

The Law
Reform
Commission

Report No 30

DOMESTIC VIOLENCE

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The Law Reform Commission is established by section 5 of the Law Reform Commission Act 1973 as a permanent law reform agency of the Commonwealth and its Territories. It commenced operations in 1975. Section 6 of the Law Reform Commission Act sets out the functions of the Commission.

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NOTE:

References to the Crimes Act 1900 (NSW:ACT) are references to the Crimes Act 1900 of the State of NSW in its application to the ACT.

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DOMESTIC VIOLENCE IN THE AUSTRALIAN CAPITAL TERRITORY

I, GARETH EVANS, Attorney-General of Australia, HAVING REGARD TO—

- (a) the Community Law Reform Program for the Australian Capital Territory; and
- (b) the need to make adequate provision for the prevention of domestic violence, that is, violence done or threatened to be done to a person who is married to, or living as husband and wife with although not legally married to, the person who does or threatens to do the violence,

in pursuance of section 6 of the *Law Reform Commission Act 1973*, HEREBY REFER to the Law Reform Commission, at its suggestion as part of the Community Law Reform Program, the following matters for review and report:

- (a) the laws in force in the Australian Capital Territory with respect to domestic violence and matters arising from domestic violence; and
- (b) any related matters.

IN PERFORMING its functions in relation to this Reference, the Commission shall—

- (a) consult the Australian Institute of Criminology, and Family Law Council and such other persons and bodies as it thinks appropriate; and
- (b) take into account any other laws or proposals for laws that are or may be relevant.

DATED this twenty-ninth day of May 1984

Gareth Evans

Attorney-General

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The Commission

For the purpose of the reference, the President, in accordance with section 27(1) of the Law Reform Commission Act 1973, created a Division comprising members of the Commission.

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** The recommendations in the report and statements of opinion and conclusion are necessarily those of the Members of the Law Reform Commission alone. They may not be shared by the consultants nor by the courts, departments or organisations with which the consultants are associated.

Summary

Extent of domestic violence

1. Domestic violence tends to be a hidden problem. It is extremely difficult to discover the extent of domestic violence in any community. However, it seems clear that domestic violence is a significant problem in the Australian Capital Territory in terms of its extent and frequency, and of the serious injuries which are inflicted.

Objectives

2. It is the business of the whole community to reduce domestic violence as much as possible.
 - Domestic violence must, so far as possible, be stopped.
 - Its victims must be given proper protection, consistent with established civil liberties, both by the law and welfare agencies.
 - Its victims' needs for support, advice and accommodation must be properly catered for by welfare agencies.
 - In the long term, the public and private attitudes which have allowed the phenomenon of domestic violence to flourish need to change.

Not a private matter

3. An assault in the home is not a private matter. The resources of the community are called on to deal with the consequences of violence in the home, be they the damaged children, the victim's injuries, the disruption to the neighbourhood, the wrecked lives.

The law's role

4. The law has an important role in punishing those who commit domestic violence offences. But the law and the police cannot bear the whole burden of preventing, and protecting the victims of, domestic violence. It can, at best, take some steps towards preventing further violence. Welfare agencies have an equally important role in preventing further episodes of violence and assisting victims. They will be called on to provide advice, support and counselling both for the victim and the offender, which may enable the victim to escape and may prevent further episodes of violence. The victim's needs may include:

- adequate health care;
- physical protection;
- accommodation separate from that of the other spouse; and
- financial support.

Women as victims

5. Although it is not possible to obtain accurate figures, the weight of available evidence indicates that women are predominantly the victims.

Offenders

6. Offenders appear to come from many different occupations and to be as likely to be top professionals as tradespeople. They appear often to have a dual nature or personality: kind, gentle, considerate and responsible, holding down highly paid and important jobs, but quite different at home; or forgiving, considerate and mature for much of the time, but then unpredictably violent, immature, irrational and jealous.

Causes of domestic violence

7. Domestic violence is a complex problem with complex causes. There is no generally agreed explanation of domestic violence, although psychologists and others have suggested a number of theories, none of them as a complete explanation. No one of them, by itself, is sufficient to explain why violence occurs in one family and not in another. The truth probably lies in a combination of theories, but in different degrees in each particular case.

Alcohol

8. The view that alcohol 'causes' domestic violence is probably too simplistic, although alcohol may help to lessen inhibitions against violence. It may release the trigger of violence but it is not a direct cause. In many incidents of domestic violence it plays no part at all. Nevertheless, alcohol is a significant factor in many incidents of domestic violence, sometimes being used deliberately by offenders as a lubricant to violence. It may also be used as an excuse: it allows offenders to deny responsibility for their actions. 'It wasn't really me, it was the grog'.

Domestic violence offences

9. Domestic violence is already a crime. There is no rule that one adult can lawfully chastise another. Domestic violence, for the purposes of this report, means actual or threatened violence, committed by one adult on another, where both are married or in a de facto relationship. It is intended to cover all violent contact or threatened contact, ranging from simple assault to murder.

General criticisms of legal responses

10. The most frequent complaint about the law's response to domestic violence is that it offers inadequate protection to victims. Complaints typically focus on two areas:

- *Police role:* a perceived reluctance of police to attend 'domestics', take complainants seriously or follow complaints up by arrest and prosecution.
- *Court protection:* the courts are criticised on the grounds that they fail to provide adequate measures (such as enforceable injunctions or restraining orders) to prevent further violence, and that court injunctions against violence can be ignored with impunity or, at least, with little fear of serious consequences.

Competing considerations

11. Reform of the law and legal processes concerning domestic violence brings into sharp focus the need to strike an appropriate balance between the needs of the victim and the rights of others in the community, including the offender. Some of the conflicting considerations include:

- the tension between civil liberties and victims' protection;
- the appropriateness of legal and police intervention into the privacy of family relationships;
- that to punish a domestic violence offender severely will in many cases also have severe economic consequences on the family.

Role of the police

12. The role of police in dealing with domestic violence is a central one. Experience in New South Wales and in South Australia has shown that new legal measures enacted to deal with the problem of domestic violence depend heavily on the police for their effectiveness. Consideration of the police role focusses on four aspects:

- the powers of the police to enter private property to break up a fight, or investigate allegations of domestic violence offences;
- the power of the police to arrest suspected domestic violence offenders;
- once a suspected offender has been arrested, the question whether the police should release on bail; and

- police training and attitudes towards domestic violence generally.

Powers of entry

13. The need to protect victims of violence must be balanced against other interests affected by any proposal to confer on police a wider power of entry onto private property than they now possess. Any liberalisation of the power to enter must conform to the International Covenant on Civil and Political Rights.

Arrest

14. There is considerable uncertainty in the law concerning the powers of police to arrest without warrant where an offence has been committed and is not likely to be repeated immediately. Arrest is justified in serious domestic violence cases for two reasons. First, the decision whether a person who is believed to have committed a serious offence should be at large should not be taken, on the spot, in the stress of the moment, by the arresting officer. A more detached person, and preferably a judicial officer, should make such a decision. It is therefore necessary to arrest to bring the accused before senior police or a magistrate. Secondly, the risk arising from making a wrong decision (to proceed by summons rather than arrest) is far higher where the offence is serious. Arrest is justified, for example, in cases such as murder, manslaughter, rape and related offences and assaults causing grievous or actual bodily harm to avoid this risk. It should not be a purpose of arrest to punish the arrested person. Rather, arrest is to protect others, or possibly the arrested person, or to ensure an appearance before the court. In the context of domestic violence, an arrest will be justified if the victim would remain in danger if no arrest were carried out. To some extent the present law can accommodate the objective of providing a cooling-down period for the offender and giving the victim an opportunity to seek advice and make a decision about what to do next.

Bail

15. Police in the Australian Capital Territory have no power to impose bail conditions relating to the suspect's conduct while on bail. In many cases of domestic violence, the immediate release of the offender may be dangerous for the victim.

Role of police

16. The task of policing domestic violence is an unpleasant, difficult and sometimes dangerous one. Particular problems arise because of a lack of specialist police training and frustration generated by some of the unavoidable aspects of domestic violence prosecutions. The quality of police response to domestic violence nevertheless still very much depends on the maturity and personality of the particular officers who attend. Dissatisfaction with the police response to domestic violence stems from inappropriate and sometimes unsympathetic attitudes shown by some police.

Prosecution process

17. A cause of a great deal of dissatisfaction for the victims, helping agencies and the police themselves is the feeling of frustration understandably felt by police if a prosecution is aborted because of non-cooperation by the victim. This sense of frustration may encourage police in some instances to feel that there is no point in trying to help the victims of domestic violence. In many ways, the key to the law's response to domestic violence is the police response. Instilling appropriate attitudes in the police force to domestic violence will not happen overnight. It is a major educational task.

Compellability of spouses

18. Often a spouse who is the victim of domestic violence may nevertheless refuse to give evidence for the prosecution. There may well be reasons, besides intimidation, why a victim might decide not to give evidence:

- a desire not to be subjected to the possibly harrowing experience of having one's private life exposed to public gaze in court proceedings;
- pressure from friends and relatives not to be 'disloyal';
- in some cases, victims feeling that they are to 'blame' in some sense.

The parties may still love each other, despite the attack, and regard a prosecution, especially if a fine or imprisonment is imposed, as too disruptive for the family.

Sentencing

19. Although gaol is an appropriate punishment in some cases, in many others the family would welcome the law being lenient in sentencing.

Criminal law's limitations

20. The criminal law cannot, by itself, provide adequate protection for domestic violence victims. This is because:

- *Need for proof beyond reasonable doubt.* Specific deterrence, or the imposition of conditions which will control the offender's future conduct, cannot be applied unless the offender has been found beyond reasonable doubt to have committed an offence. The criminal law therefore has a lower 'strike rate' than would be needed for proper protection for domestic violence victims.
- *Non-criminal conduct.* The criminal law cannot deal with non-criminal conduct such as harassment in its various forms.

Because the criminal law cannot provide the kind of protection that is needed, it is essential to have a back-up measure. Victims themselves want a more flexible response than the criminal law can provide. They do not necessarily want the full force of the criminal law brought to bear in every case. If the criminal law were the only legal response available, a significant number of victims may well be deterred from seeking help. Other available remedies—such as Family Court injunctions, 'keep the peace' orders and civil injunctions—are also defective, because either they lack effective enforcement procedures or they lack flexibility. There is accordingly a need for an immediate measure designed specifically for domestic violence cases that can be easily and effectively enforced.

Domestic Violence Unit

21. Domestic violence in a particular household is unlikely to be an isolated event. Usually, it is a crisis point in a history of difficulties and troubles between the parties. The law's primary role is to deal with this crisis. It cannot deal with its underlying causes. If the victim, the offender and the family are simply left to their own devices after the legal processes of prosecution or protection order have been exhausted, these underlying causes will not go away. More likely, they will cause further outbreaks of violence. It is not enough to concentrate effort solely on the legal response to domestic violence. The law deals with the symptoms of the disease. Something else is needed to deal with the infection itself.

Co-ordinating services

22. Victims of domestic violence need adequate health care, physical protection, and, in some cases, separate accommodation and financial support for themselves and for children. Offenders need to be encouraged to change their behaviour. Services of these kinds are available in the Australian Capital Territory from both government and non-government sources. But they are uncoordinated at present. There is not sufficient publicity about what is available. And there is no specialist, identifiable group or body which concentrates exclusively on the specific problems of victims of domestic violence or of offenders. Furthermore, there is no agency in the Australian Capital Territory specially designated to monitor domestic violence and the activities of those dealing with it.

Counselling and therapy programs

23. No legal or victim support strategy can get to one of the root causes of domestic violence: the offender's attitudes and perceptions. Court orders can help, by ensuring that the offender realises that the law really means that assaults must not recur. But more is needed. At the least, counselling would help offenders to see that their attitudes and perceptions need to be changed and to help them in that process. Programs for offenders of domestic violence are an essential measure for treating the causes, rather than just the symptoms, of domestic violence. As a pilot project, courts should be given the power to order compulsory counselling in appropriate cases.

Accommodation

24. The problem of both short-term and long-term accommodation is a central one. Physical separation does not necessarily prevent further offences, but it is an important measure of protection.

Financial support

25. One of the most formidable barriers to leaving a violent relationship is financial. It is especially acute for women victims of domestic violence, many of whom are financially dependent on their partners. For such a woman, leaving to set up a new household will be extremely difficult, particularly if there are children who go with her. Her plight may be less severe if she stays and he leaves. She may be able to find a job but the barriers to this are great too. Not only will it be difficult to find employment, but also she has to find day-care for the children (if it is available) the cost of which may be a serious drain on her stretched resources. If she cannot find a job, or will not (because she already has the full-time job of caring for the children), she is thrown onto the social security system. If she is paying private rental rates (either in the family house or in her new accommodation) and is unable to obtain help from the Rent Relief Scheme, 60% or more of her pension will be used just to pay the rent. Domestic violence victims, and other people who wish to leave dangerous relationships, should be free to do so. For women who are the victims of domestic violence, having such freedom of choice itself may even alter the balance between the parties so that the abusive conduct stops: it is an important step in equalizing relations between the sexes. In many cases, the only choice for the victim of domestic violence is between a life of continuing violence or a life of poverty. It is a choice no-one should have to make.

NOTE:

References to the Crimes Act 1900 (NSW:ACT) are references to the Crimes Act 1900 of the State of NSW in its application to the ACT.

Summary of Recommendations

Law reform

Definition of domestic violence

1. 'Domestic violence' should include all violent assaults against another person. For the purposes of legislation, it should comprise murder, manslaughter and offences against the Crimes Act 1900 (NSW: ACT): section 19, 21, 22, 24, 27, 28, 29, 30, 31 to 43 (inclusive), 46 to 49 (inclusive), 52A to 54 (inclusive), 58, 59, 61, 63 to 68 (inclusive), 71 to 74 (inclusive), 76, 78A, 78B, 78C, 79 to 81 (inclusive), 86, 87, 89 to 91B (inclusive), 493 and 546A of the *Crimes Act 1900* of the State of New South Wales in its application in the Territory; and attempts to commit any of these offences against the spouse or de facto spouse of the perpetrator. (para 9).

Police powers of entry onto private premises

2. Given the need to protect victims of violence in an effective way, police powers of entry onto premises should be clarified and expanded. In addition to existing powers of entry onto private premises, police in the ACT should be authorised to enter private premises on the invitation of anyone apparently resident in the premises if they believe on reasonable grounds that a domestic violence offence has been committed, is being committed, is imminent or is likely to be committed. The police should also be able to obtain a warrant (if necessary by radio or telephone) authorising entry if they can satisfy a magistrate that they have reasonable grounds to suspect that someone in the household needs assistance and is or has been exposed to physical violence or threats of physical violence. The warrants provisions should be analogous to those provided for in the Criminal Investigation Bill 1981 and recommended by the Commission in its report on Privacy. They include:

- limitation on police power to search for evidence of other offences unrelated to domestic violence; and
- strict limits in the terms of the warrant so that entry only relates to cases of violence on private property (paras 37 and 38).

Powers of arrest

3. There is no necessity to alter the present law of arrest pursuant to warrant in the Australian Capital Territory beyond what has already been recommended by the Commission in its earlier report on criminal investigation. But the law of arrest without warrant for past offences should be spelled out clearly in legislation. The power should be limited in the way recommended in the Criminal Investigation report: in short, a police officer should be able to arrest without warrant on a belief on reasonable grounds that arrest is necessary and proceedings by summons would not be effective or appropriate to achieve any of the following purposes:

- to ensure the appearance of the offender in court;
- to prevent the continuation of, or a repetition of, the offence;
- to prevent concealment, loss, destruction or fabrication of evidence (including to ensure that potential witnesses are not interfered with); and
- to preserve the safety or welfare of the offender.

This aspect of the Commission's earlier recommendations should be taken up without further delay by amending the Crimes Act 1914 (Cth) so as to authorise police to arrest without warrant on a belief on reasonable grounds that arrest is necessary and proceedings by summons would not be effective or appropriate to achieve any of the purposes set out above (para 47). It should be made clear that the criteria outlined above should not prevent arrest in cases of serious offences. Serious offences should be defined to include murder, manslaughter, rape and related offences and assaults causing grievous bodily harm. Attempts to commit such offences should also be included. Arrest should not be used either to punish or to deter (para 46, 47 and 49).

Bail

4. Police, in granting bail for domestic violence offences, should be empowered to impose suitable conditions, in addition to those that they can already impose, specifically designed to protect the victim of the alleged offence from further injury or harassment. Suitable conditions could include conditions that the accused:

- not harass or molest a member of his or her family;
- not approach within a specified distance of a member of his or her family; or
- if continuing to reside with the family, not to be in the house while intoxicated.

Specific considerations should be listed for police to have regard to when deciding whether to impose conditions of this kind. These considerations should not be exhaustively stated, but should include:

- the need to ensure that persons are protected from violence or harassment;
- the welfare of any children involved; and
- any hardship that may be caused to the accused or to members of the family of the accused if bail is not granted or if a particular condition is imposed.

The requirement to advert to these matters should be imposed on all bodies exercising bail functions in domestic violence cases, not just police. Provision should be made for review of the imposition of conditions on a grant of police bail: any conditions so imposed should be reviewable by a magistrate at the instance of the person bailed. A breach of these bail conditions should not of itself be a criminal offence, although in some cases a breach (for example, a further assault) may amount to an offence. However a breach of bail conditions should have the automatic effect of revoking bail, rendering the suspect liable to immediate arrest, without warrant. If the suspect is to be released again, a fresh application for bail would have to be made in the magistrate's court. When a person is released on bail for a domestic violence offence, the victim should be informed in advance of release. Any relevant conditions of bail should also be communicated at the same time. The appropriate means of achieving this is to ensure that it is written into police guidelines (paras 52–55).

Prosecution policies

5. For the purposes of instituting proceedings, and prosecuting offences, domestic violence offences should be treated in exactly the same way as other offences (para 69).

Compellability of spouses

6. The present immunity of spouses from being required to testify for the prosecution in domestic violence matters should be altered in accordance with the recommendations of the Commission in its interim report on Evidence law. Both spouses and de facto spouses should be compellable, but the Judge or Magistrate hearing the case should have power, on application by the spouse or de facto spouse, to excuse him or her from giving evidence. The considerations that should guide this decision include:

- the nature of the offence;
- the importance of the evidence and the weight that is likely to be attached to it;
- whether any other evidence is reasonably available to the prosecutor; and
- the nature of the relationship between the defendant and the witness;
- whether the witness would have to breach a confidence (para 74).

Sentencing

7. A wide range of sentencing options should be available including community service orders and orders for compulsory counselling and/or therapy programs and possibly weekend detention (para 75).

Protection orders

8. *Restraining violence and harassment.* It is not recommended that protection of domestic violence victims should be left exclusively to the criminal law. A new form of protection order should be available

to protect spouses and de facto spouses against various types of objectionable conduct. They should be modelled on the orders available under the Family Law Act 1975 (Cth) s114 and corresponding State legislation. Protection orders would prohibit further violence or harassment, on pain of criminal penalties for breach, and would be obtainable in the magistrate's court. In appropriate cases, interim protection orders should also be available. The order should be capable of being tailored to a variety of objectionable behaviour patterns. The kinds of orders that should be able to be made include orders restraining the respondent—

- from entering or remaining in the family home;
- from entering or remaining in the workplace of a family member;
- from entering or remaining in specified areas;
- from approaching family members.

Grounds

9. The grounds on which the order is to be granted should be that the respondent has already committed a domestic violence offence, or has knowingly harassed the applicant, and is likely to repeat the offence or harassment. Two should be paramount:

- the need to provide protection from violence, fear of violence and harassment;
- the need to safeguard the children (if any) from violence or witnessing violence

A breach of an order should be a criminal offence for which police may arrest without warrant (paras 88, 89, 94, 96, 104).

10. *Applications for orders.* Police should be able to apply for orders as well as victims, and people acting on their behalf, but police should not treat protection orders as a substitute for the ordinary criminal process. Legal aid should be available for applicants for protection orders (para 91–93).

Procedures

- The civil standard of proof should apply on application for a protection order.
- The procedure for applying for protection orders should be as simple as possible and speedy, that is, by summons, and, in any case, a hearing should follow not less than 3 days from the application.
- On a hearing, evidence should be able to be presented either by affidavit or orally.
- Proceedings for protection orders should be heard in open court but the names of the parties should not be published (para 93, 94, 98).

Failure to appear

11. If the respondent fails to appear after being served with the summons, the magistrate should be able to issue a bench warrant authorising his or her arrest (para 93).

Ex parte orders

12. The magistrate should have power, in emergency cases, to make orders in the absence of the respondent including at weekends and on holidays. An *ex parte* order should not bind the respondent until it has been served. When an *ex parte* order is made, the defendant should be served with a summons requiring him or her to show cause why the order should not be confirmed. If this is not done, the order would be confirmed (para 95).

Variation or revocation of orders

13. Protection orders should be capable of being revoked or modified at any time. Either party should be able to apply to the court for an order to cancel or change the terms of the existing order. Even if the parties consent to a new order or a cancellation, the existing order should only be changed after a hearing in court, or possibly in the magistrate's chambers (para 97).

Ouster orders

14. Occupation orders, or ‘ouster’ orders as they are sometimes called, whereby the violent occupier or tenant is excluded from the house, should be available as a temporary measure as part of the proposed protection order regime. However, given the particularly restrictive nature of ouster orders, there should be extra safeguards involved:

- *Notice to respondent.* The respondent should be given notice that such an order is going to be applied for.
- *Accommodation needs considered.* The magistrate should be explicitly required to consider the effect that making or declining to make such an order will have on the accommodation needs of the parties affected by the proceedings and on the children, if any.
- *Service of order required.* If an order is made in the absence of the respondent it should only be effective when the respondent has been personally served with a copy of the order. Such service should be able to be effected by anyone, including the victim (para. 99–100).

Furniture orders

15. In conjunction with a protection order, the court should be empowered to make an order transferring the exclusive possession of essential household items. Again, such an order would be temporary in effect, pending the final determination of property entitlement. In making such orders, the court should have regard to the needs of the parties and, in particular of the children, if any (para 101).

Serving of orders

16. Except in the case of ouster orders, it should be possible to give oral notice of the contents of the order, for example, by telephone, when personal service has failed. It should be enough to convey the gist of the order in this way: it should not be necessary (although it would be desirable) to read the entire order to the respondent. (para ??)

Records of current orders

17. Police should keep an immediately accessible central registry of current protection orders and a copy of each order be kept in the victim’s local police station (para 103).

Breach of orders

18. Breach of a protection order should be a criminal offence in addition to any other criminal offence which may have been committed. Police should have a power of arrest without warrant on a reasonable suspicion that a protection order is being or has been breached. The question whether the offender should be arrested or summonsed should be governed by the same criteria as apply to any other offence: a summons should be used unless it would not be effective. However where arrest is not used for a breach of a protection order, then it is essential that the person who is alleged to have broken a protection order be brought before the court as soon as possible. The police should use a summons returnable within 72 hours. There should be a special administrative section within the police force to ensure that these summonses are processed quickly. They should be issued and served within three days of the discovery of the alleged breach. (para 104, 106)

Extension to other relationships

19. Where violence in the home arises in connection with a past marriage or past de facto relationship the law’s protection, through the mechanism of domestic violence orders, should be able to be invoked. Consideration should be given to extending the protection order regime, with appropriate modifications, to protect people in relationships such as parents and their children (including adult children) and neighbours. Such consideration should not, however, delay the implementation of the recommended legislation to protect people in relationships covered by this Report (para 108).

Relationship with Family Court injunctions

20. These should remain available to the married victim of domestic violence. In order to enhance its availability, the guidelines for legal aid available in the Australian Capital Territory should be broadened to include applicants for protective injunctions (para 84). The legislation providing for protection orders

should be prescribed for the purposes of the Family Law Act 1975 (Cth) s114AB(2): this provision preserves the operation of, and gives primacy to, State and Territory domestic violence legislation (para 107).

Police: general approach

Improved training needed

21. Police training should be directed at improving the ability of police to handle domestic violence disputes including dispelling some stereotypical attitudes and overcoming the view that may be held by police that a lack of prosecution is a failure (paras 62–63).

Special unit?

22. It is not feasible to create a special domestic violence unit within the police force but there should be a small core of police officers who acquire expertise in these cases and can be used to advise and assist other police officers in difficult cases (para 64).

Privacy for victims

23. So far as resources allow, separate rooms should be made available at police stations to provide privacy for victims who want to report domestic violence offences (para. 65).

Standard reporting

24. Police attending a domestic disturbance should complete a special report to be designed by the Australian Institute of Criminology. This will enable better statistics to be kept (para 65).

Support for police

25. The Australian Federal Police should recognise this problem and provide support (including, ‘de-briefing’) for police officers who are exposed to domestic violence work to prevent the problem of ‘burn-out’ (para 65).

Police preventive action

26. The role of police in counselling and assisting both victims and offenders should be recognised. Police should be trained to refer the victim and the offender to the support, advice, counselling and other facilities that will be available through the proposed Domestic Violence Unit and elsewhere (para 65).

Support, counselling and other proposals

A domestic violence unit

27. In order to provide some co-ordination for these services, and to serve as a focus for community awareness of the problem of domestic violence, a domestic violence unit, staffed by professional welfare workers, should be established by the Department of Territories in conjunction with the Australian Capital Territory Health Authority. Such a unit will have a vital role to play in curbing the problem of domestic violence. It should have four broad functions:

- *Support for victims.* Victims of domestic violence are often in a state of helplessness. Workers in the unit should be able to provide emotional and similar support immediately after the crises to allow victims to get ‘back on their feet’;
- *Services.* The unit should act as a central contact point for specialist services, both government and non-government;
- *Police liaison.* As an adjunct to the police training measures recommended earlier, the unit should work closely with police to assist them in carrying out their role in relation to domestic violence; and
- *Publicity and public education.* Publicity is necessary both to provide information to victims and offenders about the kind of services available to them and to help to alter attitudes and perceptions which make it easier for domestic violence to occur (para 113).

Health workers

28. The ACT Health Authority should run training programs for doctors & other health workers so that they can more readily identify and refer domestic violence victims (para 120).

Counselling

29. The ACT Health Authority should establish counselling and therapy programs for domestic violence offenders and victims (para 122).

Emergency accommodation

30. Refuges providing self-contained units, giving close support and privacy should be accorded a high priority within the Department or Territory's budget for emergency or crisis accommodation (para 125).

Mortgages and rent

31. It should be specifically provided that a mortgagee is not entitled to foreclose or take any other action detrimental to the mortgagor or the family simply because of an ouster order. The Mortgage Relief Scheme should be continued as should the Rent Relief scheme (para 129, 131).

Privately rented accommodation

32. The magistrate should be empowered, when making an ouster order in relation to privately rented accommodation, to direct that the person remaining in possession be substituted for the named tenant (para 131).

Firearms

33. If the police discover in the course of investigating a domestic disturbance that the use of a firearm has been threatened, this should be noted on the proposed Domestic Disturbance Report Form and a copy should be forwarded immediately to the firearms licensing authority, who should have the power to cancel the licence. The licensee would then have the right to appeal against that decision to the Administrative Appeals Tribunal. The licensing authority should be empowered to take into account, when deciding whether someone is a fit and proper person to hold a gun licence, the fact that that person is the subject of a protection order (paras 57, 58, 59).

Statistics

34. The Australian Institute of Criminology should monitor the effectiveness of the implementation of these proposals. The Institute should also report on the usefulness, both for the legal and the welfare attack on the problem, of statistical information gathered through the use by police of the proposed Domestic Disturbance Report Form (para 21).

