DOMESTIC VIOLENCE

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PREFACE

While concern about the plight of victims of family violence was influential in selecting this area for study, my concern extends to all situations where differential treatment by the legal system either directly or indirectly deprives a class or category of victims of equal access to the law to their ultimate detriment.

The thesis took, as a starting point, homicide and serious assult: Those statistics which gave the sex and relationship of victim and agggressor, concluded that such violence was more likely to be perpetrated by an acquaintance than a stranger, and that the aggressors were overwhelmingly male.

Given that the law governing assault makes no distinction based on marital status, (other than an indecent assault charge in an instance of marital rape), the hypothesis was that procedurally the entire legal system operated in a manner that distinguished assaults on the basis of whether such assaults occurred between intimates or strangers.

In other words, one law would be implemented differentially and consistently over time and in relation to a certain class of victims so that a pattern would emerge.

Rather than the whole spectrum of family violence, the focus was on spouse-assault and the factors prohibiting victims of spouse-assault from receiving the

same protection that the law on assault theoretically gives all citizens. This differential treatment, based on marital status and the relationship of victim and aggressor, is viewed both as discriminatory and ultimately disadvantageous to the victim, their spouse, their children and to the wider society.

The domestic violence law reforms in other jurisdictions are analysed. The conclusion is that only distinct domestic violence law reforms, with more appropriate sanctions and efficacious enforcement procedures and support services, will begin to afford the domestic violence victim some measure of protection.

The problem of domestic violence is not seen simply in the context of a failure of the legal system to adequately respond to spouse assaults, but as a pervasive problem embedded in the values of the wider society. Social support services are often inert or operate in a manner antithetical to the victim's interests.

The thesis contains a number of recommendations intended to give some structure and indicate principles upon which any future Tasmanian domestic violence law reforms could be based. While the thesis was limited to spouse-assault, the law reforms proposed are gender neutral, they apply to all who suffer violence, harassment and abuse and who require the law's protection to restrain the offender.

I wish to acknowledge the valuable assistance given to me in the course of this study by the various State and Federal Attorney-General's, State Police Commissioners and Police Academies, the Women's Advisors' Offices, the Office of the Status of Women, the Department of Community Welfare and Community Development in Victoria, Tasmania, and the Northern Territory, the Family Law Council, the Institutions teaching Social Welfare Courses, and the Peninsular Women's Refuge Group in Victoria.

In particular I have valued the very comprehensive advice given by Brian Gitsham of the Crisis Care Unit, Penelope Stratman of the South Australian Women's Adviser's Office, David Wehner on his group therapy program for counselling violent men, and the Acting Commissioner of the South Australian Police Department and the Office of Crime Statistics.

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CONTENTS

RECOMMENDATIONS FOR DOMESTIC VIOLENCE LAW REFORM

RECOMMENDATION (1) (Chapter 4).

That the Tasmanian JUSTICES ACT (1959) S93 (3 a & b) be amended along the lines of S99 of the South Australian JUSTICES ACT covering not only instances where the defendant has caused, threatened, or is likely unless restrained to cause personal injury or damage to property but also where the defendant has behaved in a provocative or offensive matter likely to lead to a breach of the peace and unless restrained, is likely to behave in the same or a similar manner.

- That breach of a restraint or peace order constitute an offence enabling a member of the police force to arrest without requiring a warrant.

- That the person so arrested be brought before the court within 24 hours with weekends and public holidays being excluded from this computation. Further that bail not be available for the breach of a restraint order, and police prosecute these offences.

- That a breach of a restraint order may proceed by summonses in appropriate cases.

- That when an arrest is made on a criminal assault charge that provision be made to direct the attention of the bailor to matters especially relevant to domestic violence offenders. Reference is made to Form 4A used in Bail applications under the BAIL ACT 1978 (N.S.W.) that direct attention to the accused's demeanour, whether intoxicated, whether he has previous domestic violence offence convictions, whether there is a current "apprehended domestic violence" order against him etc. The form also suggests conditions which may be attached to bail; such as an agreement not to harass/intimidate the victim, not to drink or go to licensed premises and an agreement not to enter or go near premises occupied by the victim for 12 hours.

  That the same bail conditions apply to an arrest following a domestic assault where the decision is made that the police or victim will make an application for a restraint or "apprehended domestic violence order."

- This provides that initially bail may be granted with a condition that the offender not approach the victim for 12 hours and the police or complainant will apply for a restraint order. However if this restraint order is breached by a further assault the offender may be arrested without warrant; bail will not be provided and the offender will be brought before the court immediately (if the court is sitting) otherwise within 24 hours excepting weekends and public holidays.

- That simplified procedures and forms whereby an applicant applies, varies, revokes and gives notice of a restraint be drawn up. (Refer to the South Australian Justices Act forms in the appendices to the Review).

- That provision be made for the exclusion of the violent spouse from certain premises for a specified time on similar lines to the New South Wales and South Australian reforms. e.g. S99 (5) provides that

> "A court of summary jurisdiction may make an order ... restraining the defendant from entering premises or limiting his access to premises, whether or not he has a legal or equitable interest in the premises."

Before making such an order the court is required to consider the effect of the making or the declining to make the order on the accommodation of the parties and any children involved.

- In an "ex parte" interim order is made the defendant be summonsed to appear at a later date to show cause why the interim order not be made final.

- That either the victim, police, or a third party with the consent of the court, can make application for a restraint order.

SANCTIONS FOR BREACH OF A RESTRAINT ORDER OR FOLLOWING CONVICTION ON A CRIMINAL ASSAULT CHARGE FOR SPOUSE ASSAULT

RECOMMENDATION (2)

That provision be made for the periodic detention of prisoners sentenced to imprisonment for domestic violence offences; along the lines of the New South Wales PERIODIC DENTENTIONS OF PRISONERS (DOMESTIC VIOLENCE) AMENDMENT ACT (1982) No. 117.

CRIMINAL LAW

MARITAL RAPE

RECOMMENDATION (3) (Chapter 3 [4])

That S185 (1) of the Criminal Code be amended by the removal of the words "not his wife" and thereby according married women the same protection in law as unmarried women.

Further that the laws relating to sexual offences be revised in line with the recommendations of the Law Reform Commission Report.

PROVOCATION AS A DEFENCE TO A CHARGE OF HOMICIDE

RECOMMENDATION (4) (Chapter 4 [2-C])

That the defence of provocation be widened to include cumulative provocation occurring at "any previous time causing the accuseds lose of self-control resulting in the killing." It is suggested that S160 (a) of the Criminal Code be amended along the lines of the New South Wales CRIMES (HOMICIDE) AMENDMENT ACT (1982).

This legislation both widens the scope of the defence of provocation and enables the judge to impose a lesser sentence than the mandatory life sentence for murder if it appears that the person's culpability for the crime is significantly diminished by mitigating circumstances, whether disclosed by the evidence in the trial or otherwise.

FIREARM CONTROL

RECOMMENDATION (5)

That not only must applicants be of good character, but that there be an automatic revocation of a firearm licence and a relinquishing of the weapon into police care following conviction on a domestic assault charge or the imposition of a restraint order.

While imposing stringent controls on firearms will not stop domestic violence, it is recommended that the person with whom an applicant for a gun licence co-habits be required to consent to the granting of a firearm licence and be able to apply for a revocation.

COMPELLABILITY OF SPOUSES

(Chapter 4 [2-A])

Prior to 1980 a spouse was both a competent and compellable witness in civil proceedings but not in criminal proceedings. S85 (7) (c & d) of the Evidence Act was amended in 1980 and an assaulted spouse may be compelled to give evidence against the defendant-spouse in criminal proceedings involving violence or a threat of violence.

RECOMMENDATION (6)

It is suggested that the following principles be applied:-

That a spouse only be exempt having applied to and been excused by the court on similar provisions to those provided in the New South Wales CRIMES (DOMESTIC VIOLENCE) AMENDMENT ACT (1982) S407 AA (4-2)

> That the Judge or Justice is satisfied that the application to be excused is made freely and independently of threat or any improper influence .. and regard is had to the importance of the facts on which the evidence is to be given, the availability of other evidence to establish these facts and the seriousness of the offence charges.

The South Australian EVIDENCE ACT AMENDMENT ACT (NO. 2) (1 June 1983) makes similar provisions for the exemption of certain categories of "close relatives" in defined situations.

POLICE POWERS OF ENTRY ONTO PRIVATE PREMISE TO INVESTIGATE DOMESTIC DISTURBANCES

RECOMMENDATION (7) (Chapter 6 [5])

That police powers of entry be clarified along the following lines:

- A member of the police force who believes on reasonable gorunds that a domestic violence offence is being committed or is strong grounds for believing such offence is imminent, may enter and remain on the premise for the purpose of investigating whether the offence has been committed, or taking action to prevent the commission or further commission of such offence.

  A member of the police force who has reasonable grounds for believing that a domestic violence offence has been committed or is likely to be committed may request entrance into the premises and enter on the invitation of a family member or person who apparently resides in the premises, irrespective of whether the invitee is an adult or child. If the authority to enter and remain is expressly refused or revoked by an adult-occupier in the absence of evidence that a domestic violence offence has been or is being committed or is likely to be committed, the police officer will be required to leave the premises and any subsequent entrance in the absence of further grounds on which to form a belief that such an offence is being committed or imminent, will be required to be by warrant.

  Consideration be given to making provision for entry by radio/telephone etc. warrant, where entry is denied. (N.S.W. S357 G 1-13).

  Having entered the premises by reason of an invitation, and having establish the presence of the person upon whom it appears a domestic violence offence has been or is likely to be committed, the police may remain to investigate those circumstances irrespective of the express refusal to remain by the invitee or any other occupier.

  Where a member of the police force enters premises on the belief that a domestic violence offence is being committed or is imminent, or by invitation or warrant in instances where there are reasonable grounds for believing that a domestic violence offence has been committed, is being committed, is imminent or likely to be committed the member of

the police force shall

(a) take only such action in the premises as is reasonably necessary

(i) to investigate whether such an offence has been committed

(ii) to render aid to any person who appears to be injured

(iii) to exercise any lawful power to arrest a person

(iv) to prevent the commission or further commission of such offence

(v) to inform to persons involved of the availability of any service relevant to their needs, and to seek their permission in contacting such a service and if necessary awaiting for the arrival of a representative of that service before departing. Services shall not be specified in legislation but will include women's refuges, crisis care units etc.

A member of the police force shall only remain on private premises as long as strictly necessary to investigate, aid, and take any necessary action concerning the domestic violence incident.

RESTRAINT ORDER UNIT

RECOMMENDATION (8) (Chapter 4 [3])

That a Restraint Order Unit be set up within the Police Department with a central data bank on all current restraint orders including Family Law Court restraint orders irrespective of whether a power of arrest is attached.

That it be police policy to act as complainant in applying for restraint orders in instances of domestic violence unless the complaint is considered without merit. That police prosecute all breaches of restraint orders. That a system of statistical collection be introduced, (similar to the South Australian Police system - details of the format, 6 Tally Forms and operational police officers Domestic Dispute Report are in the Appendices to this Review) and that State Government support be given to the Australian Institute of Criminology proposal to establish a computerised legal information retrieval system, linking information systems serving the police, the courts, prisons and related organisations.

The following extract from the submission of Maureen Ellen Thompson is pertinent both to a Police Restraint Order Unit and Supervised Child Access Centres:

> "A few weeks ago I finally got around to taking the restraining order on my husband down to the police station after it dawned on me that the separation wasn't finished and I was in plenty of vulnerable situations with my husband when he came to visit the children at our home (twice, in public situations when we were exchanging the children he had yelled verbal abuse at me). To my surprise the police didn't keep a copy of the order even though I specifically brought them a copy. The policeman on the desk refused it, saying that I should have a copy with me at all times and that would be protection enough as any citizen is protected by law from assault.

My original understanding was that the police were reluctant to involve themselves in a family 'private dispute' unless there was a restraining order and that a copy kept at the police station expedited police action should there be an assault. I hope I never have to find out."

OFFICE OF CRIME STATISTICS

RECOMMENDATION (9)

That an office be established either within the Law Department or the Police Department to collaborate in evaluating and reporting on criminal matters, restraint orders etc. on similar lines to New South Wales and South Australia with sufficient uniformity to enable State comparisons.

THE PERSONAL ACCOUNTABILITY OF POLICE TO TORTS COMMITTED IN THE COURSE OF THEIR EMPLOYMENT

RECOMMENDATION (10) (Chapter 6 [8])

That the rule exempting the Crown or police authorities from vicarious liability for torts committed by police officers in the course of exercising independent statutory discretions be abolished by statute.

That such reforms approximate the New Zealand CROWN PROCEEDING ACT (1950); the English POLICE ACT (1964) S48 (1) or the Western Australian statute that grants police immunity from civil liability for any purported exercise of powers under the POLICE ACT (1892-1970) unless there is direct proof of corruption or malice. Even then a Crown right of indemnity may be preferable.

That for purposes of identification operational police be required to wear name-plates.

COMMONWEALTH MATTERS

RECOMMENDATION (11) (Chapter 5 [2])

That the following recommendations concerning the operation of the Family Law Act, the method of recording restraint orders, the level of funding required to enable the Institute of Family Studies to compile comprehensive statistics concerning marriage, divorce, and evaluation of the court system; the preservation of State laws pertaining to domestic violence, and endorsement of the proposal to establish a National agency for the collection of Maintenance, be forwarded to the Federal attorney-General.

Further that consideration be given to the establishment of "access centres" with counselling services, and that a recommendation be made to the National Inquiry into Matrimonial Property concerning deliberate waste of matrimonial

assets, the malicious destruction of matrimonial property and rights of restitution.

FAMILY LAW ACT

RECOMMENDATION (12)

That S114 AA(6) providing that the power of arrest cease to have effect six months after the date specified in the order, include the additional phrase "or until further order" to cover intractable harassment likely to exceed six month's duration.

That all actions for contempt be the responsibility of a Federally appointed law officer. That where appropriate the complainant alleging that the non-molestation order has been breached be able to provide evidence of this by affidavit to avoid appearing in court.

That the regulations concerning the attachment of a power of arrest direct that the judge

- attach a power of arrest to all "ex parte" orders concerning personal safety
- attach a power of arrest once a complaint has been filed that a personal safety or exclusion order has been breached
- attach a power of arrest automatically once it is established that a personal safety or exclusion order has been breached
- that the judge in all other cases when exercising his discretion as to whether or not to attach a power of arrest:-
    - to give priority to the victim's need for protection and the utility of the arrest power in clarifying the enforcement function of the State police should any violent incidents subsequently occur.
    - to treat it as exceptional not to attach a power of arrest in all cases other than where the violence is an isolated instance of abuse, where the injury and threats were not serious, and where there is a formal undertaking by the offender, acquiescenced by the victim that such behaviour will not be repeated and there appears to the Court highly probable that the violence or offending behaviour will not be repeated.

That caution be exercised in deeming an "ex parte" application "unmeritorious" and consideration be given to the extreme difficulties faced by the victim of family violence who seeks to invoke the law's protection while still co-habiting with her violent spouse.

RECOMMENDATION (13)

That a central data bank, preferably operating within the Tasmanian Police Department record all restraint orders and the terms and duration of such orders. That local police investigating domestic violence incidents be

directed to check with Head Office to determine whether such an order is current.

That a register be kept of persons who were formerly the subject of a restraint order, to be used in conjunction with police records to more accurately predict the level of violence and the action to be taken.

RECOMMENDATION (14)

That the Institute of Family Studies receive sufficient resource to compile adequate statistics to establish an accurate profile of what actually happens in the Family Court and to Australian marriage; in particular statistics on non-molestation injunctions, breaches and sanctions, exclusion orders and maintenance applications, orders, defaults and arrears. That central statistics giving a nation-wide profile be kept on all related family matters handled by State courts.

RECOMMENDATION (15)

That a National Agency for the Collection of Maintenance as proposed by the Attorney-General be established.

That as in South Australia the Department for Community Welfare assist with negotiating maintenance agreements but that the Family Court be responsible for registration of maintenance agreement, collection, disbursement, actions for enforcement and collecting arrears along the lines of the Western Australian Family Court.

That it be compulsory when the maintenance recipient is a pensioner, that payments be made through the Court account and that privately and annual receipts be sent to the Department of Social Security.

That the Court employ skilled actuarists and accountants to assess claims and the party's income and assets, and access be given to taxation records to assist in verifying claims.

RECOMMENDATION (16) (Chapter 4 [3])

That proposals to amend the Family Law Act to preserve the effect of State domestic violence laws, be supported. Reference is made to the case of TAPE v PIORO (S.A. S.C. 21.3.1983) which involved the relationship between the State Justices Act restraint orders and the Family Law Act injunction.

It is considered imperative that a domestic violence victim be able to resort to seeking protection by applying for a restraint order in a court of summary jurisdiction; and that this only be limited if a Family Law Court non-molestation order is in force or has been applied for.

RELATIONSHIP BETWEEN THE COMMONWEALTH FAMILY LAW ACT AND STATE LAWS COVERING INFORMAL MARRIAGES

RECOMMENDATION (17)

That it is essential that those injunctive remedies available to married persons under the Family Law Act be available to those in informal marital relationships through the equity division of the State Supreme Courts. It is anomalous that personal safety injunctions and the regulation of occupancy of the family home in situations of violence are only available to formally married persons when the family circumstances may be identical.

RECOMMENDATION (18)

TASMANIAN MAINTENANCE ACT (1967)

That the Act be amended to create reciprocal maintenance obligations between de facto spouses as applies between marital partners under the Family Law Act.

That the provision for 12 months co-habitation remain but a dependency test apply so that where one party in the de facto marriage has altered their situation to their own detriment to the benefit or advantage of the other, then the stipulation for 12 months to elapse to establish the existence of an informal marriage, need not apply.

RECOMMENDATION (19)

MALICIOUS DAMAGE OF MATRIMONIAL PROPERTY

That consideration be given to a community of property where each spouse is deemed to share the equity in the property in equal shares and be liable to the other for malicious waste, irrespective of financial contribution.

That where an extranged spouse cannot make an insurance claim as a consequence of the malicious damage being done by a member of the insurer's household (if they are technically still married) a claim will lie against the other for the value of half the property irrespective of financial contribution, and for the entire value if that property was acquired prior to the marriage, a gift during marriage or purchased subsequent to the parties separating.

LEGAL SERVICES PROVIDING ASSISTANCE TO CLIENTS

VICTIM SUPPORT SCHEMES

RECOMMENDATION (20)

Any scheme funded to provide assistance and support to crime victims shall not exclude victims of family violence. Where possible a Victim Support Scheme in relation to this category of victims will attempt to facilitate the victim's access into appropriate services directed to the individual's particular needs

as much as the needs of the family affected by the violence.

CRIMINAL INJURIES COMPENSATION ACT (1976)

RECOMMENDATION (21) (Chapter 7 [2])

That regulations direct that the court in applying S5 (1)

> i.e. whether the applicant for compensation directly or indirectly contributed to the injury ...

disregard evidence of domestic assaults prior to the assault on which the compensation claim is based. The existence of a violent relationship shall not be presumed to constitute evidence inferring that the victim assumed a risk of injury knowing her spouse to be violent.

Where the domestic violence victim acts in retaliation, self-defence, evasion or in response to an apprehended threat and is injured this will not be evidence of participation contributing to the injury, but as a response to an assault in circumstances where her personal safety is at risk.

LEGAL AID

RECOMMENDATION (22) (Chapter 7 [5])

That the Australian Legal Aid Office and the Tasmanian Law Society Legal Assistance Scheme formulate a common policy re the criteria for determining eligibility for legal aid based on a means-test; for determing the merits of cases, and the amount of assistance to which the applicant is entitled.

That the Tasmanian Law Society retain a discretion to operate outside guidelines under this common policy, but that such assistance not exceed 25% of legally funded assistance granted each year.

LEGAI AID TO A COMPLAINANT

RECOMMENDATION (23)

It is essential that legal representation and legal aid be available for people taking out summonses for assault. That the availability of such aid be publicized, and that such information be included in a domestic violence leaflet and handed by police and other agencies, to all persons involved in domestic disturbances and whenever advice is given (by police or other agency) that the victim lay their own assault complaint.

ASSAULTS ON FORMER PARTNERS LIVING APART

RECOMMENDATION (24)

That a very rigirous law enforcement apply to make it clear that unconditional support will be given to assault victims determined to escape from a violent relationship.

That police, legal practitioners be made aware of the potential seriousness of the violence perpetrated on estranged spouses; that approximately one-third of reported assaults occur after the assailant and victim no longer live together; that such assaults carry a high potential for homicide and require strong deterrent action.

RECOMMENDATIONS CONCERNING SOCIAL SUPPORT SERVICES

CRISIS INTERVENTION

There is a critical need for all statutory and voluntary organisations whose service could be providing assistance and support to domestic violence victims to consult and determine the most feasible means of co-ordinating existing services.

It would seem imperative that such a service be mobile, able to intervene promptly in family or personal crisis situations if called upon by police, be available on shift till approximately 3 a.m. at high risk times (from Friday evenings, through the weekend and public holidays) and facilitate the access of the person requiring assistance into services e.g. women's refuges. In other words resemble a crisis intervention or crisis care service.

The service would need to incorporate a Women's Information Switchboard, possibly be located in a Women's Health Centre, or alternatively Community Health or as an extension of Community Welfare as in South Australia. Information, such as the South Australian pamphlet "Is There Violence In Your Home? You can do something about it" (distributed both by the police and through super-markets), and TELECOM recorded information as well as direct phone information and "at home" advice, is necessary.

The service would need to have a facilitative agency function; to be able to respond to a crisis, co-operate with the police and take over the immediate welfare service-counselling role and in turn co-ordinate the resources needed by the woman and assist her in overcoming obstacles in order that "support" services become more responsive to her needs.

RECOMENDATION (1)

That consultation take place to discuss these options and alternative strategies to make existing statutory and voluntary services better known, better co-ordinated and more effective in meeting the needs of victims of family violence.

CHILDREN IN VIOLENT HOMES

Providing such children with alternative models and safe environments has obvious implications for child-care policies, practices and fee subsidisation. However "rescuing" infants by the provision of good day-care is doomed to failure without the intervention of services to support the victim and alter the assaultive behaviour.

RECOMMENDATION (2)

That the child-care component in women's refuges be adequately funded.

That related follow-up support groups of women who have suffered family violence be funded and include provision for child-care programs.

That the Federal Children's Services Programme funding and policies and the State Health, Education and Child Care Services recognise the welfare and special needs of vulnerable children from violent families; the "cycle of abuse" and the overlap between violence to women and the non-accidental injury to children and develop adequate service in response to these needs.

SUPERVISED CHILD ACCESS CENTRES

Considerable antagonism and stress accompanies a marriage breakdown including resentments about sharing property, contributing to children's maintenance and access to children. A number of serious assaults occure in the course of access.

RECOMMENDATION (3)

That existing child-care services be utilized in the weekends with a funding component to provide for a day-care service orientated towards providing a place where children and non-custodial parents can conduct their access visit; that it serve as a "neutral" place for the divorced parents to leave and collect children for access, and that counselling and parent group discussion sessions be included.

That where no Centre exists Department for Community Welfare homes be utilized or Family Day Care providing an additionalfunding component subsidizing the additional costs of weekend care; and the homes are collection points not providing full day care.

FAMILY VIOLENCE AND ABUSE OF DEPENDANT FAMILY MEMBERS

Infancy and old age, ill health, mental and physical incapacity, even pregnancy, all carry with them a degree of dependency upon another sometimes beyond that person's capacity to cope and retain their own control over their lives. Such stress can cause abuse.

RECOMMENDATION (4)

A variety of family support programmes such as day-care, crisis-care, temporary residential care and flexible transport services are essential along with adequate domicilliary services to alleviate stress and assist with the care of the dependent person. Such care should be integrated into family support programmes and not be a remedial reactive response only proferred when the family can no longer cope.

SUPPORT FOR WOMEN WITHIN VIOLENT RELATIONSHIPS

Women are trapped in or committed to marriage by a complex inter-relationship of factors and any provision of services must encompass the needs of women who wish to remain married as well as those who wish to leave.

RECOMMENDATION (5)

Services for women remaining in violent relationships would include

- counselling for violent men, possibly along the lines of the group therapy programme funded by the South Australian Health Commission.
- support and personal counselling for women in order that she may better assess her situation and understand the long term consequences of such violence upon herself and her children.
- provide programmes directed at reducing the isolat on of women at home, developing self-confidence, assertiveness, self-esteem, good health care practices and re-education into skills necessary for both work-force participation and towards making women more self-sufficient and less dependant.

COMMUNITY EDUCATION

RECOMMENDATION (6)

That considerable effort be made to counteract stereotypes of female subordinat on and passivity and male authority and aggression which underlies beliefs that violence towards women is a normal part of marital relations. This would include:

- revision of school curriculae and texts that reinforce the subordinate view of women
- human relationship programmes that develop in children a greater understanding of the pract cal and personal difficulties which may arise in later marriage and parenthood
- a development of values of personal responsibility of interpersonal relationships; concepts of fairness; equity and honesty to develop mutual co-operation whether applicable in "public" or "private" life.
- Pamphelts, booklets, posters and TELECOM recorded messages (where possible multi lingual) to inform victims of violence or people in crisis of their rights and which services can assist them.
- Education statutory and voluntary agencies coming into contact with victims of violence that such violence is serious and often prolonged and not simply a "marital tiff".

  That by the time the battered women seeks agency accistance the violence has generally escalated in seriousness and frequency and the women must be given all the necessary assistance should they wish to separate from their violent partners even if the respite is only temporary, and agency views about "reconciliation" preventing "family breakdown" should not pressure or oppress battered women into accepting this as the only available option.

- *The training programmes of social, medical and legal agencies should include the topic of domestic violence, and practitioners taught to identify family stress and violence, to be sensitized to the social dynamics of family life and the co-relationship of violence with alcohol abuse, unemployment, debt, emotional immaturity, lack of self-control and pervasive stereotypes of male dominance and female subordination.*

  Such training would include crisis intervention and collaborative methods of working with families within a service structure. This approach would recognise the limitations of a welfare-orientated approach to violence and alert officers not to collude with violent spouses or parents whose behaviour they are attempting to alter, in circumstances where authoritive legal intervention is more appropriate.

- *An agency's subscription to its own beliefs about how to handle family violence shouldn't invalidate the victim or other agencies' beliefs and where agencies cannot meet these needs themselves they should refer women to an agency which can and should liaise with that agency on the woman's behalf.*

RESOURCE BASED ASSISTANCE

The most immediate needs of women seeking help about violence are usually for protection and emergency accommodation; and secondly for financial assistance.

