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**Fiji Law Reform Commission
Family Law Reform**

**De - facto Family Relationships
Discussion Paper 4 - 1997**

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FAMILY LAW REFORM: DE FACTO FAMILY RELATIONSHIPS

I am pleased to enclose a copy of Fiji Law Reform Commission's discussion paper on De Facto Family Relationships. This discussion paper is the fourth in a series of paper that will be published by the Commission on different areas of family law.

The paper recognises and calls for the implementation of Fiji's obligations under the Convention on All Forms of Discrimination against Women (CEDAW) and Convention on the Rights of the Child (CROC). This paper discusses the issues and questions regarding de facto relationships and in particular discusses in more detail, the following issues:

- Definition of a de facto relationship
- Maintenance and property rights of de facto partners
- Custody and access of ex-nuptial children

Upon examination of these issues and comparison with the position in other countries, this paper highlights the problem of obsolescence of family law in Fiji, and puts forward a number of options and recommendations.

The Fiji Law Reform Commission invites submissions or comments on the issues and proposals discussed in this paper. Please note that the views and options put forward in this discussion paper are intended to encourage community discussion and input, and are not necessarily the final views of the Commission. Comments on this paper should be addressed to the Commission and reach it by 31st February 1998.

Yours sincerely

pp. D. Fenton

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Executive Summary

The rights and responsibilities of partners in de facto relationships comes under review in the reference to reform the Family Law. In the present context this task is limited to a number of issues.

- Definition of a de facto relationship
- Eligibility for spousal maintenance as a just solution in a de facto relationship breakdown
- Property interest and distribution for a de facto partner if the length and circumstances of the relationship permit these
- Pension contribution entitlement for a de facto partner in the relevant circumstances
- Eligibility for domestic/family protection as a human rights issue
- Custody and access of ex-nuptial children

The proposals of the Fiji Law Reform Commission comply with Fiji's obligations under the UN Convention for the Elimination of All Forms of Discrimination against Women ("CEDAW") and the UN Convention on the Rights of the Child ("CROC"). Both Conventions require Fiji to reduce unnecessary hardships for women and children under the present law. The reforms promote equitable and socially just options which remove, gender, legal and economic and social barriers. They respect the rights of all individuals including children - to a happy and full life.

1.0 Introduction

In an ideal world, partners in a relationship would be equal in responsibilities, rights and freedoms. They would share equally the benefits and burdens of the relationship and their contributions would be regarded as of equal worth. The law would respect and protect the relationships people freely choose, so far as it is consistent with the rights of others. It would reflect the principle of equality between partners, during a relationship and if it ends.¹

In reality, this situation does not exist. This discussion paper will show that partners in a de facto relationship are severely disadvantaged in that the law does not provide for adequate remedies upon breakdown of a de facto relationship.

1.1.1 What is a de facto relationship?

A de facto relationship refers to a non-secretive relationship between a man and a woman who live with each other as spouses on a genuine domestic basis although they are not legally married.

1.1.2 Why do these types of relationships exist?

Some of the reasons why people choose to enter into such relationships are:

- (i) some couples are unable to legally marry because one (or both) is already married to another person and is awaiting a dissolution of that marriage (a potential waiting period is 5 years);
- (ii) experience of the first marriage may lead some to say "never again" and for this reason are unwilling to make a legal commitment;
- (iii) some have drifted into relationships without ever stopping to evaluate what they were really doing;
- (iv) some couples may use it as a trial basis to see if they are compatible for marriage; or
- (v) it is a recognised customary marriage;

- (vi) some de facto partners have undergone religious ceremonies of marriage but not legal ceremonies which are a requirement under the law.

1.2 Fiji's International Obligations

Fiji has ratified the United Nations Conventions on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CROC). CEDAW requires countries to eliminate discrimination against all women in all matters relating to marriage and family relations (Article 16(1)) and to ensure through education recognition of the common responsibility of women and men in the upbringing and development of their children (Article 5(b)). This Convention also removes discrimination between women irrespective of their legal status. The Convention on the Rights of the Child requires that children not be discriminated against on the basis of their family status (Article 2).

- ## **1.3**
- Demographic changes and society's changing attitudes warrant a legislative framework which protects de facto partners following the break-up of a de facto relationship. With this in mind, this discussion paper will consider the position in other jurisdictions and puts forward a number of recommendations.