1. Introduction

The Reference

Terms of Reference

1. On 29 May 1984, the Attorney-General asked the Commission to review and report on the law relating to domestic violence in the Australian Capital Territory and 'any related matters'. The terms of the Reference require some comment. They specifically cover married people (whether living together or not) and those in de facto relationships, but do not cover other relationships, for example, divorced parties. Nor do they cover violence against children or by them. Children were the subject of an earlier Commission report¹ which dealt with the welfare aspects of children at risk but not with the specific protective measures for dealing with violence considered in this report. To the extent that these measures can be used to protect children from abuse, this report is complementary to the earlier report. Although the discussion of aspects of this report will be restricted to adult married persons and those in de facto relationships, many of the recommendations can be applied in general terms to all persons needing protection in a domestic setting. Finally, this report does not confine itself to strictly 'legal' issues, but examines welfare and related matters relevant to domestic violence.

Matters not dealt with

2. *Rape in marriage.* Two topics, both within the terms of the Commission's Reference, are not dealt with in this report. The first is rape in marriage. Until the present time in the Australian Capital Territory, it was a defence to a charge of rape that the victim was married to the offender. Amendments to the Crimes Act 1900 (NSW:ACT) which, among other things, remove the defence have just been made.² That issue will not, therefore, be addressed in this report.

3. *Spouse murder.* Secondly, spouse murder, the extreme form of domestic violence, falls within the terms of the Commission's Reference. Although figures are not readily available for the Australian Capital Territory, it is a significant problem. A recent study³ showed that 42.5% of all homicides in New South Wales between 1968 to 1981 occurred within families or de facto relationships. Almost 55% of these homicides were spouse homicides, that is, almost one quarter of all homicides were spouse killings. Of these spouse killings, 26.7% of the victims were men and 73.3% of the victims were women. The relationship between domestic violence and spouse killing was analysed by the New South Wales study as follows:

A history of physical abuse was evident . . . in almost half (48 per cent) of the spouse homicides. In almost all these cases, this abuse was in one direction, i.e., by the husband against the wife. Violence was particularly prevalent in the husband killings; while a history of assault was evident in 40 per cent of the wife killings, as many as 70 per cent of the husband killings occurred in the context of violence by the husband on the wife. Moreover, over half (52 per cent) of the husband killings occurred in response to an immediate threat or attack to the victim. Violence or fear of future violence was both the background and the cause of the use of force by women on their husbands. They killed their husbands after they or another family member had been attacked. Wife killings, on the other hand, only occurred in the context of repeated violence by the husband. It was never in itself the "reason" a man killed his wife.

Spouse murder raises difficult problems, for example, in connection with provocation. These problems are different in kind to the problems of violence that does not amount to homicide. For this reason, although the Terms of Reference do cover spouse murder, the Commission has decided not to deal with this aspect of domestic violence in this report. If it is to be dealt with by the Commission, it should be the subject of a specific Reference to the Commission.

Related matters

4. The law has an important role in punishing those who commit domestic violence offences. But the

1 Australian Law Reform Commission, Report No 18, *Child Welfare*, AGPS, Canberra, 1981.

2 Crimes (Amendment) Ordinance 1985 (ACT).

3 NSW Bureau of Crime Statistics and Research, *NS W homicides cleared up by the police between 1968 and 1981* (forthcoming).

law and the police cannot bear the whole burden of preventing, and protecting the victims of, domestic violence. It can, at best, take some steps towards preventing further violence. Welfare agencies have an equally important role in preventing further episodes of violence and assisting victims. They will be called on to provide advice, support and counselling both for the victim and the offender, which may enable the victim to escape and may prevent further episodes of violence. The victim's needs may include:

- adequate health care;
- physical protection;
- accommodation separate from that of the other spouse; and
- financial support.

The offender may be able to benefit from counselling and therapy services. The Commission's Reference requires it to report on the law concerning domestic violence and 'any related matters.' Topics such as medical services, access to advice and counselling and financial support fall under this heading and recommendations for appropriate measures are discussed in chapters 9 and 10.

Underlying themes

5. Certain themes underlie the discussion and recommendations in this report:
 - Domestic violence must, so far as possible, be stopped.
 - Its victims must be given proper protection, consistent with established civil liberties, both by the law and welfare agencies.
 - Its victims' needs for support, advice and accommodation must be properly catered for by welfare agencies.
 - In the long term, the public and private attitudes which have allowed the phenomenon of domestic violence to flourish need to change.

These are based on the view that an assault in the home is not a private matter. The resources of the community are called on to deal with the consequences of violence in the home, be they the damaged children, the victim's injuries, the disruption to the neighbourhood, the wrecked lives. It is the business of the whole community to reduce domestic violence as much as possible.

Reform in other jurisdictions

6. Domestic violence has been examined in the last decade both overseas⁴ and in Australia. The Royal Commission on Human Relationships considered the question in 1977.⁵ Since then more attention has been devoted to analysing and preventing domestic violence.⁶ At government level, all States and Territories have moved in the direction of reform

- *New South Wales*. Following a report from a specially commissioned task force⁷, legislation

4 In the UK, see E Pizzey, *Scream Quietly or the Neighbours Will Hear*, Penguin, Harmondsworth, 1974; UK House of Commons, *Report of the Select Committee on Violence in Marriage*, HMSO, London, 1975; MDA Freeman, *Violence in the Family*, Saxon House, Farnborough, 1979; J Renvioze, *Web of Violence: a Study of Violence in the Family*, Routledge & Kegan Paul, London, 1978; in the United States see eg, RJ Gelles, *The Violent Home a Study of Physical Aggression Between Husbands and Wives*, Sage Publications, Beverley Hills, 1972; D Martin *Battered Wives*, Glide, San Francisco, 1976; L Walker, *The Battered Woman*, Harper & Row, New York, 1979; K Waits, 'The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions', (1985) 60 *Washington Law Review* 267 (includes a comprehensive coverage of the American literature).

5 Australia, Royal Commission on Human Relationships, *Final Report*, AGPS, Canberra, 1977, vol 4, ch 9; and see C Gibbeson, 'Domestic Violence toward Women and Children', study undertaken for the Royal Commission on Human Relationships, 1976 (unpub).

6 J Price 8c J Armstrong, 'Battered Wives: a Controlled Study of Predispositions', (1978) 12 *Australia and New Zealand Journal of Psychiatry*, 43; J Scutt (ed), *Violence in the Family*, Australian Institute of Criminology, Canberra 1980; C O'Donnell and J Craney (eds), *Family Violence in Australia*, Longman Cheshire, Melbourne, 1982; J Scutt, 'Spouse Assault: Closing the Doors on Criminal Acts', (1980) 54 *ALJ*, 720; J Scutt, 'The Alcoholic Imperative: a Sexist Rationalization of Rape and Domestic Violence', (1981) 7 *Hecate* 88; J Scutt, *Even in the Best of Homes*, Penguin, Australia, 1983; University of Sydney Faculty of Law, Proceedings of the Institute of Criminology (No 54), *Domestic Violence*, Government Printer, Sydney, 1982.

7 NSW Task Force on Domestic Violence *Report*, Government Printer, Sydney, 1981; and see NSW Bureau of Crime Statistics and Research, *Domestic Assaults*, Department of the Attorney-General and Justice, 1975.

specifically aimed at allowing police to deal more effectively with domestic violence has been enacted⁸;

- *Victoria*. No legislation has yet been enacted, but a Government Discussion Paper was published in 1985⁹;
- *Northern Territory*. A report entitled ‘*Domestic Violence Between Adults in Northern Territory: a Review of Current Services and a Strategy for the Future*’ was prepared in 1983 by Peter d’Abbs of the Institute of Family Studies for the Northern Territory Government;
- *Tasmania*. Legislation¹⁰ was enacted in 1985 following an unpublished report¹¹
- *Other States*. In South Australia, Queensland and Western Australia legislation was enacted in 1982.¹²

External assistance

7. The Commission acknowledges the valuable assistance that it has received from a number of sources in preparing this report. In 1984, a Discussion Paper¹³ was published. The consultants appointed to assist the Commission and who are based in Canberra met on a number of occasions to assist in the preparation of this Discussion Paper. The Commission is very grateful for the particular assistance given by those consultants. The Discussion Paper itself was widely distributed and press, television and radio coverage was extensive.¹⁴ A public hearing, in which members of the public were invited to make suggestions to the Commission, was held in Canberra on 24 November 1984. The submissions made at that hearing were of high quality and a number of useful suggestions were made. Justice Maxwell and Professor Hambly, both members of Division established for this Reference, while visiting New Zealand in October 1984, held useful discussions with (among others) WR Atkin, Senior Lecturer in Law, Victoria University of Wellington, His Honour Judge Patrick Mahoney, Judge of the District Court and the Family Court, His Honour PJ Trapski, Principal Family Court Judge and Ms D Hapeta of the South Wellington Community Legal Service. Professor Chesterman, another member of the Division, held useful discussions with three English practitioners (Ms N Wyld, of Wilford McBain, Solicitors, Ms E Lawson, Barrister and Ms C Thomas, of Darlington & Parkinson, Solicitors) while in England in September 1984. The Commission has also been assisted by the Australian Institute of Criminology and the Family Law Council in the preparation of this report. The Commission’s Terms of Reference require it to consult with both those bodies and it records its appreciation to them. Particular mention should be of Dr S Hatty of the Institute, a consultant to the Commission, who, with Dr R Knight of the Australian Capital Territory Health Authority, devised and reported on a phone-in survey on domestic violence in the Territory.¹⁵ In November 1985, some of the Commission’s tentative proposals were discussed at a workshop session of a Conference on Domestic Violence in Canberra organised by the Institute. The assistance given by the Institute in this regard is appreciated. The Commission is also grateful for the time given by officers of the Australian Federal Police for informal contact and liaison during the preparation of this report.

8 Crimes (Domestic Violence) Amendment Act 1982 (NSW); Periodic Detention of Prisoners (Domestic Violence) Amendment Act 1982 (NSW); De Facto Relationships Act 1984 (NSW) Part V.

9 Victoria, Department of Premier and Cabinet, Women’s Policy Co-Ordination Unit, *Criminal Assault in the Home: Social and Legal Responses to Domestic Violence*, Government Printer, Melbourne, 1985.

10 Justices Amendment Act 1985 (Tas).

11 R Hopcroft, *Report of the Tasmanian Review on Domestic Violence*, Government Printer, Hobart, 1983.

12 Justices Act Amendment Act (No 2) 1982 (SA); Peace and Good Behaviour Act 1982 (Qld); Justices Amendment Act (No 2) 1982 (WA).

13 Australian Law Reform Commission, Consultative Document, *Domestic Violence in the ACT: Discussion Paper*, Canberra, 1984 (ACTLR4).

14 eg lead story in *Canberra Times* 8 October 1984.

15 See paras 12–24.

2. Domestic violence: nature, extent and causes

Violence a crime

8. An assault is a crime wherever it is committed. It is no defence to a prosecution for an assault that it occurred in the home, or between husband and wife. An assault against a child is in a slightly different position: there, it is a defence that the assault amounted to reasonable chastisement of the child administered by the child's parents or by some-one else lawfully entitled to administer chastisement (such as the child's teacher).¹ In the past, the common law may have included a similar defence of reasonable chastisement to a charge of assault by a husband against a wife (although not, apparently, by a wife against a husband).² That defence no longer exists³ and there is in Australia no rule of legitimate chastisement of an adult.

Definition

Domestic violence offences

9. Domestic violence, for the purposes of this report, means actual or threatened violence, committed by one adult on another, where both are married or in a de facto relationship. It is intended to cover all violent contact or threatened contact, ranging from simple assault to murder. In specific terms, there are a number of crimes which can be committed in the context of domestic violence. These are:

- murder;
- manslaughter; and
- offences against section 27, 28, 29, 30, 31, 33, 33A, 35, 37, 38, 39, 41, 46, 47, 54, 58, 59, 83, 90A, 92A, 92B, 92C, 92D, 92F, 92H, 92J, 92M, 493, 494 or 546A of the Crimes Act 1900 (NSW:ACT).⁴

These, and attempts to commit them, should be regarded as domestic violence offences if committed by a person against his or her spouse or de facto spouse.

Mental violence

10. Mental violence, which includes constant verbal abuse, harassment, excessive possessiveness, isolation and deprivation of physical and economic resources, can be devastating. In some cases its effects will be more long-lasting than a broken limb or a black eye. An overall approach to domestic violence would undoubtedly include mental violence. But legal remedies are often a blunt instrument for dealing with this kind of abuse in the family. No enforceable legal remedy can be devised to protect a person from, for example, constant humiliation. The law can aid such a person indirectly: by providing a way of ending the legal relationship (divorce plus adequate maintenance for children); by ensuring that the offender stays away from the home. The law can also help to prevent various forms of harassment such as constant telephoning and appearing suddenly at windows. But it cannot deal with conduct such as obsessive jealousy or possessiveness. The answer to these problems lies, if anywhere, in counselling and other ways of encouraging changes in the parties' behaviour, perceptions and expectations. Accordingly, the suggestions for changes to the law in this report will be confined to physical violence and to harassment.

1 Australian Law Reform Commission Report No 18, *Child Welfare*, AGPS, Canberra, 1981, para 406; and see Child Welfare Ordinance 1957 (ACT), s124.

2 See MD Freeman 'The Phenomenon of Marital Violence and the Legal and Social Response in England', in J Eekelaar and S Katz (eds), *Family Violence*, Butterworths, Toronto, 1978, 78–9. The rule of legitimate chastisement of a wife by a husband is doubted in *Blackstone's Commentaries on the law of England*, vol 1, 444–5. The rule is clearly stated in *Bacon's Abridgment*, 7th ed, London, 1832, vol 1, 693; and see *In re Cochrane* (1840) 8 Dowl 630, 633.

3 *R v Jackson* (1891) 1 QB 671, 682; cf *Meacher v Meacher* [1946] 2 All ER 307 in which the Court of Appeal had to correct the trial judge's view that a woman who was beaten for disobedience had the remedy in her own hands, namely, to obey her husband's orders, however unreasonable; and see MDA Freeman, 'Le Vice Anglais?—Wife Battering in English and American Law', (1977) 11 *Family Law Quarterly*, 199, 211.

4 The nature of these offences is set out in the explanatory notes attached to the draft Crimes (Domestic Violence) Ordinance 1986 in Appendix A.

Extent of domestic violence

A hidden problem

11. Domestic violence is a hidden problem, despite increasing awareness of it amongst those whose work brings them into contact with its victims, and at government level. Those who are violent, and their victims, tend to be secretive about it, both being usually too ashamed or frightened to talk to outsiders. Because of this it is extremely difficult to discover the extent of domestic violence in any community. In fact, it is probably impossible to obtain a reliable picture of domestic violence. To do so it would be necessary to conduct a survey of randomly chosen households and then ensure somehow that responses were truthful. As a result, much of the evidence that is available is anecdotal. One example is the following, taken from a confidential submission to the Commission:

A Canberra woman wrote to the Commission stating that after she left her husband he broke into her new home and tried to kill her, constantly telephoned her, assaulted her on several occasions (including hitting her in the face, resulting in hospital treatment), came to her house in breach of a Family Court injunction, on one occasion breaking down the back door and telling the children that he was going to kill her. He frequently broke the Family Court injunction directing him not to go to a particular suburb, not to go to his wife's home, not to approach within 10 metres of her if they met in public, not to telephone her and not to drink before or during periods of access to the children. The police kept watch on the house on some nights but they could not arrest him for breaking the Family Court injunction.⁵ The worst punishment he suffered was a suspended sentence of imprisonment. In a Family Court counselling session he said that his wife had no protection from the police and he could just throw a stick of dynamite through her bedroom window when she was asleep.

According to anecdotal evidence, domestic violence is a common problem.⁶ Social workers, doctors, police, lawyers and family counsellors have all commented on the frequency with which they come into contact with victims of domestic violence. Not one submission to the Commission has suggested that the problem is insignificant or that reports of it are exaggerated. In Canberra, women's refuges, set up to provide for women and children victims of domestic violence, are used to capacity most of the time: the problem is apparently a significant one in the Australian Capital Territory community.⁷ Spouse murder rates are grim evidence of the ultimate effect of domestic violence.

The position in the Australian Capital Territory

12. *A phone-in.* In order to gain an impression of the extent of domestic violence in the Australian Capital Territory, the Commission decided, in co-operation with the Australian Capital Territory Health Authority and the Australian Institute of Criminology, to conduct a phone-in.⁸ The advantages of a phone-in are that it is relatively inexpensive, and ensures anonymity for the people who respond. It needs to be frankly said, however, that there are a number of major disadvantages with phone-ins. First, those who respond are self-selected: the sample is not a true random sample. Accordingly, the phone-in can not be used as a guide to the proportion of families in which domestic violence occurs. Secondly, there is a very limited capacity to verify the information received. Finally, except in rare cases, the information provided is only one side of the story. While victims of domestic violence are likely to ring in, offenders rarely do, and, because of the desire to preserve anonymity of respondents, there is little or no opportunity of ensuring that a complete picture of the events concerned is obtained. Nevertheless, within these limitations, the phone-in did provide a rough picture of domestic violence in the Australian Capital Territory. Further, as the following paragraphs show, a phone-in provides graphic evidence of what lies behind the words 'domestic violence'.

13. *Design and conduct of the phone-in.* The questionnaire given to each caller during the phone-in was jointly designed by Dr Knight and Dr Hatty. The phone-in was conducted from the premises of the Women's Shopfront Information Service from 6 October to 12 October 1984. Telephone lines were open every day between 9am and 9pm. Both before and during the phone-in, wide radio, television and newspaper advertising and publicity was sought. A brief summary of the main findings follows.

5 Since this submission was received, the Family Court Act 1975 (Cth) has been amended to allow a Family Court Judge who grants an injunction to attach a power of arrest: Family Law Act 1975 s 114AA; and see para 82.

6 For a graphic and illuminating biography of a victim of domestic violence see R Friend, *Eva*, McPhee Gribble, Penguin Books, Melbourne, 1985.

7 Beryl-Canberra Women's Refuge Inc, *Annual Reports*, 1982, 1983, 1984; and see NSW Task Force on Domestic Violence, *Report*, Government Printer, Sydney, 1981 (NSW Task Force Report), 32.

8 See S Hatty & R Knight, *Violence Against Women in Canberra*, (unpub) 1985.

14. *Respondents.* Most of the respondents to the phone-in were women who described assaults upon themselves or on other women. Out of 120 callers, only 2 described violence perpetrated by a woman against a man. Many of the respondents reported that the phone-in was the first time they had ever talked about their own problems of domestic violence. Although they found it difficult to articulate their emotions and describe violent scenes they were, in the main, keen for others to know of their suffering and often went to a lot of effort to give information. Many also reported feeling trapped and being in a 'no-win' situation. They felt that there was nowhere for them to turn and no-one to go to, especially in such a small city as Canberra:

Canberra is like a small town; someone always knows someone else who knows you or your family. I'm afraid that if anything is said, or help sought, it could affect my husband's career. Then everyone suffers.

15. *Kinds and frequency of violence.* Nearly half the respondents reported experiencing violence once a week or more often. Many reported either violent language or physical abuse every day, and a quarter of the sample reported violence over a period of 15–20 years. Some of the violence was physical, other mental:

He punched at me and broke my nose. He continually bashed me against a brick wall. I lost consciousness.

My husband became abusive, accused me and my family of talking about him while I was in Sydney (and) of being an alcoholic, which wasn't true—he belittles me constantly at home, yet he never shows the feelings in company—Mental abuse is so hard to prove, especially when the man is so charming in company. People just think you're mad.

Respondents were asked to focus on the last violent incident and to describe it fully, a technique thought to be more highly reliable than asking for a description of typical violence or the worst case. A number of respondents were anxious to talk about the worst case to show the extent of their suffering. Hitting and punching was frequently reported. Bruises were the most commonly reported result of violence, followed by broken bones and internal injuries. Sexual assault was often reported. In more than a third of cases, children witnessed the violence and in a similar number of cases, respondents reported themselves as unable to fight back, leave, or do anything at all. In nearly half the reported incidents, alcohol was involved.

16. *Police involvement.* Respondents did not often report seeking police intervention. Of those who did, many were unhappy with how the police dealt with the case. The offender was arrested in 31% of cases, although 75% of victims had wanted arrest. In most cases, the offender was not charged. One respondent commented:

I just felt they would do nothing. I was also afraid for the baby. He'd threatened to kill himself and the baby.

Those who reported calling the police to the last violent incident, however, reported that the police attended in 90% of cases.

17. *Others involved.* Where respondents to the phone-in reported consulting other people about domestic violence incidents, doctors were most likely to be consulted, followed by friends and family. Friends were mostly reported to be supportive but in one-third of incidents, medical practitioners were said to have ignored the victim's plight:

Medicos side-step the issue. They don't know how to recognize domestic violence. They certainly don't know how to handle it.

18. *Offenders.* On the basis of the reports given during the phone-in, offenders appear to come from many different occupations and to be as likely to be top professionals as tradespeople. Many respondents said that those who attacked them appeared to have a dual nature or personality: kind, gentle, considerate and responsible, holding down highly paid and important jobs, but quite different at home; or forgiving, considerate and mature for much of the time, but then unpredictably violent, immature, irrational and jealous. Many respondents commented on how difficult it was to live with this dual nature.

Pattern of domestic violence

Women as victims

19. Although it is not possible to obtain accurate figures about the incidence and patterns of domestic violence, the weight of available evidence indicates that women are predominantly the victims. The evidence, including from the phone-in, has many difficulties and shortcomings: one is that the samples which are taken are self-selected or from particular groups, such as people convicted of domestic violence

offences⁹, people who respond to phone-ins on domestic violence or people who complain to the police or magistrates. Another difficulty is that information that is available does not often distinguish between serious and less serious assaults. Further, some studies give a slightly different picture. A recent survey of couples attending marriage guidance counselling showed that there was more equality in assaults, with 45% of reported cases of violence being by husbands against wives, 21% by wives against husbands and 33% mutual.¹⁰ On the other hand, spouse murder rates and the relationship of spouse murder to domestic violence, discussed above¹¹, show that husbands are three times more likely to kill their wives than vice-versa and that, when wives do kill husbands, it is often in retaliation to domestic violence. Another study indicated that 95.3% of inter-spousal assault victims were women.¹² A survey of records of an inner city legal aid centre in Sydney found that, in 90% of the cases involving domestic violence, men assaulted women.¹³ Apart from statistics, the problem of domestic violence has historically been seen as one of wife-beating. The common law at one time may have included a rule the effect of which was to restrict the extent to which a husband could beat his wife. The fact that no similar rule was formulated for wives would tend to indicate that wife-beating was by far the more prevalent problem.¹⁴

Men as victims

20. Although most attention has been given to the problems women face in dealing with domestic violence, domestic violence is not exclusively a woman's problem. Men are also sometimes victims. As a letter published in the *Canberra Times* (28 November 1985) said:

During the breakdown of my marriage I was physically assaulted by my ex-wife in front of the children . . . In addition I was verbally abused on many occasions over issues affecting my sexuality, my parentage, and my sanity. Even now, 10 years after, I bear the scars of these assaults, in my abilities to relate and trust other women.

The lack of information about how extensive or serious the problem is for male victims may be due to a reluctance on the part of men to admit to or complain about violence, or that less damage is usually inflicted on men, although both these explanations rely on stereotypes rather than information. The public perception of domestic violence, the historical emphasis that has been placed on it and such information as is available suggest that it is predominantly a phenomenon in which women are victims. But, as more effort has been put into gathering information about domestic violence against women than against men, more information is needed on the extent of domestic violence against men.

Monitoring domestic violence

21. It is highly desirable that proper statistics be kept about domestic violence in the Australian Capital Territory. This can, in part, be done through the use of the proposed Domestic Disturbance Report Form to be filled out by police on each occasion that they attend a 'domestic'.¹⁵ There is a need, once statistics start to become available, for those statistics to be reviewed. In particular, it will be necessary to assess how the recommended measures to stop domestic violence are working. Both the legal and welfare attack on the problem will need to be watched carefully to see if improvements can be made. This should be done by the Australian Institute of Criminology, which is based in Canberra. The Institute has told the Commission that it endorses this recommendation.

Causes of domestic violence

Theories

22. There is no generally agreed explanation of domestic violence, although psychologists and others have suggested a number of theories, none of them as a complete explanation. A necessarily brief account

9 eg, 98.7% of those charged with domestic violence offences in NSW in 1984 were male: NSW Domestic Violence Committee, *Report April 1983 to June 1985*, Government Printer, Sydney, 1985, (Committee Report), 13.

10 L Phillips, Survey of the Incidence of Physical Violence in the Marriages of our Client Population in *Domestic Violence: A Marital Counselling Perspective Workshop*, National Marriage Guidance Council of Australia, Victoria, 1984.

11 Para 3.

12 C O'Donnell and H Saville, *Domestic Violence and Power: A Study of Battered Women*, Sydney, 1979.

13 C O'Donnell and J Craney, (eds), *Family Violence in Australia*, Longman Cheshire, Melbourne, 1982, 54.

14 See also Wife Beater's Punishment Bill, 1889 (NSW) (lapsed): C O'Donnell and J Craney, 9.

15 See para 65.

of the main theories follows.

- *Pathological theory*. This theory argues that the violent person is ill and needs to be treated¹⁶ or, in some cases, that the victim is masochistic.¹⁷ The latter aspect of the theory is, however, controversial.¹⁸
- *Psychological theory*. This theory focusses, not so much on mental illness, but on psychological predispositions in both the violent person and the victim¹⁹: the offender is characterised, typically, as jealous, excessively dependent and overly possessive; the victim is said to be depressed, excessively dependent and insecure. It also focusses on the interaction of personalities. Some combinations are so explosive that:

. . . as individuals the man may not be violent nor the woman willing to tolerate abuse, but once in the relationship, a dynamic is set up such that violence recurs in a remarkably stable fashion.²⁰
- *Cycles of violence*. A further elaboration of this psychological approach suggests that violence in the home is a behaviour which is learned, in childhood, from a violent home.²¹ Those who have been subjected to or who have witnessed violence in childhood are predisposed to being violent adults. So also, victims of childhood violence become conditioned to be victims and gravitate towards a violent mate.²² Again, this theory is to some extent controversial.²³
- *Structural theory*. This looks to pressures of the environment, such as unemployment, cultural differences and crowded accommodation as causes of violence.²⁴ Violence is seen as a response to the frustration these pressures generate.
- *Male supremacy theory*. This theory suggests that violence by males against females is an expression of a traditional patriarchal model of society and of the family.²⁵

Alcohol

23. Finally, the role of alcohol in triggering incidents of domestic violence needs to be considered. The view that alcohol 'causes' domestic violence is probably too simplistic, although alcohol may help to lessen inhibitions against violence.²⁶ 'It may release the trigger of violence but it is not a direct cause'.²⁷ In many incidents of domestic violence it plays no part at all.²⁸ It was said to be involved in 45% of the cases of violence reported in the Australian Capital Territory phone-in. Nevertheless, alcohol is a significant factor in many incidents of domestic violence, sometimes being used deliberately by offenders as a

16 MDA Freeman, *Violence in the Family*, Saxon House, Farnborough, 1979, 136–9.

17 See R Dobash & R Dobash 'With Friends Like These, Who Needs Enemies?', *Paper* presented at the IX World Congress of Sociology, Stockholm (August 1978).

18 D Martin, *Battered Wives*, Glide Publications, California, 1976; E Pizze, *Scream Quietly or the Neighbours Will Hear*, Penguin, Harmondsworth, 1974.

19 M Elbow, 'Theoretical Considerations of Violent Marriages', *Social Casework*, November 1977, 515–26; H Toch, *Violent Men: An Inquiry into the Psychology of Violence*, Aldine Press, Chicago, 1969; L Walker, *The Battered Woman*, Harper and Row, New York, 1979, 35–41.