RECOMMENDATION (7)

Resource based assistance needs to include adequate:-

- *emergency and longer term accommodation*
- *bond and rental assistance*
- *child care services and fee subsidisation*
- *means tested rebates on statutory charges for all low-income people*
- *assisted health, life and property insurance*
- *legal aid, advice and representation*
- *agencies for the collection of private maintenance for all children irrespective of the marital status of parents*
- *less disincentives to earning a part-income to supplement a pension or benefit*

STRUCTURAL CHANGES CONCERNING THE STATUS OF WOMEN

The economic dependence and inequality of women is a major causal factor in violence against women leaving women few options other than to remain in a violent relationship.

RECOMMENDATION (8)

- That major structural changes in education and employment be aimed at breaking down the segregation of the work-force and reducing the income differentials between males and females.

- That affirmative action polices be adopted.

- That sole parents in receipt of a pension who wish to supplement their income be assisted to do so, and that the disincentives inherent in the operation of the reducing pension, taxation, and child-care fees etc. be examined, along with general issues relating to poverty and sole parent families.

WOMEN'S REFUGES

RECOMMENDATION (9)

That adequate funds be provided to provide award wages on a 24 hour roster; to expand crisis and temporary accommodation; to operate bond and rental subsidisation schemes and participate in alternative forms of housing tenancy such as collectives; to participate in Women's Information Switchboard or similar programmes; to conduct child-care and follow-up support services and to be able to operate effectively as advocates on issues or for particular individuals.

HOUSING: PRIVATE RENTAL SECTOR, PUBLIC HOUSING AND HOME OWNERSHIP LOAN POLICIES

RECOMMENDATION (10)

- Legislation and strategies to reduce discrimination in the private rent sector against children and in particular low-income sole female parents, is essential.

- The policies and practices of the Agricultural Bank in assisting the better off eligible applicant as opposed to a full range of eligible lower income applicants needs to be critically examined and the intent of subsidising home loan finance to lower income families given greater effect.

- While the intention of Private Sector Rent Subsidies to low income families is approved, it is essential that Public Housing provide a range of options including collectives, and taking a head-lease and subletting, or perhaps acting on an agency basis for private landlords. Means of closing the widening gap between those who have work, capital, access to finance, and home ownership and those who do not, must be part of an overall housing strategy.

- Local Government zoning regulations prohibiting "boarding houses" should grant an exemption to women's refuges to enable such accommodation to be provided in all residential areas, in order that the resources and infra-structure of all residential areas be able to be utilized by women and children seeking temporary emergency accommodation.

- That a register of all government vacant housing stock be kept and that such stock be utilized for temporary emergency accommodation.

- The HOUSING COMMISSION give attention to the needs of applicants to be located near friends, relatives, services etc. and a rigid application of requirements that formal custody of children be granted before alternative accommodation be granted, and that rent arrears accruing from a joint-tenancy prior to the violent relationship breaking down, not prohibit women from being entitled to alternative accommodation.

CHAPTER ONE

INTRODUCTION

(1) THE PROPOSED TASMANIAN DOMESTIC VIOLENCE LAW REFORMS

The intention of the proposed reforms is to provide a broad scheme of protective orders with immediate enforcement mechanisms and more appropriate sanctions.

The reforms are intended to offer more immediate protection and assistance to victims of domestic violence and more effective remedies than exist at present. The reforms in isolation will do little to alleviate the plight of the victim of family violence. A comprehensive range of community services are necessary to aid both victim and offender, and more apporpriate strategies developed for intervention at a time of family crisis to render more effective assistance. It is necessary to find more satisfactory means of making existing services more responsive, accessible and useful to victims of family violence.

The reforms are intended to clarify police powers in order that they can fulfill both their service role and their law enforcement role more effectively. The reforms seek to clarify police powers of entry onto private premises, to remove their personal liability for torts committed while exercising "independant statutory discretions", and to provide a legal structure enabling police to play a more effective role in dealing with violent domestic disputes. Powers of entry assist investigation, conditions of bail are aimed at preventing an immediate repetition of the assault, and in situations where a restraint order is breached and the offender arrested, no provision is made for bail. A breach of a restraint order from a court of summary jurisdiction constitutes an offence prosecuted by police. The initial complaint and application for a restraining order can be made by the victim, the police, or a third party. In domestic violence incidences it is recommended that police adopt a policy whereby they apply for the restraining order under the Amended Justices Act.

Provision is made to restrain injury to a person or property and also for an order excluding the offender from a premise or place or part thereof, irrespective of property interests, and to restrain offensive behaviour.

With respect to the criminal law recommendations are made concerning the abolition of the husband's immunity from prosecution for marital rape, and an alteration to the defence of provocation in murder to include cumulative abuse occurring either contemporaneous with the fatal killing, or at "any previous time". It is considered that a statutory embodiment that assaults and other forms of violence in the domestic environment will be treated in the same way as violence and assaults in other circumstances is necessary, and this could provide in S55 that married persons incur the same criminal responsibility in respects of their acts as unmarried persons, and the same criminal responsibility in respect of acts relating to their spouse as to all other persons.

Reference is made to the Supreme Court injunctive powers and the desirability of giving "de facto" spouses similar remedies to a married person, and the amending of the Maintenance Act to create reciprocal obligations and introduce

a dependency test.

The Report advises that the State government refer those recommendations pertaining to the Family Law Act to the Federal Attorney-General, and consult on those areas where there is an inter-relationship between Federal and State Family Law and services.

Further that laws to secure the equal status of women will assist in alleviating violence against women.

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(2) A SUMMARY OF DOMESTIC VIOLENCE LAW REFORMS IN OTHER AUSTRALIAN STATES, ENABLING RESTRAINT/PEACE/ APPREHENDED DOMESTIC VIOLENCE ORDERS TO BE MADE BY COURTS OF SUMMARY JURISDICTION

In New South Wales the CRIMES ACT (1900) has been amended by the CRIMES (DOMESTIC VIOLENCE) AMENDMENT ACT (1982) and Schedule 3 makes provision for a complaint to be made to a court of summary jurisdiction, and if the court considers on the balance of probabilities that there are reasonable grounds for fearing further assault an "apprehended violence order" may be imposed for a period not exceeding 6 months with such restrictions or prohibitions on the behaviour of the defendant as appear necessary.

This includes restricting the offender from the person's place of work or excluding the offender from premises irrespective of whether the offender has a legal or equitable interest in those premises or place.

Failure to comply with such an order is an offence enabling the police to arrest without a warrant.

The domestic violence reforms in New South Wales, South Australia and Queensland all provide that once the order has been personally served on the defendant a breach of the order is an arrestable offence. In South Australia no bail will be granted. The New South Wales legislation and the South Australian legislation provide for a term of imprisonment not exceeding 6 months and Queensland not exceeding one year or $1,000 fine. A sentence of imprisonment may be suspended; or in the case of New South Wales the Periodic Detention of Prisoners (Domestic Violence) Amendment Act (1982) may lead to sessional imprisonment e.g. weekends.

The primary distinction between the New South Wales reforms and the JUSTICES ACT and PEACE AND GOOD BEHAVIOUR ACT REFORMS IN South Australia and Queensland, is that the New South Wales "domestic violence offence" only

applies to married and de facto spouses whereas the South Australian and Queensland reforms essentially apply to restraining violent and offensive behaviour in the community - irrespective of marital status. e.g. the dispute may be between neighbours, persons sharing accommodation, or strangers.

It is essentially "peace keeping" legislation designed to give more protection from violent, harassing or offending behaviour, more effective remedies and speedier enforcement procedures.

The Queensland provisions are similar to the Tasmanian JUSTICES ACT inasmuch as they focus on personal injury and property damage. The South Australian provisions extend to provocative or offensive behaviour, and provide (as in New South Wales, New Zealand and England) for an exclusion and occupancy order excluding the violent spouses from the property if the accommodation needs of the other spouse and children prevail.

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CHAPTER TWO

(1) AUSTRALIAN RESEARCH INTO DOMESTIC VIOLENCE

A Summary of the Incidence, Profiles of Victim and Attacker and Causes:

Inadequate statistics, underreporting, arrest-avoidance and a reluctance to take legal action are some factors that make the incidence of domestic assault notoriously difficult to assess. Indications are that the abuse of dependent and vulnerable family members is widespread. The extent and seriousness of family violence is emerging from a variety of sources; Office of Crime Statistics Reports in New South Wales and South Australia; Crisis Care Unit, Police and Crime Statistics in South Australia; the Australian Bureau of Statistics National Crimes Victims Survey 1975 and the Australian Institute of Criminology Reports "Women as Victims of Crime" (1975) and "Violence in the Family". Symposiums and Conferences such as the National Symposium on Victimology (1981), the Criminal Injustice System (1981), the South Australian Domestic Violence Seminars (1978, 1979) and Conference (1983) have added to the foundations laid by the Royal Commission on Human Relationships (1975-76), the two surverys undertaken by the Commission, and the International Women's Year funding of research by O'Donnell and Saville into "Domestic Violence, and Sex and Class Inequality". The New South Wales and South Australian Task Forces on Domestic Violence conducted "phone-in" and questionnaire surveys; the Northern Territory similarly conducted a "phone-in". The New South Wales and South Australian Task Force Reports have resulted in domestic violence law reforms; reviews are currently being conducted in Victoria, Tasamnia and the Northern Territory, law reform has been effected in Queensland.

Surveys using Community Justice Centre, Legal Aid, and Women's Health Centre files have indicated the proportion concerned with family violence. Accommodation figures from Australian women's refuges, including those not accommodated due to lack of space, give the raw figures of persons approaching these agencies for assistance. Surveys of records of police calls and incidence cards have been used to estimate the proportion of domestic violence calls to all peace-keeping calls, and intensive statistical data is currently being collected by the South Australian Police Department.

Reference is made to United States and British research. A relationship is drawn between homicide and non-fatal serious assaults and the percentage where the crime is between spouses or intimates and the assailants overwhelmingly male, in order to indicate that these are extreme cases of more widespread domestic violence.

The surveys which attempt to establish a profile of victim and attacker have focused on their education, occupation, employment status; the duration of the relationship, the frequency and nature of the violence, the perceived causes and whether a weapon was used or threatened; the victim's response, the agencies used and their perceived usefulness or otherwise, the factors that inhibited her from leaving the relationship; the age range and ages where most violence occurred, the effects on children; family background, class, race ...

These studies are essentially pragmatic inasmuch as they are seeking to explore the dimensions of family violence in Australia in order to obtain a better response from the various agencies on the inter-face of family crisis and a more appropriate response from the legal system.

The causes are acknowledged as complex. Some limit their perspective to individual psychopathy, others social variables (such as alcohol, and the stresses associated with unemployment etc.) whereas others don't deny that these factors play a part in violence against women but the fundamental basis of this abuse is considered to be embedded in the very structure of society; its institutions, practices and the unequal status of women in society.

The vulnerability of women will only be reduced by measures to improve women's status and full participation in the political, economic and social life of the community. As the most vulnerable and by far the largest group of abused women are housewives with dependent children, any efforts to improve the status of women will need to encompass all women.

(2) INCIDENCE OF DOMESTIC VIOLENCE AND AUSTRALIAN RESEARCH

The incidence of Domestic Violence in Tasmania as elsewhere, is notoriously difficult to assess. Such studies that do exist give little indication of the prevalence of family violence predominantly because of inadequate crime statistics, diversion from the criminal justice system by e.g. police reluctance to arrest and prosecute, or record incidence where no action was taken, and in the shroud of silence that envelopes family violence. Family violence is vastly unreported and is the "missing statistic" on the official files.

The most useful indicators come from accommodation figures in women's refuges. For example in New South Wales in 1980, 11,000 women and children were sheltered in the 33 refuges in New South Wales and a further 3,000 women and children turned away due to lack of space.

Other useful indicators come from services such as the Crisis Care Unit in South Australia who received approximately 39,000 crisis telephone calls in the last 12 months and about 75% of the 2,100 "in-home" responses were of a domestic nature. Similarly Community Justice Centres in New South Wales can indicate what proportion of their services are a response to domestic crisis.

New South Wales and South Australia have established Offices of Crime Statistics. In 1975 the New South Wales Office carried out a study of domestic assault cases handled by Chamber Magistrates in 22 court houses; the Report states that

> "While it is important to gain some idea of the extent of domestic assaults in the community, knowing the prevalence of such assaults is in some ways less important than knowing about their severity, the context in which they occur and the action taken by the victims."[1.]

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1. JOHNSON, ROSS, VINSON. N.S.W. BUREAU OF CRIME STATISTICS & RESEARCH. Report 5, Series 2. 1975. Mid April - end of June page 2.

Their questionnaire, like those that followed, attempted to draw a comprehensive profile of the victim and offender, the pattern of assault, its seriousness and factors such as the context in which the violence occurred, any legal action taken and approaches to agencies.

In South Australia the Homicide and Serious Assault Report[2.] emphasizes the importance of informative statistics particularly in relation to the victim-offender relationship, as most homicides and serious assaults are perpetrated by relatives or acquaintances. A detailed analysis of the 12 months (1.7.82) following the domestic violence legislative reforms in South Australia, will identify matters such as the restraint orders placed on husbands who assault wives and actions for breaches of these orders.

Only when such systematic data[3.] is routinely collected from a variety of sources will a more comprehensive perspective on violence emerge. This in turn will shape a more rational allocation of resources directed at preventing and controlling domestic violence, and alleviating the plight of victims.

The evidence to the Royal Commission on Human Relationships led them to "believe that family violence is common in Australian society; (and) occurs across lines of class, race and age. (also) That the damage done to women and children is often severe."[4.]

Ann Deveson, one of the Commissioners; acknowledges that "Research is limited. We have little idea of the extent of the problem except that it is vast."[5.]

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2. SERIES II No. 9 Nov. 1981. A-G Dept. Office of Crime Statistic: Grabosky PN.

3. The same comments apply to the collection of Family Law Court Statistics refer page 113-114

4. AUSTRALIAN R.C. ON HUMAN RELATIONSHIPS. FINAL REPORT VOL. 4. AGPS CANBERRA, (1977) page 133 para. 5.

5. ANN DEVESON AUSTRALIANS AT RISK N.S.W. 1978 p.100

The Royal Commission's own research consisted of:

(a) a study by Christina Gibbeson of 111 women who had sought accommodation at Elsie Womens Refuge in Sydney between late 1975 and early 1976;

(b) a "phone-in" conducted in February 1976 which resulted in 65 women reporting domestic violence.

In 1975 the Australian Bureau of Statistics conducted a National Crime Victims survey. The A.B.S. conducted 18,694 interviews in randomly selected households throughout Australia to elicit information about crime victims in the previous 12 months. Ten types of crime were included including assault, defined as an

"unlawful attack by one person upon another for the purpose of inflicting bodily injury."

The victimisation rates per 100,000 population 15 years and over, revealed the Tasmanian average of 1840.3 to compare favourably with the Australian average of 2,305 per 100,000.

"The lower victimisation rates were reported in Tasmania for 4 of the offence categories."

The Australian Institute of Criminology published the "Women as Victims of Crime" Report by John Noble in 1975. Reference is made to a 1973 New South Wales study of over 5,500 cases of assaulted women that came before the New South Wales Courts where some 52.1% or about 3,000 cases lapsed through want of prosecution.[6.]

In 1975 the Australian International Women's Year Secretariat funded a research project on "Domestic Violence and sex and class inequality" by Carol O'Donnell and Heather Saville. These researchers also

"believe that it is impossible to ascertain the real incidence of domestic violence in our society."

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6. A.I.C. Canberra 1975 p8

They attribute this in part to cultural expectations of marital harmony, belief in the sanctity of marriage, the role of women as it is enshrined in the economic, social and legal processes of Australian society, and the attitude that abuse is a private matter and the fear of violent reprisals against both victims of violence and investigators.

The researchers interviewed 145 women in New South Wales.

In South Australia domestic violence Seminars were held in February 1978 and May 1979, and a multi-disciplinary Committee formed that reported in November 1981. Many of their recommendaitons became the basis of subsequent law reforms. The South Australian Women's Information Switchboard opened in July 1978, and conducted their "Domestic Violence Phone-In" survey in September 1980. The Women's Information Switchboard in conjunction with the Women's Adviser's Office in the Premier's Department has undertaken a community education task publishing and distributing domestic violence pamphlets and a Workers Information Handbook on the domestic violence law reforms and procedures. The South Australian "Committee of Inquiry into Victims of Crime" also reported in 1981; making some 67 recommendations many relating to changes in procedure relieving most sexual assault victims of having to testify at committal procedings and altering the law of evidence to prohibit cross-examination on the previous sexual history of sexual assault victims.

The National Symposium on Victimology was also held in South Australia in 1981 and the Proceedings printed by the Australian Institute of Criminology. Various papers dealt with the domestic violence victim.

The Institute also published the papers from the Conference on "Violence in the Family."[7].

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7. editor. J. Scutt. A.I.C. Canberra. 1980.

In New South Wales a Domestic Violence Fask Force was established which reported to the Premier in July 1981. A number of its recommendations for law reforms have been enacted but as yet very little action has been evident in response to the other recommendations that sought to grapple with the social conditions and processes which are conducive to violence.

The Task Force received 451 responses from the questionnaires it placed in the Sunday Telegraph from which it sought to elicit the seriousness of violence and the use and effectiveness of existing services and support systems. The survey report was prepared by the New South Wales Bureau of Crime Statistics and Research. This survey was supplemented by submissions from Refuges including the Lismore Women's Refuge with 45 callers.

The "Criminal Injustice System Conference" was also held in Sydney in 1981, and included research papers such as "Women Homicide Offenders and Police Interrogation". Other studies on family violence[8]. and women, both as homicide victims and offenders, have led to a revision of the defence of provocation and an acceptance, through amendments to the New South Wales criminal law, that cumulative provocation which typically involves violent or cruel conduct lasting over a number of years and results in the victim retaliating by killing her tormentor, can constitute provocation in law reducing murder to manslaughter.

The Victorian, Northern Territory and Tasmanian State Governments are all currently conducting Inquiries into Domestic Violence. The New South Wales and South Australian Task Forces have each reported and reforms have been enacted, but each continues to assess the impact of the law reforms while pressing for more long-term structural changes. Queensland amendments to the "peace orders" legislation is being monitored by the State Justices Department.

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8. Judith Allen. "The invention of the pathological family: a historical study of family violence in New South Wales" O'Donnell Family Violence in Australia Ch. 1 1982.

Dr. S.J. Egger N.S.W. Bureau of Crime Statistics and Research 1981 "Victims of Women Homicide Offenders in N.S.W.

Another useful source which gives some indication of how many domestic violence calls are made to the police, are those drawn from Police records.

There have been a number of police studies and some consensus that "Family violence and domestic disturbances consume more time than any other call on police services except street accidents."[9.]

In Tasmania a "Women as Victims of Crime" Report for the 18 months between July 1973 and December 1974, was based solely on Police Department records; namely the worksheets for each Police Division and the Crime and Occurrence book for Hobart. In line with other studies the offenders apprehended for offences against the person are overwhelmingly male (e.g. assault - common; Police Offences Act, Males 558 compared with females, 26). From the information collected it was obvious who would be the victims and when the assaults were most likely to occur. There was a higher rate of domestic assault than all other types of crimes against women known to the police. The peak times were from 6 p.m. to midnight, generally commencing on Thursday evening and escalating to Saturday night with the occurrence spilling over into the midnight to 6 a.m. period on Sunday morning.

Domestic complaint calls from Tasmanian Police Records for the week 14.7.75 to 20.7.75, indicated that 210 of the 358 calls occurred between 6 p.m. and midnight; 65% were perpetrated on wives including "de factos" and a further 7% were assaults on ex-wives or separated wives. In the remaining assaults the relationship of victim to attacker was that of other relative or acquaintance.[10.]

The Tasmanian Minister ibnitially responsible for the State Government Inquiry into Domestic Violence quoted figures indicating that Tasmanian Police receive at least 100 reports of wife bashing each month.[11.]

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9. JOHN AVERY POLICE - FORCE OF SERVICE? BUTTERWORTHS 1981.
10. McCONAGHY "POLICE CRISIS INTERVENTION IN DOMESTIC DISUPTES" THE AUSTRALIAN POLICE JNL. JULY 1976 p144.
11. EXAMINER 12/7/1978 "100 Cases a month of wife abuse"; citing the then Minister for Social Welfare, Mr. Polley.

Members of the Committee of Inquiry also examined Police Incident cards over a 3 months period from April to June 1978 mainly in the Southern Metropolitan Area. Of approximately 6,000 incident cards some 300 (5%) related to domestic violence but of these only 31 (i.e. 10%) indicated that a report had been filed.

In his paper to the 11th International Conference on Health Education, Inspector Colin Fogarty states that:

> "Interpersonal family violence has now been recognised as a serious social problem. Even in a small city like Hobart, police were involved in a total of 176 domestic disputes during a four week period, 1st to the 28th January, 1982. (Tasmanian Police. 1982)"[12.]

In New South Wales between July 1977 and June 1978, a study of the Mt. Druitt, Blacktown, Chatswood and Pymble Police Stations sought to categorise the number of domestic complaint calls as a percentage of all 'peace-keeping' calls. These were respectively 733 (25.7%); 829 (32.1%); 118 (15.3%); 27 (6.4%). The relatively few calls from Pymble, a leafy and wealthy suburb, does not mean so much that domestic violence is virtually non-existent but rather, as "phone-in" surveys indicate, the middle class and relatively affluent victims of spouse-assault don't involve the police to the same extent. Inspector John Avery who conducted the survey notes that discussions with

> "police from Tasmania, Victoria and South Australia have suggested that the proportions are reasonable similar in those states."[13.]

The difficulty of determining the incidence of spouse-assault in Tasmania or elsewhere is indicated the Australian National Crime Victims Survey. Whereas both male and female divorced and separated persons had a higher victimization rate than those who were single or married, the differences were dramatic with respect to women. (12.5% of all incidents though only 3.6% population)

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12. "C.H. FOGARTY. "Interpersonal Violence - The Police Role" 11th International Conference August, 1982. p.2.
13. AVERY. Ibid. p.50

"The assault rate was 47 times higher among separated and divorced women as compared with married women."[14.]

Further a family member or other relative is more likely to be the offender for assault victimisations than for any other type of offence (Table 11). Yet men were more

"likely to report an incident to police than women."

The reasons most often given by women being that they were too confused or upset, or they considered the matter private and not criminal.[15.]

This non-reporting is compound by women who do report being dissuaded from proceedings either by the police perception of the purpose of their intervention as primarily "peace-keeping"; i.e. to quieten things down then leave; or by a similar reluctance on the part of magistrates to issue summons.

The New South Wales 1973 study that revealed that of over 5,500 cases of assaulted women that came before the courts, about 52.1% lapsed through want of prosecution, also indicated that because of this factor magistrates tended to be reluctant to issue summonses with the results that perhaps only half the cases referred to the magistrate in chambers are pursued in the form of a summons.

The Women as Victim of crime Report deduces that

"the number of initial complaints by women in New South Wales in 1973 would have been in the vicinity of 11,000 to 12,000 of which only a quarter led to properly pursued court proceedings.

At the same time, it was felt that these women who actually involve the police, and subsequently see the magistrate in chambers, may represent a minority of the total number of women who were actually assaulted with the majority taking no action at all.

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15. DR. JOHN BRAITHWAITE. Research Criminologist "Women As Victims of Crime" Paper on behalf of N.S.W. Family Research Unit. Reporter 1979.

Court action tended to be regarded as the last resort for women who may have been the victim of assault over long periods of time."[16.]

The United States National Crimes Survey which was household survey based on a 6 months recall and conducted between 1973 and 1976 revealed considerable inter-spousal violence. Research by Strauss, Gelles and Steinmetz [VIOLENCE IN THE AMERICAN FAMILY (1978)] surveyed over 2,000 couples selected at random revealing that 3.8% of the respondents revealed one or more incidents of wife-assault in the previous 12 months. Applying this to the 47 million couples in the U.S.A. means that in any one year approximately 1.8 million wives are beaten by husbands. A third of the cases reported 5 or more beatings a year and a few cases where the violence was almost a daily or weekly event. The typical pattern is over 2 serious assaults a year.

Further 28% of the couples in the study had experienced at least one violent incident at some stage of the marriage.

Also because of the reluctance to admit and report acts of violence and because the study only surveyed couples living together and limited divorced persons responses to their current relationships Strauss considered that

"the true incidence rate is probably closer to 50 or 60% of all couples than it is to the 28% who were willing to describe violent acts in a mass interview survey."[17.]

Further while the incidence of violence by wives in only slightly lower than violence by husbands so that inter-spousal violence is descriptive, the vital distinction must be made as to the seriousness of the violence. The most dangerous and injurious forms of violence including homicide are perpetrated by men upon women, and the attacks are not only more severe but of greater frequency.

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16. JOHN NOBLE. A.I.C. Canberra. 1975 p.8.

17. Eekelaar and Katz (editors) Family Violence Butterworths 1978
Straus "Wife Beating: How Common & Why" p.39.

The United Kingdom select Committee on Violence in Marriage experienced similar difficulty in estimating the precise incidence of family violence but its evidence led it to conclude that the problem was vast. Erin Pizzey gave evidence concerning Cheswick Women's Aid Shelters 6,000 case histories in conjunction with Dr. Gayford's study of the background of the first 100 women who sought refuge at Cheswick. Data collected between November the 2 and 29th of ex parte applications for restraining orders gave 252 applicants of which 97% alleged physical violence. The projected annual figure would be 3,000 and this did not include those applications where the respondent is given notice.

The Citizens Advice Bureau estimated that in 1971 their branches dealt with 25,000 battered wives each year. Jack Ashley, the M.P. who introduced the Domestic Violence Private Members Bill, extrapolating from C.A.B. figures considered the National incident somewhere between 20,000 and 50,000 cases a year.

Again the homicide statistics are clearer inasmuch as they reveal the predominance of the male as the assailant and the woman as victim. Studies by Gibson and Klein and by Legal Research, Bedford on Criminal Homicide in England and Wales for the 12 years between 1957-68, including manslaughter and suspicious suicides reveal that 94% of the assailants were men and an estimated 40 women were killed each year by their husband. Home Office homicide statistics in 1973 reveal that of 465 homicides, 97 were killed by a spouse or co-habitee.

