views to the court (s. 30)

121 the draft Code is available online at: http://www.cjsonline.gov.uk/citizen/victims/dom_violence.html

- *victim impact statements*: prosecutors must make reasonable efforts to ensure that information is sought from the victim for a victim impact statement to be provided to the court when the offender is sentenced. This should deal with the injury and emotional harm, loss or damage to property to the victim from the offence and any other effects of the offence on the victim (s. 17)
- *complaints*: if a victim considers that their rights have not been observed they can complain to the relevant person in the agency in question, to the Ombudsman or if the complaint involves police then to the Police Complaints Authority (s.49)

Questions:

73. Would the rights of victim's of domestic violence in relation to the criminal justice system be enhanced if Fiji developed a Code of Victim's Rights or legislation similar to the New Zealand Victim's Rights Act?

74. If so would a non binding Code or legislation be preferable?

2.12 Other criminal justice issues not raised in this Discussion Paper

This Discussion Paper has canvassed issues relating to the criminal 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 3 Legal Response to Domestic Violence: Civil Law and Procedures

Questions:

75. Are there additional issues relating to the criminal justice response to domestic violence that you wish to raise?

Attachments

Attachment 1 - Model Rules Relating to Police

Excerpt relating to police from Model Domestic Violence Legislation presented by the Special Rapporteur on Violence against Women as part of her report on All Forms of Violence against Women in the Family to the UN Commission on Human Rights[122].

III COMPLAINT MECHANISMS

A. Duties of police officers

13. The law shall provide that police officers shall respond to every request for assistance and protection in cases of alleged domestic violence.

14. Police officers shall not assign a lower priority to calls concerning alleged abuse by family and household members than to calls alleging similar abuse and violations by strangers.

15. Police shall respond at the scene of domestic violence when:

(a) The reporter indicates that violence is imminent or is in progress;

(b) The reporter indicates that an order relative to domestic violence is in effect and is likely to be breached;

(c) The reporter indicates that domestic violence has occurred previously.

16. The police shall respond promptly even where the reporter is not the victim of the violence but is a witness of the violence, a friend or a relative of the victim, or is a health provider or professional working at a domestic violence assistance centre.

17. On receiving the complaint the police shall:

(a) Interview the parties and witnesses, including children, in separate rooms to ensure an opportunity to speak freely;

(b) Record the complaint in detail;

(c) Advise the victim of her rights as outlined below;

(d) Fill out and file a domestic violence report as provided for by the law;

(e) Provide or arrange transport for the victim to the nearest hospital or medical facility for treatment, if it is required;

122 Report by Special Rapporteur on Violence Against Women, to the 52nd Session of the Commission on Human Rights. E/CN.4/1996/53

(f) Provide or arrange transport for the victim and the victim's children or dependents to a safe place or shelter, if it is required;

(g) Provide protection to the reporter of violence;

(h) Arrange for the removal of the offender from the home and, if that is not possible and if the victim is in continuing danger, arrest the offender.

C. Statement of the victim's rights

21. The purpose of the statement of the victim's rights is to acquaint the victim with the legal remedies available to her during the initial stage when she complains of an infringement of her legal rights. It also outlines the duties of the police and the judiciary in relation to the victim:

(a) The police officer shall communicate to the victim in a language understood by the victim, identifying himself or herself by name and badge number. The law requires that the police officer inform the victim of domestic violence that, if a crime is alleged to have been committed against her, the officer must either arrest the suspect immediately, persuade him to leave the household or remove him from the household;

(b) The officer must drive the victim or help her find transport to a medical facility to have her injuries attended to;

(c) If the victim wants to leave her residence the officer must help her to find transport to a safe place or shelter;

(d) The officer shall take all reasonable steps to ensure that the victim and her dependents are safe;

(e) The officer must provide the victim with a written statement of the legal procedures available to her, in a language that she understands. The statement must indicate that:

(i) The law provides that the victim may seek an ex parte restraining court order and/or a court order prohibiting further abuse against the victim, her dependents, anyone in her household or anyone from whom she requests assistance and refuge;

(ii) The restraining order and/or court order shall protect the victim's property or property held in common from destruction;

(iii) The restraining order may order the offender to vacate the family home;

(iv) In the event of the violence taking place during the night, at weekends or on public holidays, the victim must be informed of emergency relief measures to obtain a restraining order by calling the judge on duty;

(v) The victim need not hire a lawyer to get an ex parte restraining order or court order;

(vi) The offices of the clerk of the court shall provide forms and non-legal assistance to persons seeking to proceed with ex parte restraining orders or court orders. To obtain a court order, the victim must be advised to apply to the court in the prescribed district/jurisdiction;

(vii) The police shall serve the ex parte restraining order on the offender.

D. Domestic violence report

22. It shall be the duty of the police officer responding to a domestic violence call to complete a domestic violence report which shall be a part of the record. The report should be collated by the Department of Justice and (where applicable) the family court.

23. The domestic violence report shall be on a form prescribed by the police commissioner. It shall include but not be limited to:

(a) The relationship of the parties;

(b) The sex of the parties;

(c) Information regarding the occupational and educational levels of the parties;

(d) The time and date the complaint was received;

(e) The time the officer began investigation of the complaint;

(f) Whether children were involved and whether the domestic violence took place in the presence of children;

(g) The type and extent of the abuse;

(h) The number and type of weapons used;

(i) The amount of time taken in handling the case and the actions taken by the officer;

(j) The effective date and terms of the order issued concerning the parties;

(k) Any other data necessary for a complete analysis of all the circumstances leading to the alleged incident of domestic violence.

24. It shall be the duty of the police commissioner to compile and report annually to the Departments of Justice/Women's Affairs and the Parliament all data collected from the domestic violence reports.

25. The annual report shall include but not be limited to:

(a) The total number of reports received;

(b) The number of reports made by the victims of each sex;

(c) The number of reports investigated;

(d) The average time lapse in responding to each report;

(e) The type of police action taken in disposing cases including the number of arrests.

VII PROVISION OF SERVICES

C. Training of police officials

62. The police department shall establish and maintain an education and training programme for police officers to acquaint them with:

(a) The nature, extent, causes and consequences of domestic violence;

(b) The legal rights and remedies available to victims of domestic violence;

(c) The services and facilities available to victims and abusers;

(d) The legal duties imposed on police officers to make arrests and to offer protection and assistance;

(e) Techniques for handling incidents of domestic violence that minimize the likelihood of injury to the officer and promote the safety of the victim and her dependents.

63. Every police cadet should be trained to respond to domestic violence cases.

64. Special units should also be established where police officers receive intensive and specialized training to handle more complex cases.

65. Educators, psychologists and victims should participate in seminar programmes to sensitize the police.