2.0 The Law in Fiji

Fiji does not have a legislative framework for de facto relationships. Further, the common law regarding women in a de facto relationship is that they do not have rights.

- To obtain maintenance for themselves
- To automatically claim shared property acquired during the de facto relationship by the de facto partners under matrimonial laws
- To claim pensions; or
- To seek the protection of a non-molestation order.

These areas of the family law which have an impact on de facto relationships will be discussed in more detail below.

ISSUES FOR REFORM

2.1 How does one determine whether a relationship can be classified as a de facto relationship?

2.1.1 The Law in Fiji

Both the common law and the legislation offer no guidance on the factors which ought to be taken into account in determining whether a particular relationship will be regarded as a de facto relationship.

2.1.2 The Law Elsewhere

2.1.2.1 New South Wales (Australia)

Section 3(1) of the NSW De Facto Relationships Act 1984 defines a de facto partner in relation to a man as a woman who has lived or is living with a man as his wife on a bona fide domestic basis for a period of two years.

Further Justice Powell in *D v MCA*ⁱⁱ noted 10 factors which must be taken into account when determining whether a relationship can be classified as a de facto relationship.

- (1) Duration of the relationship
- (2) Nature and extent of common residence
- (3) Existence of a sexual relationship
- (4) Degree of financial interdependence and support
- (5) Ownership, use and acquisition of property
- (6) Procreation of children
- (7) Care and support of children
- (8) Performance of household duties
- (9) Degree of mutual commitment and support; and
- (10) Reputation and 'public' aspects of the relationship.

2.1.2.2 Australian Capital Territory (Australia)

The ACT Domestic Relationship Act 1984 applies to those who have been in a domestic relationship for at least two years.

2.1.3 Advantages of giving statutory definition to a de facto relationship

The similar nature of de facto and married relationships and popular acceptance of non-marital relationships in Fiji.

2.1.4 Disadvantages of giving statutory definition to a de facto relationship

A possible disadvantage is that it might undermine the institution of marriage and act as a disincentive for parties to marry. This of course is based on the assumption that society values marriage as a desirable institution.

The Commission recommends that genuine de facto relationships of three years be recognised as a de facto relationship for the purposes of the new De Facto Relationships Act.

2.2 Who may claim Maintenance?

2.2.1 The Law in Fiji

Women in de facto relationships are not entitled to maintenance for themselves when their de facto relationships breakdown. However, in the case of 'ex-nuptial childrenⁱⁱⁱ', Part III of the Maintenance & Affiliation (Cap 52) enables a mother on behalf of her natural child/ren to apply for maintenance. This entitlement is subject to establishing proof of paternity in an affiliation case. For more discussion on this area, refer to the Discussion Paper on Affiliation Orders for Ex-nuptial Children.

This position can be compared to that of married women who may get maintenance either under section 84 of the Matrimonial Causes Act (Cap.51) (a maintenance claim under this section is ancillary to a divorce proceeding) or the Maintenance & Affiliation Act (Cap.52) which states that a married woman who is separated from her husband can get maintenance from her husband. However, an unmarried woman who has made substantial commitment to the de facto relationship would be at an unfair disadvantage. Both Acts therefore stop de facto wives from getting maintenance for themselves.

2.2.2 The Law Elsewhere

2.2.2.1 Tuvalu, Kiribati and Western Samoa

The maintenance legislation in these countries allows any person to get maintenance from any defendant whom she or he can prove is liable (obliged) to pay where there is a legal or customary obligation to do so.

This means that either party can get maintenance from each other without having to establish fault or prove that a legal marriage exists. Under these provisions de facto spouses may get maintenance.

2.2.2.2 New Zealand

Under sections 79 and 81(1) of the Family Proceedings Act 1980 (NZ), the court may make a maintenance order for an unmarried parent (whether a mother or father) if -

- (1) the order is desirable in the interests of providing, or reimbursing the applicant for having provided adequate care for the child; and
- (2) the order is reasonable having regard to the means (including potential earning capacity) of each parent, their needs, the support of any other person by the respondent and financial and any other responsibilities they may have.

2.2.2.3 Australian Capital Territory (Australia)

Section 18 and 19 of the ACT Domestic Relationships Act 1994 states that a party to a domestic relationship is not obliged to maintain the other party to the relationship. However the court may order one party to a domestic relationship to pay where it relates to:

- child care related maintenance;
- compensation based maintenance.