In 1974 the Dobash's study of 3,020 violent crimes recorded by police in Edinburgh and Glascow, revealed that 25% of these were assaults against wives or girlfriends.[18.]

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18. R.E. & R.E. DOBASH VIOLENCE AGAINST WIVES. London Openbooks 1980.

They also cited a study that indicated that 70% of wives who petition for divorce each year "suffer serious brutality". Other studies cite a far higher percentage (90% of 1,500 petitions) where women have suffered "repeated violence in marriage".[19.]

As in Australia, it was the constant pocession of battered women who fled with their children to seek refuge in appallingly crowded refuges, and the political activities of the women's movement and other interest groups that created the groundswell of awareness of the extent and seriousness of Family violence.

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19. ELSTON, FULLER, MURCH (1976) "Battered Wives ... Petitioners in Undefended Divorce Cases" (Cited in Dobash) unpublished Uni. of Bristol, 1973: CHESTER, STREATHER (1972) "Cruelty in English Divorce .." Marriage & The Family 34: 706:710.

(3) PROFILES OF VICTIM AND ASSAILANT

Australian research is gradually producing a clearer picture of the dimensions of violence. The popular view that family violence belongs to the working-class is nonsense. Australian and overseas research suggests that marital violence occurs in all sections of society and amongst all age groups. It is embedded in the very structure of society and the family system itself.[1.] It is not the prerogative of the deviant, the ignorant and the poor but occurs across class, race and age. With the privatisation of middle-class families came pressures to conceal violence or other aberrations that didn't conform to cultural expectations and norms of the family as beneficial to its members and to society. Research is only just penetrating this shroud of silence which hid from public scrutiny those middle class victims too ashamed to reveal their plight. The anonymity of surveys using questionnaires and "phone-ins" has served to balance the working-class bias inherent in research where data was collected from police and public hospital records and women's refuges.

What the research does reveal is that family violence is not just an individual problem pertaining to individual families, but the incidence of abuse, the seriousness of the injuries and the suffering caused, constitutes a social problem of some magnitude.

> Homicide studies reveal that it is
>
> "often .. almost a matter of chance - or the availability of a lethal weapon - whether or not these impulsive, emotional attacks result in a fatality."[2.]

The New South Wales and South Australian homicide studies reveal that in more than 4 out of 5 homicides the victim and the assailants are either relatives or close acquaintances. The studies postulate that murder is often

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1. STRAUSS (1976a) Family Violence Eekelaar & Katz (editors) p.40.
2. N.S.W. Bureau of Crime Statistics & Research. Report 5 Series 2 Domestic Assaults.

an extreme outcome of a more general pattern of domestic violence[3]. and

> "The fact that the most serious assaults arise in (domestic) circumstances suggests the existence of a much broader base of less publicised domestic assault in the community."[4].

In approximately 40% of murders and non-fatal but serious assaults or attempted murders the victim offender relationship is marital, ex-marital or intimate. Overwhelmingly the assailant is male. In only 9% of the homicides were the offenders strangers to their victims. This number of assaults by strangers appears to increase as the severity of the assault lessens, however, it is cautioned that this does not mean that the number of assaults by spouses and intimates diminishes but rather that

> "only the more extreme incidence of violence between intimates are likely to be reported to the police and to be defined as crimes."[5].

These studies reveal that

> "Violent crime is <u>not</u> randomly distributed across time and space. The propensity to offend, and the risk of becoming a victim, are much greater for some types of people, in certain social settings, than for others."[6].

One of the major "social settings" for violence is the family and marital relationships. To be a child or a wife risks becoming a victim. The violence is on a chronic, repetitive basis as opposed to a one time sudden assault.

To be able to predict violence is a factor in developing strategies aimed at preventing serious violence. One American study showed in the two years preceding an arrest for domestic assault or murder, the police had been called to the scene of the crime at least once in 85% of the cases, and 5 or more times in over half the cases.[7].

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3. RODD (1980) HOMICIDE IN N.S.W. 1958-67.
4. N.S.W. Bureau of Crime Statistics. Ibid. p.1.
5. A-G. Dept. Office of Crime Statistics. Grabosky P.N. "Homicide & Serious Assault in S.A." Series 11 No. 9 Nov. 1981 Chapter VIII "The Prevention & Control of Violence p. 40.
6. Grabosky Ibid. p. 75.
7. "Domestic Violence & The Police. WASHINGTON D.C. The Police Foundation

The major Australian studies have attempted to establish a profile of the victim and the offender. They have researched the education, occupation and employment; the frequency, duration, and the nature of the violence; the extent to which children were involved; the victim's response, the agencies used and their perceived effectiveness; the age range and the ages where violence is most prevalent; racial and class characteristics; social factors such as family background and the extent to which alcohol and weapons were involved.

Attempts have been made to elicit from the women victims, the reasons why they remained in such violent and destructive relationships and the factors that prohibited them leaving.

Many of the studies are essentially pragmatic. They seek to explore the dimensions of family violence in order that social agencies, such as the police, legal, medical and welfare system can better respond to the victim's plight. Generally the focus is on the practical need for protection and humane aid and secondly the adequacy of the criminal justice system to punish and deter spouse assault. It is recognised that the causes are complex. Much of the responsibility lies on the broader society; its institutional structures and the conditioning of men and women into roles and relationships of dominance and submission conducive to violence.

The Women as Victims of Crime Report states that

"It is perhaps in the home itself, in the nuclear family, that the vulnerability and submissiveness of woman as determined by society's role definitions and expectations are most evident. Offences by husband against wife, including bashings and rape, are the most common offences committed against women. Yet while these crimes are neither officially nor socially sanctioned it was agreed that society's indifference to these occurrences, and its failure to provide appropriate legislation, procedures or services to meet the needs of these victims, reflected an unofficial acceptance of

these Acts and an implicit approval of them by society."[8].

The research profiles reveal the very wide age range; in the New South Wales study the ages ranged between 18 and 75 years with the mean age between 35 and 39. Of the South Australian "phone-in" 96 of the 146 respondents were under 44 with the highest number of women and husbands in the age range (25-34) and therefore most likely to be parents of younger children who would both witness and be affected by the violence. In the Royal Commission "phone-in" 66% were middle-income suburban women from their mid 30's to 60's married to white collar or skilled workers, whereas most of the Elsie refuge women (64%) had been living with unskilled workers in rented homes, and 70% were under 30 years of age.

The level of education, occupation, employment and socio-economic status in the phone-ins (R.C. & S.A.) and questionnaire (N.S.W. Task Force) reflected a broad social mix suggesting that marital violence occurs in all sections of society amongst all age groups.

The distribution of secondary and tertiary education was slightly higher amongst females than males in these surveys giving some credence to theories that the husband's assaultive behaviour is correlated with the husband having lower social or economic status characteristics than his wife, and attempting to adjust the perceived inbalance and maintain his "threatened" authority by resorting to physical force."[9].

The studies reveal that the majority of women had suffered attacks throughout the whole history of their relationships. In the South Australian report about one third of the attacks commenced on the wedding day or shortly after, some before and with 28 callers (about 1/6th) during pregnancy or with the birth

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8. JOHN NOBLE. A.I.C. 1975 p.7.
9. Gelles (1974) Dobash & Dobash (1978) O'Brien J.E. "Violence in Divorce Prone Families" JNL OF MARRIAGE & THE FAMILY 33 NOV. 1971.
N.S.W. Taskforce; S.A. "Phone-in" p.15, N.S.W. Bureau of Crime Statistics "Domestic Assaults" p.12.

of a child. It is characteristic of the studies that while some knew before marriage that the man could be violent, most had not recognised the trait in their future husband.

> "Moreover very few men refrained from or reduced the level of violence when their wife was pregnant, and several women reported that it was worse at this time."[10.]

Many women report that the nature of the assaults while pregnant were attempts to cause the woman to miscarry e.g. kicking in the stomach and being pushed or thrown downstairs.

In the Royal Commission Elsie Refuge study 18% (20) of the women had suffered daily attacks. The New South Wales and South Australian studies both became aware that data on the frequency of attacks that commenced with a "weekly" category was insufficient as a number of respondents reported daily attacks. 94 of the 156 South Australian callers were beaten at least once a month and two-thirds of those far more often.

In the New South Wales Domestic Assault study of women approaching Chamber Magistrates less than half had been with their attacker for more than 10 years and almost twice the number of those under 30 decided to separate compared with those over 30. The New South Wales Task Force study indicated that those who were attacked less frequently endured the relationship longer (33.6% for over 11 years) but those who were beaten at least weekly were more likely to have left. 71% of the respondents were no longer in the violent relationship yet overall in a significant proportion (35.5%) the relationship had lasted between 1 and 5 years and in 27.5% it had lasted over 11 years.

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10. BORELAND (edit) VIOLENCE IN THE FAMILY. Ch. 6. Margaret Gregory. Battered Wives p. 115: GAYFORD "Wife Battering .." British Medical JNL. Jan. 1975 p. 194-7.
ALLEN p. 18 citing divorce cases in N.S.W. where marital violence is related to pregnancy in FAMILY VIOLENCE IN AUSTRALIA O'DONNELL & CRANEY (editors) Longman Cheshire 1982.

Questioning why such relationships had lasted so long indicates that women took their marriages seriously and their emotional and personal ties bound them to their husbands.

> "Leaving was a last resort; many of them said that the resources that they most needed were not available. They wanted some means of changing their husband's behaviour, and living peaceably with them."[11.]

However, a significant number believed, and the data substantiates this belief, that they had no effective escape. Even if they did leave their husbands would bash them for attempting to leave and hound and terrorise them for the rest of their lives.

The frequency of assaults on separated wives, former "de factos" and lovers is borne out by the research data and is a matter that deserves serious attention.

In the New South Wales study of women who approached Chamber Magistrates to make a complaint of assault, 28% of these women were living apart at the time of the assault and in some cases they had been separated as long as four years.

The New South Wales Task Force data is virtually identical. Of those women who had left violent men nearly one-third (30.1%) had been attacked when they were no longer living together.

With respect to the laying of criminal charges the issue is more clear cut when the victim and offender no longer live together and the woman's determination to escape the violent relationship must be given unconditional support by rigorous law enforcement.

In the paper on "Exemplary Prosecution of 'Domestic Violence' Offenders" Willis states that

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11. S.A. Womens Information Switchboard "Phone In" p.7.

"As a matter of general .. police should treat all assaults and violence which occur between separated couples as prima-facie non-domestic. Such assaults should be seen as more akin to assaults upon a stranger, rather than extensions of domestic conflict. In many of these 'separated' situations, the right of entry on the premises and the power of arrest are not so problematical. There will, of course, often be complications especially where access to children is involved or where the separation is recent and the woman ambivalent about the status of the relationship. Moreover, women who have been shocked and distressed by the invasion of their separate living space often share community perceptions that such invasions are really domestic in nature and that police involvement should be limited to settling things down for the time being.

A general police attitude that such assaultive invasions are not domestic and will not be tolerated by the police or the community as extensions of domestic conflict can help strengthen the woman's resolve and peace of mind and thus assist the police in dealing firmly with the offender."

The author is not implying that criminal sanctions are inappropriate when the victim and offender still live together, but

"that the distinction between parties living together and those who are now living apart is a useful starting point in generating broad policy approaches in a complicated area of growing community concern."

The New South Wales Court study indicates that assaults on the women who have left and set up their own household occur in the course of the father's access to the children, over joint property and children, when the woman returns to collect clothing and a few possession left when she fled, and sometimes in reprisal over court action or some merely to seek out and hound their former partner.

"One man threatened his wife with a knife immediately after the expiration of a good behaviour bond .. another forced his way into his de-facto wife's home and attacked her after his release from a prison term for assaulting her." (page 6).

Willis cites a case described to him by a police officer where a woman finally left her husband taking with her the seven children of the marriage and not revealing her new address to her husband. When he located her he turned up at the house late one night, bashed down the door with such violence that he brought down the surrounding architrave and plaster and then assaulted her. Of the three summary and two indictable charges, the indictable charges were not proceeded with since the senior officer vetting the charges said it was inappropriate for "domestics" to go before the higher courts.

The husband was bound over to be of good behaviour for 12 months; had breached this within six weeks and again was charged with the same three summary offences of assault, wilful damage and being unlawfully on premises. The latter charge was dismissed after the man's lawyer argued that his client had been seeking access to his children, despite the assault and break-in being late at night and no attempt being made to speak to the children.

Again a good behaviour bond which was again broken within some six weeks which resulted in a third court hearing where the man once again received a bond to be of good behaviour for 12 months.

After this third court hearing, the woman, who had according to the policeman been an excellent witness, came over to the policeman, thanked him for his efforts and told him she would not be calling on him again. She opened her handbag and showed him a long, sharp kitchen knife, and said that next time she would kill her husband.

In effect the woman had been offered no protection from the criminal law and had been left to seek self-help remedies with a high potential for homicide.[12.]

Studies by Rodd (1979) Allen (1980) Bacon and Lansdowne (1980) and Egger (1981) of homicide where the spouse murdered is the husband and the slayer the wife, all emphasis the extraordinary extent to which the victims aggression and violence against the woman initiates her retaliation. In the BACON and LANSDOWNE study 12 of the 16 cases where women were charged with killing their husbands the motive was described by the woman as a need to protect herself from physical harm either from immediate attack or from a life of suffering from which there appeared no other escape. In 13 of the 16 cases the woman had been the victim of assault or provocation in the 24 hours preceding the killing or was in immediate danger.

The nature and effects of the injuries revealed in the various studies show a level of brutality which sits uncomfortably with notions of a civilized society and a respect for human life.

In the New South Wales Court study more than 75% of the women reported that they had been punched repeatedly, mostly about the head and upper parts of the body. Several had been punched in the eyes and the mouth. One woman had a tooth broken and another's dentures were smashed in the attack. 25% of the women reported being kicked about the body .. kicking and punching were involved in nearly one-fifth of the incidents and accounted for most of the serious injuries.

Altogether 52 of the women were considered to be severely injured in the attacks. Severe external bruising was by far the commonest type of serious injury, but the sample also included two cases of severe lacerations, two

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12. "EXEMPLARY PROSECUTION OF 'DOMESTIC VIOLENCE' OFFENDERS. A preliminary Tale. p.1-2, J. Willis.

of concussion, 5 cases of internal injuries - confirmed or suspected internal ruptures, bleeding and bruising. fractures were reported in 6 cases, including fractures of the nose, ribs, vertebrae, arm (broken in 3 places) and a suspected fractured skull.

Ten of the seventeen women who suffered the severest injuries had been taken to hospital after the attack.

These women in the sample were attempting to invoke the sanctions of the criminal law "privately"; in 70 of the 87 cases (out of a total of 184) the police had been called and referred the women to the Chamber Magistrate.

> "In 14 cases they had arrested the attacker and in 12 cases initiated proceedings against him (11 summary charges and one indictment for assault occasioning actual bodily harm)."[13.]

The New South Wales and South Australian surveys substantiate the nature and extent of the injuries inflicted. About half the respondents had received head and body injuries while close to threequarters had suffered bruising or bleeding. Almost a quarter of the women had been sexually assaulted as well; the tearing off of clothing during the assault was considered by many of the women to be a deliberate strategy preventing them from fleeing the house to gain help.

All the studies suggest that a weapon is used in approximately 10% of the assaults, though those studies such as the New South Wales Task Force covering relationships of a longer duration report that 33.6% of the women had been assaulted with a weapon at least once. Threats to use a weapon however, covered a larger proportion of the cases and such threats combined with the actuality of physical assault go a long way to explaining the terror that many women feel and the strength of their belief that if they do leave, the threats will be executed.

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13. N.S.W. BUREAU OF CRIME STATISTICS & RESEARCH. DOMESTIC ASSAULTS p. 5.

The weapons threatened or used included bottles, guns, knives, golf clubs, hammer, rake, screwdriver, axe and a variety of household objects such as sauce-pans and stools etc.

The South Australian "serious Assault" study notes that these industrial societies such as Sweden, Japan, Britain, France and West Germany, all noted for low rates of homicide, are also noted for the restrictions which they impose on their citizen's ability to purchase and possess firearms. It considered that it appropriate to require firearm owners to demonstrate training qualifications and good character.[14].

While imposing stringent controls on handguns will not stop domestic violence, it is suggested that persons with whom the applicant for gun-registration co-habits, should be required to consent or be able to apply for revocation of gun ownership.

There is a co-relation between alcohol and spouse and child abuse; just as it is a factor in other criminal offences, homicides, assaults, and fatal car crashes.

Though two surveys requested no specific information on the relaitonship between the violence and alcohol a substantial proportion of the women attributed their husband's assaultive behaviour and agression to the drinking. One of the common patterns emerging in the New South Wales court study involved the man arriving home late affected by alcohol, demanding dinner and sex; and argument ensuing which rapidly escalates into violence.

While there is little doubt that alcohol is a disinhibitor and will increase the probability that some when affected will engage in violence, there is also research that suggests that

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14. HOMICIDE & SERIOUS ASSAULT IN S.A. 11 (9) NOV. 1981 Grabosky p. 76.

"individuals who wish to carry out a violent act become intoxicated in order to carry out the violent act. Having become drunk and then violent the individual either may deny what occurred. ("I don't remember; I was drunk") or plead forgiveness ("I didn't know what I was doing"). In both cases he can shift the blame for violence from himself to the effects of the alcohol."[15].

In turn the woman herself can blame the alochol and not her husband. His drunkenness is seen to excuse behaviour that she considers is not really intentional in that she believes it would not happen if he did not drink. As at least half the men in the studies are habitually heavy drinkers there is little scope for these women to find out whether the alcohol causes the violence, or whether the husband has established a pattern of drinking followed by abuse and violence in order to avoid taking responsibility for his actions.

However it is the womans belief that the alcohol caused the violence that was a factor in many of them remaining in the violent relationship, believing that it was their duty to help their husband, or feeling sorry for his weaknesses and inadequacies. These women often remained for years leaving when they could no longer endure the abuse.

However it is just as significant that in just under half the incidents no alcohol was involved, and the younger the attacker the more likely he was to be completely sober.

Drunk or sober the recurrent theme is one of suspicion of sexual unfaithfulness, morbid jealousy, rejection, extremely low frustration tolerance, sudden loss of control with violent outbursts where wives and sometimes children are punched and kicked in a savage manner. Remorse is meaningless, promises to reform directed at getting the woman to return accompanied by further violence

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15. GELLES R.J. "THE VIOLENT HOME (1972) SAGE.

if she refuses and further violence if she returns. Pregnancy heightens the tirade. The men have very little insight into their behaviour, and will actively deny, prevaricate or play down the violence. The trigger may be financial difficulties, unemployment, alcohol,children and behind this all the desire to subjugate the woman and establish dominance through aggression, violence or any means at his disposal.

Sometimes the accusation is made that the woman must remain in the abusive relationship because they have taken sadomasochistic pleasure in being beaten. This is a variation of the exculpatory male myth that women enjoy being raped and by definition are not victims. Dr. John Gayford, whose study of the first hundred cases of battered women through the Cheswick Shelter was the basis of much of his evidence to the British House of Commons Select Committee on Violence in Marriage, writes that

> "there was no evidence of sexual sado-masochism .. nor did the women fit a pattern of masochism in a wider sense. (Shore et. al 1971). The fact that women enter into a second or even a third violent relationship is no proof that she likes it, or even encourages violence. Theories of assortative mating are against her finding a stable partner (Dominion, 1972)."[16].

The sample studies indicate a higher level of unemployment amongst the men. Adverse economic conditions and the financial and psychological stress engendered by unemployment are likely to exacerbate domestic violence.

Structural unemployment creates an "excess labour" scrap heap depriving many adults of the means to secure an adequate living through work and relegates them to a poverty line existence on unemployment benefits. Invariably those closest to the dole queue are the most vulnerable, least skilled, with a

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16. DR. J.J. GAYFORD. MED. SCI. LAW (1975) VOL. 15 NO. 4 p. 244.

cumulatively poorer work record and virtually no resources to fall back on. In a society where many equate heavy drinking with masculinity, it is not surprising that the person with enforced leisure and little money seeks to drown his sorrows in the local leaving the woman with whom he lives to cope the best she can with a poverty budget. Friction is inevitable partly because of the frustrations of unemployment. The 1975 ABS study clearly indicated that poverty and the probability of becoming a crime victim or offender were irrefutably linked. The refuge studies indicate a very high level of mobility amongst the families which is no doubt related to low-income, excessive rents and rent defaulting as a reason for moving on.

The Royal Commission writes of the Elsie Refuge that it

> "prevented a bleak picture of neglect and ill treatment which appeared to have followed them all their lives. They had childhood memories of severe punishment, drunken family scenes and violence. The cycle of violence is vividly portrayed. 60% of the women reported that their own father had been violent towards their mother."[17.]

Overseas literature on wife and child-abuse emphasizes the cyclic nature of such abuse as learned behaviour perpetuating its violent form from one generation to the next. [Steinmitz and Straus (1973)].

The Australian surveys were particularly concerned about the affect of the violence upon children. The South Australian study indicated

> "that the effects on children may well be profoundly disturbing, often physically dangerous, and for many women constituted a problem they felt unable to deal with."

An overwhelming number of the children witnessed or overheard the arguments and many were directly involved, often hit while trying to intervene.

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17. AUSTRALIAN RC ON HUMAN RELATIONSHIPS. FINAL REPORT V4, 1977 p.139.

"Asthma, anorexia, and bedwetting were all stated as symptoms of the torn loyalty and confusion experienced by these children. Delinquency and drug addiction in older children were also mentioned."[18.]

The children are presented with no satisfactory alternatives on which to model their own behaviour; to the children cowering in the background the repeated pattern of violence imprints upon them that violence is a natural part of domesticity and of sexual relationships.

Evidence to the British Select Committee indicated that many of the children were extremely disturbed and very violent, and this violence and disruption meant they were suspended from school and required to attend child guidance clinics. It was dangerous for other children to spar with them

"because they do not fight in the usual way that a child will do. They attack; they go for the eyes, mouth etc."[19.]

They have been subject to a violent influence all along.[19.]

The memorandum submitted by Cheswick Women's Aid told of one incidence when it was noticed that a $2\frac{1}{2}$ year old at the Shelter had a black eye. It transpired that he had been playing in the Wendy House in the under 5's play-group, and he was cast in the role of the baby.

"His 'mother' aged four and his 'father' aged four and a half, beat him up."[20.]

Providing such children with alternative models and environments has obvious implications for child-care policies, practices and fee subsidisation. However "rescuing" infants by the provision of good day care services is doomed to failure without the intervention or assistance of agencies designed to support the victim and alter the offenders assaultive behaviour.

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18. SOUTH AUSTRALIAN WOMEN'S INFORMATION SWITCHBOARD "PHONE-IN" 1980 p.9.
19. SC. MINUTES OF EVIDENCE 26.2.1975 DR. GAYFORD P.7
20. SC. MINUTES p. 2 26.2.1975.

Of these agencies that the woman turned to first the surveys reveal that about half had sought the assistance of the police and almost as many the medical profession. Approaches to other agencies covered the full gamut but it was rare for the initial contact to be a minister, refuge, private solicitor, legal aid , life-line, or counselling or welfare service etc. Yet both the police and medical profession were rated poorly in terms of the usefulness of those agencies as perceived by women victims. On the other hand the more specific the agencies mandate, such as refuges and "Alcoholics Anon.", the higher it was rated in terms of both moral and practical support.

On the other hand a significant number of the women had sought no assistance whatsoever from either agencies, family or friends. They often endured years of abuse discussing their situation with no-one. Many internalised the abuse, blaming themselves or trying to accommodate their behaviour to that of their spouse. The significance of the studies which called for responses from the wider community as opposed to the refuge population, were that these studies revealed a pattern of spouse-abuse over all social classes. The privatisation of middle-class family life is hypothesized as the reason those women remained silent, because of the shame they felt. Also pressures were there to inveigle them to protect their husband's and therefore their own reputations. It was obvious that

> "Some men such as vicars, doctors, lawyers, schoolteachers, social workers and policement who are "moral examplars" in society will stand to loose more from public discovery of any violence and may therefore, more actively attempt to conceal it."[21.]

The O'Donnell and Saville study searched Legal Aid and Women's Health Centre records in Sydney to ascertain the proportion of cases where violence is involved, and noted that as 30% of women

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21. MARSDEN, 1978 p. 121 cited in the N.S.W. Report on Domestic Violence (1981) p. 29.

"had not approached any institution prior to leaving the relationship" the records and reported violence only represent the "tip of the iceberg."

As housewives with children represent the far largest battered group (73% in the O'Donnell study) and a third eventually leave their marriages having sought no assistance, very obvious implications exist for marital and personal counselling Agencies, legal and welfare advisors, to look at more effectively targeting and publicizing the availability of their services. Co-ordination between agencies and improved means of facilitating the abused persons access to these services and in turn the services' responsiveness to the client's perceived needs are essential.

This internalisation and self-blame by the victim and her assumption of the responsibility for the emotional well-being of the family destroys not only the woman and her marital relationship, but also one of the vital preconditions for the violence to stop. That is, the man accepting the responsibility for his own violence, exploring its roots and genuinely attempting to change his attitudes and the abuse. Preferably this process should take place with the aid of skilled counsellors, but backed up by a readiness in the criminal justice system to act to restrain the violence and impose sanctions of the offender.

One submission to the Tasmanian Domestic Violence Review speaks of this assumption of responsibility by women of the emotional well-being of the family. She writes

> "Women, particularly, need help in setting limits on the behaviour of their spouses - and this runs directly counter to the old, stereotyped image of being the continual giver and supporter of my husband's emotional needs in the marriage. Somehow I became responsible for all the emotional interactions within the family ... Part of the role of Wife, as my husband saw it, was having "emotional expertise". He saw himself as inadequate in handling, understanding or articulating emotion, and it was my job to sort things out and smooth the waters. Why did I accept this role?

Again I see myself as gradually taking on too much responsibility for the family, feeling underneath that I must compensate for any weaknesses in my husband. I used to pity my husband for his lack of self control and violence. He used to rage at me after a physical attack that it was my fault, that somehow I should "submit" and defuse his temper.

I used to wrack my brains for strategies to stop these attacks, again, taking responsibility for his behaviour.

As I began to be aware of my own feelings of rage, fear and helplessness in the face of his behaviour, I realized that these were the emotions I was responsible for and needed to act on."

Ultimately she considered her attempt to maintain this traditional stereotype of the wife as the person responsible for the emotional well-being of the family, as destructive.