20 BJ Rounsaville, 'Theories in Marital Violence: Evidence from a Study of Battered Women', (1978) 3 *Victimology: an International Journal*, 12.

21 eg J Renvoize, *Web of Violence: A Study of Violence in the Family*, Routledge and Kegan Paul, London, 1978.

22 JE Snell, RJ Rosenwald, A Robey & M Franingham 'The Wifebeater's Wife' (1964) August *Archives of General Psychiatry*, 11; PD Scott, 'Battered Wives', (1974) *British Journal of Psychiatry*, 125.

23 J Scutt, *Even in the Best of Homes*, Penguin Australia, 1983, 118–22; C O'Donnell & H Saville, 'Sex and Class Inequality and Domestic Violence' in J Scutt (ed), *Violence in the Family*, Australia Institute of Criminology, Canberra, 1980, 83.

24 R Dobash & R Dobash, 'Violence between Men and Women Within the Family Setting', *Paper* presented at VIII World Congress of Sociology, Toronto 1974; R Gelles, *The Violent Home*, Sage Publications, Beverley Hills and London, 1972, 185; Royal Commission on Human Relationships, Australia, *Final Report*, AGPS, Canberra, 1977, vol 4, 141–2.

25 Freeman, 1979, 141–8; NSW Task Force Report, 35–8.

26 Gelles, 117 n 95.

27 Freeman, 1979, 139.

28 eg Scutt, 1983, 115–8.

lubricant to violence.²⁹ It may also be used as an excuse: it allows offenders to deny responsibility for their actions. 'It wasn't really me, it was the grog'.

Conclusion

24. No one of these theories, by itself, is sufficient to explain why violence occurs in one family and not in another. The truth probably lies in a combination of these theories, but in different degrees in each particular case. It would be surprising if there was a single explanation. Domestic violence is a complex problem with complex causes.

3. General considerations

General criticisms of legal responses

25. The most frequent complaint about the law's response to domestic violence is that it offers inadequate protection to victims. Complaints typically focus on two areas:

- *Police role:* a perceived reluctance of police to attend 'domestics', take complainants seriously or follow complaints up by arrest and prosecution. There is an oft-repeated criticism that the police will tell a victim to obtain a court injunction after an assault has taken place, rather than follow up the assault by initiating criminal proceedings against the perpetrator. Then again, it is sometimes said that police will not intervene *because* a victim has obtained a court injunction.
- *Court protection:* the courts are criticised on the grounds that they fail to provide adequate measures (such as enforceable injunctions or restraining orders) to prevent further violence, and that court injunctions against violence can be ignored with impunity or, at least, with little fear of serious consequences.¹

In short, the substance of the most common criticism made of the legal system in this area is that spouse beating is not regarded as really criminal. This perception encourages offenders to think that they can 'get away with it', and helps to perpetuate violence.

Competing considerations

Reasons for tensions in the law

26. *Need for balance.* There are complex reasons for the legal system's perceived failure to provide adequate protection for the victims of domestic violence. Reform of the law and legal processes concerning domestic violence brings into sharp focus the need to strike an appropriate balance between the needs of the victim and the rights of others in the community, including the offender. Some solutions will inevitably generate controversy. The context in which domestic violence occurs imposes its own special problems. Some of the conflicting considerations include:

- the tension between civil liberties and victims' protection;
- the appropriateness of legal and police intervention into the privacy of family relationships²;
- appropriate punishments: to punish a domestic violence offender severely will in many cases also have severe economic consequences on the family.

27. *Living together.* The answers to some of these questions may be easier if the victim and offender are no longer living together. An assault in these circumstances is much more like an ordinary crime such as a mugging or a pub brawl. But it is not just a matter of devising strategies according to whether the offender and victim are or are not living together. Indeed, the question whether they are actually still living together cannot in many cases be answered easily. Further, in some cases the victim will be ambivalent about the relationship, wanting to make it work, being forced by violence to leave but coming back to try again.

The competing considerations

28. *Civil liberties and victim protection.* There is a constant tension between well-established civil liberties and the need to protect the victim. These tensions emerge in connection with police powers of entry and arrest, with the enforceability of court orders designed to protect the victim and with the compellability of a spouse as a witness in criminal proceedings. In this regard the Commission is under a particular duty to ensure that its recommendations accord, so far as possible, with the International

1 P Stratman, 'Domestic Violence: the Legal Response' in C O'Donnell & J Craney, *Family Violence in Australia*, Longman Cheshire, Melbourne, 1982; Australian Law Reform Commission, Discussion Paper No 24, *Contempt and Family Law*, 1985, para 74-85.

2 See International Covenant on Civil and Political Rights, 1966 (1980) Aust TS No 23 (ICCPR) art 23: 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State'.

Covenant on Civil and Political Rights.³ But at the same time the rights of the victim of domestic violence must be preserved.

29. *Law and the family.* Given the importance of preserving the family unit, the extent to which the law, and in particular the police, can legitimately intrude into the privacy of family relationships is not an easy matter to determine. Any violence is plainly a criminal assault: its victims need to be protected, even if they are living together in intimacy with their attackers, and, in some cases, even if they do not want, for whatever reason, the assailant prosecuted. The need for protection is made more urgent by the closeness of the victim to the offender. Yet this very closeness explains why the police and the law hesitate to intervene.

30. *Punishment of offenders.* Even where the offender is convicted, the question of the appropriate punishment to impose is a difficult one. On the one hand, the imposition of punishment for proved physical assaults should be such as to bring home to offenders the enormity of their conduct. But, apart from arguments about whether gaol will really achieve very much (the offender may come out worse than before), a severe punishment will in most cases punish the victim and the children as well because of the serious economic consequences it will have for the family. In the Australian Capital Territory, there have, up till very recently, been no punishments other than fine or imprisonment (and, in appropriate cases, suspended sentences of imprisonment).⁴

Approaches to reform

31. *A 'hard' or 'soft' approach?* A view which has frequently been expressed to the Commission in the strongest terms is that spouse beaters must be treated in just the same way as any other criminals and that the police should pursue a vigorous policy of arrest and prosecution. This may be characterised as the 'hard' approach to domestic violence offences. But there are other approaches, exemplified in the following extract from the Australian Federal Police's training program:

When a complainant has been assaulted, but not seriously injured, and is seeking to have an arrest made only because he is upset or angry, the officers should discuss with the complainant the involved ramifications of such action. When an arrest would be detrimental to the resolution of the problem, the officer should use tact in trying to convince the complainant to be calm and logical. He should seek other means of resolving the dispute. The officer can point out that loss of income would result if he or she is jailed, and also the possible detrimental effect upon the children. He should convey to the complainant, when circumstances warrant, the unsoundness of an arrest as a method of solving a family problem.

Underlying these different approaches is a philosophical or perhaps ideological difference of opinion. Proponents of the 'hard' approach argue that adopting a 'soft' approach to domestic violence offenders indicates both to victims and offenders that beatings in the home are not really criminal but almost excusable. This message may re-inforce the very attitudes which nurture the phenomenon of domestic violence. On this view, a 'hard' approach is the only way to make the offender realise the seriousness of the offence. The hard approach is supported by results obtained in a Minneapolis police study, which concluded that arrest was the most effective approach in preventing recurrence in domestic assault cases.⁵ On the other hand, proponents of the 'soft approach' point out that in many cases the intrusion of the criminal law into the family can be disastrous for the family as a whole and that a counselling approach is essential: on this view, a 'hard' approach merely exacerbates the problem, inciting the offender to take out his rage on the victim once again. A high success rate has been claimed for the 'soft' mediation approach in other American studies.⁶ It is not impossible to accommodate both the criminal and the counselling approach. When it is said that domestic violence offenders must be treated in exactly the same way as other offenders it does not necessarily mean that they should invariably be gaoled. Other offenders are treated by the criminal justice system in a flexible way which takes into account many factors in deciding how the criminal process should proceed and what punishment is appropriate to the particular case. It is not therefore necessarily discriminatory to treat domestic violence offenders with flexibility by taking into account the fact that offender and victim live together. It is similarly not discriminatory not to gaoil all

3 Law Reform Commission Act 1973 (Cth), s7.

4 Australian Law Reform Commission, Report No 15 (Interim), *Sentencing of Federal Offenders*. AGPS, Canberra, 1980, para 493.

5 L Sherman & R Berk, 'Specific Deterrent Effects of Arrest for Domestic Assault', (1984) 49 *American Sociological Review*, 261.

6 A Laszlo & T McLean, 'Court Diversion: an Alternative for Spousal Abuse Cases' in the United States Commission on Civil Rights Consultation, *Battered women: issues of public policy*, Washington DC, January 1978, cited and discussed by M Girdler, 'Domestic Violence: Social Solutions', in O'Donnell & Craney, 143-7.

domestic violence offenders.

32. *The victim's attitude.* The dilemma which the choice between the 'soft' and the 'hard' approaches poses, arises most starkly where the victim and the offender are living together. That they are still living together must be taken carefully into account in the decision about how to deal with offenders. It both makes the victim's plight more dangerous than that of other victims of crime and, at the same time, makes the process of prosecution and punishment more difficult. In very many cases the victim does not want to see the full weight of criminal law brought to bear. This may be out of a genuine desire not to see the offender punished, perhaps because the parties are reconciled or because of a fear for the victim's own personal safety. Again, it may be for quite pragmatic reasons—the family as a whole will suffer if the offender is gaoled or fined. Because in many cases there is a resultant reluctance to use the full weight of the criminal law, the Commission believes that there is a need for an 'intermediate' legal response in the form of protection orders.⁷

7 See ch 7: the question whether such protection orders are a 'soft' option will be discussed below: see para 90.

4. Police and domestic violence

Role of the police

33. The first contact of both the victim and the offender with the law is usually the police. They may be called out to the disturbance by the victim, or by relatives or neighbours. They may decide to arrest the offender, or decide that the matter is better handled by informal cautioning or counselling. The police role in preventing domestic violence, and protecting its victims from further attacks, is vital. Consideration of the police role focusses on four aspects:

- the powers of the police to enter private property to break up a fight, or investigate allegations of domestic violence offences;
- the power of the police to arrest suspected domestic violence offenders;
- once a suspected offender has been arrested, the question whether the police should release on bail; and
- police training and attitudes towards domestic violence generally.

Police powers of entry

The present law

34. Under the present law in the Australian Capital Territory, the power of the police to enter private property is limited. Normally, police have no greater power to enter private property than any other member of the public. There are, however, a number of exceptions:

- *Entry with warrant.* Police may enter private premises if they are authorised to do so by a warrant, lawfully issued, to arrest a person on the property or to search it;
- *Entry without warrant.* Where a police officer does not have a warrant authorising entry onto premises, he or she may still enter private property—
 - if authorised at common law to arrest a person on the property;
 - if the officer reasonably suspects that an offence is being committed; or
 - if the police officer reasonably suspects that a breach of the peace is occurring or is about to occur.

Difficulties for effective policing

35. The police role is to prevent crime and to keep the peace. Unless there are reasonable grounds to suspect that a breach of the peace is occurring, or is about to occur, police cannot normally enter without a warrant. Essentially, if there are no signs or sounds of violence, the police need a warrant to enter. The police undoubtedly feel uncertain about their powers of entry and often express the fear of civil proceedings or even an official inquiry if they enter in cases that are not clear. In the typical domestic violence case, the police, having received a telephone call, arrive and are confronted by someone at the door who says there is no problem. In most cases, the police simply cannot assess the seriousness of the situation if they cannot gain entry. This situation is unsatisfactory. In some cases, the victim will not want the police to come in. The police may be able to secure an invitation by talking with the person who has come to the door: in effect, the police bluff their way in. Police, especially in cases of violence against the person, should be in a position to investigate properly and fully allegations of criminal offences and to act to protect the lives and safety of individuals. To some extent, wider powers of entry conferred on police would constitute a weakening of important civil liberties such as privacy.¹ In its report on Privacy the Commission considered the principles which ought to govern the granting and exercise of powers of intrusion. The principles adopted by the Commission included the following:

¹ International Covenant on Civil and Political Rights 1966 (1980) Aust TS No 23 (ICCPR) art 17: 'No one should be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence . . .'

- (1) a power of intrusion (that is, a power to arrest a person, to search a person or a place or to enter private premises) should not be granted as a matter of course. There should be a clear weighing up of the need to interfere with privacy against the social value of the policy to be achieved by conferring the power.
- ...
- (5) authority to exercise a power should normally be dependent on special or judicial authorisation (a warrant). Exceptions may be made to this, where necessary, for . . . cases of emergency.²

Reform

36. *NSW reforms.* In New South Wales (and nowhere else in Australia) police now have wider powers of entry than their Australian Capital Territory counterparts in relation to domestic disputes. The wider powers of entry allow police to enter premises:

- on the invitation of anyone apparently resident in the house, but only if they believe on reasonable grounds that a domestic violence offence has recently been or is being committed or is imminent or is likely to be committed in the house and the ‘occupier’ does not expressly forbid entry³;
- if they are invited by a person whom the police believe to be the victim of domestic violence (or imminent domestic violence), notwithstanding that the ‘occupier’ refuses entry⁴; or
- with a warrant which can be obtained immediately over the police radio telephones.⁵

These changes themselves contain considerable uncertainty. Like the Commission’s Terms of Reference, the definition of ‘domestic violence offence’ is restricted to offences between spouses or de facto spouses.⁶ It is difficult for police to determine whether the relationship of the offender and victim falls in this category. There are also difficulties for the police in knowing whether a particular person barring entry is the ‘occupier’, defined as the person ‘immediately entitled to possession of the dwelling-house’.

37. *Clearer and wider powers.* Given the need to protect victims of violence in an effective way, police powers of entry onto premises should be clarified and expanded. In addition to existing powers of entry onto private premises, police in the ACT should be authorised to enter private premises on the invitation of anyone apparently resident in the premises if they believe on reasonable grounds that a domestic violence offence has been committed, is being committed, is imminent or is likely to be committed. But the need to protect victims of violence must be balanced against other interests affected by any proposal to confer on police a wider power of entry without consent onto private property than they now possess. Any liberalisation of the power to enter must conform to the International Covenant on Civil and Political Rights to which the Commission is required by its Act to have regard⁷ and which has been adopted by the Commonwealth:

No-one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.⁸

The difficulty is that police often have to act on scanty information such as a neighbour’s telephone call. Often, when police arrive at the house, there are no signs of violence. Yet the police may reasonably suspect that someone inside the house has been badly injured or is about to be badly injured. If an invitation cannot be secured from a member or apparent member of the household, police should be able to gain entry by warrant, obtained as soon as possible over the police radio or by telephone. The basis for granting such a warrant should be that there are reasonable grounds to suspect that someone in the household needs assistance and is or has been exposed to physical violence or threats of physical violence.

2 Australian Law Reform Commission Report No 22, *Privacy* AGPS, Canberra, 1983 (ALRC 22), para 1102.

3 Crimes Act 1900 (NSW) s357F(2)–(3).

4 id, s357F(4).

5 id, s357G.

6 id, s4(1), definition of ‘domestic violence offence’; see also para 1.

7 Law Reform Commission Act 1973 s7.

8 ICCPR, art 17; and see Human Rights Commission, *Submission*, 2 January 1985.

The Commission is aware that police rarely seek warrants under the New South Wales scheme.⁹ This does not necessarily mean that the facility of obtaining a warrant has no value. It is an important back-up procedure and should be available to police in the Australian Capital Territory. The warrant should be given by a judicial officer (in the Australian Capital Territory, a magistrate) and only if he or she is satisfied that there are reasonable grounds for suspicion. In other respects the regime recommended for entry warrants in the Commission's earlier report on Criminal Investigation¹⁰ and adopted in the Criminal Investigation Bill 1981¹¹ should be adopted. In particular, there should be a facility for obtaining the warrant by telephone.¹² A warrant so drawn would not of itself allow police to search the premises entered for evidence of offences. Police would be in no different position in relation to a search of the premises, once they had gained access under a warrant, than if they had gained access by consent. For example, they could not search for evidence of an offence unless they were also armed with a valid warrant authorising such a search.

38. *'Domestics' and police power of entry.* The Commission's Terms of Reference are limited to spouses and people living in de facto relationships. But the Commission's recommendations on police powers of entry into premises cannot be so limited. It would be impractical if the police were required, every time they wished to use the expanded powers of entry recommended here, to ascertain whether the parties concerned were married or in a de facto relationship, given that, in accordance with Commonwealth practice in other legislation¹³, 'de facto spouse' is defined by reference to whether the parties are living together in a 'bona fide' domestic relationship. From the police point of view a 'domestic' is a disturbance within a house and it is their job to deal with it, no matter who is involved. Accordingly, the legislation attached to this report and implementing the Commission's recommendations concerning powers of entry is drawn as a general amendment to the Police Ordinance 1927 (ACT) and applies to all cases of violence on private property, not just disputes between spouses or de facto spouses.

Powers of arrest

The decision to arrest

39. In the context of domestic violence, the question whether to arrest or not is a critical one. First, an arrest will afford immediate protection to the victim, as the offender is physically removed. Secondly, it represents an important decision about dealing with the offender. It is the decision which chiefly determines what approach should be adopted—a mediation or a 'hard' approach. For practical purposes it determines whether there will be a prosecution because the police will in almost all cases charge someone who is arrested (although it is not mandatory to do so).

The present law

40. *Sources of power.* The powers of police officers to arrest offenders and suspected offenders have been the subject of previous Commission reports, notably the reports on criminal investigation procedures and privacy. There are two sources of power, the common law and statutes, principally the Crimes Act 1900 (NSW:ACT) and the Crimes Act 1914 (Cth). The position is complicated by the need to draw a distinction between offences and breaches of the peace. The two are not necessarily co-extensive: a breach of the peace may or may not be an offence¹⁴ and an offence may or may not be a breach of the peace. In fact, the notion of 'breach of the peace' is surprisingly uncertain.¹⁵ It denotes violence or danger to people but probably does not cover violence to property. It encompasses riotous gatherings of people, though noise by itself does not amount to a breach of the peace. In the context of domestic violence, an offence will almost always be a breach of the peace as well.

41. *Arrest for breach of the peace.* At common law, a police officer may arrest a person who has

9 The number of warrants issued in 1983 and in 1984 was 6 in each year: NSW Domestic Violence Committee, *Report April 1983 to June 1985*, Government Printer, Sydney, 1985 (NSW Committee Report), 20.

10 Australian Law Reform Commission, Report No 2, *Criminal Investigation*, AGPS, Canberra, 1975 (ALRC 2) para 196–202.

11 Criminal Investigation Bill 1981 (Cth) Pt V.

12 ALRC 2, para 201–2; and see ALRC 22, para 1171.

13 eg, Sex Discrimination Act 1984, s4(1), definition of 'de facto spouse'.

14 eg, using inflammatory language is a breach of the peace but may or may not be an offence.

15 See G Williams, 'Arrest for Breach of the Peace' [1954] *Criminal Law Review* 578.

committed or is committing a breach of the peace if the police officer reasonably believes that a further breach of the peace will occur. This power depends on what is likely to happen in the immediate future, given what has just occurred. The reasonableness of the belief of the arresting officer is a critical factor which determines whether or not arrest is justified. Where a police officer reasonably believes that domestic violence amounting to a breach of the peace is going to continue, the victim can be protected by an arrest. This power is wide enough to provide protection to victims, but police have expressed to the Commission dissatisfaction with what is perceived to be a vague and imprecise power, based on the (unwritten) common law. They would prefer to see it written down in legislation. The Commission accepts that it is preferable to make clear in legislation the important power of arrest without warrant. However, this difficulty with the common law power of arrest is a general problem in the criminal law. It is not unique to domestic violence. It is not appropriate to provide for a codified power of arrest only in relation to domestic violence cases. This should be dealt with in legislation covering all relevant offences.

42. *Arrest for offences.* The power of police to arrest for an offence is largely regulated by statute. No difficulty arises where a warrant authorises the arrest of an offender.¹⁶ The power of arrest without warrant in the Australian Capital Territory is, however, somewhat more complicated. Where a police officer reasonably believes that an offence is about to be committed, he or she may arrest without a warrant.¹⁷ A police officer who finds someone actually committing an offence may arrest the person without a warrant.¹⁸ Where the offence has already occurred, a police officer may arrest the offender if there are reasonable grounds for supposing that the offence will continue or be repeated.¹⁹ Where, however, there is no reason to suppose that it will continue or be repeated, the police officer has only a limited power of arrest. The offender should be summonsed rather than arrested unless a summons 'would not be effective'.²⁰

Need for reform: arrest for past offences

43. *Uncertainty of the law.* There is considerable uncertainty in the law concerning the powers of police to arrest without warrant where an offence has been committed and is not likely to be repeated immediately. It chiefly arises from the provisions of the Crimes Act 1914 (Cth), s8A, providing that police can only arrest where they reasonably believe that proceeding by summons 'would not be effective'. Presumably this would include cases where the offender is unlikely to turn up to court or where serving a summons on the offender would be difficult because he or she has no fixed address. It arguably (but by no means certainly) covers the case where the offender is likely to bring pressure to bear on a witness—in the case of a domestic violence offence, the spouse. It may also cover the case of a particularly serious offence, although there may be some doubt about this case too, as logically the words seem to be concerned only with the effectiveness of the procedure and not with such matters as the seriousness of the offence.²¹ The words have never been the subject of judicial interpretation in Australia. In Papua New Guinea it has been held that determining whether proceedings by summons would be 'effective' involves considerations of:

- whether the offender will attend court if summonsed;
- the seriousness of the offence alleged;
- whether there is a risk of continuation or repetition of the offence; and
- whether there is a danger to the offender or other persons.²²

But there is still a large measure of uncertainty remaining. For example, if the seriousness of the offence is to be taken into account, how serious must the offence be? It is difficult to see why, logically, the

16 eg, a warrant under the Crimes Act 1914 (Cth) s10.

17 Police Ordinance 1927 (ACT) s18(e).

18 Crimes Act 1900 (NSW:ACT) s352.

19 Police Ordinance 1927 (ACT) s18(e).

20 Crimes Act 1914 (Cth) s8A impliedly repealing in part Police Ordinance 1927 (ACT) s18(e); *Webster v. McIntosh* (1980) 32 ALR 603; *Donaldson v. Broomby* (1982) 40 ALR 525.

21 Presumably, it may be thought the more serious the offence, the more likely it is that the offender will abscond unless in custody.

22 *R v Kakius-Isiura* [1964] PNGLR 84; *Gaigo Kakore v Sing* [1975] PNGLR 104.

seriousness of the offence is relevant to the effectiveness or otherwise of proceeding by summons otherwise than in assessing whether or not the accused is likely to abscond, but if this is its only relevance it seems unnecessary to treat it, as the Papua New Guinea cases do, as a separate matter to be taken into account. Finally, there are number of difficulties that have a particular bearing on cases of domestic violence. If the Crimes Act 1914 (Cth) s8A allows arrest to prevent a repetition of the offence, how far into the future must the arresting police officer look? Should the police officer have to take into consideration the long-term effect of an arrest or only the very short-term? It is clear that if the officer reasonably believes that there will be an immediate repetition of the offence, an arrest would be justified. But suppose the officer believes that a further offence will take place at some time over the next day or two, would arrest be justified in that case? On this question, the Commission's report on criminal investigation said 'There can be no justification for the arrest of, say, a shoplifter or housebreaker on the basis that he or she is the "kind of person" who, allowed to go free, might proceed to commit other such thefts elsewhere'.²³ Further difficulties arise in connection with the role of arrest in preventing the destruction of evidence or contact by the accused with potential witnesses. Neither of these factors has been adverted to in the judicial commentary on s8A, and it is not clear that they would be required to be considered under the section as it presently stands.

Arrest is the deprivation of freedom. The ultimate instrument of arrest is force. The customary companions of arrest are ignominy and fear. A police practice of arbitrary arrest is a hallmark of tyranny. It is plainly of critical importance to the existence and protection of personal liberty under the law that the circumstances in which a police officer may, without judicial warrant, arrest or detain an individual should be strictly confined, plainly stated and readily ascertainable.²⁴

The present law of arrest in the Australian Capital Territory for a past offence does not satisfy these requirements.

44. *Expectation of victims.* Further criticism of the present police powers of arrest have been made to the Commission in the course of this inquiry. Some consequences of the present law cause shocked responses from people who work with victims of domestic violence. For example, where a victim is so badly hurt that he or she has to be taken to hospital, there is probably no likelihood of an immediate repetition of the offence and the police should, according to the present law, proceed by summons rather than arrest unless they form the reasonable belief that the offender might abscond. Submissions to the Commission show that, at least in the context of domestic violence, there is a real tension between established civil liberties and some people's feelings that offenders should be promptly punished:

An arrest can make a woman feel empowered. . . . This is one of the remedies that could be put into effect as a means of alleviating domestic violence.²⁵

Police should remove the attacker and either bail or charge and keep this person in the lockup. If bail is granted, an injunction should be sought immediately from a magistrate so that this person is legally restrained from returning to the dwelling. . . .²⁶

The Committee was strongly of the view that perpetrators of domestic violence needed to be kept in police custody until they appeared before a magistrate as this would give the victim (and the children) time to work out what to do next.²⁷

Purposes of arrest

45. *When is arrest justified?* It should not be a purpose of arrest to punish the arrested person. Rather, arrest is to protect others, or possibly the arrested person, or to ensure an appearance before the court. In the context of domestic violence, an arrest will be justified if the victim would remain in danger if no arrest were carried out. Other justifications have been urged for a less restricted power of arrest in these cases: justifications which would argue that the power of arrest should not be so strictly controlled:

- *Cooling-down.* Arrest in domestic violence cases physically separates the parties. It may provide a cooling-down period for the offender and gives the victim an opportunity to seek advice and make a

23 ALRC 2, para 41.

24 *Donaldson v Broomby* (1981–82) 40 ALR 525 (Deane J).

25 Toora Single Wimmin's Shelter, *Submission*, 26 July 1984.

26 ACTCOSS, *Submission*, 28 November 1984.

27 Australian Labor Party (ACT Branch), *Submission*, 2 January 1985.

decision about what to do next. Removing the offender is in many cases preferable to taking the victim to a place of safety, which is a common response. To some extent the present law can accommodate this objective: arrest may be effected to prevent a further offence from being committed.

- *Deterrence.* Much of the criticism of the law's response to domestic violence concerns its apparent inability to respond in a way which brings home to the offender that violence must stop. There is some evidence to show that a quick, sharp response to violence—that is, arrest—has the most effect in stopping further attacks.²⁸ The short, sharp shock of arrest to bring the offender to court may be the most effective way of deterring future violence. This view is supported by submissions to the Commission, most of which were in favour of a 'harder' response by the law to domestic violence offenders. Normally, the deterrent effect of the criminal law appears only at the end of the criminal process by the imposition of punishment. In domestic violence cases, as pointed out earlier, there may well be reasons why punishment is less than draconian.²⁹ It is arguable that deterrence may be an appropriate objective to pursue at an earlier stage in the criminal process. If so, for deterrence to be most effective, it would be better for it to operate close in time to (preferably immediately after) the commission of the offence.

46. *Deterrence rejected.* The view that arrest should be used as a deterrent is controversial. It is a view which is implicitly rejected by this Commission in an earlier report³⁰ and it is a view which is rejected in the present law in the Australian Capital Territory. Using arrest in this way punishes before guilt is proven and infringes the most fundamental tenet of our criminal justice system, namely, that a person is presumed innocent until proven guilty. It is also clearly inconsistent with the International Covenant on Civil and Political Rights.³¹ Even though some people, understandably, feel that arrest should be used as a deterrent and that, wherever a serious or cruel offence has been committed, the alleged offender should be automatically arrested, the Commission does not feel that this sentiment should dictate that there should be a special law of arrest in domestic violence cases. Instead, uncertainties in the law of arrest without warrant for all crimes should be removed. A clarification of the law of arrest will not mean that arrest will be used more sparingly in domestic violence cases than at present.