The court is guided by factors such as:

- the income, property and financial resources of each party
- physical and mental capacity for appropriate gainful employment;
- child maintenance responsibilities of the applicant.

However in Victoria and South Australia de facto partners cannot get maintenance. It is interesting to note that in Tasmania, a woman who was deserted by a man with whom she had lived for a year has been eligible for maintenance since 1837.

2.2.3 The Need for Reform

It would seem fair that both de facto partners be obliged to maintain each other. The failure on one de facto partner to provide financial support for the other partner could cause serious injustice particularly in a long standing de facto relationship. On the other hand, the fact that the de facto partners have refrained from making their relationship legal may indicate that they have made a conscious decision not to be regulated by legal obligations applicable to married people. It is not possible to state with reasonable certainty how many de facto partners elect to remain in de facto relationships and how many have no choice because of legal difficulties on getting a divorce.

The Commission recommends that de facto partners be entitled to receive maintenance from each other. The Australian Capital Territory Domestic Relationships Act 1994 be a useful model to consider.

2.3 Property Rights

2.3.1 The Law in Fiji

In *Sheila Maharaj v Jai Chand*^{iv}, the Privy Council reversed the decision of the Fiji Court of Appeal and reinstated the decision of the Fiji High Court by granting Sheila Maharaj (the de facto wife) a licence for her lifetime over the property acquired by both parties during the relationship. This meant that she could not legally own the property but she could use it for her life time.

There is no legislative provision for the division of property between de

facto spouses. On the other hand, married people may claim a share of property under section 86 of the Matrimonial Causes Act (Cap.51). For discussion on this area, refer to the Discussion Paper on Matrimonial Property for Married Women.

2.3.2 The Law Elsewhere

2.3.2.1 Australian Capital Territory and New South Wales (Australia)

Section 14 of the ACT Domestic Relationships Act 1994 provides that a court may make an order adjusting the interests in the property of either or both parties in a de facto relationship as it deems just and equitable.

Factors taken into account include:

- the nature and length of the relationship;
- the financial and non-financial contributions made directly or indirectly;
- the contribution made by either of the parties to the welfare of the other or any child of the parties; and
- other matters the court considers relevant.

The New South Wales De Facto Relationships Act 1984 contains similar provisions.

2.3.3 Arguments for inclusion of a provision on the distribution of property

- (i) It is possible that one or both parties in a de facto relationship do not appreciate and accept the economic consequences of the relationship and their legal position on its termination. This is particularly important in a country where the majority of citizens do not know their rights under the law. They may therefore need reasonably accessible legal protection.

- (ii) The common law provides inadequate remedies to resolve property disputes in the context of people living together in domestic relationships;
- (iii) It will help in eroding the traditional held view that domestic work be treated as a "labour of love". Non-financial contributions should be considered as a relevant factor when deciding property shares between the partners following the break-up of a de facto relationship. In New Zealand and New South Wales courts can apply the equitable principle of "constructive trusts" when determining property rights for de facto partners.
- (iv) The Fiji Courts have indicated that constructive trust principles will not be applied to de facto relationships and that legislation will be required to extend to de facto partners any more rights than they currently enjoy.

2.3.4 Arguments against inclusion of a provision on the distribution of property

- (i) It could lead to a belief that there would be an erosion of the legal institution of marriage by granting the same property rights to de facto families.
- (ii) The fact of living under one roof (without marriage) is not the appropriate jurisdictional basis for relief.

The Commission recommends that a de facto partner be given a right to apply for an adjustment of interest in property acquired after the de facto relationship begin. This right be limited to those de facto relationships which have lasted 3 years. The court considers both financial and non-financial contributions of each when determining property rights for each de facto partner.

2.4 Pensions

2.4.1 The Law in Fiji

Under the Widows and Orphans Pension Act (Cap 80) only the legal widow and legitimate children of a contributor can get a contributor's pension. This provision therefore excludes a de facto wife and a contributor's ex-nuptial children.

2.4.2 The Law Elsewhere

2.4.2.1 New Zealand

Under the Government Superannuation Fund Act 1956 which provides a superannuation scheme for public servants, annuities can be paid for surviving spouses. "Spouse" is defined to include any man or woman whom the Government Superannuation Board, in its discretion, regards as being the wife or husband of the person immediately before the person's death.

2.4.3 The Need for Reform

It is evident that Fiji's pension legislation discriminates against a de facto wife and a contributor's natural children. CEDAW demands the removal of practices which promotes discriminatory practices against women depending on their marital status.