"It was an unreal, impractical, destructive and finally, unloving ideal. Real charity (in the old sense of good-will) would have required me to be more forthright and direct in my feelings, to have acknowledged my own personhood as a significant part of the marriage and acted from that basis more than from how I thought I should act according to some traditional role."

The factors which inhibit women leaving violent relationships are their personal and emotional ties to their partner, fear of living independantly and rearing children without a father, economic dependency, disabilities which attach to women in the workforce (e.g. their segregation into low-income occupations, child-care, lowered aspirations due to expectations of fulfilling a role of wife and mother and not being a primary breadwinner), discrimination in rental housing, and fear of reprisal attacks from her ex-spouse.

(4)
CAUSES OF VIOLENCE

It appears impossible to locate the causes of family violence within a single theory. Many factors have to be taken into account at several levels. The personal attributes and actions of each particular individual are shaped by the society in which they live and by the particular cultural norms within which that person and each group operates.

The main theories have sought to locate the origins of the violence in the individuals psychopathy; in social variables such as class, unemployment, alcohol etc.; or in the "structural violence" embedded in the institutional patterns, dynamics and societal relationships of the society in which we live.

The tendency to see the violence as acts perpetrated by "sick" individuals has lost whatever credibility it had as an explanatory theory as the dimensions of family violence became clearer. A New South Wales Report writes that

> "Perpetrators of family violence are often said to be 'psychopathic', 'sociopathic', 'criminal' or just plain deviant.
>
> However, since they come from all classes of society and show a wide range of personality characteristics, it is meaningless to use these labels."[22.]

Similarly explanations for domestic violence that start with internal family dynamics do little more than shift the focus from the men who batter their partners to the women who endure such assaults.

Secondly while it is obvious that a number of social variables are co-related or are causal factors in domestic violence in as much as they increase the probability of violence, they do not in isolation explain it. This does not mean that measures to reduce alcoholism, discourage habitually heavy drinking, increase employment opportunities and alter community values by assisting people

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22. N.S.W. BUREAU OF CRIME STATISTICS & RESEARCH. Conference Paper 2. "Family Violence and the Royal Commission on Human Relationships". 1979 p.7.

to live more constructively, are not both inherently valuable and likely to reduce violence. Causal links need to be established and analysed. For instance investigations have fairly consistently established that

> "children and adolescents who viewed or preferred violent T.V. programmes tended to be rated higher on various behavioural and attitudinal measures of aggression,"[23].

and these and many influences need to be examined critically.

The theory either implicitly or explicitly favoured in the Australian Domestic Violence studies is that violence against women is a by-product of social inequality and has its historically roots in the concept of female coverture and the legal, social, economic and political subordination of women.[24].

Much of the overseas literature supports the view that

> "violence is embedded in the very structure of society and the family system itself" (Straus, 1976).

It is apparent that all dependant relationships carry the seeds of potential abuse of those who are vulnerable.

Some dependant relationships are inevitable. Infancy and old age, ill health, mental and physical incapacity, pregnancy etc. all carry with them a degree of dependancy upon another. A variety of family support programmes, such as day-care, crisis care and temporary residential care and domicilliary services are essential to alleviate stress and assist with the care of the dependent person.

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23. NATIONAL SYMPOSIUM OF VICTIMINOLOGY. WYNN, VINSON N.S.W. CORRECTIVE SERVICES COMMISSION "The Media as a Cause of Crime and fear". p.2.

24. O'DONNELL & SAVILLE "DOMESTIC VIOLENCE & SEX & CLASS INEQUALITY". FAMILY VIOLENCE IN AUSTRALIA. P.52.
PENELOPE STRATMAN Ibid p.121.
JOSCEYLEN SCUTT "SPOUSE ASSAULT: CLOSING THE DOOR ON CRIMINAL ACTS THE AUSTRALIAN LAW JNL - VOL 54 DEC 1980 p. 720

The situation with spouse-abuse is somewhat different in that the adult woman is not perceived to be incapacitated. The State has no special concern, such as the "parens patriae" doctrine that recognises the special responsibility of the State for the care and protection of infants. Notions of adult equality make any call for special consideration appear inappropriate.

Yet women are not equal to men in this society and their vulnerability will only be reduced by measures that improve their status, their economic independence, and allow them to act independently with authority as the author of their own deeds and to take their lives in their own hands.

Much of the Australian research touches on the socialisation of men and women into prescribed roles, the limiting of options and the stresses which are conducive to violence inherent in circumstances where women are dependant. The end result of the process of socialisation into prescribed roles is women,

> "domestically orientated, economically dependent, passive, politically non-involved and powerless, and deriving her identity and sense of value and worth via her husband and children."[25.]

Overwhelmingly the studies show the violence is unleased against women with greatest frequency when they are out of the work-force, financially dependant upon their husband or partner, pregnant or at home caring for young children.

Only when the status of all women is improved, including those who choose to take the primary role in remaining at home to care for their own children and equal opportunities are also given to men to participate in nuturing roles, will the potential for family relationships to erupt into violence diminish.

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25. A.I.C. John Noble "Women As the Victims of Crime" p. 3.

While structural inequalities subordinating women exist in society spouse abuse will continue to be a serious social problem. Those who subscribe to a belief that marriage is not an equal partnership and that a man has a right to rule his household, that his status is that of household head, that his authority is not to be challenged and that in the interests of "harmony" his wife must acquiesce and defer to his demands, also subscribe to that "implicit, unrecognised" norm which permits a husband to hit his wife.

Traditionally the law has controlled the degree of violence the assaultive spouse has used rather than prohibited wife assault, and short of murder there has been very little State intervention proscribing male violence in marriage.

A brief structural analysis of the position of women in the family from a historical perspective is necessary to order to gain an understanding of the pervasiveness of the traditions of male domination and female subordination upon which modern stereotypes which legitimize violence are based.

Historically the civil law notion of sharing of community property in marriage had no counterpart in common law. It has been suggested that as feudal land tenure imposed the obligation on the man to perform the feudal dues (such as military service) that arose as an incident of tenure, it became customary in medieval law that only men controlled property. As land was the main source of status and wealth and male control was dominant a system of patriarchy controlled both the ownership of land and the status of women. The canon law concept of marriage as a sacrament in common law became the doctrine of spousal unity wherein virtually all the woman's legal identity and "rights" were subsumed by the husband. Centuries later this concept of female coverture was described by BLACKSTONE:-

> "By marriage the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during marriage, or at least in incorporated into that of the husband".

By the late 16th and early 17th century the harshness of the common law and its dispossession of the wealthier woman of her property upon marriage were ameliorated somewhat in equity by doctrines of anti-nuptial and post-nuptial settlements, restraints upon anticipation, and the law of dower. Basically by wealthy families attempting to preserve their property from dissipation by improvident sons-in-law.

The growth of capitalism with its attendant "landless" population dependent on wage-labour, the enclosure movement and growth of capital saw vast changes in the role of the family and the position of women. Whereas in the feudal estates industry was family based with husband and wife participants in productivity, the dislocation caused by the means of survival being wage-labour and the passage of minimum wage laws meant that the family was no longer a unit of production but a liability to men whose labour was sought and a means of survival to women and children who were dependent upon men having lost their tradition base of production and self-sufficiency in domestic industry and food production.

A complex system of poor relief in each parish, and harsh Poor Laws to place the responsibility for the destitute women and children onto the husband whose minimum wage was set, set in train a society where social injustice was rife. The poor were increasing in numbers, desertion, pauperisation and starvation were the lot of the lower class.

Basically by the end of the 17th century there were two classes of women; one destitute, overworked, with a low life expectancy and high infant mortality; the other with the rise of a bourgeois class and Protestant ideology, privileged, relatively idle, but with the scope of their lives narrowed to a "doll's house" existence in a privatised family setting, their role confined within the context of home and family and isolated from the public sphere.

While Protestant strictures forbade corporal punishment the law did not. Protestantism nevertheless preached that the spiritual and civil authority of the husband was a civil honour which God had given to man, and the wife's duty was obedience.

In law the position of women was that of a subject class subordinate to men. For instance in coverture the wife became a legal non-entity and whatever rights she had as a single woman e.g. to contract,[26.] own property, sell her labour and retain her wage, retain title to property owned prior to marriage and retain inheritance separately; were subsumed by her husband.

Supposedly "for her protection and benefit so great a favourite is the female sex by the laws of England".[27.] This favouritism enabled the husband to become owner of his wife's property even that acquired or inherited prior to marriage; if he predeceased her and bequeathed "her property to another" she had limited rights of dower to portion of the income from the estate; her husband acquired a right to his wife's personal services and earnings, her marriage vow was said to deprive her of her right to revoke her consent to intercourse irrespective of her wishes, and husbands were accorded a right to chastise wives, as were masters over servants or apprentices.

Coverture resulted in the law's benefits being placed solely at the disposal of the husband who by a variety of actions for damages was able to protect the quasi-proprietary interest he had in his wife and her services.

In return the husband was required to provide his wife with "necessities". The wife's remedy was limited to being able to pledge her husband's credit for food and essentials; a single act of adultery removed all obligation upon the husband to provide support.

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26. MANBY AND RICHARDS v SCOTT (1663) 1 LEV 4; 83 ER 1085

27. BLACKSTONE. 1 COMMENTARIES 444

This subordination of the wife to the dominion of her husband and the immunity it gave husbands at this stage extended to husbands a legitimate right to chastise their wives. In RE COCHRANE[28]. authority was cited that:

"The husband has by law power and dominion over his wife and may keep her by force within the bounds of duty, and may beat her, but not in a cruel or violent manner."

The question of assault and the right to detain a wife against her will arose again in THE QUEEN v JACKSON[29]. while denying that such a right of personal chastisement and dicta supporting it were authorative, the judges nevertheless gave approval to a right in a husband to restrain his wife in some circumstances.

It is hardly surprising that a century and a half ago, John Stuart Mill wrote that

"Marriage is the only actual bondage known to our law. There remain no legal slaves except the mistress of every home."

The injustices to women who were bound in marriages where they were subject to cruelty, assault, deprived of the means of maintenance, and could be deprived of their children's custody, resulted in demands that divorce be made available.

Cruelty to wives by violent husbands was the basis of much of the justification for divorce law reform. Reference is made to the writings of John Stuart Mill and the pamphlet "Wife Torture" by the early feminist Frances Cobb in 1870.

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28. IN RE COCHRANE (1840) 8 Dowl. 630; 4 Jur 535,

29. R v JACKSON (1891) 1 Q.B. 671 at 678-679

Various Statutes such as the Matrimonial Causes Act (1857) followed by Married Women's Property Acts, Married Women and Tortfeasors Acts, and Family Law Acts, progressively removed the formal inequality of women which resulted from marriage. The second phase, of compensating women for the economic consequences of work-force exclusion as a result of fulfilling a home-maker role, is just beginning to emerge now.

With the passage of such legislation much of the public concern about wife assault dissipated. It was assumed that divorce would remedy any defects by enabling women to leave violent husbands.

For almost a century the whole issue of marital violence went underground until the 1970's emerging only in cruelty petitions for divorce, spouse homicides, and finally exposed when the first women's refuges opened and authors such as Erin Pizzey pierced the silence with books such as her "Scream Quietly or the Neighbours will Hear." (1974).

Ironically, the family has received more attention from the helping professions and social researchers than any other subject and yet no facet was more avoided than violence. Revelation of child abuse was initially treated with disbelief and much of the initial research was directed at establishing irreputable evidence that abuse did exist and was widespread. The same kind of verification process has applied to spouse assault a decade or so later. This is part of a process to get the Government, professions, and wider community to acknowledge the seriousness of family violence as a widespread social problem: Then to seek solutions. It has also been a response to the failure to acknowledge that such violence existed. For example, John O'Brien (1971) observed that from 1939 to 1969 the Journal of Marriage and the Family did not have one article which addressed itself to violence in the family. Prior to 1980 the Authoritive Psychological Abstracts contained no index entry for family or domestic violence.

Similarly I noticed when looking through the Attorney-Generals Information Service that the articles on violence which began to appear were subsumed under "Family Law" until 1979 when the "Domestic Violence" heading appeared. The emergence of media interest also has been gradual as indicated by Tierney's examination of the New Your Times Index between 1970 and 1978 for reference to wife beating as a social issue. Such references were non existent in the first few years, then sparse, then with 44 then 19 references respectively in the final two years.

The "official" silence implicitly condoned spouse abuse and operated in conjunction with victims being discouraged from seeking legal sanctions against their violent husbands.

The strength of the traditional stereotype of male authority and female subordination is so pervasive that it was still necessary as late as 1946 for the English Court of Appeal[30]. to over-rule a lower court decision that allowed a husband the right to assault his wife because she disobeyed him by visiting her relatives.

Freeman also cites a 1975 Scottish case where a sheriff on fining a husband for hitting his wife in the face remarked that

> "It is a well known fact that you can strike your wife's bottom if you wish, but you must not strike her on the face."[31].

From verbal evidence from victims it appears many violent husbands heed such advice taking care to aim their blows on the skull behind the hair line and on parts of the body usually clothed. A classic line of assault which

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30. MEACHER v MEACHER (1946) C/A p. 216.

31. FREEMAN "Le Vice Anglaise? - Wife Battering in English and American Law" FAMILY LAW QUARTERLY (1977) 11:199.

seeks to injure without leaving exposed injuries and where the assault will only become apparent to outsiders if the woman discloses her injuries. Reliance to continue to assault comes from the assaultive male's potential to intimidate his victim by further violence; an implicit assumption that he has the right to hit his wife; a common knowledge that no sanctions will be brought to bear by the legal system; the privatisation of the family and the economic dependence and the emotional and psychological investment that women make to their role as wife and mother which gives them little identity and independance other than their marriage and a sense of shame if they perceive their partner's violence as their "fault".

Legal reforms, more effective remedies and sanctions will only be a marginal step in the move to eradicate violence within the family; on a more fundamental and long term level structural changes reducing inequalities between men and women and moves to improve the status of women in all spheres, will be more instrumental.

CHAPTER THREE

THE INADEQUACIES OF EXISTING STATE LAW PERTAINING TO DOMESTIC VIOLENCE

(1) SUMMARY OF TASMANIAN LAWS PERTAINING TO DOMESTIC VIOLENCE

The provisions of the Family Law Act do not extend to "de facto" spouses and accordingly the Family Law Court has no power to issue non-molestation orders restraining violence by parties in an informal marriage and the spouse is left to her remedies under State law.

Essentially the woman may seek to have her assailant prosecuted under the criminal law for his assault upon her; she may attempt to invoke the civil jurisdiction of the Supreme Court seeking an injunction restraining further injury and damages for his tort; alternatively she may apply to the lower courts to seek to have her assailant bound over to keep the peace towards her and enter into a recognizance to secure this.

None of these options adequately protect the victim of domestic violence.

For instance when the "de facto" wife seeks similar injunctive relief to those available to the married person under the Family Law Act she can only invoke the inherent jurisdiction of the Supreme Court. The nature and extent of this is not clear and the few cases illustrate that these civil remedies in tort are uncertain remedies granted, if at all in domestic violence cases, by reluctant courts in "exceptional cases". Not only is such an action likely to be complex and expensive but a spouse is less likely to succeed in claiming reparation for financial loss or other quantifiable damage consequential on injuries inflicted upon her in a domestic assault than if the injury had been e.g. a consequence of her husband's negligent driving, or an injury by a non-family member. To sue one's husband is considered "unwifely".

If she goes to the lower courts to seek to have her partner bound over on his recognizance to keep the peace towards her this is a far cheaper and more accessible action but has limited effectiveness as a remedy for the domestic violence victim.

Firstly specific conditions cannot be attached to the bond referring the offender into personal counselling, psychiatric treatment, alcohol rehabilitation or group therapy programs, or placing him under the supervision of the probation service to ensure some follow-up.

Secondly if the bond is breached the complainant has to lodge yet another complaint to the court, with the most likely outcome the recognizance being forfeited and another bond entered into. If the offender is intractable it is often the woman victim who scrapes the bond money out of her housekeeping rather than jeopardise her partner's liberty. The police are not mandated to arrest for a breach of the bond; unlike South Australia and Queensland's

amended Justices Act and Peace and Good Behaviour Act, breach of the bond is not an arrestable offence. Police can only arrest if there is evidence of what would in any event be an offence regardless of the bond.

Thirdly, the flexibility of injunctive relief that may be available in the Supreme Court and is available to married persons who elect to apply to the Family Law Court, is not available.

The offender cannot be restrained from coming into the complainants premises or place of work, nor can an occupancy or tenancy order be made (as in South Australia, New South Wales, New Zealand and England) excluding the violent partner from the home irrespective of property rights.

While the criminal law of assault theoretically is adequate and applies irrespective of marital status, in practice the response of the ciminal justice system to spouse-assault cases is clearly inadequate.

Police reluctance to prosecute is strengthened by the belief that as spouses are not compellable witnesses for the prosecution against the offending partner, they may loose their "key witness". S100 makes it a crime to obstruct or dissuade a person from attending as a witness or giving evidence yet the complainant or potential prosecution witness is not called upon to give an adequate account of failure to attend or withdrawalal of the complaint and in no situation is intimidation more likely than where assailant and victim co-habit or where the woman is terrified of retaliatory assaults. The New South Wales Crimes (Domestic Violence) amendment (1982 - Schedule 1 S407 AA (2) & (3) compelling the spouse to give evidence unless she makes application to the court to be excused and this is granted if the application satisfies specific grounds, is preferable. Such cases are too grave to be left to a victim whose unwillingness may not arise from a restoration of domestic harmony so much as a fear of further brutality.

The criminal law sanctions in domestic assaults are ineffectual; they grant the victim little protection; economic sanctions and imprisonment may deprive the family of a breadwinner. The New South Wales Periodic Dention of Prisoners has some applicability to domestic assaults the majority of which occur over weekends. An awareness that current remedies are ineffectual results in the official agencies discouraging prosecution.

No other class of assault victims bears the burden of initiating their own complaint; domestic assaults are unique in this respect. Women who fail to proceed with their action are blamed for failing to do what no other class of victim is expected to do; that is, assume personal responsibility for prosecuting criminal law offenders. It is essential that legal representation and legal aid be available for people taking out summonses for assault and the woman's income in domestic assault actions, not be deemed to be that of the combined family income in assessing legal assistance.

The husband's immunity from prosecution for the rape of his wife as provided in S185 (1) of the Criminal Code is considered not only "anachronistic, unjust and discriminatory" but symbolizes a legislature as yet too immature to civilise the more primitive aspects of the Code and to grant the same protection to married women as to unmarried. Marriage does not legitimise rape, nor should the criminal code de-criminalise an act of rape on the basis that technically a marital status exists between rapist and victim. The sanctity of marriage requires that marital intercourse be consensual, and that the government's

removal of the husband's immunity from prosecution for marital rape is a necessary endorsement of the principle of equality in marriage and condemnation of sexual abuse in marriage.

Reforms to the laws governing provocation as a defence reducing murder to manslaughter is discussed under New South Wales law reforms in the section on Domestic Violence Law Reforms in New South Wales, South Australia and Queensland.

TASMANIAN STATE LAWS

The provisions of the Commonwealth Family Law Act do not and cannot extend to "de facto" spouses. Accordingly, the Family Court has no power to issue injunctions to restrain domestic violence and the spouse is left to her remedies under State law.

The situation of the de facto spouse in Australia is vunerable compared to her counterpart in England or America where both legally married and unformalised marital relationship can be treated uniformly by legislatures. In England the Domestic Violence and Matrimonial Proceedings Act (1976) and in Scotland the Matrimonial Homes (Family Protection) Scotland Act (1981)[1]. extends to co-habitees, and makes provision for the occupancy of the home by exclusion of the violent spouse and transfer of tenancies, as does the New Zealand Domestic Protection Act (1983).

In the U.S.A. the States have power over marriage and divorce and this has facilitated those jurisdictions extending the same protections and support services within a unified court system, to both married and non-married alike.

Under Tasmanian State law, irrespective of formal marital status, the battered wife has a number of options, none of which at present provide her with adequate protection.

She may seek to have her assailant prosecuted under the criminal law for his assault upon her.

She may invoke the civil jurisdiction of the Supreme Court relying on her injury constituting a tort, which is a civil wrong infringing her private rights. The assault also constitutes a crime but the civil remedies of injunctions and damages may be more relevant to the victim than the criminal law which directs its attention towards punishing the offender.

She may seek to invoke the Justices jurisdiction in the lower courts in order to bind her assailant over to keep the peace towards her.

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1. The Scottish Act implements the recommendations of the Scottish Law Reform Commission Report No. 60 on "Occupancy Rights in the Matrimonial Home and Domestic Violence" Note: (1980) 6 C.L.B. 1320).

Each of these options under current Tasmanian law are discussed and comparisons made with those reforms interstate which seek to resolve some of law's inadequacies in relation to the problem of violence and harassment between family members, co-habitees and neighbours. Namely the:-

JUSTICES ACT AMENDMENT ACT (NO 2) 1982: SOUTH AUSTRALIA.

CRIMES (DOMESTIC VIOLENCE) AMENDMENT ACT 1982 No. 116: NEW SOUTH WALES

PERIODIC DETENTION OF PRISONERS (DOMESTIC VIOLENCE) AMENDMENT ACT 1982 No. 117 NSW.

CRIMES (HOMICIDE) AMENDMENT ACT. 1982 NSW

PEACE AND GOOD BEHAVIOUR ACT, 1982 (NO. 67) QUEENSLAND

The English DOMESTIC VIOLENCE AND MATRIMONIAL PROCEEDINGS ACT and the New Zealand DOMESTIC PROTECTION ACT (1983) are discussed in Chapter 5 and a comparison is made with the Australian FAMILY LAW ACT.

TASMANIAN STATE LAWS PERTAINING TO DOMESTIC VIOLENCE

(2) THE CIVIL JURISDICTION OF THE SUPREME COURT

Tasmania has no State legislation which specifically empowers the court to grant an injunction to prohibit a violent "de facto" spouse from molesting his partner nor can he be excluded from occupancy of the matrimonial home as a consequence of his violence.

State Courts in Australia have reached different conclusions as to whether they have the power to issue injunctions to restrain threatened domestic violence.

In Queensland the court considered it had no power to issue a non-molestation injunction, yet could issue an injunction to prohibit the man's trespass on the property in which the applicant was residing.[2] Invasion of property apparently being more worthy of protection than violation of one's person.

On the other hand the Supreme Court of South Australia[3] held that although in general the restraint of criminal conduct should be left to the operation of the criminal law, the Supreme Court has jurisdiction, in an appropriate case, to grant an injunction restraining the commission of threatened tortious acts, such as assault and molestation.

The grounds, in the Chief Justices' reasoning, were that every tort (civil wrong) may be redressed by way of injunction; however the remedy was discretionary and he was of the opinion that the courts should refuse to grant injunctions to restrain apprehended future assaults "in all but the most exceptional circumstances".

The tort of assault is an infringement of a private right and accordingly the court was not precluded from granting an injunction. The existence of the binding over jurisdiction of the Justices of the Peace did not deny the existence of a concurrent equitable jurisdiction in the Supreme Court to enjoin the same acts. Nor did the fact that the tort of assault also constituted the commission of a criminal offence, preclude consideration of the injunction to restrain the respondent from "assaulting, molesting, abusing, intimidating or harassing" her.

The case appeared to be determined on matters of policy: The restraint of criminal behaviour was considered best left to the operation of the criminal law; the appellant wasn't dependent on the public authorities responsible for criminal law enforcement but could make her own complaint of assault, or invoke the jurisdiction of the Justices to bind her assailant to keep the peace.

2. FITZWILLIAM v BECKMAN (1978) Qd. R. 398. Denmack J.

3. PARRY v CROOKS (1981) 27 S.A.S.R.I.

At the same time it was recognised that the situation in the Magistrates Courts in Sough Australia at that time (February, 1981) was unsatisfactory. Judge Zelling, in a dissenting judgement, was of the opinion that an injunction should be granted:-

> "At most it would be a question of whether the common law remedy was sufficiently efficacious as that equity had no need to intervene. In practice, especially in the field of domestic relations, a binding-over order is not as valuable as an injunction because of the congestion and delay in magistrates courts and because of the disinclination of magistrates to spend time hearing applications to bind-over arising out of domestic disputes."

The Chief Justice on the other hand considered that the criminal law or binding over to restrain threatened breaches of the peace should be the normal method of invoking the law and not the Supreme Court for obtaining preventive orders in relation to apprehended violence. If such orders weren't efficacious remedies because of congestion in the magistrate's courts or because binding over was not an effective deterrent then these were matters to be reviewed by the legislature and administratively.

In South Australia such reforms were introduced by the JUSTICES AMENDMENT ACT (No. 2) in 1982. These reforms vastly improve the likelihood of the victim obtaining simple and effective deterrents against threatened violence, and are discussed under State law reforms.[4.]

The Supreme Court injunctive powers were also considered in PARRY v CROOKS to apply to four situations:-

(i) where the conduct complained of affects the use of the matrimonial home or matrimonial property...and this applies equally to "de facto" relationships.

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4. Page 101

(ii) where the injunction is granted toprotect rights in contract or tort or a threatened breach thereby ....

(iii) where the conduct enjoined amounts to pressure on an injured spouse to forego the exercise of her legal rights.

(iv) the final category invoked the "parens patriae" protective jurisdiction of the Supreme Court in relation to children.

Judge Zelling was of the opinion that

"where the conduct complained of affect the housing, health or general welfare of the children, either directly or by the effect the conduct has on the mother, then .. this is a sufficient ground to found an injunction."

The situation in Tasmania, given the differing opinions of other State courts, is that the present law is uncertain as to whether the superior courts have an inherent jurisdiction to issue injunctions to restrain apprehended domestic assaults.

This is crucial to the de facto wife who fears continued domestic violence and cannot avail herself of the Family Law Court but must rely on State remedies.

The "parens patriae" protective jurisdiction in relation to children is available, and in situations of violence affecting the children the court is more likely to use its injunctive powers than in situations where the injured person applies to the Supreme Court on her own behalf. It appears this inherent jurisdiction does exist but the nature and extent of such jurisdiction is not clear.

What is clear is that potentially injunctions in equity in the Supreme Court may afford a far better remedy to the de facto spouse than either the criminal law or binding her assailant over to keep the peace. But these civil remedies in tort are uncertain remedies granted, if at all, by reluctant courts.

It is essential that those injunctive remedies available to married persons under the Family Law Act, be available to co-habitees through the equity division of the State Supreme Courts. It is anomolous that personal safety injunctions and the regulation of occupancy of the family home in situations of violence, are only available to formally married persons.