Reform

47. *Reform of power of arrest without warrant.* There is no necessity to alter the present law of arrest pursuant to warrant in the Australian Capital Territory beyond what has already been recommended by the Commission in its earlier report on criminal investigation. But the law of arrest without warrant for past offences should be spelled out clearly in legislation. The power should be limited in the way recommended in that report: in short, a police officer should be able to arrest without warrant on a belief on reasonable grounds that arrest is necessary and proceedings by summons would not be effective or appropriate to achieve any of the following purposes:

- to ensure the appearance of the offender in court;
- to prevent the continuation of, or a repetition of, the offence;
- to prevent concealment, loss, destruction or fabrication of evidence; and
- to preserve the safety or welfare of the offender.

In addition, specific mention should be made of the need to ensure that potential witnesses are not interfered with: this is a particular concern in domestic violence cases.

48. *Implementation.* It is not legally possible to provide by an Australian Capital Territory Ordinance for a specific power of arrest in relation to domestic violence offences contrary to the provisions of the Crimes Act 1914 (Cth) s8A.³² Nevertheless, the changes discussed above would be of critical importance

28 L Sherman & R Berk, 'Specific Deterrent Effects of Arrest for Domestic Assault', (1984) 49 *American Sociological Review*, 261.

29 See para 28–30.

30 ALRC 2 para 41.

31 'Everyone has the right to liberty and security of person. No one should be subjected to arbitrary arrest or detention': ICCPR art 9.1.

32 *Webster v McIntosh* (1980) 32 ALR 603.

in effectively dealing with domestic violence in the Australian Capital Territory. The Commission's earlier recommendations have been considered by Government and support has been expressed for them on a number of occasions. The Commission understands that the changes to the powers of arrest recommended in the earlier report are not controversial. The amendments to the Crimes Act 1914 (Cth) s8A are desirable both to curb domestic violence and generally. This aspect of the Commission's earlier recommendations should be taken up without further delay by amending the Crimes Act 1914 (Cth) so as to authorise police to arrest without warrant on a belief on reasonable grounds that arrest is necessary and proceedings by summons would not achieve any of the purposes set out above.

49. *Serious offences.* None of the criteria just outlined distinguishes between serious and less serious offences. The Commission's earlier report took the view that, for some offences, arrest should never be available:

It would be difficult to accept, for example, that there could ever be justification for arresting someone for riding a bicycle without a light. The difficulty is to fix upon a system of classification that divides offences into 'arrestable' and 'non-arrestable' which does not create more problems than it solves.³³

The solution recommended there was for certain offences to be proclaimed by regulation to be non-arrestable unless a warrant were obtained.³⁴ It was suggested that the so-called 'victimless crimes' such as gambling be so proclaimed. Domestic violence offences are of their nature crimes with victims. Consideration of whether general provision should be made for 'victimless crimes' should not delay implementation of the recommendation referred to in the previous paragraph. A more significant problem emerges at the other end of the spectrum. For more serious offences, such as murder, manslaughter, rape and assault occasioning grievous bodily harm, is it ever appropriate to proceed by summons rather than arrest? The present police practice is to arrest in such cases. It is possible to imagine a case where there is no danger of a repetition of the offence, and the likelihood of the accused absconding is extremely low. For example, in the case of a domestic assault causing grievous bodily harm where the victim is removed to hospital, the police may form the view that, on the criteria set out in paragraph 47, there is no need to arrest. The Commission has concluded that, although justification for an arrest in such cases cannot be found in the use of arrest as a form of punishment, arrest is justified in serious cases of this kind for two reasons. First, the decision whether a person who is believed to have committed a serious offence should be at large should not be taken, on the spot, in the stress of the moment, by the arresting officer. A more detached person, and preferably a judicial officer, should make such a decision. It is therefore necessary to arrest to bring the accused before senior police or a magistrate. Secondly, the risk arising from making a wrong decision (to proceed by summons rather than arrest) is far higher where the offence is serious. It may be that the police officer at the scene of the crime forms the view that the offender is most unlikely to repeat the offence or is most unlikely to abscond. But if the officer is wrong in his or her assessment, the consequences could be very grave. Arrest is justified in such cases to avoid this risk. Accordingly, it should be made clear that the criteria outlined in paragraph 47 will not prevent arrest in cases of serious offences. It would be undesirable to exclude 'serious offences' simply in those terms; some content needs to be given to that expression. The commission has chosen to give it content by listing categories of offences which can arise in domestic violence incidents, and which would, in every case, justify arrest. Adopting the listing approach, serious offences should be defined to include murder, manslaughter, rape and related offences and assaults causing grievous bodily harm. Attempts to commit such offences should also be included. It may be thought that other serious offences, not involving assaults, should also be included, as the proposed amendment to the Crimes Act 1914 (Cth) will have Australia-wide application. However the selection of other offences which should be included is not a matter within the present Terms of Reference.

Bail

Present law

50. Once arrested, a person suspected of a domestic violence offence may be released on bail. Police in the Australian Capital Territory have a wide discretion in this regard.³⁵ They may, for example, decide

33 ALRC 2, para 30.

34 *id.*, para 34. The reference to 'non-arrestable' offences means offences that are not subject to the arrest without warrant provision: a warrant would therefore be needed to arrest a person for such an offence; and see Criminal Investigation Bill 1981 (Cth) cl 10(5).

35 Court of Petty Sessions Ordinance 1930 (ACT) s50; Police Ordinance 1927 (ACT) s24.

whether to require the suspect to lodge an amount of money or find a 'surety'³⁶ as a condition of bail. But police have no power to impose bail conditions relating to the suspect's conduct while on bail.³⁷ By contrast, in New South Wales, conditions specifically tailored to the particular offender and to the victim's protection can be imposed with police bail³⁸, for example:

- conditions that the offender not drink whilst on bail; or
- conditions that the offender not approach the victim of the offence.

Breach of bail conditions allows the police to arrest immediately.³⁹ In many cases of domestic violence, the immediate release of the offender may be dangerous for the victim. In the Australian Capital Territory, present police practice in domestic violence cases is to exercise police discretion, for example to delay release, taking into account the fact that the arrested person is accused of domestic violence. For instance, a drunk offender will be kept in custody until sober (this is sometimes justified on the basis that it is for the offender's own protection).

Reform

51. *A 'twelve hour peace'?* One way of providing protection to victims is to provide for a compulsory cooling-off period under which a suspected domestic violence offender, once arrested, is not permitted to be released for some specified time, for example, 12 hours: this establishes a '12 hour peace'. This was in fact recommended by the New South Wales Task Force⁴⁰, but not adopted. It was presumably thought that any detention of an arrested person should be governed by bail rules. A 'twelve hour peace' regime would be contrary to the International Covenant on Civil and Political Rights.⁴¹

52. *Bail conditions.* Instead, a regime similar to that adopted in New South Wales, and recommended by the Commission in its Criminal Investigation report⁴² should be adopted for domestic violence cases. It should be possible for the police themselves, in granting bail for these offences, to impose suitable conditions, in addition to those that they can already impose, specifically designed to protect the victim of the alleged offence from further injury or harassment. In cases of arrest, the imposition of bail conditions will serve the same purpose as the proposed protection order⁴³, filling the gap between release after arrest and obtaining a protection order. Suitable conditions could include conditions that the accused:

- not harass or molest a member of his or her family;
- not approach within a specified distance of a member of his or her family; or
- if continuing to reside with the family, not to be in the house while intoxicated.

53. *Considerations and review.* As in the Criminal Investigation Bill 1981 (Cth), specific considerations should be listed for police to have regard to when deciding whether to impose conditions of this kind. These considerations should not be exhaustively stated, but should include:

- the need to ensure that persons are protected from violence or harassment;
- the welfare of any children involved; and
- any hardship that may be caused to the accused or to members of the family of the accused if bail is not granted or if a particular condition is imposed.

The requirement to advert to these matters should be imposed on all bodies exercising bail functions in

36 A person who undertakes to forfeit a sum of money if the suspect does not appear for trial.

37 Both the Court of Petty Sessions and the Supreme Court may impose such conditions: Court of Petty Sessions Ordinance 1930 (ACT) s248A; The Supreme Court has inherent jurisdiction to impose bail conditions.

38 Bail Act 1978 (NSW) s36–9.

39 id, s50.

40 NSW Task Force on Domestic Violence, *Report*, Government Printer, Sydney, 1981, (NSW Task Force Report) recommendation 8.

41 See fn 31 above.

42 ALRC 2, para 183–7.

43 As to which, see ch 7

domestic violence cases, not just police. Further alterations to the law will be needed to provide for review of the imposition of conditions on a grant of police bail: any conditions so imposed should be reviewable by a magistrate at the instance of the person bailed.

54. *Breach of conditions.* A breach of these bail conditions should not of itself be a criminal offence, although in some cases a breach (for example, a further assault) may amount to an offence. In this respect the Commission is departing from recommendations in its earlier report on criminal investigation⁴⁴ that a breach of any bail condition should be an offence carrying the same penalty as the alleged offence for which bail was given, but with an upper limit of a fine of \$500 or six months imprisonment. Difficult questions of sentencing would arise. The preferable course is for a breach of bail conditions to have the automatic effect of revoking bail, rendering the suspect liable to immediate arrest, without warrant. If the suspect is to be released again, a fresh application for bail will have to be made in the magistrate's court.

55. *Victim informed.* One final matter remains concerning bail for domestic violence offences. It is essential, when a person is released on bail for a domestic violence offence, that the victim be informed in advance of release. Any relevant conditions of bail should also be communicated at the same time. The appropriate means of achieving this is to ensure that it is written into police guidelines.

Firearms

The use of terror

56. One matter which deserves special consideration is the use of firearms in domestic violence cases. Abusive spouses sometimes use firearms against their partners. This is not just true of the worst cases of domestic violence, but also in many other cases where there is a firearm in the house. Its presence terrifies even if it is never actually fired. The police have told the Commission that domestic disturbances sometimes pose grave dangers to them. Violence is sometimes turned against the police. This would not be such a problem if it were not for the presence of a gun. In the Australian Capital Territory there is no right to own a firearm. It is a privilege controlled through a licensing system.⁴⁵ There is no doubt that the threat to use a gun, even in bluff, against another person is a gross abuse of that privilege. Any such abuse should be a ground for withholding a licence.

Recommendations

57. *Notification of firearm incidents.* If the police discover in the course of investigating a domestic disturbance that the use of a firearm has been threatened, this should be noted on the proposed Domestic Disturbance Report Form⁴⁶ and a copy should be forwarded immediately to the firearms licensing authority (a Registrar under the proposed new Ordinance). The Registrar will have power under the new legislation to revoke a licence at any time if he or she forms the view that the licensee is not a fit and proper person to hold a licence.

58. *Removal of firearms licence.* The Commission has been told by the Department of Territories that, under the proposed Ordinance, the Registrar will have the power, in certain cases⁴⁷, to cancel the licence. The licensee will then have the right to appeal against that decision to the Administrative Appeals Tribunal. This provision should also apply in the case of use or the threatened use of a firearm in a domestic violence context. Although the information on which the Registrar would act would be hearsay (the police have simply noted that it is alleged that the licence holder threatened to use a gun)⁴⁸, this approach is satisfactory given that there is no *right* to hold a gun licence and that the taking away of a gun licence is not generally a very severe deprivation. A former licensee who has a need for the licence for his or her livelihood, for example, or for competitive sport can apply to the Administrative Appeals Tribunal to have the licence restored.

59. *Domestic violence protection orders.* The proposed new Ordinance should include provision allowing the Registrar to take into account, when deciding whether someone is a fit and proper person to

44 ALRC 2, para 175(f); Criminal Investigation Bill 1981 (Cth) cl 55.

45 The present law, the Gun Licence Ordinance 1937 (ACT) is under review and a new Ordinance is expected soon.

46 As to which, see para 65.

47 eg, where the licensee has been convicted of certain offences or where he or she has been bound over to keep the peace.

48 It can to some extent be overcome by the Registrar checking independently.

hold a gun licence, the fact that that person has been required by a court to enter into a recognizance to keep the peace. A protection order should also be within the scope of this provision, although the Registrar would have to ascertain whether the order was concerned with violence or other conduct not amounting to violence. For example, a protection order that was simply preventing the spouse from telephoning would generally not be a basis for revoking or not granting a gun licence.

Police: a general approach

Role of police

60. *A difficult job.* The New South Wales Task Force on Domestic Violence reported varying responses from the public about the police role in domestic violence incidents, ranging from ‘good’ and ‘helpful’ to ‘horrendously unsympathetic’.⁴⁹ The task of policing domestic violence is an unpleasant, difficult and sometimes dangerous one. As one police officer said to the Commission:

Yes, it’s the worst job that we have to do. It’s worse than deaths. You get used to them. But with domestics you can never do the right thing. The parties have had years of rotten marriage and you’re there to try and do something about it. You know that whatever you do it’s going to happen again. And in most cases you can’t do anything anyway because the wife decides she does not want to prosecute.

Particular problems arise because of a lack of specialist police training and frustration generated by some of the unavoidable aspects of domestic violence prosecutions. The quality of police response to domestic violence nevertheless still very much depends on the maturity and personality of the particular officers who attend.

61. *A central role.* The role of police in dealing with domestic violence is a central one. Experience in New South Wales and in South Australia has shown that new legal measures enacted to deal with the problem of domestic violence depend heavily on the police for their effectiveness.⁵⁰ For example, the effectiveness of protection orders in South Australia depends on the police at almost every stage of the process, from when the police first come to a house where there is violence to the enforcement of the orders when they are shown to be breached.⁵¹ It is fair to say that the differing views that are sometimes expressed about the question whether protection orders are an effective remedy for domestic violence can be almost entirely explained by the differing police responses experienced by victims of domestic violence.

Police training and experience

62. *Police training.* Some police officers have put to the Commission that no amount of class-room training and simulation exercises can be as effective as the real thing. In their view, police trainees should be given as much experience as possible in attending ‘domestics’, first of all as trainee observers, and then as police officers under the supervision of an older, experienced officer. The presence of such an officer would help to overcome difficulties for police that may arise because of age disparity between the disputants and the policemen and women who attend. Certainly, experience can be the best teacher. But there is a great deal of essential preparatory training which can be imparted in the class-room. Much of the dissatisfaction with the police response to domestic violence stems from inappropriate and sometimes unsympathetic attitudes shown by some police. Police training should be aimed at dispelling some of the stereotyped responses to the offender’s actions and the victim’s plight, such as:

- married relationships are private and the police have no business intervening except in the most violent cases;
- ‘they asked for it’;
- ‘it’s the booze, not the person’;
- a slap or a belting does not really amount to violence and is not criminal.⁵²

49 See S Eggar, J Croucher & W Bacon, *Domestic Violence—Survey of Attitudes towards Available Services*, a paper prepared for the NSW Task Force on Domestic Violence, *Report* 38–41.

50 NSW Committee Report, 12; N Naffin, *Domestic Violence and the Law—Study of s99 of the Justices Act (South Australia)*, Women’s Advisor’s Office (South Australia), June 1985 (Naffin Report), 94–98, 133–4 and see recommendations 3–11 (inclusive), 13, 14, 16, 17, 19–21 (inclusive).

51 *ibid.*

52 See NSW, Premier’s Department, Women’s Co-ordination Unit, *Domestic Violence—You don’t have to put up with it*, Government

63. *Abandoned prosecutions.* A cause of a great deal of dissatisfaction for the victims, helping agencies and the police themselves is the feeling of frustration understandably felt by police if a prosecution is aborted because of non-cooperation by the victim. This sense of frustration may encourage police in some instances to feel that there is no point in trying to help the victims of domestic violence. In fact, the police action itself may have had a salutary effect so that the victim now feels that there is no need for prosecution. Police must be trained to understand why victims do not want their partners prosecuted and not to feel that an aborted prosecution is a sign of police failure.

[T]here is a need for immense patience and understanding. Inevitable uncertainties surround the decisions of domestic violence victims to invoke the law. There is simply no easy answer to this.⁵³

In many ways, the key to the law's response to domestic violence is the police response. Instilling appropriate attitudes in the police force to domestic violence will not happen overnight. It is a major educational task.

64. *A domestic violence police unit?* One suggestion to the Commission called for a specially-trained group of police officers to be responsible for domestic violence cases. This proposal, though desirable, is not practicable because, given the frequency of calls to the police to attend 'domestics',⁵⁴ the size of such a proposed unit would be prohibitive if it were designed to cover the whole of the Australian Capital Territory on a 24-hour basis. But it would be practicable to have a small core of experienced police officers who, amongst their other duties, acquire an expertise in domestic violence cases. These members could be used in particularly difficult cases and could be available to advise and assist other police officers in handling domestic violence cases.

65. *Miscellaneous matters.* There are a number of miscellaneous matters to which early consideration should be given.

- *Privacy for victims.* So far as resources allow, separate rooms should be made available at police stations to provide privacy for victims who want to report domestic violence offences.⁵⁵
- *Form of reports.* It would be desirable to provide police with a pre-printed form which would enable statistics to be kept on police work in this area, by recording whether or not physical violence was reported or observed and whether the police initiated criminal and civil (protection order) proceedings. The form could be used by police to note any other details which they may need to record. The design of such a form is important. If it is difficult to use it will not be used. Accordingly the form should be designed by experts. The Australian Institute of Criminology has experience in designing such forms and has expressed a willingness to assist.
- *Support for police.* It has been noted that police officers find domestic violence work extremely difficult. Yet little attention has so far been paid to the needs of these officers who sometimes suffer profoundly disturbing experiences dealing with domestic violence. The Australian Federal Police should recognise this problem and provide support (including 'de-briefing') for police officers who are exposed to these experiences, to prevent the problem of 'burn-out'.

66. *Police preventive action.* The role of police in counselling and assisting both victims and offenders should be recognised. Because they are usually first on the scene, and because of their special position of authority in the community, police should be trained to refer the victim and the offender to the support, advice, counselling and other facilities that will be available through the proposed Domestic Violence Unit⁵⁶ and elsewhere. Referrals of this kind can be done both orally and by the police giving a pamphlet to each party. Police are often well aware that particular domestic violence offenders are very likely to repeat the offence. It is in the interests of the police, the victim, the family and the community at large that the police take steps to ensure that domestic violence does not recur. It is essential that police take on this responsibility so that their workload in relation to domestic disturbances will eventually be lessened.

Printer, Sydney, 1983.

53 Naffin Report, 154.

54 From 1 January 1985 to 26 July 1985, ACT police attended 498 'domestics'.

55 Naffin Report, recommendation 10.

56 See ch 8.

5. Prosecutions

Scope of chapter

67. This chapter deals with the next stage in the law's involvement with a domestic violence offence: the decision whether or not to prosecute the offender, and a number of special aspects of the trial process, in particular the compellability of a spouse to give evidence for the prosecution against the other spouse.

Prosecution policy

Prosecution process

68. As a background to examining prosecution policy in the Australian Capital Territory, some explanation of the process of prosecution is called for. For most domestic violence offences, the prosecution is a summary one in the magistrate's court. The informant (the person in whose name the prosecution is brought) is normally a police officer.¹ The police have to prepare the case for court and a lawyer from the Director of Public Prosecutions' office argues the case in court. There is a second type of prosecution possible—a private prosecution—but it is very rarely used. Here, a private citizen rather than the police brings the action in his or her name and does all the preparatory work for mounting the case in court (usually through a privately engaged lawyer). According to the present guidelines, the Australian Capital Territory Legal Aid Commission may assist someone to mount a private prosecution though the Commission has been informed that the practice is not to assist such actions.²

Charging and prosecution policy

69. It is most important that the prosecution process at all its stages not distinguish between domestic violence offences and other offences. The police in the Australian Capital Territory have told the Commission that, in determining whether to charge a person with a domestic violence offence, the same criteria are applied as is the case with other offences. Once the suspect is charged, the case is taken over by the office of the Director of Public Prosecutions. The Director has a discretion not to prosecute even though the police have laid charges.³ This discretion can be exercised for technical reasons, such as lack of evidence, or for other reasons, such as where the appropriate punishment is a fine but the accused is impoverished. It would be possible for the Director of Public Prosecutions to exercise the discretion not to prosecute in domestic violence cases if he or she took the view that the criminal process was inappropriate in a particular case or class of cases, or in domestic violence cases generally. The Commission has been told by the Director of Public Prosecutions that the office treats domestic violence cases no differently to other crimes. This approach, of both the police and the Director of Public Prosecutions, is appropriate and should continue.

Compellability of spouses

The present law

70. In the Australian Capital Territory, married people (but not de facto spouses) are competent but not compellable witnesses when called to give evidence by the prosecution in criminal proceedings.⁴ They remain compellable witnesses when called by the defence. This means that a spouse may, but does not have to, give evidence against the other spouse in a domestic violence case. De facto partners, on the other hand, are treated in the same way as any other witness and can be compelled to give evidence against each other.

1 Strictly speaking, this is a private prosecution (the police officer being the private citizen who brings the prosecution) but, in effect, it is the State which is prosecuting and whose resources are used to bring the action: see Australian Law Reform Commission, Report No 27, *Standing in Public Interest Litigation*, AGPS, Canberra, 1985, para 343.

2 AA Hardiman, Legal Aid Commission (ACT), *Submission*, 22 July 1985.

3 *Prosecution Policy of the Commonwealth*, AGPS, Canberra, 1982.

4 Evidence Ordinance 1971 (ACT) s66(1).

Criticisms

71. The rule applying to married people can be criticised in a number of respects. First, it offends against the principle that, in determining any legal proceeding, the court should have available to it all relevant evidence.⁵ Secondly, by extending the exemption only to married persons, it excludes those in de facto relationships, contrary to stated government policy on non-discrimination⁶ and the articles of the International Covenant on Civil and Political Rights.⁷ Finally, a consequence of the rule, in domestic violence prosecutions, is that in many cases wives exercise their right not to give evidence. Although the prosecution may be able to establish the necessary facts without the oral evidence of the wife, usually the prosecution must be abandoned because the wife's evidence is essential. This contributes to possible police scepticism about mounting prosecutions in domestic assault cases.⁸ Victims of domestic violence therefore have, in practice, the ultimate control of the process of prosecution. This is inconsistent with the principle, stated earlier in this report⁹, that, in general, domestic violence offenders should be treated in the same way as other offenders. In some cases it may even increase the already difficult burden of the victim: 'the placing of a choice in the hands of the woman herself is almost an act of legal cruelty . . .'.¹⁰

Reform

72. *General principles.* In determining any legal proceeding, the court should have available to it all relevant evidence. This fundamental principle is not in dispute. Nor is it in dispute that:

- the enforcement of the criminal law should not be allowed to disrupt marital and family relationships to a greater extent than the interests of the community really require¹¹; and
- the community should not make unduly harsh demands on its members by compelling them to give evidence when this will have the effect of visiting punishment on those they love, betray confidences or entail social or economic hardships.¹²

These principles support amendments to the law to make spouses, in domestic violence prosecutions, compellable witnesses for the prosecution. They also support an appropriately drawn exemption for spouses. The scope of the exemption is the subject of the following paragraphs.

73. *NSW reforms.* Under recent amendments to the law in New South Wales, spouses only have a limited exemption from being compelled to give evidence as witnesses for the prosecution in domestic violence cases. The exemption is also extended to de facto spouses. The magistrate or judge may excuse the spouse or de facto spouse from giving evidence if he or she is satisfied that the witness has not been intimidated and that, having regard to the availability of other evidence and the seriousness of the alleged offence, it is a proper case in which the witness should be excused from testifying.¹³ It appears that this change has not worked as anticipated. Magistrates are apparently allowing women not to testify on grounds not provided for in the legislation, including that the parties have become reconciled. Prosecutors may also simply decide not to call a witness who indicates a lack of desire to give evidence.¹⁴ Presumably magistrates are reluctant to bring down the weight of the law on a spouse who does not want to testify. If this is so, the spouse effectively remains a non-compellable witness despite the change to the law. The change to the law in New South Wales was apparently based on the assumption that the principal reason

5 Australian Law Reform Commission, Report No 26 (Interim) *Evidence*, AGPS, Canberra, 1985, (ALRC 26), para 82.

6 See, eg, Sex Discrimination Act 1984 (Cth).

7 International Covenant on Civil and Political Rights 1966 (1980) Aust TS No 23 (ICCPR), art 26.

8 See para 62–3.

9 Para 31–2, 69.

10 NSW Task Force on Domestic Violence, *Report*, Government Printer, Sydney, 1981, (NSW Task Force Report), 55.

11 eg Sir Richard Blackburn, former Chief Justice of the Supreme Court of the ACT, *Submission*, 15 October 1984.

12 ALRC 26, para 529.

13 Crimes Act 1900 (NSW) s407AA. These amendments were justified by the Task Force on Domestic Violence on the grounds that: (1) they relieve women of the difficult burden of being, effectively, the person who decides whether or not the prosecution should go ahead; (2) police frustration at aborted prosecutions was probably leading to a reluctance on the part of the police to attend diligently and speedily to domestic violence calls; and (3) it would reduce opportunities for intimidation, as the spouse could rightly say, 'I cannot help it—the matter is out of my hands': NSW Task Force Report, 55.

14 NSW Domestic Violence Committee, *Report April 1983 to June 1985*, NSW Government Printer, Sydney, 31–2.

for a spouse not wanting to testify was that he or she had been overborne. There may well be reasons besides intimidation why a victim might decide not to give evidence:

- a desire not to be subjected to the possibly harrowing experience of having one's private life exposed to public gaze in court proceedings;
- pressure from friends and relatives not to be 'disloyal';
- in some cases, victims feeling that they are to 'blame' in some sense.

The parties may still love each other, despite the attack, and regard a prosecution, especially if a fine or imprisonment is imposed, as too disruptive for the family.

74. *Recommendations.* The reasons for a particular witness not wanting to testify in a domestic violence prosecution may be many and complex. To single out one factor from a complex of factors as a basis for an exemption would not be sound. On the other hand, making a spouse a compellable witness in domestic violence prosecutions is an important prop for the victim, even if it is not used in many cases, and is consistent with principle. At least it is available so that the victim can say: 'I have no choice'. Because there is a small number of magistrates in the Australian Capital Territory, a wide diversity of approaches to the treatment of the compellability issue could be avoided. This seems to have been one of the causes of the failure of the reform in New South Wales—different magistrates have been adopting different approaches. In general terms, the fundamental reason for granting spouses exemption from having to testify against their partners is that such testimony undermines the cohesiveness of the family unit. It would support a similar exemption for other close family members and de facto spouses.¹⁵ Paradoxically, reform in relation to compellability of spouses in domestic assault prosecutions is to the opposite effect: spouses should not be exempt, or perhaps should only have limited exemption, from giving evidence. In its Interim Report on the law of Evidence applying in (among other things) Australian Capital Territory courts, the Commission has suggested that spouses should be compellable in all prosecutions, but that the court should be able to allow a spouse, de facto spouse, parent or child of a defendant in criminal proceedings to object to being required to give evidence against the defendant. The court must then weigh the harm that would be caused, either directly or indirectly, to the witness or to the relationship between the witness and the defendant against the desirability of obtaining the evidence. The court, in weighing up these considerations, must have regard to:

- the nature of the alleged offence;
- the importance and weight of the witness's evidence;
- whether alternative evidence is available;
- the nature of the relationship between the witness and the defendant; and
- whether the witness would have to breach a confidence.¹⁶

This solution adequately balances the competing considerations and is particularly appropriate in domestic violence cases where there has been a genuine reconciliation. It should be adopted for domestic violence offences in the Australian Capital Territory.