The Commission recommends that a de facto partner be entitled to his/her partner's pension contributions. However, this right will only be limited to those de facto relationships which have lasted 3 years. In the case of two de facto spouses, the court consider the responsibilities that each spouse must undertake in order "to reasonably maintain" both de facto relationships.

2.5 Non-molestation orders

2.5.1 The Law in Fiji

A non-molestation order is a protection order made by the court against a harassing spouse. To date the court have not granted a de facto wife a non-molestation order for protection against violence in relation to that relationship. In comparison married couples have a common law right to get such a protection order. This is available also under section 107 of the Matrimonial Causes Act (Cap 51) which states that generally the court may make orders which in its view are just or convenient.

2.5.2 The Need for Reform

It is illogical and discriminatory not to give de facto partners non-molestation orders. Domestic violence occurs not only in relationships where partners are legally married but also in de facto relationships. The reality is that all women in general encounter problems in obtaining and enforcing a non-molestation order. Currently the general law on molestation orders is inadequate and they are currently being reviewed to make them more effective. However, the law should be available to protect both married and de facto partnerships.

The Commission recommends that a right to a non-molestation orders be codified. The right should extend to include both married and de facto couples.

2.6 Custody and Access of ex-nuptial children from de facto relationships

2.6.1 The Law in Fiji

Under the common law only the mother of natural children has the right to custody unless the mother has been medically certified as insane or has abandoned the child or is considered unfit or has conducted herself in a manner which is not in the interests of the child.^v

2.6.2 The Law Elsewhere

2.6.2.1 New Zealand

The role of both parents in the upbringing of their natural children plays an integral role in the handling of custody and access application. In *McDougall v Cheyne*^{vi}, the court ordered that the children change school so that they would attend a school which was closer to both parents.

New Zealand courts consider the following factors when determining custody and access applications:

- the emotional wellbeing of the parents
- their parenting abilities
- their material resources
- the nature of their relationship with the child
- the child's network of friends and family
- the child's educational and other development needs
- the relationship with the children
- the relationship with a new partner of the parent
- the desirability of stability and continuity for the child

There is then no distinction between the factors affecting custody and access of nuptial and ex-nuptial children.

2.6.3 The Need for Reform

United Nations Conventions such as CEDAW and CRC demand that such discriminatory laws be removed. More importantly, Article 38(2)(a) of the Fiji 1997 Constitution prohibits discrimination on the basis of birth and therefore requires the removal of the distinction between legitimate and illegitimate children.

The Commission recommends that the distinction between legitimate and ex-nuptial children be abolished. Both de facto spouses be given equal right to get custody and access based on the new factors discussed in the Discussion Paper on Affiliation Orders for ex-nuptial children.

2.7 A Separate De Facto Relationships Act?

2.7.1 The Law in Fiji

There is no legislative framework governing de facto relationships in Fiji. This can be compared to married people who are currently governed by different statutes, all of which are inadequate and are currently under review.

2.7.2 The Law Elsewhere

2.7.2.1 Australia

All the Australian States with the exception of Queensland have legislation governing de facto relationships.

2.7.3 The Need for Reform

An argument in favour of having a separate De Facto Relationships Act is that experience of other jurisdictions has shown that the complexity of de facto relationships law demands careful integration and consistency within a single piece of legislation.

Moreover, this will allow for a consolidation of relevant and appropriate case law interpretation on this matter. This will contribute to the development of some solutions to Fiji's problems in the area of de facto relationships law.

The Commission recommends that all matters affecting de facto relationships be governed by a new De Facto Relationships Act.

ⁱEquality before the law; Australian Law Reform Commission; Discussion Paper 54; July 1993 at page 8
ⁱⁱ(1986) DFC 95-030; the first reported case on the NSW De Facto Relationships Act 1984, it is important to note that the factors listed above were drawn from social security cases in Australia.

ⁱⁱⁱ Ex-nuptial children is a modern term used to refer to illegitimate children

^{iv}Sheila Maharaj v Jai Chand [1986] 32 FLR 119

^vCustodian includes any person other than mother or putative father of an illegitimate child, who is appointed to have custody for such a child or to whom such a child is committed under or by virtue of any written law: Section 2 of the Maintenance and Affiliation Act (Cap.52)

^{vi}Quoted from W.R Atkin; (1991) "Living Together without Marriage" [1990] NZFLR 446 per Judge Keane.