An unformalised union will be subject to the same stresses and the same economic and social constraints that gives rise to family violence and calls for similar remedies. Children will be no less affected and the battered woman's injuries no less painful because the union is not formalised; nor can it be considered "just deserts" for not having married. The existence of childen and the nature of family relationships is such that dependency and economic vulnerability is inherent in the home-maker who remains outside the paid labour force in the interests of her partner and children. Yet despite rights and obligations having been created by one party, altering her position to her detriment for the benefit of her "de facto" spouse, very few rights are recognisable in existing law. This applies particularly in circumstances where the union breaks down during the life of the parties compared with dissolution by death where anomalously certain rights accrue under Workers Compensation, superannuation, and Family Testators Maintenance Acts.

The plight of the "de facto" spouse and children subject to domestic violence must be acknowledged and appropriate reforms made by State legislatures. Penelope Stratmann[5]. writes that the concept of a right to exclusive occupancy of premises as an interim solution in situations of domestic violence -

> "should not be dismissed out of hand upon the basis so often resorted to - the doctrine of absolute ownership, which displaces consideration for the protection of people and the welfare of children."

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5. "Domestic violence: The legal response" in FAMILY VIOLENCE IN AUSTRALIA edited by Caral O'Donnell and Jan Craney. Longman Cheshire (1982) 131.

An injunction is essentially a temporary device, and in domestic violence situations the temporary exclusion of the violent partner from the home when the assault has both caused bodily harm and further attacks are feared, is an interventionist solution depriving one party temporarily of property "rights" but this is a secondary consideration and far less drastic than leaving the wife to be battered or to seek the sanctuary of a refuge having been forced to leave her home.

An order giving one party exclusive but conditional rights to occupy a property of which the other party is part owner is not an order altering the interests of the latter in the property within the meaning of S79 of the Family Law Act (1975).[6.]

What is essential is that:-

> "Any reform in this area will have to clarify the basis of a rational inter-relationship between the law of property and the law relating to personal protection. Unless Courts have the power to determine possession of the home in which the "de facto" spouses have been cohabiting, the advantages of an increased jurisdiction to grant protective injunctions will be minimised."[7.]

The Tasmanian Law Reform Commission report "Obligations arising From De Facto Relationships", while failing to deal adequately with matters of property, nevertheless recognised that the critical test in enforcing obligations between persons in a de facto relationship, is one of dependency. Dependency being capable of being proved when the parties have cohabited for a continuous period of 12 months. Twelve months also constitutes the separation period evidencing irretrievable breakdown of the marital relationship under the Family Law

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6. MULLANE v MULLANE (1983) 57 ALJR H.C.

7. STRATMANN. Ibid p. 131

Act and where maintenance obligations arise under S16 (5) of the Tasmanian MAINTENANCE ACT (1967).

It is suggested that this maintenance provision is only deficient inasmuch as it places obligations upon men to support dependent women. It is recommended that it be amended to create reciprocal maintenance obligations upon de facto spouses on a similar basis to the maintenance provisions of the Family Law Act.

With respect to the injunctive powers of the Supreme Court it appears that injunctions to restrain apprehended assaults will be refused "in all but the most exceptional circumstances". In the case of PARRY v CROOKS the woman's facial bruising and the violence causing her to flee her house with her three children was considered by the majority of the court, not to warrant granting and injunction.

Specious arguments about the degree of violence suffered and quibbles about the seriousness of threat made or the victims apprehension of future violence, are likely to distract attention away from the fact that the battered spouse in an unformalised union may require the injunctive remedies available in equity to the Supreme Court, is denied access to the Family Court, and may find the Justice's powers to bind-over her assailant to keep the peace towards her, a limited remedy.

It is recommended that similar injunctive powers pertaining to personal safety and exclusion from occupancy of the home in situations of violence be available to de facto spouses as are available to formally married persons under the Family Law Act.

Not only is the scope and extent of the Supreme Court's injunctive powers more limited and uncertain than those under the Family Law Act, the court has a discretion to stay an action in tort brought by one marital partner against

the other during their marriage if it appears to the court or judge "that no substantial benefit would accrue to either party from the continuation of the proceedings."[8]. So even though each of the parties to a marriage has a like right of action in tort against the other as if they were not married, such actions may be stayed by either the Supreme Court, or Court of Requests.

The spousal immunity that prevents one spouse from suing the other no longer applies, but seeking reparation for financial loss consequential on the injuries inflicted upon her by her spouse or other quantifiable damage is not only a complex and expensive action but is fraught with the difficulty of enforcing the judgement debt against the other spouse and the likelihood that she would be less likely to succeed in her action against her spouse than against a stranger. On the one hand the legislature has given spouses the right to take a civil action for the tort which is an actionable wrong infringing upon their private rights yet the attitude persists that it would be "unwifely" to sue one's spouse for wrongs against you despite compensatable damage. Whereas had the action been a criminal rather than a civil one the injured spouse could have been denied, compensation under the Criminal Injuries Compensation Scheme on precisely the ground that she is married to her assailant.

These matters of a spouse's civil rights are not trivial. There is substantial evidence that attacks upon women actually increase during pregnancy, and the emergence of a body of medical opinion that some defects apparent at birth are attributable to the pre-natal injuries suffered by infant during the assault on the mother.

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8. MARRIED WOMEN'S PROPERTY ACT (1935) TASMANIA S7A (2-a)

9. GB. HOUSE OF COMMONS SELECT COMMITTEE REPORTS ON VIOLENCE IN MARRIAGE (1976) VIOLENCE IN THE FAMILY 1975-76, MINUTES & EVIDENCE. Cmmd. Papers 6680-6700.

However given the difficulties inherent in a wife suing a husband for compensatable damage arising out of his assault, the limits on the Court's injunctive remedies combined with their reluctance to use their equitable jurisdiction other than in "exceptional circumstances" and the preponderance of property rights over personal safety in "de facto" marriages, means that these solutions are not feasible in violent relationships.

(3) THE CRIMINAL LAW

In Tasmania under the CRIMINAL CODE (1924)

"any person who unlawfully assaults another is guilty of a crime."[1.]

While words alone cannot constitute an assault a threat of violence which the victim has reasonable grounds to believe can be effected coupled with the assailant's ability to carry out that threat, constitutes an assault. Clearly assault does not necessarily involve the infliction of an injury and a threat to e.g. use a gun or other weapon which is present, is an assault. Applying force unlawfully and depriving another person of their liberty (e.g. locking them in a room) also constitutes an assault. Other provisions for aggravated assault[2.] wounding or causing grevious bodily harm,[3.] and culpable homicide[4.] which may either constitute murder[5.] or manslaughter[6.] are provided under the CRIMINAL CODE and all have their applicability to domestic violence.

These provisions are status neutral in the sense that

"a married person incurs the same criminal responsibility in respect of his or her acts and omissions as if such person were unmarried."[7.]

Sentencing involves a considerable degree of judicial discretion inasmuch as the code provides under S389 (3) that, except where otherwise expressly provided, the punishment for any crime shall be imprisonment for up to 21 years, or by fine, or both punishments

"and shall be such as the Judge of the court of trial shall think fit in the circumstances of each particular case."

This discretion has been praised for enabling the punishment to fit the

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1. S184
2. S183
3. S172
4. S156
5. S157
6. S160
7. S55

circumstances surrounding that particular case and condemned for being an abdication of responsibility by the legislature to determine the severity of punishment according to the crime charged.

In principle such sentencing flexibility is valuable.

In practice women victims of a crime committed against them are disadvantaged in that issues of right and wrong and marital accusations of why the violence occurred blur the criminality of the offence.

The attitude to the crime is that it is not so much perpetrated against the victim as between them. The woman victim is made to assume some of the moral blame and guilt for her husband's actions even though she may be estranged having left her husband because his behaviour towards her was intolerable. As later discussed a husband under S185 of the Tasmanian Criminal Code has absolute immunity from prosecution for the rape of his wife irrespective of estrangement, separate cohabitation, and informal marital relationship with another man etc. The charge is "indecent assault" not rape and the sentences are invariably less severe simply because of an attitude that down-grades the gravity of the crime on the basis that victim and offender once married.

It is clear that assault is a crime and the law in itself adequate. Theoretically an assault against a spouse is no different to an assault on a stranger. Indeed the Tasmanian POLICE OFFENCES ACT (1935) provides that where the unlawful assault is of an aggravated nature and perpetrated against a female or a child under 14 then the court may fine or imprison for 12 months and in addition may require the offender to enter into a recognizance with sureties, that is a bond, to be of good behaviour for up to 6 months.[8]. This in itself implies a recognition of the physical vulnerability of children and women whose size, weight and physical strength does not match that of their male assailants.

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8. S35 (2)

S55(1) provides that any police officer may arrest without warrant any person found offending under this Section, or in danger of causing serious injury to the property and person of another.[9.]

However, despite the adequacy of the criminal law in theory, in practice there is a considerable disparity in treatment by police, judges, magistrates, lawyers and related professions in situations where the offender and victim are married.

At every stage of the legal process the woman victim of domestic violence is placed at a disadvantage in comparison to all other categories of assault victims.

Initially the police may be reluctant to arrest despite sufficient evidence to charge because their law enforcement role conflicts with their service function which places a value on conciliation and mediation. A strong law enforcement policy is perceived to be undermined as the women are

> "reluctant to take their husbands to court; they may fear reprisals, the family unit could be broken; and financial hardship could result should he be sent to prison."[10.]

What is not adequately comprehended is the enormity of the battered woman's predicament. She may be unable or unwilling to leave the marriage but seeks to invoke criminal law sanctions and police protection as a means of deterring further brutal bashings.

An informal arrest-avoidance policy may be the police practice. If arrested bail may be granted without any assessment or advocacy of the victims situation. As repugnant as the concept of preventative detention may be, the civil liberties of an already injured woman who remains at home terrified that the release of her assailant before he has "cooled off" may result in reprisals,

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9. S 55 (3 a-d)
10. HOUSE OF COMMONS SELECT COMMITTEE pp. 376-377.

must be taken into account.

Penelope Stratmann understands the position well: She writes:-

"The ready availability of bail (often granted with little acknowledgement of the victim's position) may frustrate the whole point of the arrest. From the victim's point of view, the fear engendered by knowledge that the offender is, or may be, at large is as debilitating and threatending as his actual presence - sometimes more so. The children who cower in a corner are unacknowledged victims. Yet this omnipresent and socially dislocating fear is an element invariably overlooked by police, magistrates and lawmakers in assessing the severity of the situation. The criminal law takes no adequate account of it."[11.]

At an abstract level the criminal code makes it a crime to interfere with a witness. S100 provides that

"any person who with intent to pervert or obstruct the due course of justice, wilfully prevents, obstructs, or dissuades such person from attending as a witness .. or from giving evidence .. is guilty of a crime."

Yet if the victim withdraws her complaint, or decides not to proceed with the prosecution she is seen as vascillating or aligning herself with the offender and thereby compromising her victim status. The chances of a successful prosecution diminish and a negative attitude to processing domestic assaults through the criminal justice system becomes entrenched. Rarely, if ever, is the question of intimidation of the witness by threats and further acts of violence even considered.

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11. FAMILY VIOLENCE IN AUSTRALIA. EDITORS O'DONNELL & CRANEY p. 123.

What is unique in domestic assault cases is the extent to which the burden of prosecuting is imposed on the complainant. In theory the criminal law makes no distinction based on marital status: domestic assault for the purpose of the criminal law, is not a separate category of assault. Yet overwhelmingly the victims are women, and the police reluctance to prosecute is a world wide phenomenon. No other class or category of victims in the western criminal justice system are expected to bear the burden of a criminal law prosecution.

Most criminal prosecutions for domestic assault are commenced by summons, whereas when a criminal prosecution is commenced by charge, the police prosecutor conducts the case. The burden on the victim of conducting her own private criminal prosecution particularly while she lives with a husband or partner whose violence may terrify her is enormous, yet women victims are blamed for failing to do what no other class of victim is expected to do - that is, assume personal responsibility for prosecuting criminal law offenders.

Pakula writes:

> "A particular concern is the extent to which the burden of taking action both in initiating prosecution or applying for relief and seeking enforcement upon breach of court orders, is imposed upon the woman. The very fact that she has to take the action herself is calculated to occasion a repetition of the violent acts from which she seeks relief. Unless her first contact with the law or other helping agency is sympathetic and constructive, she will probably decline to pursue her case, and all too often nothing will be done.
>
> What is required is more active and positive intervention in these situations by the police, chamber magistrates, lawyers and judges, to fulfil whatever potential the law has for ameliorating the position of the victims of domestic violence."[12].

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12. N.S.W. BUREAU OF CRIME STATISTICS v RESEARCH. CONFERENCE PAPER 2. HENRY PAKULA & OTHERS. p. 14 (1979).

Although arrest cosntitutes a clear path to the courts there is considerable evidence documenting both police reluctance to arrest and the prosecutrix withdrawing her complaint, even in cases where the injuries are severe.[13.]

However even when police have adopted a strong enforcement policy,[14.] the willingness of the courts to grant bail, the frequency of adjournments, the overall leniency of the sentences conspire against achieving a result for the victim of any apparent significance.

Typically the case may be withdrawn or dismissed because the parties fail to appear for the bearing yet in non-marital domestic assaults (as stated by Justice Everett in the McQUEEN CASE (11.4.1983) HOBART CRIMINAL COURT) the

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13. BORELAND, Marie (edit) "VIOLENCE IN THE FAMILY". Article by Chatterton.

McCABE & SUTCLIFFE "Defining Crims: A Study of Police Decisions" Oxford University Centre for Criminological Research. Occasional Paper No. 9 Oxford 1978 p.44.

JUSTICE OF THE PEACE "Domestic Violence" 23.7.1977 p. 436.

RENVOIZE, J. WEB OF VIOLENCE. Routledge and Kegan Paul. London. 1978 p. 69-70, 73, 75.

MYERS, L. "Battered Wives, Dead Husband" Student Lawyer ABA March 1978 p. 50.

MARTIN, D. "Battered Wives" Glide. California. 1976. p. 99

GAYFORD

14. Bedfordshire Police. 1976 Results over 6 months: 288 complaints, 104 arrests of which only 3 given immediate custodial sentences thus 285 (95%) responsible for acts of violence against their wives remained at liberty after the wives had notified the police.

Crown has the prerogative to proceed with charges even if it was not the wish of the complainant, and a warrant was issued for the arrest of a man who was a material witness and had refused to answer his subpoena to give evidence at the trial of his son and another man accused of wounding him.

In "civil proceedings" husbands and wives are both competent and compellable witnesses.[15] However in criminal cases the husband and wife are competent witnesses but not compellable, other than in cases of an assault of any nature committed against a person under the age of 16 where they may be a compellable witness for the prosecution against the spouse charged.[16]

The amended Evidence Act embodies the recommendations of the Tasmanian Law Reform Commission Report,[17] and provides that the consent of the accused is no longer required before his or her spouse can be called as witness for the prosecution, and the prosecution may comment on the failure of a spouse to give evidence in favour of the other spouse if competent to do so.

This lack of compellability of the victim as a witness for the prosecution introduces considerable uncertainty into domestic assault cases and militates against their successful prosecution. Police naturally view this lack of compellability of the injured spouse to appear as a witness for the prosecution, as a major obstacle given the higher evidentiary standard of proof in criminal law cases.

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15. EVIDENCE ACT 1919 S84 (1).

16. EVIDENCE AMENDMENT ACT 1981 TASMANIA. NO. 52.

17. COMPETENCE & COMPELLABILITY OF SPOUSES TO GIVE EVIDENCE IN CRIMINAL PROCEEDINGS PREFERRED AGAINST THE OTHER SPOUSE (REFERENCE NO. 1).

This spousal immunity from compulsion to give evidence against her assailant spouse does not apply to de facto spouses who may be compelled by the prosecution to give evidence in criminal proceedings in which the other spouse is the accused.

The NSW Law Reform Commission[18.] suggested introducing a discretion in the court to require a married person to give evidence against his or her spouse where

"the interests of justice outweigh the importance of respecting the bond of marriage."

Other Committees[19.] while expressing concern about

"the social implications and .. potential harmful effect on the institution of marriage which would be caused by the complete repeal of such law"

nevertheless supports the common law exception and recommend its enactment in situations where violence is inflicted upon one spouse by the other or there is some deprivation of liberty.

In England the Court of Criminal Appeal view in R v LAPWORTH,[20.] that the wife was a competent and compellable witness was over-ruled by the House of Lords in HOSKYN v METROPOLITAN POLICE COMMISSIONER[21.] which held that the wife was not a compellable witness against her husband in spouse assault proceeding

In Australia the early High Court case of RIDDLE v THE KING[22.] considered the wife not a compellable witness. This view has been adopted in some cases[23.] but not in others.[24.] where the spouse has been considered a compellable witness in spouse assault cases.

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18. DE FACTO RELATIONSHIPS: ISSUES PAPER 1981

19. AUSTRALIAN SENATE STANDING COMMITTEE ON CONSTITUTIONAL & LEGAL AFFAIRS. THE EVIDENCE (A.C.T.) BILL NOVEMBER (1977) p.19 (para. 73) p. 20 (para. 75 (e).

20. R v LAPWORTH (1931) 1 KB 117

21. (1978) 2 WLR 695 (1978) 2 ALL ER 136

22. (1911) 12 C.L.R. 622

23. QUEENSLAND SUPREME COURT IN R v BYRNE (1958) QdN 18.

24. QUEENSLAND COURT OF CRIMINAL APPEAL IN R v JACKSON (1975) Qd. R.137; GAVIN

It appears that both the Australian High Court and the English House of Lords agree that at common law, the victim of spouse assault is a competent but not a compellable witness against her husband.

The issue of the States concern in protecting individuals through the criminal justice system as a matter of public policy, and the individuals "right" to frustrate that process in the interests of her personal relationship with her spouse has been settled without the earlier common law exception in spouse assault cases being preserved. In RIDDLE v R (1911) the accused had been convicted of wounding his wife with intent to murder her; she had been unwilling to give evidence but the trial judges had ruled that she was a compellable witness. The High Court quashed the conviction indicating that the necessity of gaining evidence did not necessarily go beyond

> "securing to the wife the protection of the law against her husband's criminal violence where it is her wish to avail herself of the protection."[25.]

Both the N.S.W. Task Force on Domestic Violence[26.] and the S.A. Task Force[27.] have either made a recommendation that the spousal immunity from compellability as a witness be repealed, or recommended further investigation.

The S.A. Report writes that the fact that spouses cannot be compelled to bear witness against each other

> " .. lays an enormous emotional burden upon the victim, leaving her open to pleas and threats from the offender and criticism from friends and relatives. In effect it means that she is her sole guardian: society will not insist upon intervening for her protection (although it accepts in all other cases that it is in the interests of society to prosecute violent aggressors). Without legislation to make spouses compellable

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25. RIDDLE v R. O'CONNOR J.
26. RECOMMENDATION 12
27. RECOMMENDATION 7

witnesses in such cases, there will remain ambiguity about police prosecutions in domestic assault cases."[28.]

Such legislative reforms have been enacted in N.S.W. and Victoria. The N.S.W. CRIMES (DOMESTIC VIOLENCE) AMENDMENT ACT, 1982[29.] provides that both legally married spouses and those living together in a "bona fide domestic basis" are compellable witnesses in domestic violence proceedings either for the prosecution or for the defence without the consent of the accused, except in those limited circumstances where he or she has applied to and been excused by the judge or justice.[30.]

The Judge or Justice must be satisfied that the application to be excused is made without duress, "freely and independently of threat or any other improper influence by any person."[31.] The seriousness of the domestic violence offence charged and both the importance of the facts upon which the spouse will be required to give evidence and the availability of other evidence to establish these facts, must also be taken into account.

In VICTORIA the CRIMES ACT (1958) was amended in 1978 to provide that a spouse or former spouse is a competent and compellable witness for both prosecution and defence in all cases, although a spouse may be exempted from giving evidence on behalf of the prosecution by reason of the "general circumstances of the case" such factors being enumerated in S400 (4) of the Act.

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28. S.A. DOMESTIC VIOLENCE COMMITTEE REPORT AND RECOMMENDATIONS ON LAW REFORM: NOV. 1981 p. 16.

29. NO. 116 SCHEDULE I IN RELATION TO COMPELLABILITY OF SPOUSES TO GIVE EVIDENCE IN DOMESTIC VIOLENCE PROCEEDINGS.

30. S407 AA (2) + (3)

31. S407AA (4) (a + b)

It is recommended that similar legislation be introduced into Tasmania making both legally married and de facto spouses compellable witnesses where one is charged with a domestic violence offence.[32.] Further, that the legislation be drafted to leave no doubt that its provisions relate to estranged spouses cohabiting separately as well as those in a subsisting marriage living on the same premises, as sufficient evidence exists of the frequency and seriousness of assaults perpetrated against women who have sought to free themselves from violent marriages.

The result of the N.S.W. and VICTORIAN amendments shifts the burden off the victim in the sense that she has no choice but is compelled to give evidence unless she takes the positive action of seeking to be excused and must present that request to the court. Such a request will only be granted if the court decides, on the grounds specified, that her appearance as a witness in unnecessary. The reasons for excusing the victim must be recorded and the application heard in the absence of the jury.

Police reticence to lay charges of assault in the belief that they may lose their "key witness" will no longer apply. The Crown will be in exactly the same position in prosecuting marital assaults as in all other assaults

As pointed out by Anne Riches[33.] the approach embodied in the amendment making spouses compellable witnesses, coincides with the view of Lord Edmund Davies in his dissenting judgement in HOSKYN (1978) at 159, who said

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32. NOTE: "De Facto spouses are already compellable witnesses, however legislation aimed at giving adequate remedies in situations of domestic violence needs to be expressed to include de facto as well as formally married persons.

33. AUSTRALIAN CURRENT LAW ARTICLES. "Domestic Violence Reform (N.S.W.) - A Beginning" JUNE 1983. BUTTERWORTHS.

"For my Part I regard as extremely unlikely any prosecution based on trivial violence being persisted in where the injured spouse was known to be a reluctant witness. Much more to the point, as I think, are cases such as the present, as MORGAN (1976) AC 162, and as others arising from serious physical maltreatment by one spouse of the other. Such cases are too grave to depend simply on whether the injured spouse is, or is not, willing to testify against the attacker. Reluctance may spring from a variety of reasons and does not by any means necessarily denote that domestic harmony has been restored. A wife who has been subject to a 'carve up' may well have more reasons than one for being an unwilling witness against her husband. In such circumstances, it may well prove a positive boon to her to be directed by the court that she has no alternative but to testify."

The fact that S420 (1) of the Tasmanian Criminal Code preserves the right of any person, with the leave of the Supreme Court, to file and indictment against any other person for any crime alleged to have been committed, is not the issue. The issue is that women victims of domestic violence as a class are treated differently to all other assaultees. They in effect are required to pursue their own private criminal law prosecutions as victims in order to guarantee their legal protection, the State having abdicated that prosecutorial role when the assailant is a spouse of the victim, partly on the basis that the prosecution case is weakened by the injured spouse not being a compellable witness for the prosecution.

Further the lack of legal aid and the expense of obtaining a private solicitor also provide deterrents;"... legal aid is available in most courts of petty sessions to persons charged by police, but not to complainants"[34].

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34. FISHER R.G. "Domestic Violence " THE AUSTRALIAN POLICE JOURNAL OCT. 1981.

It is absolutely essential that legal representation and legal aid be available for people taking out summonses for assault. Fear of retaliation, loss of the breadwinner and deep concerns about criminal sanctions being invoked by the woman against her partner, are factors that make women reluctant to proceed.

However rather than assisting women to overcome obstacles in the way of legally guaranteeing their protection official agencies tend simply to discourage prosecution knowing that current remedies are ineffectual. Spouse assault victims are uniquely disadvantaged by factors such as the non-compellability of spouses to give evidence in criminal proceedings; the consequent exposure of the victim to intimidation and pressure from the spouse charged with the offence and the reticence of police to prosecute knowing that their primary witness may decline to give evidence; and ultimately the channelling of "battered wives" as a unique class of victims who are expected to initiate their own actions, to file their own assault complaint often without legal aid, and pursue a prosecution as a private person for a criminal assault in full realisation that the sanctions sought to guarantee their personal safety from assault may be ineffectual.

Her attempt to seek the laws inadequate protection may result in her violent spouse taking vengeance on her for putting him as "risk" of State intervention in his privately conducted criminal assaults on his wife.

(4) MARITAL RAPE

MARITAL RAPE AND THE IMMUNITY OF THE HUSBAND FROM PROSECUTION UNDER S185(1) OF THE TASMANIAN CRIMINAL CODE

The retention of spousal immunity from prosecution for rape, is not only "archaic and unjust"[1] but symbolises the State's condonation of the sexual abuse of women within marriage. The immunity of husbands from rape of their wives derives from notions of female coverture and their status in marriage as it applied some 300 years ago. Because this immunity has statutory embodiment in the CRIMINAL CODE the subsequent developments in the common law that have removed the husband's immunity in certain circumstances, have no application in Tasmanian law. So long as the parties are technically still married the man may rape his wife or former partner but cannot be prosecuted for rape.

This immunity is inconsistent with the concepts embodied in the Family Law Act. S114 (2) provides that the court may make an order relieving a party from the obligation to perform marital services or render conjugal rights. Further the marriage can be terminated by the unilateral actions of one party and estrangement should infer a revocation of the consent to intercourse.

The marriage can be terminated on the unilateral decision of one spouse evidenced by twelve months separation as constituting an irretrievable breakdown of the marital relationship; this choice clearly extends to marital sexual relations - if non-consensual such sexual relations would not have to be endured. Parties may separate yet live together under the one roof and the absence of sexual relations is but one element in evidencing a separate existence, as is the existence of sexual relations in evidencing whether a resumption of co-habitation (for a period of not less than three months) constitutes a restoration of the marital relationship.

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1. Bellchambers Tas. Unr. 94/1982 Hawkins April 1983.

The common law doctrine of spousal immunity from prosecution for rape-within-marriage, and its embodiment in various criminal codes including S 185 (1) of the Tasmanian Criminal Code (1924), is a ruthless and anachronistic re-inforcement of women's subordinate position in marriage.

The immunity has been severely criticised and in some Australian and overseas jurisdictions has been qualified or abolished. Abolition of the husband's immunity at least accords to wives theoretical sexual equality in marriage, and would afford some protection by the criminal law at least in the most brutal, violent and reprehensible cases.