Sentencing

75. The question of disposition of offenders found guilty of domestic violence offences is the last matter to be dealt with in this chapter. At present in the Australian Capital Territory, penalties that may be imposed for an offence are:

- fine;
- imprisonment (including suspended sentences), where this is permitted under the law creating the offence; and
- community service orders.

15 ALRC 26, para 898, 902.

16 *id.*, para 898, 902. See clause 103 of the draft Evidence Bill attached to that report.

The last has only recently become available.¹⁷ It has already been suggested¹⁸ that the imposition of a fine or imprisonment will in many cases punish the victim's family as well as the offender. This is true of all criminal offences, but in the case of domestic violence the family has already suffered. It is at the sentencing stage that it is most appropriate to take into account the kinds of considerations that support the 'soft' approach to domestic violence. Although gaol will still be an appropriate punishment in some cases, in many others the family would welcome the law being lenient at this stage.¹⁹ In addition to the present range of options available to Australian Capital Territory courts in dealing with domestic violence offences, weekend detention may be desirable. This option will be considered fully in the Commission's forthcoming report on Sentencing of Offenders, and will not be dealt with further here. Further, it should be open to the courts to require offenders to attend compulsory counselling and therapy programs of the kind recommended later in this report.²⁰

17 Supervision of Offenders (Community Service Orders) Ordinance 1985 (ACT).

18 Para 30.

19 N Naffin, *Domestic Violence and the Law—Study of s99 of the Justices Act (South Australia)*, Women's Adviser's Office (SA), June 1985, 44.

20 Para 121–2.

6. Existing legal measures for preventing future violence

Criminal law

Introduction

76. On one view, the criminal law, properly enforced, should be enough to provide long term protection for people against domestic violence. The criminal law not only looks backwards in time to the offence, but is also capable of looking forward to possible future offences. This looking forward is done either through mechanisms such as the suspended sentence, which can be used as a threat to force an offender to adhere to specified conditions, or by imposing a heavy sentence (such as a term of imprisonment) which deters future offences by the convicted person (specific deterrence). Both these mechanisms can only be used after it has been shown beyond reasonable doubt that an offence has been committed.

Imposition of conditions

77. *Criticisms.* The provisions of the Crimes Act 1900 (NSW: ACT)¹, under which conditions are imposed on a person after conviction, have been criticised in an earlier Commission report.² It is not clear what conditions can be imposed by a court. Nor is it clear what the vague stipulation to ‘be of good behaviour’ (which is usually imposed) means and what amounts to a breach of it. Breach of conditions imposed by a court rarely lead to further action. These criticisms are not restricted to domestic violence cases. A further criticism, particularly relevant to domestic violence cases, is that the enforcement mechanism is largely ineffective. When there is a breach of a condition, the police have no power to arrest automatically but must instead go before a magistrate who may either issue a summons or a warrant for arrest.³ A breach of a condition therefore has no immediate repercussions. As is the case with breaches of Family Court injunctions⁴, it seems that a breach attracts no immediate consequences. The person who has broken the court order gains the impression that breach is not a very serious matter. This impression is generally reinforced by what happens at the court hearing (often weeks or months after the event). The offender is usually dealt with leniently. To put it shortly: this mechanism lacks teeth.

78. *General reform of criminal law.* Any amendment of the provisions discussed in paragraph 77 to provide proper and effective protection for domestic violence victims would not be restricted to domestic violence cases. They cover all types of criminal activity. Although these procedures are in need of reform, for the reasons outlined below⁵, it is not recommended that protection of domestic violence victims should be left exclusively to the criminal law. Consideration of the general reform of these procedures will be left to the Commission’s reference on sentencing.

Specific deterrence

79. The other way in which the criminal law can prevent future violence is through specific deterrence. However, the use of imprisonment for all criminal conduct should be a last resort.⁶ This is certainly a marked feature of the criminal justice system in the Australian Capital Territory, particularly as, under current arrangements, persons sentenced to imprisonment by Territory courts must serve their sentences in New South Wales prisons. In the particular case of domestic violence offences, a magistrate may be even more reluctant to impose a term of imprisonment because of the impact (financial or otherwise) that this will have on the family. They have already suffered enough. The magistrate may also feel that the law should not intrude more than is absolutely necessary into family life despite the violence that has been proved to have occurred. Therefore, so long as stiff penalties are not generally imposed on domestic

1 Crimes Act 1900 (NSW:ACT) s556B, 556C.

2 Australian Law Reform Commission, *Sentencing of Federal Offenders*, Report No 15 (Interim), AGPS, Canberra, 1980, (ALRC 15) para 358–77.

3 Crimes Act, 1900 (NSW:ACT) s556C(1).

4 Para 81–4.

5 Para 80–8.

6 ALRC 15, para 67, 160.

violence offenders, the criminal law may not have a marked deterrent effect. The Commission is presently inclined to the view that the sentencing discretions possessed by magistrates should not be restricted by requiring heavier penalties in domestic violence cases. Magistrates are in the best position to assess the facts of each particular case and must be able to tailor the sentence they impose to the facts of the offence and the surrounding circumstances, including the needs of the victim.⁷

Summary

80. In summary, the criminal law cannot, by itself, provide adequate protection for domestic violence victims. This is because:

- *Need for proof beyond reasonable doubt.* Specific deterrence, or the imposition of conditions which will control the offender's future conduct, cannot be applied unless the offender has been found beyond reasonable doubt to have committed an offence. The criminal law therefore has a lower 'strike rate' than would be needed for proper protection for domestic violence victims.
- *Non-criminal conduct.* The criminal law cannot deal with non-criminal conduct such as harassment in its various forms.

Because the criminal law cannot provide the kind of protection that is needed, it is essential to have a back-up measure. The balance of this Chapter discusses whether three such measures, injunctions under the Family Law Act 1975 (Cth), civil injunctions generally and 'keep the peace' orders can provide the kind of protection needed. The conclusion is reached that none of these procedures can provide that protection. It is essential, therefore, to have a further back-up measure in the form of protection orders to overcome the deficiencies of the criminal law in the domestic violence context: such orders should be able to be obtained on the civil standard of proof (the balance of probabilities) and should be able to deal with all types of objectionable conduct. The Commission is aware that a response of this kind to the problem of domestic violence may be seen as, to some extent, undermining the law's symbolic and educative roles and may therefore be thought to be potentially damaging. It is true, if a non-criminal response were the only one available to deal with domestic violence, it would tend to promote the view that a domestic assault is not really criminal. But is not suggested that this should be the case. As is argued below⁸, protection orders are an additional weapon with which to combat domestic violence: they are not a substitute for criminal prosecutions where these are warranted. One important effect of the proposed protection orders will be that they will actually increase the potential criminal liability of the person against whom the order has been obtained. This is because breach of an order will be a criminal offence and in many cases breaches will be relatively easily proved. Breaches of protection orders which prohibit harassment or going onto premises will be easier to prove than are assaults. Finally, a recent study of the operation of the South Australian protection order provisions⁹ has shown that victims themselves want a more flexible response than the criminal law can provide. They do not necessarily want the full force of the criminal law brought to bear in every case. If the criminal law were the only legal response available, a significant number of victims may well be deterred from seeking help. In this area an intermediate response, namely the protection order, is essential.

Injunctions under the Family Law Act

Protective injunctions

81. *Power of the Family Court.* Married (and only married) victims of domestic violence can seek an injunction for their personal protection (including from harassment), or for the protection of the children of the marriage, from the Family Court or from a magistrate exercising jurisdiction under the Family Law Act 1975. These injunctions can include provisions, for example:

- restraining a party to the marriage from entering or remaining in the matrimonial home; or
- restraining a party to the marriage from entering the place of work of the other party to the marriage

7 The question of the proper role of judicial discretion in imposing a sentence will be addressed in the Commission's report on Sentencing.

8 See para 90.

9 N. Naffin, *Domestic Violence and the Law—A Study of s99 of the Justice Act (South Australia)*, Women's Adviser's Office (SA) June 1985.

or restraining a party to the marriage from entering the place of work or the place of education of a child of the marriage.

A deliberate breach of the injunction amounts to contempt of court and the offender can be punished by the court, with a gaol sentence if necessary.¹⁰ The Court's power to tailor injunctions to particular patterns of violence or harassment is a wide one and includes the power to restrain the spouse from entering the matrimonial home. Harassment in its various forms—for example, parking outside the victim's house, continually telephoning or appearing unexpectedly at windows—can be the subject of an injunction. Mental violence, such as insulting and denigrating the victim in front of the child, can also be forbidden by an injunction¹¹ although this kind of injunction is not often sought or granted.

82. *Power of arrest.* In response to criticisms of the ineffectiveness of Family Court injunctions, the Family Law Act was amended in 1983 to allow the court to attach a power of arrest to certain injunctions if it is specifically asked to do this by the applicant.¹² The court cannot attach a power of arrest on its own initiative. If a police officer reasonably suspects that an injunction that carries such a power has been disobeyed, he or she can immediately arrest without warrant and the offender must be brought before the court within 24 hours (48 hours on weekends and holidays).¹³ The court will only punish the offender if the victim applies to the court for the offender to be dealt with for breach of the injunction. Otherwise the offender must be released. A frequent complaint about this new provision is that some Family Court judges are sometimes reluctant to attach the power of arrest to an injunction and that lawyers often do not apply for it. When this is not done, the injunction remains as before—'toothless'. Further, even when the power of arrest is attached, the victim may well not be in a position (because of lack of time) to make an application to the Court, through a solicitor, to have the offender dealt with. He or she is therefore released.¹⁴

83. *Ineffective protection.* Though there is no hard evidence available, it is frequently claimed that injunctions are often breached, in some cases very soon after they have been granted. Injunctions are difficult to enforce. The victim, after initially going to court to obtain an injunction (which itself may take weeks if not months), must again go to court after the injunction is breached to initiate contempt proceedings which can involve another delay of weeks if not months. Even then, the court may well not impose a harsh punishment on the offender, even when he has disobeyed an injunction a second or third time.¹⁵

Summary

84. This report is not concerned with the question whether changes to the Family Law Act are necessary.¹⁶ The Family Law Act itself provides that, where State or Territory legislation specifically deals with domestic violence and a person is seeking a court order under that legislation, then the Family Law Act injunction may not be used.¹⁷ In some cases, particularly where matrimonial proceedings are already in train, it will be convenient to use the Family Court. The Family Law Act may in specific cases be suitable if a non-criminal response to the problem is desired or the Family Court counselling service (available to married couples whether or not court proceedings have been initiated) would be effective. The Family Court injunction is an alternative strategy which should remain available to the married victim of domestic violence. In order to enhance its availability, the guidelines for legal aid available in the ACT should be broadened to include applicants for protective injunctions. At present, these applications do not attract legal aid, although applications for the proposed domestic violence protection orders would be, and private

10 id, s35, 108, 114(4)–(5).

11 *Plows and Plows* (1979) FLC 90–712. The question of enforceability of such an injunction was not explored in this case. It may well be effectively unenforceable.

12 Family Law Act 1975 (Cth) s114AA.

13 id, s114AA(3), (7).

14 Most breaches occur at weekends. The papers for an application must then be ready by Monday morning: D Farrar, *Submission*, 26 June 1984.

15 See Australian Law Reform Commission, Discussion Paper No 24, *Contempt and Family Law*, 1985, (ALRC DP 24) para 78.

16 The Commission is examining the effectiveness of Family Court injunctions in its reference on contempt of court, including, specifically, their effectiveness in protecting victims of domestic violence.

17 Family Law Act 1975 (Cth) s114AB(2).

prosecutions for assault are covered.¹⁸ This is an anomaly and should be removed.

‘Keep the peace’ orders

85. The remedies most commonly used in the magistrate’s court are a ‘keep the peace’ order¹⁹ and the procedure whereby a violent party enters into a recognizance (undertaking) to keep the peace or be of good behaviour.²⁰ Neither can be tailored to meet some cases of harassment and other objectionable conduct falling short of violence or threatened violence. The defendant is brought before the court by means of summons or a warrant for arrest issued by a magistrate after the victim or a police officer has complained about the defendant’s threatening behaviour. If the magistrate is satisfied that the defendant has acted violently or threateningly and is likely to do so again, he or she may require the defendant to enter into an undertaking to keep the peace or be of good behaviour. The defendant may be required to provide sureties—that is, undertake to forfeit money—if he or she breaches the undertaking to keep the peace or be of good behaviour. In practice, breaches of these undertakings are often not acted upon. Police cannot arrest without warrant a person who breaches these types of orders. Nor is breach of itself an offence. In summary, the problems with these procedures are:

- they lack flexibility in dealing with various types of conduct commonly associated with domestic violence, such as harassment;
- they are cumbersome to use because of delays inherent in the procedure;
- they have ineffective enforcement procedures; and
- in any case, they are often not enforced.

Civil injunctions

Availability of civil injunctions

86. Another remedy which is available is for the victim to seek an injunction against further violence in the magistrate’s court.²¹ This remedy can also be applied for in the Small Claims Court.²² However it is again a remedy which lacks flexibility. It could not, for example, be used to stop harassment which did not amount to violence or a legal nuisance. Further, the remedy for breach of the injunction is to return to court for contempt proceedings, a remedy which in other contexts, particularly under the Family Law Act 1975 (Cth), has been shown to be an ineffective one.²³

Injunctions to restrain criminal behaviour²⁴

87. The use of injunctions in civil proceedings to restrain criminal conduct, such as assault, has been proscribed, or at least kept within very narrow limits, by the courts.²⁵ The reason for this is that it is thought that the criminal law should be used to control criminal conduct. Further, the existence of an injunction could prejudice a fair criminal trial, particularly if the accused has already been before a civil court for contempt proceedings arising out of the breach of the injunction.²⁶ On the other hand, injunctions have been more readily granted to protect proprietary rights²⁷ or to preserve property or assets.²⁸ In recent

18 See Attorney-General’s Department, *Summary of the eligibility criteria of the Australian Legal Aid Offices, Legal Aid Commissions, the Public Defenders Office (Qld) and the statutory and administrative legal assistance schemes administered by the Attorney-General*, September 1985, 76. And see also ALRC DP 24 para 83.

19 Crimes Act 1900 (NSW:ACT) s547.

20 Court of Petty Sessions Ordinance 1930 (ACT) Pt X.

21 Court of Petty Sessions (Civil Jurisdiction) Ordinance 1982 (ACT) s6.

22 Small Claims Ordinance 1974 (ACT) s4(1).

23 See para 81–4.

24 See generally, Australian Law Reform Commission, Report No 27, *Standing in Public Interest Litigation*, AGPS, Canberra, 1985, para 112.

25 *Attorney-General (ex rel Lumley) and Lumley v TS Gill and Son Pty Ltd* [1927] VLR 22; and see, eg, *Parry v Crooks* (1980) 27 SASR 1.

26 *Gouriet v The Post Office Engineering Union* [1978] AC 435, 490.

27 Holdsworth’s *History of English Law*, vol V, Methuen/Sweet & Maxwell, London, 1973, 323–4.

years there has been a movement away from the view that injunctions can never, or only very rarely, be used to restrain criminal conduct. This is evidenced in both case law²⁹ (more particularly cases involving domestic violence) and in some textbooks.³⁰ Nevertheless, such injunctions are still granted only with caution. In *Parry v Crooks*, King CJ, having said that generally the criminal law should deal with criminal conduct, went on to say that binding over the defendant to keep the peace:

. . . should be looked upon as the normal method of invoking the law to prevent future assaults. If, as has been suggested, it is not an efficacious remedy because of congestion in the magistrates' courts or because binding over is not effective as a deterrent, I think that the procedure should be reviewed. . . . It is of the utmost importance that the law provide a simple and effective deterrent against threatened violence. . . . If binding over is no longer an effective deterrent perhaps there is needed a new form of order to keep the peace, disobedience of which would render the offender liable to deterrent punishment.³¹

The following chapter discusses such an order.

28 *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509.

29 *Egan v Egan* [1975] Ch 218; *Zimitat v Douglas* [1979] Qd R 454; *Daley v Martin* (No 1) [1982] Qd R 23.

30 JF Clerk, *Clerk and Lindsell on Torts*, 14th ed Sweet and Maxwell, London, 1975, 293–4; ICF Spry, *Principles of Equitable Remedies*, 3rd ed, Law Book Co, Sydney, 1984, 324–9.

31 (1980) 27 SASR 1, 8 (King CJ).

7. Domestic violence protection order

Protection orders

Need for protection orders

88. *New kind of order.* The previous chapter showed that the criminal law cannot by itself provide adequate protection to people from domestic violence offences. Family Court injunctions are not available for de facto spouses and are not easily enforced. The procedure for imposing ‘keep the peace’ orders and civil injunctions are in many cases inappropriate to apprehended domestic violence. There is accordingly a need for an immediate measure designed specifically for domestic violence cases that can be easily and effectively enforced. The measure proposed is a domestic violence protection order. Such an order should mirror the kinds of injunctions that can be made under the Family Law Act 1975 (Cth) s114. It would not carry the slur of a criminal conviction and in many cases would impose no hardship on the respondent. It would merely prohibit further violence or harassment, on pain of criminal penalties for breach. Protection orders should be obtainable in the magistrate’s court. Remedies in the magistrates’ courts can be obtained more quickly (and in emergency cases they can be given immediate priority). Expense is not so high as in other courts. Magistrates have considerable experience in cases involving violence.

89. *Flexibility.* The order should be capable of being tailored to a variety of objectionable behaviour patterns, in the same way as the Family Law Act injunction is. Thus the court should have a wide power to deal with physical violence and harassment in its various forms.¹ The kinds of orders that should be able to be made include orders restraining the respondent—

- from entering or remaining in the family home;
- from entering or remaining in the workplace of a family member;
- from entering or remaining in specified areas;
- from approaching family members.

90. *A ‘soft’ option?* It must be stressed most strongly that the police should not regard this procedure as a substitute for criminal proceedings. The Commission is strongly of the view that the criminal process must not be seen to be diluted or displaced by the presence of a protection order procedure. If the circumstances are appropriate for a prosecution, this should take place. A domestic assault should be capable of being the basis for both a criminal prosecution *and* an application for a domestic violence order. There should be no falling back on the protection order procedure alone, simply because it is easier to use and more likely to succeed. If this approach is adopted, protection orders will not be a ‘soft’ option but a necessary part of a flexible response by the law to domestic violence.

Procedure

Who may apply?

91. *Victims and agents.* The victim of domestic violence (that is, the spouse or de facto spouse of the offender) should be able to apply to the court for a protection order either in person or through a lawyer. It would be desirable if a person acting on behalf of the victim (other than a lawyer), such as a social worker from the proposed Domestic Violence Unit², were also able to apply for a protection order. At present in the magistrate’s court a non-lawyer can conduct another person’s civil case with leave of the court.³ Because it is not clear whether the provision that authorises this also applies to quasi-criminal proceedings, specific legislative provision should be made to allow a third party (other than police) to apply for a protection order on behalf of a victim.

1 The Commission’s attention has been drawn to a case where a man harassed a women’s refuge for many days. He committed no criminal offence in doing so.

2 See ch 8.

3 Court of Petty Sessions (Civil Jurisdiction) Ordinance 1982 (ACT) s179(1)(d).

92. *Police.* In New South Wales⁴, South Australia⁵ and Western Australia⁶ domestic violence legislation provides for the police to make applications to the court for a protection order on behalf of the victim. There are a number of advantages in making similar provision in the Australian Capital Territory. In many cases the victim of domestic violence is in a state of helplessness because of the violence. It is in the police's interests to take steps to stop further violence because it will eventually lighten their workload. Finally, one effect of the police initiating proceedings for a protection order is that it brings home to the respondent the seriousness of the matter. This procedure should be adopted in the Australian Capital Territory. Police should be instructed to make full use of it. In South Australia, police commonly use the procedure⁷ whereas in New South Wales the police have apparently been reluctant to seek orders on behalf of victims.⁸ The Commission has not been able to ascertain why these different patterns have emerged. Where police do apply for a protection order, they should ensure that the victim and other members of the family are kept fully informed and consulted at all stages.⁹ Where police, or someone other than the victim, apply for a protection order, the court should not make the order sought unless it is satisfied that the victim wants it to be made.

Applications

93. It is essential that the procedure for applying for protection orders be as simple as possible. The procedure itself should not deter victims of domestic violence from taking the necessary steps to protect themselves. The procedure should follow the procedure used in South Australia and Western Australia with some minor modifications. The application should be by summons served on the respondent. If this is administratively possible, the hearing should be conducted in the Canberra Family Court building. It is very important that the proceedings be brought on quickly. The longer the delay between the violent episode and the court proceedings, the less effective is the law in curbing violence. In New South Wales the respondent is often brought before the court by arrest¹⁰, a procedure which allows for a relatively quick court hearing. The Commission is not in favour of this procedure¹¹ principally because an application for a protection order is not a criminal trial.¹² Instead, a special procedure should apply to domestic violence protection order applications so that the case comes on within, at most, three days of the application being lodged. If the respondent fails to appear after being served with the summons, the magistrate should be able to issue a bench warrant authorising his or her arrest: this would be an extension of the present provision.¹³ Legal aid should be available for applicants for protection orders.

Making the order

94. *Procedure and considerations.* The procedure at a hearing should, in general, follow the normal procedure for civil trials in the magistrate's court. Evidence should be presented either in the normal way or by affidavit and the magistrate should apply the civil standard of proof. The grounds on which the order is to be granted should be that the respondent has already committed a domestic violence offence, or has knowingly harassed the applicant, and is likely to repeat the offence or harassment. The proposed legislation should specifically include references to offences committed outside the Australian Capital Territory. In addition, to the extent that it is possible to do so, a protection order should have effect outside the Territory, that is, it should be an offence, triable in Australian Capital Territory courts, to breach a protection order in Queanbeyan. Specific criteria should guide the magistrate in the exercise of the

4 Crimes Act 1900 (NSW) s547AA(2)(b).

5 Justices Act 1921 (SA) s99(2).

6 Justices Act 1902 (WA) s172(2).

7 Approximately 97% of orders are applied for by police: N Naffin, *Domestic Violence and the Law—A Study of s99 of the Justices Act (South Australia)*, Women's Adviser's Office (South Australia), June 1985 (Naffin Report), 127.

8 NSW Domestic Violence Committee, *Report April 1983 to June 1985*, Government Printer, Sydney, 1985, (NSW Committee Report), 21.

9 Naffin Report, recommendations 10, 13, 14.

10 Crimes Act 1900 (NSW) s547AA(14).

11 Subject to what is said below.

12 The respondent may be facing criminal proceedings for assault as well and may have been arrested for that reason, but this is not relevant to the protection order proceedings.

13 Court of Petty Sessions Ordinance 1930 (ACT) s42, 199.

discretion whether to make a protection order. This is particularly important as some types of orders will be restrictive of the respondent's rights.¹⁴ Of the many possible criteria which should be taken into account, two should be paramount:

- the need to provide protection from violence, fear of violence and harassment;
- the need to safeguard the children (if any) from violence or witnessing violence.

In addition, the accommodation needs of the members of the family and the hardship that may be caused to any person (including the respondent) if the order is made should be specifically considered by the magistrate. Protection orders should be able to be made by consent.¹⁵ This procedure allows the victim not to give evidence. At the same time the nature of the order can be explained to the respondent.

95. *Orders where respondent does not appear.* The magistrate should have power in emergency cases to make orders in the absence of the respondent including at weekends and on holidays when incidents of domestic violence are most prevalent. An *ex parte* order should not bind the respondent until it has been served.¹⁶ Further, when an *ex parte* order is made, the defendant should be served with a summons requiring him or her to show cause why the order should not be confirmed. If this is not done, the order would be confirmed.

96. *Interim, etc orders.* Where the application for a court order is opposed, or where the order is made and the person against whom it is made appeals, the question arises what conditions should apply in the interim period. It would be quite possible to delay proceedings, or protract proceedings by appeal for weeks or months. In the interim, the victim would have no protection. In New South Wales, this problem has been overcome by applying the bail rules to the interim periods.¹⁷ But this is to treat what is a civil hearing as if it were a criminal hearing. An alternative is for the court to be given power to make interim (or interlocutory) orders pending a full hearing¹⁸ and for the terms of such an order to be binding pending an appeal.¹⁹ This is the procedure adopted by the Family Court under the Family Law Act 1975 (Cth). It would make delaying tactics pointless. It is possible that, under an interim order, a person may be prevented from approaching the applicant's place of work, or be excluded from his or her home without a full hearing or pending an appeal. This should not, of itself, be enough to deny to applicants the facility of an interim protection order. There is no reason to distinguish protection orders from injunctions under the Family Court Act 1975 (Cth), or civil injunctions generally. Certainly, interim injunctions are preferable to the New South Wales solution of applying the bail rules in the interim period.

97. *Variation or revocation of orders.* Because an order is potentially restrictive of the respondent's movements (for example, preventing any approach to the other spouse) and because the parties may wish to attempt a reconciliation, protection orders should be capable of being revoked or modified at any time. Either party could apply to the court for an order to cancel or change the terms of the existing order. It is suggested that, even if the parties consent to a new order or a cancellation, the existing order should only be changed after a hearing in court, or possibly in the magistrate's chambers. This is necessary to protect the victim who may have been coerced into consenting to an alteration or revocation.

Publicity

98. It was suggested in the Discussion Paper that applications for protection orders should be heard in closed courts and not be publicised.²⁰ Going to court is a difficult experience for most people and in particular for domestic violence victims. Open courts may deter victims from seeking protection. A victim may want the offender's name to be kept secret for the victim's own protection and in the interests of the

14 See para 99–100.

15 The Commission has been told that in New South Wales it is frequently the case that the respondent is content to allow the magistrate to make a consent order: R Lansdowne, *Submission*, 15 January 1985.

16 As mentioned above, para 93, the magistrate should be empowered to issue a warrant for the arrest of the respondent who fails to respond to a summons.

17 Crimes Act 1900 (NSVI) s547AA(14)(b), (15).

18 As in eg, Domestic Protection Act 1982 (NZ).

19 As in the Family Court unless a stay of proceedings is specifically asked for and granted—see Family Law Regulations, reg 120(8).

20 Australian Law Reform Commission, Consultative Document No 4, *Domestic Violence in the ACT: Discussion Paper*, Canberra, 1984, 48: this is the position in New Zealand under the Domestic Protection Act 1982 (NZ).

children. Against this, it can be said that domestic violence should not be a hidden crime, treated as something to be kept within the family. It is a matter of public concern. The administration of justice is best served by having open courts and unencumbered reporting. It is an important factor in increasing public awareness of domestic violence, which itself is a first step in changing old attitudes to the problem. The solution adopted in the Family Law Act 1975 (Cth) is appropriate here: domestic violence cases should be heard in open court but the identity of the parties should not be disclosed.²¹ Apart from this, the press should be free to report on domestic violence cases.