Scutt writes[2.] that it is a basic proposition

"that no person should remain unprotected by the law, simply because she is a married person, and that no person should escape prosecution, simply because he has wed his victim."

Public interest is not served by retaining the immunity.

COONAN emphasizes that

"but for the existence of the marital relationship a person's actions would be subject to the sanctions of the criminal law, the interests of public policy are not served by ignoring such acts any longer."[3.]

It is ironic and anomolous that marriage law as embodied in the FAMILY LAW ACT accords an equal status to marital partners, while the common law spousal immunity for marital rape and its embodiment in criminal codes, deprives a married woman of the criminal laws protection from rape and affords legal protection instead to the assailant who has raped her. This immunity is based entirely on the status of marriage as it existed some 300 years ago.

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2. SCUTT (edit) RAPE LAW REFORM: Australian Institute of Criminology p. xiii.
3. SCUTT (edit) RAPE LAW REFORM: Helen Coonan p. 44.

Under the present Tasmanian criminal law the wife-victim is left without redress, and a husband can rape her with legal impunity irrespective of consent and irrespective of the degree of estrangement short of final divorce.

If there is a subsisting marriage the husband's immunity from prosecution for marital-rape is absolute; he cannot be guilty for the rape of his wife because S185 (1) of the Tasmanian CRIMINAL CODE provides:

> "Any person who has carnal knowledge of a female not his wife without her consent is guilty of a crime which is called rape."

Due to the express provision of S185 (1) the common law doctrine of spousal immunity has no application in Tasmanian law, and nor do the qualifications which modified some of the harsh injustices of the common law immunity, apply either. While the common law has modified the doctrine gradually, the criminal law enshrined in code remains an inflexible anachronism of a by-gone age.

The Tasmanian Court of Criminal Appeal in BELLCHAMBERS v THE QUEEN[4]. stated that:

> "The existing law of Tasmania can be seen as an unacceptable statutory expression of an archiac, unjust and discriminatory rule, which is not only subject to the criticism levelled against the basis of the common law principle itself but also lacks the ameliorative effect of the common law qualification that the wife's implied consent may be revoked."

The common law immunity was further described as

> "a generally discredited and obsolete principle of the common law in respect of rape",[5].

and reference made to the criticism of the Victorian COURT OF APPEAL in R v McMINN (1981) 38 A.L.R. 565 of the then Victorian law prior to the enactment

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4. TASMANIAN UNREPORTED (4/1982 page 5 NEASEY J. EVERETT J.)
5. Ibid

of the CRIMES (SEXUAL OFFENCES) ACT 1980.

The situation in Tasmania however remains that:

"The definition of rape in S185 of the Criminal Code is such that a man can never be convicted of the rape in Ta smania of a female who is his wife, whatever the matrimonial circumstances and whether or not there has been what would at common law amount to a revocation of so called implied consent."[6.]

The Tasmanian law granting immunity to husbands from prosecution for rape was again very recently described by Justice Everett, as "archaic, unjust, and discriminatory" in in R v HAWKINS.[7.]

It is sometimes pointed out[8.] almost by way of inference that the existence of the immunity for marital rape is not a matter of great concern - that as S389 of the Tasmanian Criminal Code provides for considerable judicial discretion in sentencing, then this allows a gradation of severity of punishment according to the circumstances of each case. In effect, that despite the immunity from prosecution for rape, the husband who rapes his wife can still be prosecuted for indecent assault and the sentence can be as severe as a sentence for rape, as this in fact (but not in law) is what he has done.

This line of reasoning evades the issue. Firstly, Tasmania's system of judicial discretion in sentencing may be unique in comparison to other Australian jurisdictions and some would see it as an abrogation of the responsibility by the legislature to itself determine which offences are considered more or less serious and grade the punishment accordingly. Nevertheless such wide judicial discretion in determining the severity or otherwise

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6. BELLCHAMBERS No. 941 1982 p.4.
7. No. 313/1982
8. ATTORNEY-GENERAL MR. BINGHAM "MERCURY" - 22/4/1983 "STATES IMMUNITY LAWS UNJUST: SAYS JUDGE.

of the sentence does exist in this jurisdiction, and apart from a few exceptions (where the mandatory punishment is death or life imprisonment) S389 provides that all crimes are punishable by a maximum sentence of 21 years imprisonment and/or fine.

Whatever the advantages or disadvantages of such a system[9.] it is not for the judge to look beyond the crime charged (of indecent assault) to the substance of another crime, namely rape, when the very reason the offender is not being charged with rape is the existence of the immunity in law embodied as it is in the criminal code.

Secondly, given that the immunity is anarchronistic, unjust and completely out of step with present Family Law and marital status, there is no satisfactory alternative other than to abolish the husband's immunity from prosecution for marital rape.

The Tasmanian LAW REFORM COMMISSION'S REPORT on the reform of the law relating to rape and sexual offences[10.] recommends that:

"the immunity of husbands from prosecution for rape be abolished."

Further elaboration on necessary changes to the substantive law can be found in this report. The Domestic Violence Review endorses the recommendations of the Law Reform Commission Report and urges their legislative enactment.

While the abolition of the immunity will not solve the problem of rape within marriage, it will be an acknowledgement by the law that the harm and injury inflicted upon the wife is unjustifiable and inexcusable.

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9. W.J.E. COX: CROWN ADVOCATE TASMANIA: RAPE LAW REFORM (edit) SCUTT J. - "The provisions of the Code enable Judges to apply a penalty appropriate to the gravity of the particular case without the constraint of different statutory maxima imposed by references only to the basic ingredients of various crimes."

10. No. 841 1982 Section 6 No. 1 p.31 para. 17 Tabled in Parliament December, 1982.

The criminal law and criminal justice system may be ineffectual in altering basic patterns of behaviour that find expression in domestic violence and rape within marriage. Nevertheless removal of the immunity, would have an important symbolic effect in that it would define principles governing the status of married women in this State. It would also be a statement of government policy on appropriate community attitudes on the status of women and the principle and value of equality in marriage, as well as a condemnation of violence in marriage.

It would bring Tasmania into line with other State legislatures who have already abolished the immunity of the husband from prosecution for marital rape, as part of the reform of the criminal law relating to rape and other sexual offences.

South Australia, in 1976, became the first jurisdiction in the common law world to enact rape in marriage legislation[11.] a pioneering action which attracted intense interest and controversy both in Australia and overseas.[12.] The concerns expressed by the Mitchell Committee[13.] that:

> "To allow prosecution for rape by a husband upon his wife with whom he is co-habiting might put a dangerous weapon into the hands of a vindictive wife and an additional strain upon the marital relationship."[14.]

have been unfounded as have fears of a flood of complaints. In the four years from December 1976 to 1980 the South Australian policy received 13 reports of rape in marriage.[15.] The two cases that proceeded to trial involved estranged spouses living in separate households and included aspects of other violent and assaultive behaviour.

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11. CRIMINAL LAW CONSOLIDATION AND AMENDMENT ACT 1976
12. SALLMAN, 1976, 1980
13. S.A. Criminal Law & Penal Methods Reform Committee: formed in December, 1975 and headed by Justice Roma Mitchell.
14. Mitchell Committee ibid.
15. Chappell, Sallman "Rape in Marriage Legislation in S.A." The Australian Journal of Forensic Sciences. Vol. 14 No. 3 Mar. 1982.

Though the first jurisdiction in the common law world to qualify the common law doctrine of the husbands immunity for marital rape, the South Australian reform is an unsatisfactory piece of legislation containing substant ambiguities. A tortuous passage through Parliament amidst controversy and con ation, produced a compromise law drafted piecemeal by a Parliamentary Committee and described as being

> "full of interpretative snags which will cause the Courts great problems when, and if, cases came to light."[16].

The CRIMINAL LAW CONSOLIDATION ACT AMENDMENT ACT, 1976 enacted S73 (3) providing that

> "No person shall, by reason only of the fact that he is married to some other person, be presumed to have consented to sexual intercourse with that other person",

but this was qualified by a later provision at S73 (5) which introduces a new concept of "aggravated rape". Where a spouse shall not be convicted of rape or indecent assault upon his spouse unless the alleged offence was in the conte on an:

> "(a) assault occasioning actual bodily harm, or threat of such an assault upon the spouse.
>
> (b) an act of gross indecency, or threat of such an act, against the spouse.
>
> (c) an act calculated seriously and substantially to humiliate the spouse, or threat of such an act, or
>
> (d) threat of the commission of a criminal act against any person."

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16. Sallman. RAPE LAW REFORM edit Scutt p. 80.

Nonetheless it was a symbolic and deeply significant reform that made legal history, and has subsequently been improved upon by reforms in other jurisdictions.

In the United States about five legislatures followed suit, the case of RIDEOUT v RIDEOUT from the State of Oregan being heard in the same year as the first Australian marital rape case of GREENWAY (May 1978).

In Australia, Victoria with the VICTORIAN CRIMES (SEXUAL OFFENCES) ACT (1980) and New South Wales with THE CRIMES (SEXUAL ASSAULT) AMENDMENT ACT (1981) restructured laws relating to non-consensual sexual offences, by replacing the principal offence of rape with graduated categories of "sexual assaults" with corresponding penalties. Part of these reforms abolished the husband's immunity for prosecution for rape.

The New South Wales Act clearly states in S61 A (4):

"The fact that a person is married to a person -

(a) upon whom an offence under S61 B, S61 C or S61 D is alleged to have been committed shall be no bar to the first mentioned person being convicted of the offence .."

The commentary on the Act[17.] states that the

"provision has been made for more abundant caution. Were there no subsection 61 A (4) in the Act, the legal position would not be different from that specified in the subsection. Since the common law of rape and attempted rape is, by virtue of the amended S63, abolished, the immunity of the husband against conviction as a principal in the first degree for that offence automatically disappears. Nonetheless, because the abolition of that immunity was regarded as an important matter of government policy, and since it is desirable to avoid any possible argument to the contrary subsection 4 spells out that the status of marriage shall be no bar to

17. DR. G.D. WOODS, DIRECTOR, CRIMINAL LAW REVIEW DIVISION, Department of Attorney-General & of Justice: SEXUAL ASSAULT LAW REFORMS IN N.S.W. 1981 p.10.

a conviction for an offence under S61 B, 61 C or 61 D."

Dr. WOODS also comments on the symbolic importance of abolishing the spousal immunity for marital rape; that domestic sexual assault rarely occurs in the absence of ordinary assault; that the provision of refuges represents contemporary recognition that domestic violence is a serious and widespread contemporary problem, and that the law has an educative function in condemning physical violence within the family.

Further, the likelihood of there being few prosecutions of husbands for sexual assault, and the likelihood of such allegations being difficult to prove, does not detract from the correctness of the change in the law.

The cases that have come before the courts illustrate the harassment that some estranged spouses suffer; the violence of which sexual assault or rape is merely one manifestation; the fear, terror, threats to life and systematic property damage; and the futility of the injunction as protection against an intransigent husband whose desire to inflict harm exceeds any deterrent value the injunction might be expected to have.

In the first case of marital rape in South Australia (May 1978) the Family Law Court had issued two injunctions against the husband, GREENWAY, both of which had been breached, and the police had been called on a number of occasions since the separation, by Mrs. Greenway to protect her from her husband's hostile actions. The circumstances surrounding the rape involved Greenway threatening to kill his wife with a screwdriver, dislocating her jaw, breaking furniture and ripping the phone out of the wall.

The case resulted in conviction unlike the second case where the Judge refused to allow a request to be put to the jury requesting that any with strongly held views on the rape-within-marriage legislation, likely to affect

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18. DUNCAN CHAPPELL, PETER SALLMAN "RAPE IN MARRIAGE LEGISLATION IN S.A., ANATOMY OF A REFORM". THE AUSTRALIAN JOURNAL OF FORENSIC SCIENCES VOL. 14 NO. 3. MAR. 1982 p. 62.

their objectivity, stand down from selection.[18.]

Again in the Tasmanian cases of marital rape the spouses were estranged and living separately, and the rape was one aspect of other violent and assaultive behaviour.

The absolute immunity granted to husbands under S185 (1) of the CRIMINAL CODE, reduces the charge to one of "indecent assault" with a corresponding expectation that the sentence will be less severe than a sentence for rape.[19.] In Australia it has long been held as in England,[20.] that a husband may be convicted of assault or indecent assault upon his wife where he uses force to impose sexual intercourse. Where the immunity from rape exists the argument has been presented that as the husband has an absolute right to marital intercourse, then this is an answer to a charge of "indecent assault" no more force than necessary being used to effect intercourse, irrespective of the non-consensual nature of the Act.

Such arguments which attempt to "normalise" marital rape, cloud awareness that marital rape is just the tip of the wider problem of domestic violence generally, and that a very significant number of assaults reported to police occur subsequent to spouses having separated.

In the BELLCHAMBERS CASE[21.] the husband's immunity under S185 (1) was described by Justice Everett and Justice Neasey of the Court of Appeal as "archaic, unjust and discriminatory". This was reiterated by Justice Everett in the HAWKINS CASE.[22.]

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19. BELLCHAMBERS - 12 months imprisonment with the last 6 months suspended on certain conditions. The Appeal was on the grounds that this sentence was excessive.

    HAWKINS - 6 months imprisonment

20. R v MILLER (1954) 2 W.L.R. 138
21. BELLCHAMBERS CASE (No. 94/1982)
22. HAWKINS CASE (No. 313, 1982)

The BELLCHAMBERS CASE involved a marital rape in the presence of the victim's mother with the children nearby, and followed a breakin to the mother's house and an assault to her prior to assault and rape of her daughter.

The HAWKINS CASE involved the victim being restrained, bonded, assaulted and threatened with a rifle and subjected to various non-consensual, sexual acts.

Each instance involved violence, terror and abuse; only the presence of the immunity in the code converting what in fact was rape into a charge of indecent assault.

It is possible that the problem of violation without redress in law, may be a factor precipitating a violent retaliation resulting in the wife killing the husband following a forced, non-consensual sexual assault.[23.]

The origin of the common law doctrine of spousal immunity, on which S185 (1) of the code is based, is attributed to a declaration of Sir Matthew Hale made without reference to any authority over 300 years ago that:

> "The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife has given up herself in this kind unto her husband, which she cannot retract."[24.]

Gradually the reforms of the late 19th and 20th centuries eroded the concept of female coverture and established formal equality between spouses.

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23. TASMANIAN CASES OF ROBYN GARDINER & ANNE FRANKE (1983) where pleas changed to guilty of manslaughter.

24. Hales Pleas of the Crown (1736) Vol. 1 p. 629. (1st published) Hale died in 1676 .. declaration made in the 17th century not the 18th.

The development of the criminal law did not keep in time with civil law developments maintaining the inflexible attitude that all marital intercourse is lawful and therefore a husband is immune from prosecution for rape of his wife irrespective of the issue of consent.

Hale's authority has never been overruled though it has been both qualified and subject to judicial criticism for almost 100 years. Minority judgements in R v CLARENCE[25]. declared that while the communication of venereal disease knowingly by the husband to the wife amounts to legal cruelty and is ground for a judicial separation it should also constitute a criminal assault as it would were the parties unmarried.[26].

Where a formal judicial decree of separation had been granted the husband's immunity from prosecution for rape no longer applied,[27]. yet in other instances the absence of a formal decree of separation despite the wife having initiated divorce proceedings was held to protect the husband's immunity from prosecution for the rape of his wife.[28]. Once the decree nisi was granted following the divorce hearing the wife's consent to marital intercourse was considered to be revoked and the husband could be charged with her rape.[29]. The common law also accepted that an injunction against molestation, or such an undertaken given by the husband to the court would similarly deprive the husband of this immunity for prosecution for rape.[30].

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25. R v CLARENCE (1888) 22 QBD 33 Hawkins J. with Day J. concurring.
26. R v BENNETT 4 FTF 1105.
27. R v CLARKE (1949) 2 AII E.R. 448.
28. R. v MILLER (1954) 2 W.L.R. 138.
29. R v O'BRIEN (1974) 3 AII E.R. 663.
30. R v STEELE (1977) 65 Cr. App. Rep. 72.

It is at least arguable in those Australian States where the common law applies, that the law in 1983 doesn't provide husbands with any status immunity. The immunity principle has been much criticised and its current applicability doubled.[31.]

However, with respect to Tasmania as before stated

> "the definition of rape in S815 (1) of the CRIMINAL CODE is such that a man can never be convicted of the rape in Tasmania of a female who is his wife, whatever the matrimonial circumstances and whether or not there has been what would at common law amount to a revocation of so-called implied consent."[32.]

It is essential that the "anachronistic, unjust and discriminatory" rule be abolished. The spousal immunity under S195 (1) is a relic of a past age, which has absolutely no justification for its existence on the statute books in this era. Marriage does not legitimise rape, nor should the criminal code decriminalize an act of rape on the basis that technically a marriage status exists between rapist and victim.

There is sometimes a tendency to confuse the protection of the sanctity of marriage with "marital privacy" as if there is a private domain outside the range of the criminal law. While privacy is one aspect of civil liberties, so too is the right to the protection of the criminal law irrespective of marital status, and irrespective of whether the assault or rape occurred om the privacy of the home. Those who subscribe to a belief in the sanctity of marriage and the dignity of individuals joined in marriage, must recognise the principle that each act of marital intercourse (as with consent to marry) is freely and willingly given and not vitiated by threat, force, or duress and further that the violence, degradation and humiliation intended by the

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31. R v CALDWELL (1976) W.A.R. 204.
32. BELLCHAMBERS CASE

assailant in an act of marital rape is the antithesis of consensual marital sexual relations. Marriage does not legitimize rape.

(5) PEACE COMPLAINTS

The peace complaint is an ancient common law remedy.

"The common law permits anybody to arrest for a breach of the peace committed in his presence or reasonably apprehended by him."[1.]

The officer is under a duty to prevent the occurrence of a breach of the peace, and action in execution of this duty excuses him from liability he might otherwise incur,[3.] however the extent of this authority is somewhat vague and requires statutory clarification.

With respect to apprehanded breaches of the peace in threatened domestic violence situations, it is considered that a more appropriate enactment would be one granting police restricted powers of entry into private premises for the purpose of investigating such incidents. This is discussed further under police powers and statutory recommendations.[4.]

The old common law remedy of the peace complaint is embodied in the Justices ACT (1959)[5.] It is a potentially useful remedy in that procedurally it requires very little formality and if the complaint is well founded the person against whom the complaint is directed will be bound over to keep the peace towards the complainant. To the "de facto" spouse excluded from the injunctive remedies under the Family Law Act and unlikely to be granted injunctive relief by the superior courts other than in "exceptional cases",[6.] yet requiring a protective order which will act as a deterrent and is relatively easily available, the peace complaint is the most useful procedure.

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1. CAMPBELL & WHITMORE FREEDOM IN AUSTRALIA.
2. THOMAS v SAWKINS (1935) 2 K.B. 249.
3. DOWLING v HIGGINS (1944) TAS S.R. 32.
4. REFER PAGE 4.
5. TASMANIAN JUSTICES ACT (1959) PART X SURETY OF THE PEACE.
6. REFER TO THE SECTION: TASMANIAN STATE LAW. THE CIVIL JURISDICTION OF THE COURT, Page 51.

The application is made to a justice by a sworn complaint setting out the facts and corroborated on another person's affidavit if necessary.[6a] In domestic violence situations the complainant is likely to rely on S93 (3) (a & b) which provides for a person to be bound over for any act which if done, would be both punishable as an offence and calculated to cause serious injury to the complainant, to any person in the complainant's care or to any property of the complainant. The bond or surety is not a punishment for past violence but is aimed at preventing future incidents which would constitute a breach of the peace. The justice must consider

> "that there is just cause for fear that the person so threatening will, if not prevented, carry his threat into execution."

If the justice considers there is immediate danger to the complainant's person or property a warrant for apprehension may be issued otherwise the complaint proceeds by summons.[7.] In these civil proceedings where the wife lays a complaint to justices and seeks to have her assailant husband bound over to keep the peace towards her she is both a competent and compellable witness,[8.] and therefore on the same legal footing as a "de facto" spouse.

The costs of the proceedings for surety of the peace are to be paid by the complainant, unless the justice considers it more fitting that the defendant pay the complainants costs to the extent these are deemed reasonable.[9.]

The situation of a married woman home-maker with no source of income and totally economically dependant on a working husband can be extremely difficult. In a subsisting marriage, despite the complaint for the assault being directed against the husband, the battered wife may fall outside eligibility criteria for legal assistance on the basis of her husband's income yet she could be in virtual poverty having no control over household income.

6a. JUSTICES ACT (1959) S94(1)(2).
7. S94 (3)(4)
8. EVIDENCE ACT S82
9. JUSTICES ACT (1959) S98(1)

The complaint may be contested, further evidence may be required and legal representation necessary. As this is not a Commonwealth legal matter unless either party is in receipt of a Commonwealth pension or benefit, financial assistance through the Australian Legal Aid Office is not available, and State aid must be sought. Frequently the complainant is unaware of these avenues of assistance and some time may elapse before she finds out whether assistance will be given and from what source. Any fragmentation of legal and information or advisory services and financial assistance invariably operates like an obstacle race to an ill-informed client and renders attempts to invoke available legal remedies less effective.

The bond or recognizance cannot exceed one year. If the dependant fails to enter into a recognizance he may be jailed until he has done so but not for longer than he would have been bound under the original order.[10.]

The limitation of the peace complaint as a remedy for the domestic violence victim is that specific conditions cannot be attached to the bond.

The flexibility of the injunctive relief that can be given by superior courts or by Family Courts is not available. The dependant cannot for instance be restrained from coming onto the complainant's premises or place of work. There is no power other than persuasion of referring the dependant or parties to psychiatric or alcohol rehabilitation treatment, personal counselling, or placing the offender under the supervision of the probation service in order that some follow-up assistance is available.

Once again the problem of enforcement is an issue.

Police can only arrest if there is evidence of what would in any event be an offence regardless of the bond, and not merely because the bond has been broken by further threats and violence.

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10. S97 (1); S99 (1)(2)

It is up to the complainant to lodge a further complaint to the court that the bond has been breached and requesting that the recognizance be forfeited. This can be proved by proof that the bound person was convicted of an offence e.g. assault against the complainant, that was prohibited under the bond, or proof of the breach or threat to do the very thing the bond sought to restrain him from doing.[11.] The sum required by the recognizance is forfeited, and non-payment can be recovered by execution against goods and chatels and in default 3 months imprisonment.[12.]

As a remedy the bond is ineffectual in that it grants the victim no immediate protection and the police no specific power of arrest for the breach of the bond. It is left to the complainant to return once again to the court.

The South Australian Chief Justice of the Supreme Court in PARRY v CROOKS considered the problem one for the legislature

> "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."

The South Australian and Queensland legislatures by amending the JUSTICES ACT and by the PEACE AND GOOD BEHAVIOUR ACT have respectively in 1982 sought to remedy defects in peace orders. These are discussed following under State legislative reforms.

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11. JUSTICES ACT (1959) S105 (1) (a & b)
12. S106

CHAPTER FOUR

(1) A SUMMARY OF DOMESTIC VIOLENCE LAW REFORMS IN NEW SOUTH WALES, SOUTH AUSTRALIA AND QUEENSLAND AND THEIR APPLICABILITY TO TASMANIAN LAW REFORM.

Generally offences that constitute a breach of the peace such as injury to persons or property or offensive behaviour, now constitute a specific domestic violence offence. The reforms emphasise the preventive, deterrent approach where the court order aims to protect the victim by preventing further injury but at the same time improve enforcement when orders are breached; they provi more appropriate sanctions and a variety of conditions which can attach to the courts orders. A police power of arrest attaches to the order, breach of which is an offence enabling the police to arrest without warrant. (N.S.W., S.A., QLD.) Restrictions are placed on bail which direct the person considering the bail application to specific enquiries relating to the domestic violence victim. The offender may be excluded from the complainants workplace, home or other specified premises irrespective of his or her legal or equitable interest in that property. (S.A.; N.S.W.). The peace orders apply between all persons (S.A.; QLD.) but only between legally married and de facto co-habitees in N.S.W. This limits the provisions to inter-spousal violence and may exclude estranged de-facto spouses and other victims of family violence (such as aged or incapacitated adults or children not adequately covered by Child Protection of Welfare legislation).

Spouses are compellable witnesses for the prosecution without the assent of the accused. [VIC. (1978) N.S.W. (1982) S.A. (1983)], The hearing may be "ex parte" (N.S.W.; S.A.; QLD.) but in S.A. the offender is summonsed to appear in court at a later date. The orders can be for a specified time (6 months N.S.W.) or an indefinite period (S.A.); and penalties provide for imprisonment (e.g. QLD. up to one year) and also for periodic detention. (QLD. & N.S.W.).

In S.A. the police serve the restraining order, have the power of arrest as the breach is an offence, restrictions are placed on bail and the police

lay the complaint for breach in all but about 3% of the cases. Copies of the restraining orders are sent to the Restraining Order Unit at Police Headquarters. The N.S.W. and QLD provisions also place the responsibility for enforcement of orders when disobeyed onto the State rather than the victim.

N.S.W. has redefined police powers of entry into private premises where violence is apprehended, and for telephone or radio warrants when entry is refused. The defence of provocation has been broadened to include acts "at any previous time" as constituting provocation thus taking comprehension of accumulative abuse over a number of years of violence as a factor affecting the accused persons loss of self control and the consequent killing.

Both S.A. and N.S.W. Have removed the former spousal immunity from prosecution for a husband's rape of his wife, and other States are reforming sexual offence laws.

The relevant legislation is the N.S.W. CRIMES (DOMESTIC VIOLENCE) AMENDMENT ACT 1982 No. 116 with three schedules on the compellability of spouses, police powers of entry and apprehended violence orders. The PERIODIC DETENTION OF PRISONERS (DOMESTIC VIOLENCE) AMENDMENT ACT (1982) No. 117 and Form 4A of the BAIL ACT (1978).

In S.A. the JUSTICES ACT AMENDMENT ACT No. 2 (1982) and the EVIDENCE ACT AMENDMENT ACT (No. 2) 1983 apply and legislation on police powers of entry is under consideration.

In QLD the PEACE AND GOOD BEHAVIOUR ACT (1982) has similar provisions to the S.A. peace orders and the N.S.W. "apprehended domestic violence" orders but though the order may contain a number of stipulations and conditions, none apply specifically to the exclusion of the offender from the victims home or work premises irrespective of property interests. It follows only N.S.W. and S.A. can accord de facto spouses who are victims of violence, similar non-molestation and exclusion orders that are available to married persons under Family Law Court injunctions; and which temporarily overide the offenders

Property "rights".