Ouster and furniture orders

99. *Ouster orders.* Occupation orders, or ‘ouster’ orders as they are sometimes called, whereby the violent occupier or tenant is excluded from the house, are more controversial. They are already available under the Family Law Act 1975 (Cth) and should be available as a temporary measure as part of the proposed protection order regime. Such orders would not ultimately affect property rights, which must be determined in the Family Court, or other appropriate court in the case of de facto relationships:

An occupation order plainly cannot be regarded as anything more than a stop-gap measure until the parties’ respective rights can be determined pursuant to the Matrimonial Property Act 1976 or otherwise.²²

100. *Need for special safeguards.* Ouster orders could, in a number of cases, impose quite severe hardship, in particular the order which excludes the respondent from the matrimonial or shared home. Orders requiring a person not to approach the victim, or not to go, for example, into a certain suburb can also be restrictive of rights, though, as is the case in the Family Court, such orders would only be made in extreme cases, often after the respondent has breached a less restrictive order. Concern has been expressed to the Commission about these types of orders, particularly orders excluding the respondent from the home. Whilst it is correct to say that property rights and freedom of movement are less important human rights than is the right of the victim to be free from violence and molestation, there is no doubt that the exclusion of the respondent from the home is a step which is fraught with high emotion and may have repercussions beyond the respondent’s own feelings. It may, for example, adversely affect the children in some cases. In New South Wales, South Australia and Western Australia, and under the Family Law Act 1975 (Cth), the procedure for obtaining a protection order or injunction has no extra safeguards for ouster orders. Given the particularly restrictive nature of ouster orders, there should be extra safeguards involved:

- *Notice to respondent.* The respondent should be given notice that such an order is going to be applied for.
- *Accommodation needs considered.* The magistrate should be explicitly required to consider the effect that making or declining to make such an order will have on the accommodation needs of the parties affected by the proceedings and on the children, if any.
- *Service of order required.* If an order is made in the absence of the respondent it should only be effective when the respondent has been personally served with a copy of the order. Such service should be able to be effected by anyone, including the victim.

The question arises whether the above safeguards are also necessary in cases where the protection order restricts the respondent’s freedom of movement. As pointed out above, such orders are made only after the respondent has repeatedly disobeyed less restrictive orders. It is not recommended that the extra safeguards outlined above should apply in cases other than those in which the order excludes the respondent from the home.

101. *Furniture orders.* In New Zealand it is possible to obtain a furniture order in conjunction with an ouster order.²³ This prevents the excluded party from stripping the home of furniture, fittings and appliances. A similar kind of order should be available in the Australian Capital Territory in appropriate cases. In conjunction with a protection order, the court should be empowered to make an order transferring the exclusive possession of essential household items. Again, such an order would be temporary in effect, pending the final determination of property entitlement. In making such orders, the court should have

21 cf Family Law Act 1975 s121.

22 *Goldsack v Goldsack Family Law Service*, Butterworths, New Zealand, N-108 (Judge Inglis, QC) commenting on the Domestic Protection Act 1982 (NZ) s21.

23 Domestic Protection Act 1982 (NZ) s30.

regard to the needs of the parties and, in particular, of the children, if any.

Enforcing a protection order

Introduction

102. *Serving of orders.* It has been suggested above that a protection order made in the absence of the respondent should not be binding until it is served. In some cases under the South Australian legislation, serving the order has proved to be very difficult, with the result that the victim remains unprotected.²⁴ Under recommendations made above²⁵, where the respondent has failed to appear after receiving a summons, the magistrate can issue a warrant for the respondent's arrest before making the order. In addition, it should be possible to give oral notice of the contents of the order, for example, by telephone, when personal service has failed. It should be enough to convey the gist of the order in this way: it should not be necessary (although it would be desirable) to read the entire order to the respondent: this may prove to be impossible if the respondent puts down the telephone. In the case of ouster orders, however, as recommended above, oral service should not be enough, given the restrictive effect of orders of this kind. In some cases, police protection may be required in order to effect service of a protection order. If this is the case, the police would also be in a position to help to ensure that the terms of the order are carried out.

103. *Police procedure.* The police cannot know whether someone has broken a protection order if they cannot quickly find out whether there is an order against that person and what its terms are. Accordingly, copies of all current protection orders should be kept in a police central registry and be immediately accessible by police radio telephone. In addition, it is essential that the local police station be given a copy of orders affecting people within the station's geographical coverage and that the orders are kept in a readily accessible file or on a computer.

Breach of protection orders

104. *A separate offence.* Probably the most commonly heard complaint made about court injunctions or orders in domestic violence cases is that 'they are not worth the paper they are written on'. Breach of a protection order should not lead to forfeiture of a surety or proceedings for contempt of court: instead it should be a criminal offence itself. In addition, police should be empowered, in appropriate cases, to arrest without warrant for a breach of a protection order. The combination of a breach being a separate offence and the power to arrest without warrant is found in the Western Australian²⁶, South Australian²⁷ and New South Wales²⁸ domestic violence legislation.²⁹ The fact that a breach of a protection order is a separate offence increases the potential criminal liability of respondents. At present the criminal law has a low 'strike rate', as noted earlier.³⁰ Under the protection order regime, conduct which would not otherwise be criminal such as harassment and going onto premises will attract criminal liability. Furthermore, proof of breach of protection orders of this kind will be very much easier than proof of, for example, an assault. The power of arrest overcomes the main difficulty associated with injunctions and keep the peace orders namely, that the police cannot arrest for breaches (except in the case of Family Court injunctions where the court's discretion is exercised so as to attach a power of arrest to the injunction³¹). This measure seems to be generally regarded by lawyers, police and social workers as the single most important feature of domestic violence legislation. It transforms the notoriously ineffective 'keep the peace' order or injunction into something which has bite. Making the power of arrest a universal rather than an unusual adjunct to the court order is necessary, given the reluctance of judges in the Family Court, when applying domestic violence legislation, to attach a power of arrest to a court order.³² A power to arrest for continuing violence

24 Naffin Report, 125.

25 Para 93.

26 Justices Act 1902 (WA) s173(2).

27 Justices Act 1921 (SA) s99(b).

28 Crimes Act 1900 (NSW) s547AA(8).

29 Such a power of arrest is, of course, only a *power* of arrest: it does not *require* that the offender be arrested in all cases.

30 Para 80

31 Family Law Act 1975 (Cth) s114AA.

32 The position appears to be the same, if not worse, in the UK: it has been held that the power of arrest should be attached to injunctions under the Domestic Violence and Matrimonial Proceedings Act 1976 (UK) only in 'exceptional circumstances': *Lewis v Lewis* [1978] 1 All ER 729.

or harassment with the implied threat of violence is justified in order to safeguard the victim.³³

105. *Arrest or summons?* Protection orders must be vigorously enforced. There will be little point in introducing a new form of protection order if it does not have the effect of preventing further violence. The most prevalent complaint about the new protection orders in New South Wales and South Australia is that they are not properly enforced.³⁴ Proper enforcement requires prosecution for breaches. It may require arrest in appropriate cases. However, it has already been argued that the proper role of arrest is not to punish.³⁵ Police should arrest for breach of protection orders according to the same criteria which apply for any other offence, that is, where a summons would not be effective.³⁶ Otherwise they must proceed by summons. Because a breach of a protection order is an offence under the Commission's proposals, there is, strictly speaking, no need to provide specifically for a power of arrest. It is already covered by the existing law as modified by the Commission's proposals for arrest. However, for the avoidance of doubt, and to ensure that there is no confusion in the minds of police with the discretionary power of arrest which exists in connection with Family Court injunctions, it is recommended that the power of arrest should be specifically provided for in the proposed legislation.

Avoidance of delay

106. If the police do proceed by summons rather than arrest, there is a serious problem of delay. According to current practice, there may be a delay of many months between the offence and the serving of a summons and then a further delay before the matter is heard in court. The key to deterring future violence lies in shortening the time between the breach of the order and the prosecution for the offence constituted by the breach. In domestic violence cases the need for protection is particularly acute because of the closeness of offender and victim. Accordingly there should be a special procedure for these cases whereby a summons is issued very quickly and the case is heard very shortly after. It will be necessary to constitute a special administrative section within the police force to implement these proposals. The summons itself should be returnable within 72 hours.³⁷ A summons should be issued and served within three days of the alleged breach. If the alleged offender is not dealt with on the first appearance before the court either after an arrest or after a summons is served, the magistrate can impose bail conditions. No change to the law is required in this regard.

Relationship with Family Court injunctions

107. If a magistrate's court makes an order which impinges on an order of the Family Court, or which affects rights which are potentially the subject of such an order, the relationship between the two orders needs to be considered. Conflicts could arise if, for example, a protection order forbade one spouse approaching the other but the Family Court had ordered child access. It could also arise in connection with a protection order excluding one spouse from the home. The magistrate, in making a protection order, should take into account any existing order under the Family Law Act 1975 (Cth). Further, it is possible, if the parties consent, for a magistrate exercising jurisdiction under the Family Law Act 1975 (Cth) to modify an order made under that Act.³⁸ Finally, the legislation providing for protection orders should be prescribed for the purposes of the Family Law Act 1975 (Cth) s114AB(2): this provision preserves the operation of, and gives primacy to, State and Territory domestic violence legislation.

Extension to other relationships

108. As was pointed out earlier in this report, the terms of the Commission's Reference are limited to violence between married persons or those in de facto relationships. The Commission's recommendations, and the legislation attached to this report, have been drawn, with two significant exceptions³⁹, on this basis.

33 Compare Crimes Act 1900 (NSW:ACT) s352 which permits arrest where a person is found committing *any* offence, however trivial.

34 NSW Committee Report, 22; Naffin Report, 146–54.

35 Para 46.

36 See paras 42–3.

37 Court of Petty Sessions Ordinance 1930 (ACT) s41.

38 Family Law Act 1975 (Cth) s46.

39 See para 38, 48.

But people in other domestic relationships could also benefit from the proposed protection orders. Where violence in the home arises in connection with a past marriage or past de facto relationship, as, for example, where a divorced person harasses or assaults the former spouse, the law's protection, through the mechanism of domestic violence orders, should be able to be invoked. Injunctions under the Family Law Act are already available for previously married couples. Although strictly not within the Terms of Reference, these relationships should also come within the protection order regime. Other relationships may be considered. Violence between parents and their children (including adult children) is one such relationship. Disputes between neighbours is another: this class of disputes is covered in the Western Australian and South Australian domestic violence legislation.⁴⁰ Consideration should be given to extending the protection order regime, with appropriate modifications, to protect people in relationships of this kind. Such consideration should not, however, delay the implementation of the recommended legislation to protect the parties to the relationships covered by this Report.

Protection orders: an evaluation

South Australian experience

109. In making the recommendations in this chapter, the Commission has paid close attention to experience in both New South Wales and South Australia. The protection order scheme that operates in South Australia has recently been evaluated in the Naffin report, which concluded that:

- protection orders are a necessary complement to the criminal law to cater properly for the varying needs of domestic violence victims;
- they are an improvement on the South Australian equivalent of the 'keep the peace order';
- they are generally more effective than injunctions under the Family Law Act 1975 (Cth); and
- the attitude of police toward domestic violence victims is a key factor in improving the availability and effectiveness of protection orders to domestic violence victims.

Although only a small number of victims were interviewed in the course of preparing that report, most expressed negative views about the effectiveness of protection orders: in some cases, they were said to exacerbate the situation. Welfare and legal workers, on the other hand, from their experience of a wider range of domestic violence cases, were more positive:

according to this survey group the chief advantage of the orders is that they deter persons who are normally law-abiding from engaging in further acts of violence. To a limited extent, the orders are effective. The main problem with the orders—their principal disadvantage—is that they fail to deter persistent offenders who have developed cynical attitudes towards the law. It follows that the attitude of the respondent is all important. The extent to which the respondent takes the order seriously is the extent of its effectiveness.⁴¹

The report points out the vital role the police have in ensuring the effectiveness of protection orders. In fact, the perceptions of victims and of welfare workers very often depends on the attitude that police choose to adopt:

[A] common theme . . . is that whenever the police are committed, enthusiastic and conscientious, victims of domestic violence receive justice.⁴²

The implications of this for the Australian Capital Territory are clear. Police must be involved from the beginning and must be given careful and detailed training, drawing on the South Australian experience.

The law as educator

110. Finally, the importance of instituting a protection order regime goes beyond whatever effectiveness it may have in preventing or deterring future domestic violence offences. Undoubtedly, it will not be completely effective: it will not stop some offenders. But the symbolic and educative role of the law should not be overlooked. Provision for protection orders is a substantial measure which would reflect the law and society's disapproval of violence in the home. Given the importance of public perceptions in this matter, a clear statement of the law's position is obviously desirable.

40 eg, Justices Act (SA) s99.

41 Naffin Report, 116: the report concedes that this is 'somewhat tautological'.

42 id, 94.

8. Domestic Violence Unit

Need for a specialist agency

Crisis point

111. So far, this Report has concerned itself with the legal response to domestic violence. In the nature of things, police and the law only become involved in domestic violence cases in a time of crisis. The recommendations for protection orders to be made by magistrates, paralleling those available to married couples from the Family Court¹, were based in part on an acknowledgement that domestic violence in a particular household is unlikely to be an isolated event. Usually, it is a crisis point in a history of difficulties and troubles between the parties. The law's primary role is to deal with this crisis. It cannot deal with its underlying causes. If the victim, the offender and the family are simply left to their own devices after the legal processes of prosecution or protection order have been exhausted, these underlying causes will not go away. More likely, they will cause further outbreaks of violence. It is not enough to concentrate effort solely on the legal response to domestic violence. The law deals with the symptoms of the disease. Something else is needed to deal with the infection itself.

Co-ordinating services

112. As was noted earlier², victims of domestic violence need adequate health care, physical protection, and, in some cases, separate accommodation and financial support for themselves and for children. Offenders need to be encouraged to change their behaviour. Services of these kinds are available in the Australian Capital Territory from both government and non-government sources. But they are uncoordinated at present. There is not sufficient publicity about what is available. And there is no specialist, identifiable group or body which concentrates exclusively on the specific problems of victims of domestic violence or of offenders.³ Furthermore, there is no agency in the Australian Capital Territory specially designated to monitor domestic violence and the activities of those dealing with it. It is essential, both in humanitarian and economic terms, for an overall and co-ordinated approach to be developed to provide the welfare services necessary to curb the problem of domestic violence. It is also essential for anyone in the Australian Capital Territory who is affected by domestic violence to know that help is available through a single contact point.

A domestic violence unit

Functions

113. In order to provide some co-ordination for these services, and to serve as a focus for community awareness of the problem of domestic violence, a domestic violence unit, staffed by professional welfare workers, should be established by the Department of Territories in conjunction with the Australian Capital Territory Health Authority. Such a unit will have a vital role to play in curbing the problem of domestic violence. It should have four broad functions:

- *Support for victims.* Victims of domestic violence are often in a state of helplessness. Workers in the unit should be able to provide emotional and similar support immediately after the crises to allow victims to get 'back on their feet';
- *Services.* The unit should act as a central contact point for specialist services, both government and non-government;
- *Police liaison.* As an adjunct to the police training measures recommended earlier⁴, the unit should work closely with police to assist them in carrying out their role in relation to domestic violence;

1 See ch 7.

2 Para 4.

3 Women's refuges perform some of these functions.

4 Para 62-3.

and

- *Publicity and public education.* Publicity and public education are necessary both to provide information to victims and offenders about the kind of services available to them and to help to alter attitudes and perceptions which make it easier for domestic violence to occur.

Referral to services

114. A major role of a domestic violence unit would be providing referrals to the various counselling and therapy programmes that are or are likely to become available within the Australian Capital Territory for domestic violence victims and offenders. These services include health services and accommodation assistance for victims of domestic violence. For some victims of domestic violence, alternative, safe accommodation is an urgent necessity. Women's refuges are not always acceptable or appropriate for victims.⁵ In situations where there is grave danger for the victim or children, an escape route will be necessary; either a refuge, a motel or possibly being sent interstate to stay with friends or relatives. This will be a particularly vital measure in some cases, although it will need to be handled carefully and sensitively. Effective implementation of this measure would involve either cash hand-outs or vouchers for accommodation and other necessary expenses. Finally, an important service which a domestic violence unit would provide is assisting victims in court proceedings. Representatives of the domestic violence unit should be able to act for applicants for protection orders.

Police liaison

115. The police have a vital role to play in the longer term prevention of domestic violence. It is the police who can suggest to the warring parties that help is at hand and that steps can be taken to stop the violence. This process should start when the police attend 'domestics'. They should tell the parties about the Domestic Violence Unit. A pamphlet should be given to each party, setting out the law and the protection which the law can give to the victim. It should also provide information about the services available to the violent party. The police should develop a close working relationship with the Domestic Violence Unit.

Publicity and public education

116. The services that are available to deal with the problems of domestic violence are not well publicised or well known in the community. In the long run, effective publicity and public education is probably the most important strategy for combatting domestic violence. The cost of designing campaigns of this kind, and actually running them, would be a fraction of the cost of police, court and other public service time presently taken up with handling domestic violence related tasks. Expenditure of this kind is well worth the effort, especially if allied with campaigns specifically designed to bring home to people in the community generally that domestic violence is a crime and that, despite some community attitudes, it must be seen as such. The kind of publicity campaign to be mounted is a matter for expert guidance, but the Commission draws attention to advertisements and pamphlets prepared in New South Wales.⁶ Pamphlets of this kind, prepared for victims and offenders and offering advice and assistance to each, can be extremely useful tools in ensuring that the message gets through.

Costs and benefits

117. The functions of a domestic violence unit, then, would be as follows:

- to provide support, assistance, information and short-term counselling for victims of domestic violence;
- to act as a central referral point for other agencies such as medical workers, police and lawyers;
- to assist victims in finding emergency and longer-term housing;
- to provide support and assistance to victims engaged in legal proceedings;
- to act as a nerve-centre for all domestic violence information in the Australian Capital Territory and

5 See para 124.

6 For example see NSW Premier's Department, Women's Co-ordination Unit, *Domestic Violence—You Don't Have to Put Up With It*, Government Printer, Sydney 1983 and multi-lingual poster.

to organize publicity and public education programs;

- to establish close ties with the police;
- to provide advice to domestic violence offenders about counselling and therapy programs.

These services, like many others provided in the Australian Capital Territory, will be used not only by Canberra residents but also by people from nearby areas in New South Wales. In making decisions on the allocation of resources for the Domestic Violence Unit, it would be struthious to ignore the dependence of these people on the Territory's services. The Commission has not been able to estimate the cost of such a unit accurately. No other Australian jurisdiction has established a unit specifically to deal with domestic violence matters. In Adelaide, a 24 hour crisis intervention unit operates but it deals, not just with domestic violence, but with all crises affecting people. The costs of that unit in 1984 amounted to some \$500 000. Because of the labour intensive nature of such a unit, it could be expected that a 24 hour domestic violence unit in the Australian Capital Territory would cost a similar amount.. Such a unit would, in the Commission's view, be too expensive. Nevertheless, similar results can be achieved without the necessity for that level of expenditure. Devices such as rosters and after-hours numbers provided to callers by a telephone answering machine would significantly reduce the costs of a domestic violence unit without significantly impairing its ability to operate. The expense involved in establishing and maintaining a fully staffed domestic violence unit on such a basis is well justified. A properly staffed unit would be able to rationalise and make more effective the delivery of services to victims and offenders and to their families. But more importantly, it would enable, for the first time, a proper attack on the underlying causes of domestic violence. Such an attack is the only way in which, in the long term, the present expenditure of court, police, legal and public service time on the aftermath of domestic violence can be reduced.

Staffing

118. Workers for the Domestic Violence Unit should be recruited carefully. Victims of domestic violence must be allowed to make their own decisions about their future. Uncritical support is essential: welfare workers who impose their own perceptions and prejudices, 'taking the victim over', hinder rather than help ultimate recovery. Sometimes social workers adopt the attitude that reconciliation is always the best course of action. While in particular cases this may be so, in some circumstances pressure to 'patch it up' can be very damaging. In some cases it will be quite appropriate for the parties to separate. The victim's difficult decision to seek help should not be undermined by exhortations to get back together and 'have another try'. Staying in a violent relationship very often has nothing to do with genuine reconciliation. Instead, economic pressures, fear, shame or simply helplessness are reasons for staying: these are not good reasons for maintaining a relationship. By the same token, the opposite attitude, that leaving a relationship is always the best course, is equally likely to be damaging. In most cases, the parties themselves are in the best position to make this difficult decision. Workers in the Domestic Violence Unit should not 'take over' their clients' lives.

9. Health and counselling services

Health services

Medical workers

119. As noted earlier, respondents to the phone-in reported that the most likely contact after a domestic violence incident was a doctor. The NSW Task Force found similar results.¹ But the Task Force Report also drew attention to dissatisfaction voiced by a number of victims with the approach of doctors:

As with other professionals, . . . doctors were sometimes described as reluctant to get involved with or recognize domestic violence.²

Again, respondents to the phone-in gave similar reports:

Medicos side-step the issues. They don't know how to recognise domestic violence. They certainly don't know how to handle it.

This may be explained by the difficulties facing a medical worker, particularly the family doctor, when he or she suspects violence. The matter obviously has to be handled with extreme delicacy. But doctors and community health centres should offer something more than purely medical services to domestic violence victims: a holistic approach to patients is now generally regarded as desirable and, within the bounds of available resources, health workers should follow it. Apart from this, it is an important step in preventive medicine to inform the victim of legal and other services. Advice and counselling are also called for.

Doctors can do more than treat a woman's injuries and prescribe sedatives. They can, but seldom do, refer women to community agencies.³

Part of the problem in the Australian Capital Territory may be due to a lack of knowledge about where victims can be referred.

No special training or methods

120. Present medical training does not deal with domestic violence as a specific problem. No statistics are kept which record the incidence of domestic violence and hospitals and health centres have no specific procedure for identifying domestic violence cases. An elaborate data collection system to gather this information would not, however, be warranted. Such a system may be unduly intrusive on patients' privacy, it would be burdensome to run and maintain and there is no immediate use for the statistics that would be generated. However, medical centres are a very important resource in the fight against domestic violence because of their access to victims and the opportunity that this presents to provide help to them. Proper follow-up and referral is a vital measure of preventive medicine in relation to domestic violence. Doctors and other health workers should have a heightened sensitivity to the signs of domestic violence. This should be achieved by in-service training programs run by the Australian Capital Territory Health Authority. Once a victim is identified, the doctor should be able to provide advice and information to enable the victim to take steps to prevent further violence. The simplest procedure is to refer the victim to the proposed Domestic Violence Unit: in appropriate cases, not just by telling the patient to ring a number, but by arranging an interview.

Counselling and therapy programs

Existing programs

121. No legal or victim support strategy can get to one of the root causes of domestic violence: the offender's attitudes and perceptions. Court orders can help, by ensuring that the offender realises that the law really means that assaults must not recur. But more is needed. At the least, counselling would help

1 NSW Task Force on Domestic Violence, *Report*, NSW Government Printer, Sydney, 1981, 86.

2 S Eggar, J Croucher & W Bacon, *Domestic Violence—Survey of Attitudes towards Available Services*, a paper for the NSW Task Force on Domestic Violence, *Report*. 45.

3 M Girdler, 'Domestic Violence: Social Solutions' in C O'Donnell & J Craney, *Family Violence in Australia*, Longman Cheshire, Melbourne, 1982, 150.

offenders to see that their attitudes and perceptions need to be changed and to help them in that process.

- *ACT 'Challenge' program.* A small project, named 'Challenge' which is run by volunteers, has been started in the Australian Capital Territory. It is privately funded, but its organisers regard the program's informality and lack of professional image and bureaucratic trappings as beneficial (despite the problems it poses) for two reasons: as well as providing a good environment for counselling and therapy, participants' fears of taking part in the program ('Will I be referred to a psychiatrist?') are allayed. As the program only commenced in 1984, client numbers have not been sufficient to start a group program. Members of Challenge have therefore been counselling clients individually. To date there is no information about the success of this program.
- *Adelaide program.* A pilot project in Adelaide conducted by Mr D Wehner has been in operation for approximately 18 months. It is specifically directed at men who have been violent to their partners. The number of men who have participated is small (only 78 to date), with each group containing approximately 12 people. The program is voluntary, that is, it does not depend upon court-ordered participation, and is reported to be a qualified success. Mr Wehner reported to the Commission that the best result achieved has been that 75% of a given group reported that they had stopped beating their partners while the worst result was that that only 50% reported that they had stopped⁴, but the subjective nature of these responses should be borne in mind when assessing the success of the program.

Clearly, if a fully-fledged group program for violent people were to be developed in the Australian Capital Territory, it would have to be established on a more formal basis. The present program, Challenge, could not cope with the numbers which would be generated by court-ordered counselling and therapy.

Court-ordered programs

122. Both Mr Wehner and 'Challenge' administrators agree that compulsory participation in a suitable counselling program should at least be an option available to the court in cases of domestic violence offences. At present, both programs are voluntary. One argument against compulsory participation in such a program is that it would tend to be counter-productive. An essential element, the desire for change on the part of the offender, would not be present. In any event, it is clear that not all offenders would need, or could benefit from, such a program. Only those who could benefit would be considered for a program of this kind, on the analogy of programs already developed in the Australian Capital Territory and elsewhere for drink-driving offenders. Programs for domestic violence offenders are an essential measure for treating the causes, rather than just the symptoms, of domestic violence. The Australian Capital Territory Health Authority should establish counselling and therapy programs for people who are violent to their partners, which should be an option for magistrates dealing with offenders. This option may be used in conjunction with conditions imposed either without proceeding to conviction⁵ or, more usually, when a suspended sentence is imposed.⁶ This recommendation is made tentatively because there is no available information to indicate whether a court-ordered, as opposed to a voluntary, program will be beneficial. The Commission is aware that such a program may be used by offenders cynically, in order to escape a heavy punishment. Court-ordered counselling should therefore be attempted on a trial basis and the program should be carefully monitored by a committee consisting of workers in the program and a magistrate.

4 D Wehner, *Spouse Abuse Intervention Project, Final Report*, South Australian Health Commission, 1985.

5 Crimes Act 1900 (NSW:ACT) s556A.

6 *id.*, s556B.

10. Accommodation and financial support

Accommodation

Introduction

123. The problem of both short-term and long-term accommodation is a central one. Physical separation does not necessarily prevent further offences, but it is an important measure of protection. Accommodation needs will be discussed in terms of short-term needs—the provision of ‘escape’ accommodation; medium-term needs—an accommodation order made by a court pending any final determination of property rights; and long-term needs—the determination of the parties’ respective property rights. The right to essential household goods such as the refrigerator and the washing machine will also be discussed.

Emergency accommodation

124. *Refuges and other options.* The need for an escape path has been noted earlier, where it was suggested that workers in the proposed Domestic Violence Unit should, amongst other things, have access to accommodation for victims of domestic violence. At present, the only accommodation immediately available for victims is a women’s refuge. In the Discussion Paper¹ it was pointed out that existing women’s refuges may not be either available or appropriate to some women. The refuges are usually crowded. They cannot offer the type of accommodation which a significant number of people need, namely, a self-contained unit providing peace and quiet.

There is nowhere in Canberra or Queanbeyan for a complete family unit to obtain emergency housing together, except perhaps Jerrabomberra House . . .²

The same applies to a family trying to escape a violent spouse. It was suggested in the Discussion Paper that a short-term solution to the problem would be for the proposed Domestic Violence Unit to provide money or vouchers for motel accommodation. Whilst this should remain an available option in suitable cases, experience in England has shown that many motels or hotels will not co-operate in such a scheme. Those which are willing to provide accommodation tend to be at the lower end of the market and in some cases have exploited the scheme by housing ‘guests’ in sub-standard accommodation. Further, some victims, especially women, may find it a humiliating experience to go to a relatively public place, such as a motel, showing the visible effects of domestic violence. Finally, an important aspect of places like women’s refuges is the support they provide—support that is lacking in a motel, although to some extent this can be provided by social workers.

125. *An alternative type of refuge.* The preferable solution is refuges offering small self-contained units which can provide both the close support and the privacy needed by some victims of domestic violence. The Housing Branch of the Department of Territories has told the Commission that it cannot, with present resources, provide this type of emergency accommodation, nor is it likely that funds will become available in the foreseeable future. Nevertheless this type of accommodation should be accorded a high priority within the Department’s budget for emergency or crisis accommodation.

126. *Removing the offender.* If it is impossible to find accommodation for the victim it is the offender who must be removed. Arrest would only provide a solution for a very short time. Other mechanisms, such as the imposition of bail conditions, and protection orders which exclude the offender from the home, will be available under the Commission’s recommendations. Though this latter measure may be used with some reluctance by police and magistrates, it is preferable to forcing the victim, often a woman with children, to find alternative accommodation. It is far easier for a single man to find accommodation (more so if he is the breadwinner) than it is for a single woman, particularly if she has children with her.³

1 Australian Law Reform Commission, Community Law Reform Consultative Paper No 4, *Domestic Violence in the ACT*, Canberra, 1984, (ACTLR 4) 54.

2 Committee of Inquiry into Homelessness and Inadequate Housing in the ACT and Surrounding Regions, *Homelessness—a capital problem*, AGPS, Canberra, January 1984, (Homelessness Report), 65.

3 B Cass & MA O’Loughlin, ‘Social Policies for Single Parent Families in Australia: an Analysis and a Comparison with Sweden’, Social Welfare Research Centre, *Reports and Proceedings*, No 4, March 1984, 41–5.

127. *A men's refuge?* It was suggested in the Discussion Paper⁴ that, in addition to more emergency accommodation for women, there ought to be a men's refuge which provides a place for violent men to take time out from the family, often at the suggestion of the police. Such a refuge would relieve the pressure on the battered woman to leave the home. In view of the difficulty of finding additional safe places for women, resources will presumably be unavailable for a men's refuge too. As mentioned above, it may be relatively easy for a man to find somewhere to go so that the need for a men's refuge may not be nearly so urgent or critical as the need for additional alternative women's refuges.⁵

Medium term accommodation

128. *Owner-occupied accommodation.* It was recommended earlier in this report⁶ that a protection order should be capable of including orders excluding the offender from the family home. Orders of this kind have caused controversy in the past in the Family Court and in other countries because of a deep-seated resistance by magistrates and judges to excluding people from their homes. More recently, the Family Court has been more willing to make the decision to oust violent men from the family house on the basis of balance of needs.⁷ Such an order would not be permanent. It would have effect pending the working out of long-term arrangements. Nevertheless, a number of consequences need to be considered.

129. *Mortgages.* If the home is under mortgage, the question who should ensure that the mortgage payments are made arises. Normally, an ouster order would have no effect on the liability of the mortgagor or mortgagors named in the mortgage to keep up the repayments. In the normal mortgage, liability to make payments under the mortgage is not dependent on the mortgagor remaining in occupation. Difficulties may arise in two cases:

- *Ouster a breach of mortgage conditions.* If the mortgagor vacates the property, even in compliance with a protection order, this may, in some cases, amount to a breach of the mortgage covenants, allowing the mortgagee, if so inclined, to call for payment of the whole of the principal and interest. Although this is unlikely to occur—and would be even more unlikely in the case of both spouses being joint mortgagors—it should be specifically provided that the mortgagee is not entitled to foreclose or take any other action detrimental to the mortgagor or the family simply because of an ouster order.
- *Victim left with liability.* In some cases, the victim of domestic violence, still remaining in the house, may be saddled with the liability of making payments under the mortgage. In these cases, limited assistance is available from the Mortgage Relief Scheme. This subsidises so much of the mortgage commitments as exceeds 25% of income for up to 12 months or up to \$3,000 (whichever first occurs). It only applies to initial loans and will not assist in respect of later mortgages. The scheme should be continued as it provides valuable, though limited, aid for some domestic violence victims.

130. *Privately rented accommodation.* The effect of an ouster order, if the home is privately rented, can be complicated. If the ousted party is the only tenant named in the lease, that person could simply give notice and terminate the tenancy. The landlord may be able to do the same on the ground that the tenant has left the premises. In either case, the victim of domestic violence would be left with no accommodation. There are two possible ways of ensuring that this does not occur:

- *First-right-of-refusal model.* The parties named in the agreement would work out future arrangements for themselves, provided that, if the tenancy is ended, the landlord must offer a new tenancy to the person still in possession. That person would have the first right of refusal. There are significant practical difficulties with this. A re-letting would involve expenses such as stamp duty. The new tenant (in most cases the wife or de facto wife) would have to provide a new bond of four weeks' rent (which, at the time of writing, could be well over \$500). Women in particular are very often financially disadvantaged by separation, particularly if they have custody of the children.

4 ACTLR 4, 54.

5 If it is decided to fund further women's refuges, this will have to be done consistently with the Sex Discrimination Act 1984 (Cth), in particular, in relation to the exercise by Commonwealth and Territory officials of discretions to grant applications for funding groups who are authorised under the Act to discriminate on the grounds of sex.

6 Para 99.

7 *Davis and Davis* (1983) FLC 319.

- *Substitute model.* The magistrate could be empowered, when making an ouster order in relation to privately rented accommodation, to direct that the person remaining in possession be substituted for the named tenant.⁸ If this were adopted, what would be the effect if the order is revoked? It would clearly cause great practical difficulties if the original tenant were then reinstated. To avoid this, the occupation order should continue for the term of the lease. In fact, such an order would often have only a short-term effect because private rental agreements in the Australian Capital Territory are usually short-term.⁹ No great harm would be done, when or if the parties resume cohabitation, if the original tenant is not reinstated. The fact that the tenant has been changed by a court order should not be a ground for eviction. The bond money should continue to be held as bond for the substituted tenancy and should not be repaid to the ousted party until the tenancy comes to an end, that is, when the substituted tenant moves elsewhere.

131. *Recommendations.* The second of these options is to be preferred. There should not be a financial disincentive preventing people who are in physical danger from taking steps to protect themselves. The only disadvantage of this proposal is that the original tenant's bond money would be inaccessible until the substitute tenant decides to move somewhere else. If this were to prove a problem, the magistrate could exercise a discretion either to order that the bond money be released and new bond be paid by the substitute tenant (in cases where the latter can afford to do this) or to order that no new bond money be provided by the substitute tenant. Where the ousted party is the breadwinner, the substituted tenant may not be able to afford to pay the rent, especially if a social security benefit is the main component of his or her income. In such cases, the Rent Relief Scheme will be available.¹⁰ This scheme, like the Mortgage Relief Scheme should be maintained, as it provides an essential aid to victims of abusive relationships who want to start afresh.

132. *Title to land.* An ouster order does not affect property rights. It is a temporary measure, merely depriving a person of his or her right to occupy premises pending the determination of the parties' property rights in the Family Court (or other appropriate court in the case of de facto relationships).¹¹ The Court of Petty Session has no power to hear cases 'in which the title to land is genuinely in question'.¹² The recommendations just made as to the alteration of mortgages and leases may be thought to involve such questions. The powers of the court under those recommendations should apply notwithstanding the limitation on the Court's jurisdiction.

Long term accommodation

Private accommodation

133. Providing long-term accommodation for the victims of family violence must be considered in the context of the accommodation needs of the whole community. They are only one group of people who may have such needs. When the family house is owner-occupied by either or both spouses, the long-term determination of the parties' property rights can already be dealt with by the courts. If the parties are or have been married, in the absence of agreement between the parties, this question is determined by the Family Court.¹³ If the parties are not married, the determination of the parties' property rights can be made in the Supreme Court of the Australian Capital Territory. For people in privately rented accommodation, the courts normally have no role to play because the tenancy agreement will probably expire while the parties are deciding about their future.

Government housing

134. *Introduction.* The public housing sector provides long-term security, so a decision to transfer an already existing government tenancy to the victim of family violence has long-term implications for both

8 As in New Zealand: Domestic Protection Act 1982 (NZ) s27.

9 Homelessness Report, 31.

10 This scheme is available to anyone eligible for public housing and, in rare cases, to people marginally outside the public housing guidelines. Applicants must go on the waiting list for public housing. In the meantime, while he or she is paying rent, relief is available for three months and is renewable.

11 See para 99.

12 Court of Petty Sessions (Civil Jurisdiction) Ordinance 1982 (ACT) s10.

13 The issues associated with family property after the breakdown of marriage are presently being considered by the Commission: see Australian Law Reform Commission, Discussion Paper No 22, *Matrimonial Property Law*, Canberra, 1985.

parties. Further, the public sector will have to bear substantially the burden of providing accommodation to those people, previously accommodated in non-public housing, who are left without economic support after a relationship breaks down, particularly if they have children. 'Female headed families are more likely to rent from the Government than to buy.'¹⁴ The Housing Branch of the Department of Territories is responsible for the allocation of public housing in the Australian Capital Territory. For a couple who are already in government accommodation, the practice at the moment is that the principal breadwinner is the named tenant. If he or she vacates the house or flat for 30 days, Housing Branch may end the tenancy and, in appropriate cases, re-let the premises to the other party. Thus, in these cases, an ouster order may ultimately mean the transfer of the tenancy to the victim. In some cases, the party remaining on the premises may move, either to escape the violent spouse or (especially if there are no children) because the house is now too large. The ousted spouse, if still eligible, will be able to obtain other government accommodation in due course. Where there are children, the Housing Branch's present policy is that the house will be let to whichever party has the care and control of the children.

135. *Joint tenancy agreements.* If the original tenancy agreement were made with the couple jointly, ending the tenancy and re-letting it to the appropriate spouse would be made simpler. Housing Branch has considered adopting the practice of letting accommodation to joint tenants but, so far, has not done so. It apparently perceives difficulties in deciding who would be responsible for paying the rent and, if the couple have broken up, who should pay any back rent owing. One way around this apparent difficulty would be to name a particular party as the person responsible for making payments. In the event of that party leaving, all that would have to be done is to substitute a new person in the agreement. A preferable approach would be, as with private sector rental accommodation, for the responsibility for paying the rent to be the joint responsibility of both tenants. If one leaves, they would still be jointly liable until the tenancy is altered or terminated. This would involve minimal administrative action on the part of Housing Branch. In the Commission's view, letting government accommodation to joint tenants would be desirable. Not only would it conform more closely to current trends towards equality of the sexes, but it would also simplify the alteration of lease arrangements upon one party leaving.

General considerations

136. The housing problems faced by victims of domestic violence are part of a larger problem of accommodation, which can be particularly acute for separated women. Housing Branch of the Department of Territories is reconsidering a number of its policies on housing.¹⁵ The criteria and guidelines for granting public housing are being reviewed. Approximately 2000 extra units will be added to the government housing stock over the next three years. In the light of these developments, it is not an appropriate time to make specific recommendations about general housing policy apart from what has already been said.

Financial support

The financial barrier

137. One of the most formidable barriers to leaving a violent relationship is financial. It is especially acute for women victims of domestic violence, many of whom are financially dependent on the man. For such a woman, leaving to set up a new household will be extremely difficult, particularly if there are children who go with her. Her plight may be less severe if she stays and he leaves. She may be able to find a job but the barriers to this are great too. Not only will it be difficult to find employment, but also she has to find daycare for the children (if it is available) the cost of which may be a serious drain on her stretched resources. If she cannot find a job, or will not (because she already has the full-time job of caring for the children), she is thrown onto the social security system. If she is paying private rental rates (either in the family house or in her new accommodation) and is unable to obtain help from the Rent Relief Scheme, 60% or more of her pension will be used just to pay the rent.¹⁶

14 Homelessness Report, 31.

15 In the light of recommendations made in the Homelessness Report and in T Vinson, *Beyond the Image*, Review of Welfare Services and Policies in the Australian Capital Territory, Commonwealth of Australia, AGPS, Canberra, 1985.

16 The problems facing women single parents are fully documented in Cass & O'Loughlin.

Poverty

138. *Female single parent families.* In Australia, about 90% of single parent families are headed by women.¹⁷ Of these, approximately 85% were formed following cessation of a de facto or married relationship.¹⁸ In 1981, about 85% of female-headed single parent families were on government pensions¹⁹, the great majority (80%) of those being on Class A widow's pension or supporting parents benefit.²⁰ By contrast, only about 18% of male-headed single parent families were on government pensions.²¹

The situation of single parent families in the social security system is therefore predominantly (in fact almost entirely) a situation which affects women and their children, even though ten per cent of single parent families are headed by men. The over-representation of families headed by women amongst single parent families in receipt of income maintenance is a consequence of the greater disadvantages which women confront in the labour market, particularly when they are responsible for the care of children.²²

In 1978-9 one third of single parent families were living in poverty and one half with two or more children were living in poverty.²³ More recent figures show that this grim picture has worsened.²⁴ It would not be an over-statement to say that for many victims of domestic violence the choice is simply between continuing violence and poverty.

139. *Lowering the financial barrier.* The financial barriers can be lowered to some extent by proper information. One of the jobs of the proposed Domestic Violence Unit will be to provide information about such matters as housing, emergency grants and social security entitlements. But information can only go so far: it cannot make adequate social security payments and access to accommodation that are inadequate. This is a profound problem of social justice. Women become financially dependent on their partners because they are expected to work full-time in the home for no wages. Many women accept this role with equanimity. But if the relationship turns sour they are trapped. It is bad enough where the parties do not get on with one another. It is much worse where bad relations are accompanied by violence.

140. *The costs of abusive relationships.* The long-term effects of the existence of these formidable barriers to leaving abusive relationships cannot be calculated. The effects on the children of witnessing either physical or mental abuse between their parents are likely to be devastating and may possibly lead to a repetition of the same pattern when the children become parents. The community's resources will have to be used to deal with the problems. And the effects of abusive relationships already cost the community in human and financial resources, both of the victims themselves and of the people who have to deal with the problem such as police, medical workers, lawyers, courts and social workers. The Commission is aware of the difficulty which governments face in providing adequate pensions and other schemes for achieving even a basic minimum standard of living for social security recipients. But domestic violence victims, and other people who wish to leave dangerous relationships, should be free to do so. For women who are the victims of domestic violence, having such freedom of choice itself may even alter the balance between the parties so that the abusive conduct stops: it is an important step in equalizing relations between the sexes. The Commission is not raising these issues with a view to making recommendations about them. This report is not the place for such recommendations. Rather, the Commission wishes to draw attention to the extent of the problem and its impact in particular on victims of domestic violence. In many cases, the only choice for the victim of domestic violence is between a life of continuing violence or a life of poverty. It is a choice no-one should have to make.

17 id, 6.

18 id, 8.

19 id, 9.

20 id, 12.

21 id, 9.

22 id, 13.

23 id, 1.

24 A Burbidge, *Poverty in Australia*, Institute of Family Studies, Melbourne, July 1984.

Appendix A

Draft Legislation

- Draft Crimes Amendment Bill 1986 (Cth)
- Explanatory notes to draft Crimes Amendment Bill 1986 (Cth)
- Draft Crimes (Domestic Violence) Ordinance 1986 (ACT)
- Explanatory notes to Draft Crimes (Domestic Violence) Ordinance 1986 (ACT)
- Draft Crimes Amendment Ordinance 1986 (ACT)
- Explanatory notes to draft Crimes Amendment Ordinance 1986 (ACS)

A BILL

FOR

An Act to amend the *Crimes Act 1914* in relation to powers of arrest

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

Short title, &c.

1. (1) This Act may be cited as the *Crimes Amendment Act 1986*.
- (2) The *Crimes Act 1914*¹ is in this Act referred to as the Principal Act.

Territorial application

2. This Act extends to each external Territory, and to each other place, to which the Principal Act extends.

3. Section 8A of the Principal Act is repealed and the following sections substituted:

Arrest without warrant by member of police force

“8A. (1) A constable may, without warrant, arrest a person for an offence against a law of the Commonwealth or of a Territory if the constable believes on reasonable grounds that—

- (a) the person has committed or is committing the offence; and
- (b) proceedings by summons against the person in respect of the offence would not achieve one or more of the following purposes:
 - (i) ensuring the appearance of the person before a court of competent jurisdiction in respect of the offence;
 - (ii) preventing the continuation of, or a repetition of, the offence or the commission of some other offence;
 - (iii) preventing the concealment, loss or destruction of evidence of, or relating to, the offence;
 - (iv) preventing harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence;
 - (v) preventing the fabrication of evidence to be given or produced in proceedings in respect of the offence;
 - (vi) preserving the safety or welfare of the person.

“(2) Where—

- (a) a person has been arrested for an offence under sub-section (1); and
- (b) before the person is charged with the offence, the member of the police force in charge of the investigation into the offence does not have, or ceases to have, reasonable grounds to believe that—
 - (i) the person committed the offence; or
 - (ii) holding the person in custody is necessary for achieving any of the purposes referred to in paragraph (1)(b),

the person shall forthwith be released from custody in respect of the offence.

¹ No 12, 1914; for previous amendments, see No. 67, 1982; Nos. 80 and 153, 1982; Nos. 91, 114 and 136, 1983; Nos. 10, 63–165, 1984; and No. 191, 1985.

“(3) Sub-section (1) does not apply in relation to a prescribed offence.

“(4) Paragraph (1)(b) does not apply in relation to the following offences:

- (a) murder;
- (b) manslaughter;
- (c) an offence, whether committed in the Australian Capital Territory or not of the kind to which Part IIIA of the Crimes Act, 1900 of the State of New South Wales, in its application in the Australian Capital Territory, applies or of a like kind;
- (d) an offence involving the inflicting of grievous bodily harm;
- (e) an attempt to commit an offence referred to in paragraph (a), (b), (c) or (d).

“(5) This section does not affect the operation of any other law of the Commonwealth, or a law of a Territory that makes provision with respect to arrest.”.

Explanatory Notes to

Draft Crimes Amendment Bill 1986 (Cth)

Outline

1. This Bill amends the *Crimes Act 1914* (Cth) so far as that Act provides for police powers of arrest. It implements recommendations of the Australian Law Reform Commission in its Report on Criminal Investigation (ALRC 2) (1975) and Domestic Violence (ALRC 30) (1986).
2. The principal object of the Bill is to clarify and state comprehensively the circumstances in which police may exercise the power of arrest without warrant where an offence has been committed.
3. It is not intended to affect the power of police to arrest in other circumstances.

Notes on Clauses

Clause 1—Short title, &c.

4. This clause provides for the short title of the Bill and declares that the *Crimes Act 1914* is referred to as the Principal Act.

Clause 2—Territorial application

5. The *Crimes Act 1914* extends to all the external Territories and to places outside Australia (section 3A). In order to ensure that the amendments made by this Act also have extra-territorial operation, cl 2 provides that the territorial operation of this Bill is the same as the territorial operation of the Principal Act.

Clause 3

6. This clause repeals and replaces s8A of the Principal Act. That section provides that a police officer may arrest without warrant for an offence if ‘proceedings by summons would not be effective’. There is considerable doubt as to the precise meaning of ‘effective’ in this context.

Proposed section 8A—Power of arrest without warrant

7. *Proposed sub-section (1)* allows a police officer to arrest without a warrant if the police officer believes on reasonable grounds that the person to be arrested is committing or has committed the offence and that arrest is necessary to achieve one or more of the following purposes:
 - to ensure the appearance of the offender in court;
 - to prevent the continuation of, or a repetition of, the offence;
 - to prevent concealment, loss, destruction or fabrication of evidence;
 - to prevent witnesses being interfered with or improperly influenced;
 - to preserve the safety or welfare of the offender.

The Criminal Investigation Bill 1981 (Cth) cl 10 is the basis of this provision but proposed sub-para 8A(1)(b)(iv)–(v) have been added. These concern interference with witnesses and the fabrication of evidence.

8. *Proposed sub-section 8A(2)* provides for the release of a person who has been arrested under this provision if the officer in charge of investigation into the offence ceases to have reasonable grounds to believe that arrest is still necessary.
9. *Proposed sub-section 8A(3)* allows for regulations to be made the effect of which will be that arrest without a warrant will not be available for certain offences. It is anticipated that, if regulations are made prescribing offences for this purpose, only relatively minor offences will be covered.
10. *Proposed sub-section 8A(4)* relates to certain serious crimes against the person. It provides that the

criteria set out in proposed sub-s (1) are not to be applied by arresting officers in determining whether to make an arrest for these serious offences. It will have the effect that police officers will be able to arrest without warrant in appropriate cases for these offences notwithstanding that there is no doubt that the suspect will appear or there is little or no likelihood of a repetition or continuation of the offence. For offences of this gravity, it is inappropriate that the arresting officer, in the heat of the moment, should be required to make decisions weighing up the criteria set out in sub-s (1). This is more appropriately done by senior police officers, after reflection, or by a magistrate on a bail application. The offences are:

- murder;
- manslaughter;
- rape and other serious sexual offences;
- any offence involving grievous bodily harm; and
- attempts to commit any of these offences.

11. *Proposed new sub-section (5)* provides that the powers of arrest conferred by this section are in addition to other powers of arrest that Commonwealth officers may exercise.

12. *References:* Report para 43, 47–9; ALRC 2 para 30, 34, 38–44.

DRAFT CRIMES (DOMESTIC VIOLENCE) ORDINANCE 1986

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AUSTRALIAN CAPITAL TERRITORY

Crimes (Domestic Violence) Ordinance 1986

An Ordinance relating to domestic violence

PART I—PRELIMINARY

Short title

1. This Ordinance may be cited as the *Crimes (Domestic Violence) Ordinance 1986*.

Commencement

2. This Ordinance shall come into operation on a day to be fixed by the Minister by notice published in the *Gazette*.

Interpretation

3. In this Ordinance, unless the contrary intention appears—

“child”, in relation to a person, includes—

- (a) an adopted child of the person;
- (b) a step-child of the person;
- (c) an ex-nuptial child of the person; and
- (d) a child of the person or of the spouse or de facto spouse of the person, being a child who is or was, at the relevant time, ordinarily a member of the household of the person and the spouse or de facto spouse of the person and treated by them as a child of their family;

“the Court” means the Court of Petty Sessions;

“de facto spouse”, in relation to a person, means a person of the opposite sex to the first-mentioned person who is living with the first-mentioned person as that person’s husband or wife although not legally married to the first-mentioned person;

“member of the family”, in relation to a person, means a spouse, de facto spouse, child or parent of the person;

“parent”, in relation to a person who is—

- (a) an adopted child—means the adoptive parent of the child;
- (b) a step-child—includes the step-parent of the person;
- (c) an ex-nuptial child—includes the natural father of the person; and
- (d) a child as mentioned in paragraph (d) of the definition of “child”—includes the person, and the spouse or the de facto spouse of the person, mentioned in that paragraph;

“police officer” means a member of Australian Federal Police;

“protection order” means an order made under Part II.

Prescribed offences

4. A reference in this Ordinance to a prescribed offence is a reference to the following offences—

- (a) murder;
- (b) manslaughter;
- (c) an offence, whether committed in the Territory or elsewhere, of a kind to which section 27, 28, 29, 30, 31, 33, 33A, 35, 37, 38, 39, 41, 46, 47, 54, 58, 59, 83, 90A, 92A to 92D (inclusive), 92F, 92H, 92J, 92M, 493, 494 or 546A of the Crimes Act, 1900 of the State of New South Wales in its application in the Territory applies or of a like kind;

(d) an attempt to commit an offence of a kind referred to in paragraphs (a) to (c) (inclusive), being an offence committed or attempted to be committed by a person against the spouse or a former spouse, or the de facto spouse or a former de facto spouse, of the person.

PART II—PROTECTION ORDERS

Protection orders

5. (1) The Court, if it is satisfied on the balance of probabilities that a person has engaged in conduct (whether in the Territory or not) that—

- (a) constitutes a prescribed offence committed against the person's spouse or de facto spouse; or
- (b) may reasonably be regarded as harassment of the person's spouse or de facto spouse,

and is likely to engage again in such conduct, may make an order restraining the person from engaging in that conduct or in similar conduct.

(2) The Court, if it is satisfied on the balance of probabilities that a person has engaged in conduct (whether in the Territory or not) that—

- (a) constitutes a prescribed offence committed against a former spouse, or a former de facto spouse, of the person; or
- (b) may reasonably be regarded as harassment of a former spouse, or a former de facto spouse, of the person,

and is likely to engage again in such conduct, may make an order restraining the person from engaging in that conduct or in similar conduct.

(3) On an application for a protection order, the Court may, if it considers that it is desirable to do so, before considering the application, make an interim protection order.

(4) The Court may, on application by the applicant or the respondent, vary or revoke the protection order.

Applications for protection order

6. (1) An application for a protection order under sub-section 5(1) may be made by the spouse or the de facto spouse of the person against whom the order is sought.

(2) An application for a protection order under sub-section 5(2) may be made by the former spouse, or the former de facto spouse, concerned.

(3) A police officer may apply for a protection order.

(4) With the leave of the Court, a person other than a person mentioned in sub-section (1), (2) or (3) may apply for a protection order as agent for the applicant.

(5) In relation to proceedings on an application made as mentioned in sub-section (3) or (4), a reference in this Part to the applicant is a reference to the person against whom the offence concerned was committed, or who was harassed.

(6) The person against whom the order is sought shall be the respondent to the application.

(7) Where an application for a protection order has been served on a person, section 199 of the *Court of Petty Sessions Ordinance 1930* applies in relation to the person as it applies in relation to a defendant as mentioned in that section.

Affidavit evidence

7. (1) Evidence on an application for a protection order may be given on affidavit.

(2) It is not necessary to call a person who made such an affidavit to give evidence unless a party to the proceeding, or the Court, so requires.

Form of orders

8. (1) Subject to this Ordinance, a protection order may include provisions restraining a person—

- (a) from being in premises in which the applicant for the protection order resides;
- (b) from being in premises that are the place of work of the applicant for the protection order;
- (c) from being in a specified locality, being a locality in which premises as mentioned in paragraph (a) or (b) are situated;
- (d) from approaching within a specified distance of the applicant for the protection order; and
- (e) if the person continues to reside with the applicant for the protection order—from entering or remaining in the place of residence while intoxicated.

(2) A protection order that includes provision as mentioned in paragraph (1)(a) may also include provision—

- (a) restraining the respondent from taking possession of personal property of either the applicant or the respondent, being property that is reasonably needed by a member of the respondent's family; or
- (b) directing the respondent to give possession of such of that property as is specified in the order to a specified member of the respondent's family.

Matters to be taken into account

9. (1) In determining an application for a protection order, the matters that the Court shall take into account include—

- (a) the need to ensure that persons are protected from violence and harassment;
- (b) if the members of the respondent's family include a child who has not attained the age of 18 years—the welfare of the child;
- (c) the accommodation needs of the members of that family; and
- (d) the hardship that will be caused to the respondent or to any other person if the order is made.

(2) In determining whether to make an order that includes provision of the kind mentioned in sub-section 8(2), the Court shall also take into account the property, income and financial resources, and the financial obligations, of the applicant and the respondent.

Orders on applications by police, &c.

10. A protection order shall not be made on an application made as mentioned in sub-section 6(3) or (4) unless the applicant consents to the making of the order.

Notice to respondents

11. A protection order shall not be made unless—

- (a) the respondent has had actual notice of the application for that order; or
- (b) by reason of circumstances of seriousness or urgency, it is proper to make the order without notice to the respondent.

Ouster orders

12. (1) Where an agreement (including a mortgage or a lease of premises) provides that, if the respondent ceases to reside in his or her place of residence, a person may do a particular thing prejudicial to the interests of the respondent or a member of the respondent's family, the person is not entitled to do that thing if the respondent ceases to reside in the place of residence, in compliance with a protection order.

(2) Where the respondent is the lessee, or a lessee, of his or her place of residence, the Court may, on making a protection order that, or that includes provision that, would have the effect of restraining the respondent from entering or remaining in the place of residence, make an order—

- (a) varying the lease by substituting for the lessee or lessees a member of the respondent's family; and
- (b) directing that any payments made under the lease be treated as having been made by that member.