In Tasmania the situation is that a married victim of spousal violence may obtain a Family Law non-molestation injunction or one excluding the violent partner from the matrimonial home; de facto spouses and others may apply to the civil jurisdiction of the State Supreme Court to seek injunctive relief on the basis of the dependant's actionable wrongs against them. The scope of this equitable jurisdiction is uncertain and the Supreme Court reluctant to act if they consider a criminal charge, breach of the peace complaint or Family Law Court injunction more appropriate. Any aggrieved person may, under the Justices Act, have another bound over to keep the peace towards them.

The major defect of these remedies for the domestic violence victim is that they are rendered ineffectual as they are not immediately enforceable if the offending spouse disobeys the peace order or non-molestation injunction by repeating the assault. The police do not enforce such orders and it is left to the victim to return to the court to complain of their breach. Further the provisions which allow the magistrates court to bind a person over to keep the peace on surety, do not provide for special conditions to attach to the bond such as psychiatric, alcohol or personal counselling or supervision under probation.

With respect to the BAIL ACT no specific provisions direct the bailor to consider the position of the domestic violence victim if the person charged with domestic assault is released.

Arrest-avoidance partly relates to problems of evidence and the higher standard of proof required in criminal cases, when it is presumed that the victim may decline to give evidence as she is not a compellable witness for the prosecution. The EVIDENCE ACT requires such amendment. Police powers to enter and remain on private premises to act on domestic violence complaints and the issue of their personal liability (and their employers immunity from

liability) for any torts committed in exercise of independent statutory discretions, are two areas requiring statutory reforms.

With respect to the criminal law the husband's immunity from prosecution for the rape of his wife (S185) must be abolished, and the defence of provocation widened to include acts "at any previous time" to accommodate acculumative violence over a number of years as being a factor in the accused's loss of self-control at the time of the murder.

The specific recommendations are made at the beginning of the Report. (page 4).

(2)
NEW SOUTH WALES

In New South Wales the recommendations of the Task Force on Domestic Violence reported in July 1981; many of these recommendations became the basis of the reforms enacted in November 1982.

The stated object of the legislation is to facilitate efforts to reduce the incidence of domestic violence in New South Wales by ensuring

> "that the criminal justice system treats assaults and other forms of violence in the domestic environment in the same way as it deals with violence and assaults in other circumstances ..."
>
> and
>
> "that police play an effective role in investigating domestic violence, and where necessary, in prosecuting offenders."[1].

(A) The CRIMES (DOMESTIC VIOLENCE) AMENDMENT ACT 1982 No. 166 and the PERIODIC DENTION OF PRISONERS (DOMESTIC VIOLENCE) AMENDMENT ACT (1982) No. 117 attempt to remedy the inadequacies of the ciminal law's response to domestic violence.

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1. The Hon. D.P. LANDA: HANSARD N.S.W. PARLT. PAPERS 24.11.1982 & 2893.

A definition of "domestic violence offence" is inserted into the N.S.W. CRIMES ACT (1900) through an amendment to S4(1) so that specified offences if committed by one spouse against the other or by a de facto spouse, will constitute a "domestic violence offence".

Both legal and de facto spouses are compellable witnesses in domestic violence proceedings (S407AA (a & b) but may apply to the court to be excused.

This brings N.S.W. law on compellability of spouses as prosecution witnesses into line with amendments in the VICTORIAN law (1978) and SOUTH AUSTRALIA (July 1983).

Schedule 2 amends the CRIMES ACT in relation to police powers of entry to private premises in cases of domestic violence.

The police power of entry is restricted; if the officer has reasonable grounds for believing that a "domestic violence offence" has recently been committed, is in progress or is imminent he may enter and remain for the purpose of investigating or taking action if invited even though the invitee may be a child. S357 2 (2 & b). He must leave if such authority is refused or revoked by an occupier (SS3) however if the invitation to enter is given by the person upon whom the domestic violence offence has been committed or who is in danger, the police may stay,

"notwithstanding that an occupier of the dwelling-house expressly refuses authority to the member of the police force to so enter or remain" (SS4). Provision is made for entry by obtaining a radio/telephone warrant where entry is denied; (S357G) and whether entering pursuant to a warrant or by invitation the police shall only take such action and remain "only as long as is reasonably necessary". (S357H).

This in effect means to investigate the complaint, render aid, exercise any lawful power of arrest, and prevent the further commission of the offence.

A record in triplicate is made of the warrant containing the address of the premises concerned, the name of the magistrate who granted the warrant, the name of the complainant police officer, and the time of grant of the warrant [S 357G (12)].

A special bail form has been drawn up for domestic violence offenders under the BAIL ACT (1978). Form 4A specifically draws the attention of the officer considering the bail application, to matters relevant to the domestic violence offender e.g.

> "what is the accused's demeanour, is he intoxicated, has he previous convictions for domestic violence, is there a current "apprehended domestic violence" order against him? The form also suggests conditions which may be attached to the bail. These include an agreement not to harass/intimidate the victim, not to drink or go to licensed premises and an agreement not to enter or go near premises occupied by the victim for 12 hours."[2].

The 12 hour restraint as a condition of the bail agreement is a partial acknowledgement of the N.S.W. Task Forces' recommendation for a mandatory "12 hour peace" for the victim of the domestic violence. It satisfies the presumption that bail should be granted in all but special circumstances, while giving some respite to the victim and a compulsory "cooling-off" period.

Amendments to apprehended domestic violence orders (S547AA CRIMES ACT N.S.W.) empower courts of summary jurisdiction to make orders imposing restrictions or prohibitions on the behaviour of those from whom violence is apprehended.

These provisions are very similar to the "breach of the peace" amendments to the S.A. Justices Act and the Queensland PEACE AND GOOD BEHAVIOUR ACT where the breach of an order is a criminal offence enabling the police to arrest and charge the offender and removing the onus to complain of the breach

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2. AUSTRALIAN CURRENT LAW ARTICLES. JUNE 1983. ANNE RICHES. "Domestic Violence Reform (N.S.W.) - A Beginning".

from the victim to the police prosecutor.

The complaint of apprehended violence may be made by the aggrieved spouse or the police and if founded,

> "the court may make an order imposing, for a period not exceeding 6 months, such restrictions or prohibitions on the behaviour of the defendant as appear necessary or desirable". [S547 AA (1)]

This may include restricting or prohibiting the defendant from approaching the "aggrieved spouse", from access to any specified premises occupied by or frequented by her, irrespective of whether the defendant has a legal or equitable interest in the premises or place. The court is required to

> "consider the accommodation needs of all relevant parties and the effect of making such an order on any children".

The prohibitions on the violent spouses behaviour also extend to protecting the victim from violence at her place of work, and from other specified behaviour that might affect her. This most likely would cover harassing behaviour designed to annoy and intimidate, or directed at employers in order to secure the woman's dismissal etc., matters that crucially affect the victim but stop short of actual physical violence. [S547AA (3) a-c (4)].

An apprehended violence order may be made in the absence of the defendant, [S547AA (6)] however although the order may later be varied or revoked, no provision is made as in S.A., that the defendant served with an "ex parte" interim order is then summonsed to appear in court to show cause why the order not be made final. It seems preferable that the S.A. provision apply in order that the magistrate at least hears the offender's view and has both the opportunity to refer the offender into any specialist counselling considered appropriate, warn him of sanctions for any breach and convey the courts disapprobation of the use of brute force and violence as a means of resolving marital antagonisms.

A breach of an apprehended domestic violence order is a criminal offence and the penalty is up to 6 months gaol. No provision is made for a fine however the amendments do not affect the operation of SS 556A, 556B Crimes Act which provides for the conditional release of offenders.

(B) The PERIODIC DETENTION OF PRISONERS (DOMESTIC VIOLENCE) AMENDMENT ACT (December 1982) No. 117 provides for a sentence of periodic detention e.g. weekends, to be imposed on a domestic violence offender even though the term of the sentence is less than 3 months. [S5A (2) a] S5 defines a "domestic violence offence". The amendments go a considerable way towards more appropriate commitals for domestic violence offenders in that partial imprisonment can coincide with predictable "high risk" times, most incidents occurring at night during the weekend with alcohol involved. At the same time partial imprisonment can leave the offender free to work and retain his job rather than risk the economic destruction of the family unit as a result of attempting to punish the offender.

While welcoming the legislative enactments arising out of the N.S.W. Task Force recommendations on legal remedies and the role of the police, there is criticism that these reforms have been taken in isolation from other urgent action necessary to effectively alleviate domestic violence.[3.]

These include substantial increases in women's refuge funding to allow award wages and 24 hour staffing; the establishment of 24 hour crisis welfare services in metropolitan areas; family advisory services; increased provision of housing and rehousing assistance to women who have left a violent home; as well as the long-range educative action necessary to alter the kinds of attitudes determining whether people will resort to violence, and the alleviation of the social and economic problems that place sometimes intolerable stress on vulnerable families.

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3. "What happened with the Report on Domestic Violence?". N.S.W. Task Force Women's Co-ordination Unit.

The social welfare, counselling and crisis support units are discussed later.

(C)
N.S.W. HOMICIDE LAW REFORM IN RELATION TO THE DEFENCE OF PROVOCATION IN SITUATIONS OF DOMESTIC VIOLENCE

The Tasmanian Criminal Code provides that a culpable homicide which would otherwise be murder, may be reduced to manslaughter if the person who causes the death does so in the heat of passion ... [S160(a)]. Provocation presuppposes the legal guilt but gives a defence which operates to reduce the penalty in those cases where extenuating circumstances make the killing morally less blameworthy. The requirements were that the provocation from the person killed at the time the homicide was perpetrated had to be such that an ordinary person in a similar situation would have lost their self-control; and the killing was contemporaneous with this.

The law relating to the defence of provocation in the case of domestic homicides has been criticised, as not recognizing cumulative violence and abuse over a number of years as constituting provocation right up to the time the killing occurred, and secondly as not containing "the reality of women's psyche"[4]. by the requirement that the killing be a sudden retaliation to the provocation done in the heat of passion.

Public discussion about the need to widen the defence of provocation to include a broad spectrum of abuse was stimulated by domestic killings that followed years of violence and abuse, yet such provocation was only considered relevant to the intention to commit murder but not relevant to the defence of provocation.[5].

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4. Bebe Loff LSB Vol. 7. No. 2. 1982.

5. 1980 5 LSB 63, 240, 312 Violent & Bruce Roberts: 1981 6 LSB 149 Georgia Hill:
1982 7 LSB 52 (S.A. "Axe Murder Case") P80 homicide law reform N.S.W.

For instance in the South Australian Case the woman had suffered intolerable domestic violence, bashings and assaults for a period of 27 years and was finally exposed to the reality of incest and rape perpetrated by her husband upon her daughters. One daughter had been knifed and assaulted the evening before and on the evening he was killed had earlier been taken for a drive and attempted to rape her. The Trial Judge ruled that provocation was not applicable; the Court of Appeal ordered a retrial which eventually resulted in acquittal.

In N.S.W. the CRIMES (HOMICIDE) AMENDMENT BILL was introduced in March 1982. It amends S19 of the CRIMES ACT, 1900 leaving the mandatory life sentence for murder

> "unless it appears to the Judge that the person's culpability for the crime is significantly diminished by mitigating circumstances, whether disclosed by the evidence in the trial or otherwise".

The legislation also widens the scope of the defence of provocation by allowing the conduct of the deceased that so provoked the accused into losing self-control to be either immediately before the killing or "at any previous time". [S23(2)].

This abolishes any requirement for suddeness in retaliation, or a retaliation "reasonably proportionate" to the final provocation. The defence of provocation is not lost because the accused acted with intent to kill or inflict grevious bodily harm. The onus is on the prosecution to prove the absence of provocation when there is evidence of provocation.

The N.S.W. Legislation does not adopt the recommendation of the VICTORIAN Law Reform Commission Report "PROVOCATION AND DIMINISHED RESPONSIBILITY AS DEFENCES TO MURDER (Jan. 1982) that the 'objective test' for provocation be dropped. The test being that an "ordinary person", similarly situated, would have been provoked into losing self-control. The "ordinary person test" may

be totally inappropriate, particularly if the jury has recourse to stereotype notions that the woman could have extracated herself from the violence and is therefore partly to blame for the violence.

Resistance to amending criminal and civil law to accommodate more realistically situations more likely to apply to women than men; such as allowing accumulative acts of provocation over years and seeking additional powers to enforce non-molestation injunctions against a person of superior physical strength; are sometimes strenuously opposed by persons with an interest in treating domestic violence as cases of individual psychopathology requiring treatment. This approach often portrays the "patient" or violent spouse as being provoked by the "passive" victim. For instance, the amendments to the N.S.W. provocation law were opposed by the N.S.W. government consultant psychiatrist whose "Deliah syndrome" theory postulated that the violence arose out of a pathological need of the women who 'asked for it';[6.] in much the same manner that the Family Law amendments proposing a power of arrest to attach to non-molestation orders were opposed publically by a former F.L.C. Supervisor of Counselling Services, on the basis that women would be passive victims manipulating attacks against them.[7.]

It is recommended that similar alterations be made to the defence of provocation by amending S160 of the CRIMINAL CODE to enable acts constituting provocation to be either immediately before the killing or "at any previous time", as in the N.S.W. CRIMES (HOMICIDE) AMENDMENT ACT (1982); and that the "ordinary person" test be abandoned in line with the VICTORIAN L.R.C. Report before mentioned.

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6. 1982 7 LSB p. 289

7. Refer to the Section on Family Law Court Non Molestation Injunctions page 124 footnote 36.

(3)
SOUTH AUSTRALIA

In March 1982 the South Australian legislature introduced significant and carefully drafted reforms to the Justices Act (1921 - 1981) aimed at providing more effective remedies and speedier enforcement procedures whereby a person may be bound over to keep the peace.

A Domestic Violence Committee with wide ranging expertise[8.] was commissioned in August 1979, to Report and make Recommendations on Law Reform. The Report in November 1981 became the basis for subsequent law reforms. The JUSTICES ACT AMENDMENT ACT (NO. 2) 1982 abolished the previous peace complaint procedures and replaced these with more effective remedies and procedures.[9.]

Generally the amended Act makes the same behaviour an offence as previously would have been considered a breach of the peace at common law or under existing Statutes. That is actual or threatened personal injury or damage to property likely to happen again unless the offender is restrained. It focuses on preventive solutions and the element of punishment and retribution are subordinate to the attempt to restrain violent and threatening behaviour.

But in addition it covers provocative or offensive behaviour where such is likely to lead to a breach of the peace unless restrained. [S99(c)(i-iii)] The provisions of the act are not limited to domestic violence between co-habitees but apply to all anti-social behaviour likely to cause injury, damage, or a breach of the peace unless restrained. Consequentially marital status is irrelevant and de facto partners have the same remedies as married victims of domestic violence.

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8. Crisis Care Unit, Womens Shelter, Police. SACOSS, Child Protection Unit, A-G Department, Counselling psychologist, & Office of Women's Advisor representatives.

9. DIVISION VII ORDERS TO KEEP THE PEACE S99 (1-12).

Where the reforms are significantly different and innovative is the provision for an order excluding an offender from certain premises irrespective of whether or not he has a legal or equitable interest in that property. Similar provisions were later enacted in N.S.W. S.A. and N.S.W. are unique in this respect.

S99(5) provides that

"a court of summary jurisdiction may make an order .. restraining the defendant from entering premises or limiting his access to premises, whether or not he has a legal or equitable interest in the premises"

but before making such an order that court is required to consider the effect of the making or declining to make the order on the accommodation of the parties, and any children involved.

S99(5) gives persons in a marital relationship (de facto or formal) the same rights as legally married partners under the Family Law Act in domestic violence situations, and similar rights as English co-habitees under the Domestic Violence and Matrimonial Proceedings Act.

The importance of the provision is that it gives priority to the personal safety of the party exposed to violence and temporarily subordinates the violent partners property rights.

Either the victim or the police can make the complaint; [S99(2)a & b] the complaint can be heard "ex parte" (in the absence of the defendant) who is summoned to appear at a later date to show cause why the interim order should not be made a final order. [S99(3)(4)]. Once the order has been served on the defendant he has committed an offence if he does the Act, such as assault, that the order seeks to restrain him from doing. [S99(6)]

The virtue of this is that the order becomes immediately enforceable, unlike the old peace complaint procedure where the victim had to return to court to file another complaint that the order had been breached. Under S99(7) where a member of the police force has reasonable cause to suspect that a person has committed an offence under subsection (6) he may, without warrant, arrest

and detain that person, as breach of the order is in itself a criminal offence.

If the person is arrested provision is made that he be brought before a court of summary jurisdiction within 24 hours, with weekends and public holidays being excluded from this computation. (S58, 9). This means e.g. is an assault is made in breach of the order, on a Saturday and the offender is arrested he will be kept in police custody until the court sitting on the Monday; no bail will be granted. The exception will be when the police press criminal charges of assault (or another charge) and not charge the offender for having breached the order under S99(6); and then bail may be granted.

In conjunction with this legislation the South Australian Police Commissioner has announced that it will be policy that the police will act on the complainant's behalf in cases of domestic dispute. In other cases (such as neighbour disputes) it is up to the victim to take out the complaint personally.[10] Once the order is served on the offender he commits an offence if he breaches the order and it is then the responsibility of police not the victim, to prosecute.

The non-compellability of spouses as witness against the other for the prosecution was amended in S.A. by the EVIDENCE ACT AMENDMENT ACT (NO. 2) passed on the 1st of June, 1983. As in N.S.W. certain categories of "close relatives" may apply to the court, to be exempted from giving evidence.

The procedures and forms whereby a complainant applies, varies, revokes, and gives notice of a restraint order have been simplified. These basic, useful forms can only improve the complainant's access to the courts, and in turn their very utility must save much of the justices and magistrates time without

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10. L.S.B. (1982) VOL 7 No. 5 p. 248 "Domestic Violence - Law Reform in S.A."

diminishing from the quality of judgement in determining the case.[11.]

Further the South Australian Attorney-General's Department have established an Office of Crime Statistics. As well as special studies such as "Homicide and Serious Assault in S.A.",[12.] the Office, from the 1st of July, 1982, has collected data on restraint orders to identify the characteristics of the parties (such as whether they are married or de facto co-habitees, related or strangers etc.); the terms of the orders made, orders breached and sanction. The report on restraining orders will be published around August 1983. The S.A. Police Department are also collecting quarterly statistics on the number of attendances made by patrols in response to domestic violence complaints.

Considerable attempts have been made to heighten community awareness of the problem of domestic violence and the legislative reforms and remedies available. A leaflet "is there violence in your home?" "You CAN do something about it" was printed by the Women's Advisers Office.[12A] It advises what to do if in immediate danger, or if expert counselling or information is needed, the legal options, and the phone numbers of helping agencies. Both the police cars and Crisis Care Unit carry the leaflet as well as distribution through clinics and other outlets, including a supermarket chain.

A worker's handbook about "Obtaining a Restraining Order under the Justices Act" was produced by the Women's Information Switchboard and the Women's Adviser's Office in MARCH, 1983. Both are directed towards the female victim on the basis that the domestic violence "statistics available so far indicate that approximately 90% of the "offenders" are men."[13.]

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11. FROM NO. 35, Complaint for an Order of restraint, 35a Summons to Defendant No. 36 Order of restraint, No. 36a Summons pursuant to S99(4) No. 37 Application to Revoke or vary an Order persuant to S99. No. 37a. Order of Restraint as Varied for revoked.
12. A-6 Office of Crime Statistics, Series 11 No. 9. Nov. 1981 Grabosky P.N.
12A. APPENDIX
13. A WORKER'S HANDBOOK. PAGE 3.

Two difficulties rose in relation to the reforms.

There was initial doubt about the relationship between Justices Act restraining orders and the Family Law Act. The magistrate in TAPE v PIORO held that as the parties were legally married the appropriate remedy was a Family Law Act injunction. The Supreme Court (21.3.83) held that in this particular case the magistrate was wrong as the police officer had applied for the order whereas under the Family Law Act only the husband and wife can apply for orders. But in cases where there were proceedings before the Family Court and one spouse had personally sought an order against the other without the intervention of the police, then the magistrate would not be able to make a similar order under the Justices Act.

The proposed amendments to the Family Law Act seek to preserve the effect of State laws in this area, so that in S.A. for instance married people may be able to elect to use the more immediate restraining order under the Justices Act than the expensive and more complex remedy of obtaining a Family Court injunction. The effect of the TAPE v PIORO decision on the Justices Act reforms is not as limiting as might have been expected as "in all but 3% of orders the police are acting as complainants."[14].

The second matter was concern about the potential misuse of the breach of peace powers in political and industrial disputes. An attempt was made by the Opposition to limit the complaint to situations arising out of present and past "personal animosity".[15]. The amendment failed and the restraining order provisions apply generally to all citizens engaged in the kind of hostilities or breaches of the peace that the Act prohibits.

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14. WORKERS HANDBOOK SUPPLEMENT JULY 1983.

15. S.A. HANSARD APRIL 1982 P. 3953 McRAE & WEISE.

WESTERN AUSTRALIA

The Western Australian legislature has enacted domestic violence law reforms modelled on the South Australian reforms.

In September, 1981, the Honourable Lyla Elliott introduced a motion for debate in the Legislative Council relating to domestic violence, the establishment of a Crisis Care Unit, increased funding to Women's Shelters and suggested amendments to the Family Law Act.

In March 1982 the liberal government appointed a committee chaired by Judge Andersons of the Family Court, and requested the committee to report by August; 1982. The delays in the Commonwealth amendments to the Family Law Act, in turn delayed the completion of the committee's Report and in 1982 the new Government introduced the **JUSTICE AMENDMENT BILL (No2)** which was assented to in December and commenced operating in May 1983.

The provisions are substantially the same as the South Australian domestic violence reforms. The "Surety of the Peace and Good Behaviour" section was deleted and replaced with PART VII "Orders to Keep the Peace." A breach of a peace order is an offence enabling the police to arrest without a warrant and detain for up to 24 hours. An offender may be restrained from approaching particular premises and the penalty for breaching the peace order can be 6 months imprisonment.

A Crisis Care Unit has been established along similar lines to the South Australian Crisis Care Unit.

Since the legislation was enacted in May 1983 the volume of cases has shown a steady increase. The East Perth Court of Petty Sessions used to deal with about one or two cases a week and now deals with two to three complaints a day. The Act provides that either the police or person affected can be the complaintant.

(4)
QUEENSLAND

The Queensland PEACE AND GOOD BEHAVIOUR ACT (1982) (NOVEMBER 1982 NO. 67 PART II) is very similar to those provisions in the Tasmanian JUSTICES ACT, with respect to the injury or damage to persons or property and likely recurrence which gives rise to the preventive orders enabling the offender to be bound over: procedurally the means of bringing the persons before the Magistrates Court and the hearing of the complaint are also similar.

However the Queensland ACT remedies some of the deficiencies that exist in the Tasmanian Justices act. The Offence Provisions (PART III SS10-12) provide that a person who breaches the peace and good behaviour order may incur a maximum penalty of $1,000 or imprisonment for one year, and a further order may be made.

S6(4) provides that a peace and good behaviour order may contain other stipulations and conditions. The absence of such a provision was a defect in earlier "breach of the peace" legislation.

As stated by the Queensland Attorney-General[16].

> "The Court may order imprisonment, weekend detention, fines, probation orders and community service orders as penalties upon conviction of a person for an offence, quite independent of any punishment which may have been imposed on him for commission of the offence causing a breach of the order."

This was viewed as a more realistic method of ensuring compliance with orders of the courts as well as providing some adequate protection for the aggrieved person. Provision was also made for the execution of a warrant for arrest or the service of a summons on a Sunday as well as any other day (S13)

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16. HON. S.S. DOUMANY, Minister for Justice and Attorney-General Qld. Parliamentary Debates. Hansard. 1982 No. 6. p. 840 14th September, 1982.

to permit speedy intervention, and the Bail Act was amended to apply to persons apprehended under an arrest warrant or who failed to appear in court to answer the complaint, as well as to those who had committed an offence against the Peace and Good behaviour Act by breaching the peace order.

Previously women or other victims of domestic violence in Queensland were seriously disadvantaged, the breach of the peace provisions[17.] in the Justices Act having been repealed in the 1960's leaving the only recourse the expensive and litigious process of going to the Supreme Court, to get an order of surety against the accused by a procedure known as articles of the peace. As an alternative many women attempted to apply the emergency provision of the MENTAL HEALTH ACT whereby their assailant could be detained for up to 72 hours, even though such provisions were inapplicable to a person not found to be suffering from a mental disease.

The provisions of the Peace and Good Behaviour Act make specific directions as to bail, and provide for up to one year's detention for offenders.

Concerns were expressed about the vast responsibilities put on Justices of the Peace under the Act, their mode of appointment, adequacy and training, and the desirability of community legal centres to supplement the system of legal advice.[18.]

As in South Australia the concern was raised that the legislation could be used indiscriminately to intervene in legitimate industrial action such as a strike or picket, or as a weapon giving draconian powers and little safe-guards in matters such as political demonstrations, and that domestic dispute needed to be more narrowly defined to anti-social behaviour arising from personal animosity.[19.]

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17. S198-S208 JUSTICES ACT.

18. QLD. PARLT. DEBATES. (10.11.82) NO. 15 p. 3125 Mr. Gibbs.

19. QLD: DR. SCOTT YOUNG. S.A. MR. McRAE & BARBARA WEISE) APRIL 1982 p. 3953.

However overall the role of the Justices of the Peace was considered to be a facilitating one; in an emergency they can issue a summons or warrant and the complainant need not be the victim but can be a neighbour, priest, social worker etc. Although not mentioned in the categories of other persons who could file a complaint on behalf of the victim, it is assumed that women's refuge workers will take an active part in assisting domestic violence victims file complaints.

CHAPTER FIVE

THE FAMILY LAW ACT, IT'S OPERATION AND COMPARABLE LEGISLATION IN ENGLAND AND NEW ZEALAND

(1) Summary.

This section contends that in the absence of State domestic violence law reform, the Family Law Court restraint orders are potentially the most useful protection available to legally married victims of family violence.

However considerable problems exist in relation to enforcement, the onus on the victim to pursue and action for contempt of court for the breach of a restraint order, the ineffectual sanctions and the absence of immediate protection for the victim.