(3) Subject to sub-section (4), such an order has effect according to its tenor.

(4) Where the lease has been registered under the *Real Property Ordinance 1925*, such an order does not have effect until a memorial of the variation of the lease is registered under that Ordinance.

(5) Sub-section (2) does not apply in relation to a Crown lease within the meaning of the *Real Property Ordinance 1925*.

(6) This section applies notwithstanding section 10 of the *Court of Petty Sessions (Civil Jurisdiction) Ordinance 1982*.

Operation of protection orders

13. (1) A provision of a protection order is not applicable in relation to a person unless the person has actual notice of the provision.

(2) The notice may have been given orally, but in the case of a provision that would have the effect of restraining the respondent from entering or remaining in his or her place of residence, that shall have been given in writing.

Breach of protection order

14. (1) A person shall not contravene or fail to comply with a provision of a protection order that is applicable to the person.

Penalty:

(2) A person may, in accordance with law, arrest a person for an offence against sub-section (1).

(3) Where a prosecution for an offence against sub-section (1) is instituted by summons, the summons shall require the person to appear to answer the information at a time not later than 72 hours after the time at which the summons is issued.

(4) Service of the summons shall be effected at least 24 hours before the time appointed in the summons for the hearing of the information.

(5) Sub-sections (3) and (4) have effect notwithstanding sections 38 and 41 of the *Court of Petty Sessions Ordinance 1930*.

Restriction on publication of court proceedings

15. (1) A person shall not publish in a newspaper or periodical publication or by radio broadcast or television, or otherwise disseminate to the public or to a section of the public or to a section of the public by any means, the identity of a party to proceedings in connection with a protection order, or information from which the identity of such a party may readily be ascertained.

Penalty:

(2) Sub-section (1) does not prevent a publication in circumstances that, or is of a kind that, were the proceedings under the *Family Law Act 1975* would not constitute a contravention of section 121 of that Act.

(3) Proceedings for an offence against this section shall not be commenced except by, or with the consent in writing of, the Attorney-General or the Director of Public Prosecutions, or a person authorised by either of those persons in that behalf.

PART III—MISCELLANEOUS

Bail

16. (1) Where a person or body has, under a law of the Territory, power to grant bail to a person (in this section called the “accused”) in respect of a prescribed offence, the matters that the person or body shall take into account in determining whether to grant bail to the accused and the conditions on which bail is to be granted include—

- (a) the need to ensure that persons are protected from violence and harassment;
- (b) if the accused or a victim of the alleged offence has custody of a child who has not attained the age of 18 years—the welfare of the child; and

- (c) any hardship that may be caused to the accused or to members of the family of the accused if bail is not granted or a particular condition is imposed.

(2) Without limiting the operation of any other law, the conditions upon which bail in respect of a prescribed offence may be granted include conditions for the protection of persons from violence or harassment, including conditions that the accused—

- (a) not harass or molest a member of the family of the accused;
- (b) not be in premises in which a specified member of the accused's family resides;
- (c) not be in premises that are the place of work of a specified member of the accused's family;
- (d) not be in a specified locality, being a locality in which premises as mentioned in paragraph (b) or (c) are situated;
- (e) not approach within a specified distance of a specified member of the family of the accused; and
- (f) if the accused continues to reside with members of his or her family—not enter or remain in the place of residence while intoxicated.

(3) Where—

- (a) a police officer grants bail to a person on a condition imposed under sub-section (2); and
- (b) the person is unable or unwilling to comply with the condition,

the person shall be taken before a Magistrate to be dealt with according to law.

(4) Where—

- (a) bail has been granted to a person upon a condition imposed under sub-section (2); and
- (b) the person contravenes or fails to comply with the condition,

the bail is thereupon forfeited and the accused is liable to be re-arrested.

Spouses compellable in certain prosecutions

17. In a prosecution for a prescribed offence, a person shall not be taken not to be compellable to give evidence by reason only that the person is the spouse of a defendant.

Spouses, &c., may object to giving evidence

18. (1) In a prosecution for a prescribed offence, a person who is a member of the family of a defendant may object to being required to give evidence as a witness for the prosecution.

(2) The objection shall be made before the person gives evidence or as soon as practicable after the person becomes aware of his or her right so to object, whichever is the later.

(3) In a prosecution for a prescribed offence, a person who is a member of the family of a defendant may object to being required to give evidence of a communication made between the person and that defendant.

(4) Where it appears to the court that a person who is or is about to give evidence may have a right to make an objection under sub-section (1) or (3), the court shall satisfy itself that the person is aware of that provision as it may apply to the person.

(5) If there is a jury, the court shall hear and determine the objection in the absence of the jury.

(6) Where, upon an objection under sub-section (1) or (3), the court finds that the undesirability of obtaining the evidence, by reason of the harm that would be caused, whether directly or indirectly, to—

- (a) the person who made the objection; or
- (b) the relationship between that person and the defendant concerned,

by the giving of evidence or by the giving of evidence of the communication, as the case may be, outweighs the desirability of obtaining the evidence, the person shall not be required to give the evidence.

(7) For the purposes of sub-section (6), the matters that the court shall take into account include—

- (a) the nature of the offence for which the defendant is being prosecuted;
- (b) the importance of any evidence that the person might give and the weight that is likely to be attached to it;
- (c) whether any other evidence concerning the matters to which the evidence of the person would relate is reasonably available to the prosecutor;
- (d) the nature of the relationship between the defendant and the person; and
- (e) whether, in giving the evidence, the witness would have to disclose matter that was received by the witness in confidence from the defendant.

(8) Where a person has made an objection under this section, the prosecutor may not comment on the objection, on the decision of the court in relation to the objection or on the failure of the person to give evidence.

Explanatory Notes to Draft Crimes (Domestic Violence) Ordinance 1986 (ACT)

Outline

1. This Ordinance makes provision for a number of matters associated with domestic violence in the ACT community. It provides for:
 - protection orders to restrain future domestic violence;
 - bail conditions to be imposed on domestic violence suspects; and
 - the compellability of spouses and others to give evidence in proceedings for domestic violence offences.
2. It implements recommendations of the Australian Law Reform Commission in its Report on Domestic Violence (ALRC 30) (1985).

Expressions

ALRC 2: Australian Law Reform Commission, Report No 2, *Criminal Investigation* (1975)

ALRC 26: Australian Law Reform Commission, Report No 26, *Evidence, Interim Report* (1985)

ALRC30: Australian Law Reform Commission, Report No 30, *Domestic Violence* (1986)

Notes on Clauses

PART I—PRELIMINARY

Clause 1—Short title

3. This clause sets out the short title of the draft Ordinance.

Clause 2—Commencement

4. This clause provides for the commencement of the Ordinance on a date to be fixed.

Clause 3—Interpretation

5. This clause defines a number of terms used in the Bill.
 - *child*: this definition is necessary to avoid doubt as to the inclusion of adopted children and illegitimate children.
 - *de facto spouse*: This is the definition adopted in the *Sex Discrimination Act 1984* (Cth) s4.
 - *member of the family*: this definition includes spouse, de facto spouse, children and parents.
 - *parent*: this definition is necessary to include adoptive parents and step-parents, and, in relation to illegitimate children, the natural father.
 - *police officer*: members of the Australian Federal Police.
 - *protection order*: this is the order provided for in Part II of the Ordinance.

Clause 4—Prescribed offences

6. This clause defines domestic violence offences in relation to which protection orders will be available and in relation to which bail conditions may be imposed by police. The offences are:
 - murder and manslaughter (*para (a) and (b)*);
 - the following offences against the Crimes Act 1900 (NSW:ACT): *section 27*: administering poison or wounding or causing grievous bodily harm with intent to murder; *section 28*: destroying property or causing explosions with intent to murder; *section 29*: administering poison, shooting or attempting to drown, suffocate or strangle with intent to murder; *section 30*: attempt to murder by other means; *section 31*: sending letters threatening to kill;

section 33: wounding or inflicting grievous bodily harm or shooting; *section 33A*: discharging loaded arms with intent to cause grievous bodily harm; *section 35*: malicious wounding or inflicting grievous bodily harm; *section 37*: attempt to choke, suffocate or strangle with intent to commit an indictable offence; *section 38*: administering chloroform and the like with intent to commit an indictable offence; *section 39*: administering poison so as to endanger life or cause grievous bodily harm; *section 41*: administering poison with intent to injure, aggrieve or annoy; *section 46*: burning, maiming, disfiguring, disabling or causing grievous bodily harm by gun powder or the like; *section 47*: causing explosions etc with intent to burn, maim, disfigure or do grievous bodily harm; *section 54*: causing grievous bodily harm by unlawful or negligent act; *section 58*: assault with intent to commit offences; *section 59*: assaults occasioning actual bodily harm; *section 83*: administering drugs with intent to abort; *section 90A*: kidnapping; *section 91B*: procuring females with intent to have intercourse by violence &c.; *section 493*: common assaults; *section 494*: aggravated assaults; *section 546A*: behaving in a riotous, indecent, offensive or insulting manner near a public place;

- attempts to commit any of these offences.

The definition also covers offences committed outside the Australian Capital Territory that are of the same kind as the offences specified in the *Crimes Act 1900* (NSW:ACT) and the *Police Offences Ordinance 1930* (ACT). This will permit the court to act where the domestic violence occurred, for example, in Queanbeyan.

PART II—PROTECTION ORDERS

Clause 5—Protection orders

7. *Sub-sections (1) and (2)* are the central clauses providing for protection orders. Protection orders will be available to spouses, de facto spouses, former spouses and former de facto spouses. They are orders restraining the respondent from committing further offences to which the Ordinance applies (as to which see cl 4) or further harrasing the applicant spouse. To be entitled to an order, the applicant must show:
 - that the respondent has committed a domestic offence or has been guilty of harrasing the applicant; and
 - is likely to continue to do so.

Although it may be necessary that the applicant prove that an offence has been committed, the standard to which that proof is required is the balance of probabilities only, not, as in a criminal prosecution, beyond reasonable doubt. Specific provision is made to allow the court to act on harrassment that takes place outside the Territory, for example, in Queanbeyan.

8. *Reference*: Report para 94.
9. *Sub-clause (3)* provides for interim protection orders.
10. *Sub-clause (4)* provides that protection orders can be varied or revoked on application. *References*: Report para 80, 88–90, 96–7.

Clause 6—Applications for protection orders

11. This clause sets out the procedure for applying for a protection order.
12. *Sub-clauses (1) and (2)* provide that the spouse or de facto spouse, or former spouse or de facto spouse, who is the victim of domestic violence may apply for the order.
13. *Sub-clause (3)* authorises police officers to apply for a protection order.
14. *Sub-clause (4)* authorises other persons (for example, social workers from the proposed Domestic Violence Unit) to apply on behalf of victims of domestic violence.
15. *Sub-clause (5)* is necessary to ensure that references in the Ordinance to ‘the applicant’ refer to the victim of domestic violence rather than the police officer or the agent who may have made an application under the sub-cl (3) or (4).

16. *Sub-clause (6)* defines the respondent to an application for a protection order.
17. *Sub-clause (7)* applies s119 of the *Court of Petty Sessions Ordinance 1930* (ACT) to applications for protection orders. Under that section, a person who has been served with a summons but does not appear as required by the summons may be arrested. Sub-cl (7) authorises the arrest of respondents to domestic violence protection order applications who similarly fail to appear as required by the application for the order.
18. *References*: Report para 91–3, 95.

Clause 7—Affidavit evidence

19. This clause provides that evidence on a protection order application may be given by affidavit and that there is no necessity to call the deponent unless there is a specific request to do so or the court requires it.
20. *Reference*: Report para 94.

Clause 8—Form of orders

21. This clause sets out some of the kinds of provisions that may be included in protection orders. C15 is the basic provision: this clause is a non-exhaustive statement of some of the provisions that may be included, for example:
 - ‘ouster’ orders;
 - orders requiring the respondent to stay away from the applicant, including from places of work and the school the children attend;
 - orders requiring the respondent to stay out of specified areas;
 - orders requiring the respondent to ensure that he or she is not drunk while at home.
22. *Sub-clause (2)* provides for what are called ‘furniture orders’. These may only be made as an addition to an ‘ouster’ order. The effect of a furniture order may be to ensure that the respondent does not ‘strip’ the home of its furniture and appliances or gives possession of furniture and appliances to one or more of the members of the family remaining in the home. A furniture order does not give the title in the property to the applicant or anyone else, it simply refers to right to possession of the property.
23. *References*: Report para 94, 99, 101.

Clause 9—Matters to be taken into account

24. *Sub-clause (1)* sets out some of the matters to which the court must have regard in determining whether to make a protection order. Particular attention is drawn to the need to ensure protection of victims of domestic violence, welfare of children of the family, accommodation needs and relative hardships that may ensue from the making of the order.
25. *Sub-clause (2)* requires the court to take into account financial resources and obligations of the parties in determining whether to make a furniture order.
26. *References*: Report para 94, 99–101.

Clause 10—Orders on applications by police, etc

27. This clause is intended to ensure that protection orders that are made reflect the needs and wishes of domestic violence victims. It provides that orders made on applications made otherwise than by victims (for example, by police) must reflect the victim’s wishes. It is designed to prevent abuse of the protection order regime, given that the kinds of orders that can be made may have extremely serious consequences for respondents.
28. *Reference*: Report para 92.

Clause 11—Notice to respondents

29. This clause provides that, in the normal case, the protection order should not be made unless the respondent has had actual notice of the application. Where, however, there are circumstances of

seriousness of urgency, an *ex parte* protection order may be made.

Clause 12—Ouster orders

30. Ouster orders, that is, orders that remove the respondent from his or her place of residence, require special provision to be made. *Sub-clause (1)* protects the interests of the respondent and other members of the family if an ouster order is made. It may be that mortgage or other agreements contain provisions requiring the family, or specified members of the family, to remain in residence in the house. The remedies of the mortgagee, etc, for a breach of this provision will not be available if the respondent is simply complying with the order in ceasing to reside in the house.
31. *Sub-clauses (2) and (3)* apply where the house is leased, rather than owned, by the respondent or members of his or her family. In these circumstances, the court may vary the lease to ensure that the lease remains with members of the respondent's family. In most cases of residential leases, this will not impose hardship on the respondent as these leases are of relatively short duration.
32. *Sub-clauses (4) and (5)* provide that leases registered under the *Real Property Ordinance 1925* (ACT) are not affected by an order under sub-cl (2) until the order is registered under that Ordinance. This is to protect the integrity of the register. Nor do orders under sub-cl (2) apply in relation to Crown leases as this is the basic form of tenure in the ACT.
33. *Sub-clause (6)* provides that, so far as the powers of the court under this section are concerned, the restriction in the *Court of Petty Sessions (Civil Jurisdiction) Ordinance 1982* (ACT) prohibiting the court from dealing with matters affecting title to land do not apply.
34. *References:* Report para 99–101.

Clause 13—Operation of protection orders

35. *Sub-clause (1)* requires that the respondent have actual notice of the individual provisions of a protection order (for example, to stay away from the place of work of the applicant or not to approach within a specified distance of the applicant) before the individual provisions become effective.
36. *Sub-clause (2)* provides that the actual notice may be given orally (perhaps over the telephone) but for ouster orders, written notice is required.
37. *Reference:* Report para 102.

Clause 14—Breach of protection order

38. *Sub-clause (1)* makes it an offence to disobey a protection order of which notice has been given in accordance with cl 11.
39. The question whether, in a particular case, a respondent who has broken a protection order should be arrested will be governed by the general law. In some cases, an arrest will be appropriate. *Sub-clause (2)* emphasises that arrest is available in accordance with the general principles, for these offences. In others, (for example where there is no likelihood of a repetition of the offence) proceedings by summons will be appropriate. *Sub-cl (3)* provides for a shortened period in the case of summons: where police decide to proceed by way of summons, the summons is to be returnable not later than 3 days after issue.
40. *Sub-clause (4)* requires that the summons be served at least one day before the hearing.
41. *Sub-clause (5)* is necessary to override provisions in the *Court of Petty Sessions Ordinance 1930* (ACT) which provide for longer periods for return and service of summons for criminal offences.
42. *Reference:* Report para 106.

Clause 15—Restriction on publication of court proceedings

43. *Sub-clause (1)* makes it an offence to publish the identity of applicants for protection orders or persons against whom protection orders have been made.
44. *Sub-clause (2)* ensures that the restriction on publication imposed by sub-clause (1) applies only to the same extent as restriction on publication of parties names in proceedings under the Family Law Act 1975 (Cth).

45. *Sub-clause (3)* provides that prosecutions for offences under this section are not to be commenced without the consent of the Attorney-General or Director of Public Prosecutions.
46. *Reference:* Report para 98.

PART III—MISCELLANEOUS

Clause 16—Bail

47. Under the present law in the ACT, the bail condition imposed by police when granting bail is simply to answer bail. *Sub-cl (1)* requires that police officers, and others, in determining whether to grant bail to a person arrested in respect of a domestic violence offence, take into account—
- the need to ensure that persons are protected from violence;
 - the welfare of any children that may be involved; and
 - hardship that may be caused to the accused or to members of his or her family.
48. *Sub-clause (2)* authorises police to impose additional conditions when granting bail for domestic violence offences. These conditions must be for the protection of persons from violence or harassment. They may include conditions—
- not to harass or molest;
 - to stay away from the victim; or
 - to refrain from drinking alcohol.
49. *Sub-clause (3)* provides for the case where police grant bail subject to one of these conditions but the accused is not able or willing to comply. In these circumstances, the accused is to be taken before a Magistrate to have the matter reviewed.
50. *Sub-clause (4)* provides that a breach of a condition imposed under sub-cl (2) forfeits the bail and the accused may re-arrested.
51. *References:* Report para 52–4.

Clauses 17—Spouses compellable in certain prosecutions

52. Under present law, a spouse of a defendant in a criminal prosecution is not compellable to give evidence for the prosecution. This clause removes this immunity where the prosecution is for a domestic violence offence. Instead, cl 18 provides for a wider but discretionary immunity. The Australian Law Reform Commission is considering the question whether the immunity should be removed in all cases and has made tentative recommendations to that effect (ALRC 26) on which this provision and cl 18 are based.
53. *Reference:* Report para 74.

Clause 18—Spouses, etc, may object to giving evidence

54. As with cl 17, this clause is based on ALRC 26.
55. *Sub-clause (1)* provides that in domestic violence offence prosecutions, spouses, and other members of the family of the defendant (for definition see cl 3) may ask to be excused from giving evidence as witnesses for the prosecution.
56. *Sub-clause (2)* requires the objection to be made as soon as possible—either before the witness gives evidence or as soon as the witness becomes aware that he or she can make the objection.
57. *Sub-clause (3)* provides for a similar objection to be made by a similar class of witnesses, but limited to evidence on communications made within the family.
58. *Sub-clause (4)* requires the court to ensure that the witness knows of his or her rights under this clause: in practice, the court will advise witnesses who appear to be members of the family of the defendant.
59. *Sub-clause (5)* requires that, for jury trials, the determination of the objection shall be in the absence of the jury.

60. *Sub-clause (6)* requires the court to determine the objection. The court must assess the harm that would be caused to the witness and to the relationship between the witness and the defendant and weigh that harm against the desirability of having all relevant evidence before the court. If, after this consideration, the court concludes that the harm involved in giving the evidence outweighs the need to obtain the evidence, the witness is to be excused from giving the evidence.
61. *Sub-clause (7)* sets out some of the considerations the court must take into account, including the nature of the offence (the desirability of having the evidence admitted increases the more serious the offence), the importance of the evidence, whether other evidence is available, the nature of the relationship between the defendant and the witness and whether to require the witness to give the evidence would involve the breaking of a confidence.
62. *Sub-clause (8)* prohibits comment by the prosecution on the fact of, or the outcome of, the objection.
63. *References:* Report para 75; ALRC 26 para 251–55, 529.

AUSTRALIAN CAPITAL TERRITORY

Police Amendment Ordinance 1986

An Ordinance to amend the *Police Ordinance 1927*

Short title

1. This Ordinance may be cited as the *Police Amendment Ordinance 1986*.

Principal Ordinance

2. The *Police Ordinance 1927* is in this Ordinance referred to as the Principal Ordinance.
3. The Principal Ordinance is amended by inserting after section 17 the following sections:

Power to enter domestic premises

“17A. (1) Where a member of the Police Force has been invited onto premises by a person apparently resident in the premises for the purpose of giving assistance to a person in the premises who has suffered, or is in imminent danger of suffering, physical injury at the hands of some other person, the member may, without warrant, enter the premises for the purpose of giving that assistance.

“(2) Where, upon application being made to a Magistrate by a member of the Police Force for the issue of a warrant under this section, the Magistrate is satisfied that—

- (a) there are reasonable grounds to suspect that a person in premises is in imminent danger of, or has suffered, physical injury at the hands of some other person and needs assistance to prevent, or deal with, the injury; and
- (b) a member of the Police Force has been refused permission to enter onto property for the purpose of giving that assistance, the Magistrate may issue a warrant in writing signed by the Magistrate authorising members of the Police Force to enter, subject to any conditions specified in the warrant, the premises for the purpose of giving that assistance.

“(3) Subject to section 17B, a Magistrate shall not issue a warrant under sub-section (2) unless a statutory declaration has been furnished to the Magistrate setting out the facts that gave rise to the suspicion mentioned in that sub-section.

“(4) In considering an application under this section, the Magistrate shall take into account, in addition to any other relevant matter—

- (a) the gravity of the injury or apprehended injury; and
- (b) whether any other suitable means are available to give the assistance.

Telephone warrants

“17B. (1) Where it is impracticable to make an application under sub-section 17A (2) in person, the application may be made by telephone or by other appropriate means of communication.

“(2) Before making an application as mentioned in sub-section (1), the applicant shall prepare a form of application and a statutory declaration as mentioned in sub-section 17A (3) but may, if it is necessary to do so, make the application before the declaration has been made.

“(3) Where a Magistrate issues a warrant in pursuance of an application made otherwise than in person, the Magistrate shall prepare and sign the warrant and inform the applicant of its terms.

“(4) The applicant shall prepare an instrument in accordance with those terms and write on it—

- (a) the time and the day on which the warrant was signed; and
- (b) the name of the Magistrate.

“(5) The applicant shall, within 24 hours after the warrant is signed, give to the Magistrate—

- (a) the instrument prepared as mentioned in sub-section (4); and

(b) the application and statutory declaration, duly completed, as mentioned in sub-section (2).

“(6) Subject to sub-section (7), so long as the warrant remains in force, the instrument prepared as mentioned in sub-section (4) may be used instead of the warrant.

“(7) A court shall not find that a member of the Police Force entered onto property in accordance with a warrant signed as mentioned in sub-section (3) unless the warrant is produced in evidence.”.

Power of police to apprehend offenders

4. Section 18 of the Principal Ordinance is amended by omitting from paragraph (e) ‘of having committed, or being about to commit,’ and substituting ‘of being about to commit’.

Explanatory Notes to Draft Police Amendment Ordinance 1986 (ACT)

Outline

1. This Ordinance amends the *Police Ordinance 1927 (ACT)* by providing for a wider power of entry for police onto private property for cases of domestic violence. It implements recommendations of the Australian Law Reform Commission in its Report on Domestic Violence (ALRC 30) (1985).

Notes on Clauses

Clause 1—Short title

2. This clause sets out the short title of the draft Ordinance. No provision is made for commencement and the Ordinance will therefore come into operation upon gazettal.

Clause 2—Principal Ordinance

3. This clause provides that the *Police Ordinance 1927 (ACT)* as the Principal Ordinance.

Clause 3

4. This clause inserts two new proposed sections into the Principal Ordinance. The two sections provide a wider power of entry onto premises for police in domestic violence cases and allow police to obtain warrants authorising such entry by police radio telephone or other like means.

Proposed section 17A—Power to enter domestic premises

5. At present, unless police are authorised to enter to make an arrest or have a warrant, their power to enter private premises is no greater than that of any other citizen.
6. *Sub-clause (1)* provides that, where the police are invited onto premises by anyone resident in the premises for the purpose of helping someone who has suffered or is about to suffer physical injury, the police may enter. At present, in strict law only the invitation of the occupier of the premises is sufficient.
7. *Proposed sub-section (2)* authorises a magistrate to grant a warrant to a police officer to enter premises to give assistance to a person who has or is about to suffer physical injury. The grounds on which the warrant is to be issued are that there are reasonable grounds to suspect that the person has suffered or is in danger of suffering such injury and that permission to enter has been refused. The warrant may be issued subject to conditions.
8. *Proposed sub-sections (3) and (4)* make procedural provision requiring that the application for the warrant be supported by a statutory declaration and requiring the magistrate to take into account, among other things, the kind of injury alleged and whether any other means of assistance are suitable and available.
9. *References:* Report para 37–8.

Proposed section 17B—Telephone Warrants

10. This clause provides for the issue by telephone of warrants under proposed s17A.
11. *Sub-clause (1)* authorises an application to be made by telephone or other appropriate means of communication where it is impracticable to make the application in person.
12. *Proposed sub-sections (2)–(5)* make procedural provision concerned with the granting of telephone warrants. The statutory declaration required by proposed sub-s 17A(3) must still be made out but need not be sworn before the application for the warrant is made. The magistrate must sign the warrant and tell the applicant of its terms: the applicant then completes a copy of the warrant writing on it when the warrant was signed and the name of the magistrate who issued it. The copy of the warrant, the application for the warrant and the statutory declaration (duly completed) must be forwarded to the magistrate within 24 hours after the warrant was issued.

13. *Proposed sub-section (6)* provides that the copy of the warrant is as effective as the warrant itself.
14. *Proposed sub-section (7)* requires that the original warrant be put in evidence in any proceedings based on the warrant.
15. *References:* Report para 37–8.

Clause 4—Power of police to apprehend offenders

This clause makes an amendment consequential upon the proposed draft Crimes Amendment Bill 1986.

Appendix B

Acknowledgments

Schedule of Organisations and Persons who made Submissions

Adventist Church

W Andrews, Snedden Hall and Gallop

ME Arnstein, Director, Canberra Marriage Counselling Service

Australian Capital Territory House of Assembly

Australian Labor Party (ACT Branch)

PH Bailey, Deputy Chairman, Human Rights Commission

P Kaye Beckwith, Co-ordinator, Citizens' Advice Bureau ACT

Sir Richard Blackburn, Former Chief Justice of the Supreme Court of the ACT

E Boyson, Co-ordinator, Migrant Resource Centre

A Brown, Chief Superintendent ACT Region, Australian Federal Police

AT Butlin, Co-ordinator, Capital Territory Health Commission

Canberra Women's Refuge Inc

D Farrar, John Faulks and Co

L Geary, The Queanbeyan District Hospital

J Greenwell, Acting Deputy Secretary, Attorney-General's Department

PJ Grills, Commissioner for Housing, Department of Territories

C Hermes, Former Chief Magistrate of ACT Court of Petty Sessions

Rev G Hunter, Family Life Committee, Presbytery of Canberra

A Langdale, Development Officer, Capital Territory Health Commission

P McDonald, Administrator, Melba Neighbourhood Centre

E McGuire, Welfare Branch, Department of Territories and Local Government

RI Pight, Acting Chief Superintendent, Australian Federal Police

E Price, Volunteer Support Counsellor, Life Line Canberra

M Raine, Canberra Rape Crisis Centre

B Rope, Former Commissioner for Housing, Department of Territories and Local Government

St Vincent de Paul Society

R Tindall, Community Services Director, South NSW Conference of the Seventh-Day Adventist Church

LM Webb, Former Commissioner for Housing, Department of Territories and Local Government

Toora Collective

A Wentworth, Executive Director, ACTCOSS

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