While proposed amendments expanding injunctive powers and making provision for attaching a power of arrest to restraint orders are an improvement some caution is expressed about the interpretation of such powers in English cases under the similar provisions of the Domestic Violence and Matrimonial Proceedings Act (1976). Generally there is a reluctance to attach a power of arrest and an attitude that many "ex parte" injunctions are unmeritorious. A 1983 judgement deprived an ex-wife of protective provisions of the Act. Similar attitudes were evident in opposition to the Family Law Act amendments where it was claimed that women would provoke violent situations in order to manipulate the injunctive provisions restraining a violent spouse or excluding him from the matrimonial home.

With respect to enforcement and contempt proceedings the view is taken that in all situations where a personal safety order requires enforcement, it is essential that the system remove from the victim the financial and other burdens associated with enforcing court orders. It is considered that such contempt proceedings should be on the application of a Federal law officer.

Further the image of a Family Court should never disguise the criminality of assaults which the orders seek to restrain, and sanctions for breach should be seen to be effective and authoritive.

Reference is made to State laws extending similar protections to cohabitees; a central data bank accessible to police recording all restraint orders; and the inadequacy of Family Law Court and State Statistics and follow up studies to monitor the effectiveness of the orders made.

The New Zealand Domestic Protection Act (1983) is discussed briefly.

(2) THE FAMILY LAW COURT NON-MOLESTATION INJUNCTIONS

The legal system in Tasmania at present, is fundamentally deficient in dealing with domestic violence.

Potentially the most useful protection available to legally married battered wives are the injunctive powers under the Family Law Act, but substantial criticism exists as to the enforcement of non-molestation orders, the sanctions for breach, the disproprotionate cost and onus on the victim to pursue an action for contempt through the same court whose initial non-molestation order has proved so ineffectual.

The present injunctive orders available udner the Family Law Act do not offer adequate protection to women who seek their protection because they cannot be promptly enforced. As State police currently have no power to enforce Family Court orders, an attitude prevails that the civil jurisdiction has ousted the criminal jurisdiction and they have no power to arrest. Evidence of what would constitute a criminal assault or lesser offence under State law tends to be ignored and the woman is advised to see her solicitor to institute a complaint that her husband has breached the court's non-molestation order by assaulting her again and is thereby in contempt of court.

It is little wonder that to the victim, a sense of frustration, futility and hoplessness prevails. She may have suffered serious assaults, even life threatening crisis and be in constant fear that this violence could erupt against her at any time. Having sought legal assistance and secured a Family Law Court injunction, not infrequently on the advice of State police, the woman then seeks police assistance to protect her during another violent incident only to be told that they cannot act because she has a Family Court injunction that they have no power to enforce, and that she must take action for breach through the Family Court.

The submission from the Tasmanian Police Commissioner to the Joint Select Committee[1]. is succinct:-

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1. Report of the Joint Select Committee on the Family Law Act p.118 note 16.

"Adequate protection of women and children from domestic violence is a high priority and consideration needs to be given to strengthening the injunction procedures under the Family Law Act.

Perhaps the most common problem confronting police officers is the situation where one party to a dispute is interfering with or molesting the other in defiance of an order of the Court. The injured party naturally looks to the police for immediate help in enforcing what she sees as her rights and there appears to be no power in the police to do anything unless a State law is broken. The regulations provide for the arrest and imposition of sanctions against a person found to be in contempt of the Court. In many cases, however, this procedure is of little immediate or practical help. A wife, for example who is being abused or terrorised in the middle of the night by a drunken husband in defiance of a non-molestation order from the Court, must be advised by the police officers she calls to the scene, to consult her solicitor in the morning to arrange for a complaint to the Court.

Frequently the injured party cannot afford continual applications to the Court through a solicitor."

It was submitted that this situation was most unsatisfactory and the court order 'almost valueless' unless provision be made in the Act to permit the Court to attach a power of arrest to the non-molestation order.

The Office of Women's Affairs were also concerned with the efficiency of the orders and injunctions made under S114, and their submission that the Act be amended to give a judge discretion to attach a power of arrest to a personal protection order was accepted by the Joint Select Committee.[2.]

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2. Recommendation 39. 6.21, Page 117: Joint Select Committee on the Family Law Act 1980).

On the 11th December, 1980, the Commonwealth Attorney-General, Senator Durack, announced that amending legislation would be introduced into Federal Parliament implementing many of the recommendations of the Joint Select Committee. The injunctive powers of the court were to be widened to include restraining one party from entering the matrimonial home or other premises where the applicant resides (or a specified area of these premises) and from that person's or child's place of work.[3] Further S114 AA

> "will enable a Court to attach a power of arrest to an injunction granted either for the personal protection of a party to, or a child of, a marriage or to exclude a person from certain premises, in circumstances where the Court is satisfied that bodily harm has been caused to the party to, or a child of, the marriage by the person against whom the injunction is directed, and that person is likely to cause (future) bodily harm".[4]

Once a power of arrest order has been made, a Commonwealth or State police officer may arrest without warrant a person they have reasonable grounds for believing is in breach of the injunction.

Subsections 114 AA (3), (4), (5) and (7) deal with the bringing of a person arrested before a court.

The duration of the power of arrest is not unlimited in that it will cease to have effect six months after the date specified in the order or on an earlier date if specified by the court.[5]

The Attorney-Generals belief was that this amendment attaching a power of arrest to personal protection injunctions

> "will significantly increase the protection available to wives and children

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3. S 114 (1)(b) Clause 48. The Senate. Explanatory Memorandum 1981.
4. Clause 49. The Senate. Explanatory Memorandum.
5. S 114 AA (6)

who are faced with domestic violence"

and that

"it will assist the police in dealing with this problem."[6.]

Prior to the Joint Select Committee Report on the Family Law Act (1980) judicial opinion generally was somewhat sanguine about the effectiveness of protective injunctions. This complacency was reinforced by the absence of any statistical data or follow-up studies analysing actions for breaches of injunctions and their adequacy as a protective remedial measure from the victim's viewpoint.

The Institute of Family Studies[7.] although provided for in the 1975 Family Law Act, was not officially opened until September 1980. The Institute has access to the divorce statistics collected from the Court by the Australian Bureau of Statistics but these statistics are sparse and insufficient to establish an accurate profile of what is actually happening in the Family Court and to Australian marriage.

For instance there are no statistics on non-molestation injunctions, or injunctions excluding violent spouses from the matrimonial home. No statistics on actions for enforcement following breaches of protective injunctions or outcomes. No follow-up studies to ascertain the effectiveness of non-molestation injunctions. The same situation exists in relation to maintenance defaults.

Violence and poverty against women and children are not attractive topics and the absence of statistics is a means of rendering a vast social problem invisible in order that it can be ignored for a little while longer.

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6. SENATE. 20 October 1981. 1374 Hansard.

7. Initially provided for under S116 of the Family Law Act; repealed and replaced by PART XIVA - No. 23, 1979, S21 spelling out in detail the functions and structure of the Institute.

The Institute[8.] has expressed dismay over the paucity of such information.

"A further problem is that no central ABS statistics are kept about divorce-related matters handled by each State's courts of summary jurisdiction. Separation, desertion, spousal assault, child abuse, maintenance appeals, child custody and access orders prior to an actual divorce are all indicators of marital and family breakdown in Australia. Yet no overall picture can be obtained. This lack cannot be filled by the IFS with its limited staff and resources, and chances of having the ABS do it are extremely unlikely given government cutbacks."[8.]

This absence of information has encouraged complacency that existing Family Law is operating effectively, or at least not to the detriment of the parties involved and that reforms were not necessary. For instance only in its Fourth Annual Report (1980) did the Family Law Council decide to review its previous position that it was neither necessary nor desirable to attach a power of arrest to protective injunctions. The Council acknowledged the submissions of groups - including the National Women's Advisory Council[9.] and Hobart Women's Shelter,[10.] as being influential in reviewing the question of whether attaching a power of arrest was necessary to assist in the enforcement of injunctions designed to protect women from domestic violence.

The Family Law Councils 5th Annual Report (1980-81) endorsed the Select Committee recommendation on the power of arrest but nevertheless considered the proposed reform "simplistic", and that a "whole oversight of domestic violence" was required.

What is of greatest concern is that the amendment may be rendered ineffectual by a widespread judicial reluctance to attach a power of arrest to an injunction to ensure its effective and speedy enforcement.

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8. IFS. ANNUAL REPORT 1980-81 p. 27.
9. N.W.A.C. Canberra Meeting Dec. 1979.
10. Hobart Women's Shelter Meeting. Hobart 1980.

In matters of personal safety once a protective order has been made following an assault causing bodily harm, the applicant has a right and an expectation that the non-molestation injunction will be acted upon when her security is threatened, and that the police as law enforcement agents, will be able to grant her immediate protection by restraining her assailant.

The same futility will prevail if judges fail to exercise powers which enable protective injunctions to be enforced. The history of judicial restraint in matrimonial law where married women sought injunctive relief from battering husbands, is a very sad history where the plight of the battered wife was virtually disregarded.

In England the courts had seemingly very wide powers to grant an injunction in all cases where it appeared "just and convenient".[11.] To the disadvantage of married women the judiciary chose to interpret these powers restrictively requiring the application for an injunction to be ancilliary to some substantive action. This meant that the battered wife could not obtain a non-molestation order unless she had begun proceedings to terminate her marriage.[12.] Not only did this militate against reconciliation but gave rise to a practice where, in cases of extreme urgency, an injunction would be granted if the wife undertook to file the petition, and subsequently if it was immediate protection and not divorce the women wanted, the divorce petition was abandoned.

Following the Enactment of the DIVORCE REFORM ACT (1969) (which came into operation 1 JANUARY 1971) increasing concern was expressed about the plight of battered wives and in 1974 the BATTERED WIVES (RIGHTS TO POSSESSION OF THE

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11. S45 SUPREME COURT OF JUDICATURE (CONSOLIDATION) ACT (1925); S74 COUNTY COURTS ACT (1959).

12. CRUTCHER v CRUTCHER. TIMES. 18.7.78 page 10. This decision claimed that the power to grant an injunction under S1 DVMP ACT "whether or not any other relief" is sought, applied only to an application in the county court. Applications in the High Court still required substantive proceedings to which the injunction was ancilliary.

MATRIMONIAL HOME) BILL was introduced as a private members bill and only withdrawn upon the Government agreeing to set up a Select Committee to consider the problem of Violence in Marriage.

As a result specific legislation dealing with domestic violence was introduced. The DOMESTIC VIOLENCE AND MATRIMONIAL PROCEEDINGS ACT (1976) remedied some of the inadequacies in previous legislation.

The non-molestation injunctions are similar to those provided in the Australia Family Law Act with two important exceptions. The provisions extend to unmarried co-habitees living in a de facto relationship, [S2(1)] and there is provision to attach power of arrest to the non-molestation injunction or the order excluding a violent spouse either entirely or from part of the home or from the surrounding area.

The English Domestic Violence Act was a deeply significant piece of social legislation which required that a spouse's right to personal safety be given priority over rights of property, however within a few short months of enactment it was virtually emasculated by the judiciary. Many women were granted injunctions by county court judges evicting the man from the house following a violent assault, however in two cases the man appealed and two separate divisions of the Court of Appeal allowed the appeals[13.] holding that the county court judges had not the power to grant the injunctions.[14.]

These two decisions caused great consternation. They virtually deprived the exclusion provision[15.] and the extension of these protections to "de facto partners"[16.] of almost all effect as invariably the male had sole or joint interest in the matrimonial home, especially in Council property. Critics

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13. B & B 14.10.77. Cantliff v Jenkins 25.10.77.
14. In B & B the Court of Appeal held that S1 D.U.M.P. Act was purely procedural enabling county court judges to grant injunctions and did not enable the courts to evict a husband or spouse who was the sole owner. In Cantliff v Jenkins the Court of Appeal adopted that decision and applied it to a case of joint-tenancy.
15. S1 (1-C)
16. S1 (2)(1)

of these two decisions claimed the Court of Appeal had flouted Parliament's intention of protecting women from domestic violence.

In the case of DAVIS v JOHNSON the full Court of Appeal was called upon to review these two decisions to determine whether they were erroneous and if so, whether the Court of Appeal was bound by its own former decisions.[17.]

The Court upheld the woman's appeal and restored the initial county court injunction evicting her de facto from the Council flat that they held as joint-tenants. The President of the Family Division, Sir George Baker, considered B v B wrongly decided stating that

> "By importing into the Act the conception of non-interference with a sacred right of property, even where there had been extreme and horrifying violence, the court had deprived section 1 (1)(c) of any practical meaning or purpose".

He considered that the power to make an injunction was useless if no injunction could be made. The "realities of life" were that "almost invariably the man had the sole or a joint-interest, especially in Council property".

The purpose of the Act "enabled the country court to provide immediately for the urgent and pressing need of wife and child for a roof, excluding the violent husband from what had been the matrimonial home. It made the county court the first aid post when there had been serious infringement of the basic human right of wife or child not to be subject to violence".[18.]

Leave to Appeal to the House of Lords was granted which resulted in a unanimous decision that an unmarried woman has the same rights as a married woman and can have her lover excluded from the matrimonial home though she has no property rights in it.[19.]

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17. DAVIS v JOHNSON (1978) I ALLER (C.A. & H.L.)
18. TIMES LAW REPORT 28.11.1977 p.5 & 8.
19. TIMES 10.3.1978 page 1.

The other protective provisions of the Domestic Violence Act were also subject to vascillating and sometimes unduely restrictive interpretations.

In WALKER v WALKER (13.12.1977) the Court of Appeal considered that the words "intolerable" or "impossible" were vague and subject to misuse in determining whether it was impossible for the parties to share the home and the proper test was

"what, in all the circumstances was fair, just and reasonable".

Other judges found it

"difficult to believe that it could ever be fair, save in the most exceptional circumstances, to keep a man out of his own flat or house for more than a few months".[20.]

This concern about the proprietary interests of the husband invariably led to the attitude that the injunction ousting the husband was a short term remedy with the husband's predominant property "rights" being restored by the wife moving out.

In HOPPER v HOPPER

"a reasonable time would be time enough to enable the wife to make arrangements to her accommodation".[21.]

Other decisions emphasised that the "Domestic Violence...Act" was not designed to provide a long term solution to a housing dispute between husband and wife but were essentially emergency procedures of a short-term not long-term nature.[22.]

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20. LORD SALMON DAVIS v JOHNSON (1978) w WLR 553 & 576
21. TIMES 1.6.78 p.8 LORD JUSTICE ORMROD.
22. WOOTON v WOOTON 23.5.1983 C/A: TIMES 27.5.1983 p.14.

Given that some situations of violence are intractable and despite past non-molestation injunctions, serious assaults and constant threats and harrassment continue long after the parties have separated, there are some circumstances where it is advisable to make an injunction for an indefinite period or until further order, and not limit it to a few months.

In SPENCER v CAMACHO [23.] the women had obtained an injunction prohibiting her partner from assaulting and molesting her and excluding him from the Council house where he was a joint-tenant. Three such injunctions were obtained for periods of 2 to 3 months but further violent incidents occurred during the weekly access he had been granted to the child. The Court of Appeal upheld the woman's appeal that the injunction be granted indefinitely or until further order.

When the parties have permanently separated or have petitioned for a divorce it would seem preferable and less disruptive that the protection remain until after other proceedings have been finalised.

The position of the formerly married woman still subject to harrassment is somewhat anomolous, again due to an unduely strict construction of what constitutes "a party to the marriage" under the Domestic Violence .. Act. In WHITE v WHITE the Court of Appeal dismissed the wife's appeal where she had attempted to have a power of arrest attached to an existing injunction preventing her former husband from molesting her and the children and preventing him from entering the former matrimonial home. The Court considered the Act only gave protection to subsisting marriages and co-habitees; not to parties whose marriages had been dissolved.[24.]

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23. 20.1.83. COURT OF APPEAL TIMES 26.1.83 LAW REPORT p. 10.
24. 8.2.1983 COURT OF APPEAL. TIMES 15.2.1983 p. 24

It seems that their application of the test based on establishing when that relationship has come to an end,[25.] is extremely one-eyed and legalistic particularly as the parties had been married; the indicents of violence in that relationship had led to non-molestations injunctions which still existed, and the violence had continued in the post-marital phase of the relationship.

The National Refuge Survey in England indicated that as many as 11% of women were harassed after they had left the refuge and many had to leave accommodation in the past because of this.[26.] The Australian statistics on serious assaults indicated that almost a third of such assaults were upon women who were estranged from their violent spouses.

A significant number of brutal murders similarly are perpetrated on women who have sought to escape from violent relationships.

It would seem imperative that these protective injunctions be available to women in instances of spouse assault, irrespective of whether the parties are technically divorced or not. It is somewhat ironic that as interpreted by the Court, the Domestic Violence .. Act extends its injunctive protection to the never married co-habitees, but fails to protect the formerly married.

This is particularly significant in the light of the Court of Appeal decision in HORNER v HORNER, decided only days after the WHITE'S CASE which extended the scope of the existing assault injunction to prohibit the husband sending threatening postcards and making frequent telephone calls to his wife's place of work.[27.]

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25. Lord Justice Ormrod in McLEAN v NUGENT (June 22, 1979 C/A transcript No. 490 of 1979.

26. LEAVING VIOLENT MEN: a study of refuges and housing for battered women, by Harkell & others W.A.F. (F2) London.

27. HORNER v HORNER. 18.2.82: TIMES 19.2.1982. The application was made in the county court as the powers granted to justices under the Domestic Porceedings and Magistrates Court Act (1978) are directed at restraining violence.

A woman subject to harassment and assault has just as much right to be protected at her place of work which after all is the source of her income, as she has a right to protection in her own home.

It is essential that this protection from harassment in her place of employment from a former spouse, be available to divorced women. The Australian legislation as amended will provide for an injunction restraining one party to a marriage from entering the place of work of the other or of a child of the marriage.

On the other hand the Australian legislation throughout refers to actions between "Parties to a marriage" and it could well be that a similar restrictive interpretation as in WHITE'S CASE could deprive divorced women of protection from assault by their former spouses.

It is a valid concern that both the injunctive power and the power of arrest not be used indiscriminately, or in a routine manner. One English appeal was on the grounds that the power of arrest attached to the non-molestation order following an assault, might predjudice any future custody claim the husband might make.[28.]

What is more to the point is that the arrest power is not activated until the police believe the husband to be in breach of the non-molestation injunction and this will only arise in situations when the violent spouse is again assaulting the other in defiance of a court order granted because former assaults had caused actual bodily harm.

To err on the side of caution would require the injunction to be granted rather than denied, to afford some protection to women who are more likely to have a realistic appreciation of being battered and in fear of future assaults, than an adjudicator presented with the problem vicariously.

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28. WIDDOWSON v WIDDOWSON. COURT OF APPEAL 26.4.1982. TIMES LAW REPORT 27.4.1982 p. 25.

There has been criticism e.g. by the Legal Action Group in England[29]. claiming that county-court judges are reluctant to make injunctions excluding violent men from shared homes. In the first year of the Domestic Violence .. Acts operation a tenth of all such applications were refused;[30]. and in 1978 in just over 50% of applications for injunction the Court did not attach a power of arrest.[31].

This criticism, that judges are reluctant to utilize these powers conferred by Statute to protect victims of spouse assault, would probably be considered unfounded by a judiciary who considered they were making decisions in the light of what was "just, fair and reasonable" between the parties.

There are however many subtle forms of discrimination that operate to disadvantage women in society and the legal system is no less discriminatory than any other sector. Conservatism abounds; it is generally considered a drastic step to curtail the property "rights" of a violent husband by requiring him to withdraw temporarily from the matrimonial home. The "rights" by a battered wife to her personal safety are not given such a high priority.

Consequently there is a reluctance to alter the status quo by evicting the violent spouse unless the situation is intolerable. For instance it has been said that:

"the granting of an injunction to enforce the removal from or the barring of entry to the matrimonial home is a grave and drastic order and it should

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29. LAG: a pressure & educational group with nearly 4,000 members, mainly lawyers.

30. JUNE-OCT. 1977 (5 months); 1,745 exclusion orders directed at men; 174 refused
TIMES 30.12.1977 "Judges Grant many orders to Battered Women.

31. Figures issued by the Lord Chancellor's Department for England & Wales 1978 HMSO Cmnd 7,627.

not be made unless it is impossible for the parties to live in the same house, there being on foot an imperative or inescapable or otherwise intolerable situation".[32.]

The English Court of Appeal has rejected this approach and the test in excluding the violent spouse from the home will depend on what is "fair, just and reasonable in all the circumstances".[33.] Words such as "intolerable" were considered vague and subject to misuse in argument. Other cases clearly established that the battered wife could apply for an injunction evicting the violent husband, irrespective of property rights and regardless of whether the parties were formally married. The law's concern to protect the "rights" of the accused were not to be pursued to the extent that the complainant would be unfairly prejudiced in her attempts to seek protection from her assaultive spouse.[34.]

On the other hand a difficulty arises between the conflicting interests of a husband who has a right to put his case and be heard in court and a battered wife who seeks an "ex parte" injunction (i.e. before the respondant has had notice of her application) to obtain a non-molestation order or evict the husband in cases of immediate threat.

There is an inability to conceptualise the fear and terror that women suffer who have been subjected to repeated and serious batterings and emotional abuse. So much so that an "ex parte" injunction may be the only means of escape in circumstances where they have nowhere to go but are terrified of the repercussions of taking legal action and continuing to live with their violent partner until the case comes up.

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32. BUTLER, J. IN THE MARRIAGE OF LEE. (1977) FLC 90-314 @ 676.

33. WALKER v WALKER (13.12.1977) COURT OF APPEAL.

34. ANSAH v ANSAH (1977) 2 ALLER; DAVIS V JOHNSON (1978) 1 ALLER. (& H/L); LEWIS v LEWIS (1978) 1 ALLER @ p729.

This failure to conceptualize the battered wife's predicament can result in policies which are both covertly sexist and prejudice the chances of getting legal protection. For example the English Family Law Registry considered that nearly a half a ex-parte injunctions were "unmeritorious" and should not be made "unless thereis immediate danger of serious injury".[35.] Accordingly, a practice note was sent out cautioning all lawyers and no doubt as a consequence, many women would have been denied an ex-parte injunction despite evidence of injury on the grounds that their usually male lawyer would not believe the situation critical.

A similar view has been expressed by a Senior Administrator of the Family Court in Australia, who expressed a view that women would manipulate the injunctive provisions by provoking situations of violence against them and then playing the role of a "passive victim".

The former Principal Director of Court Counselling for the Family Court of Australia, Mr. McKenzie, sent a letter[36.] apparently to all trade unions in Australia which illustrates the kinds of prejudices which operate to discriminate against women who seek legal protection and the hostility to reforms which seek to improve the law's response to domestic violence. His letter stated:-

> "Domestic violence has recently become an issue pursued largely by Activist Women's Groups who have perceived the need for protection of women and children. This year the N.S.W. Government Task Force on Domestic Violence produced a rather simplistic and sexist report. The fact that 9 out of the 10 members were women may have been among the factors shaping the report.
>
> The fact that women are bashed every day (no statistics) prompt them to pursue the issue despite suggestions to the contrary. It is my assertion, after discussion with counsellors that such places ---.."

35. TIMES (27.5.1978) p. 3 "COURT IS WORRIED ABOUT DIVORCE INJUNCTION PLEAS"
36. HANSARD 24.11.1982 p. 2900 THE HON. ELISABETH KIRBY on CRIMES (DOMESTIC VIOLENCE) BILLS.

"--would be more likely to increase violence rather than diminish it".

Mr. McKenzie further stated his total opposition to the proposed legislation and he gave his reasons;

"This will give considerable passive power to victims. That is people who are less articulate and who are inclined to express their feelings physically, could quite easily be manipulated into violent acts or acts that could be construed as violent by spouses who are apparently passive victims".

This letter aroused considerable concern. It was criticised on the basis that it propagated the usual myth that domestic violence is usually the end of an escalating row, the product of an interaction between husband and wife and as such both have responsibilities for its occurrence. The wife is not seen as the victim but the provocator of the assault. If she resists the assault she is labelled violent and aggressive; if she suffers in silence then her passivity is seen to have incited the male aggression.

It was contrary to the findings of the Royal Commission into Human Relationships, ignored available statistics, and attempted to focus the blame for the assault on the victim as a means of denying the validity of any proposed law reforms aimed at protecting victims of domestic violence.

Other Australian Family Court judges have commented that the provisions of the English Domestic Violence and Matrimonial Proceedings Act were wide

"The protection of the alleged offending party appears to be minimal and almost draconian power appears to be given to a single justice".[37.]

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37. A COMMENT ON THE ENGLISH LEGISLATIVE PROVISIONS ON VIOLENCE IN THE HOME AND S.114 OF THE FAMILY LAW ACT, 1975. by THE HONOURABLE MRS. JUSTICE MARGARET LUSINK, JUDGE OF THE FAMILY COURT OF AUSTRALIA.

Again, and the above comment is from a woman judge, pre-eminant concern is expressed about the man's right to be heard.

An opportunity to be heard is a basic tenet inherent in our legal system, but this right to a hearing is frequently regarded as superior to the woman's need for immediate protection.

On the one hand orders can be obtained at short notice in cases of urgency (by telephone in extreme cases) and "exparte", i.e. before the respondant has had notice of the application, in cases of immediate threat.[38.]

The situation is one where the law is adequate but the way it is administered may operate in a manner prejudicial to women. There is a failure to comprehend that the woman must act swiftly and without notice to the violent spouse if she is to obtain the order before she is intimidated into withdrawing her application by further violence. The liklihood of a vengeance assault for her having dared seek protection is very real. There is often uncertainty as to when this violence will erupt and how serious the danger is likely to be. When the situation has become so intolerable that the woman needs an escape route for herself and the children, then the injunctive orders may afford some protection and a request for an application in the absence of the husband following an assault should be granted.

In one submission to the Domestic Violence Review the woman described her situation; the assistance she had sought first in an attempt to save her marital relationship then her attempts to extracate herself having determined that separation was inevitable. Despite having sought advice and counselling from the hospital, the Family Court, Legal Aid, the refuge, and her lawyer, when the time came, sooner than she had planned, and she had to move into emergency accommodation, an "ex parte" restraining order was required.[38A.]

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38. FAMILY LAW REGULATION 42 (2): may be made in writing, orally, or in such form as the court considers appropriate.

38A. REFERENCE IS MADE TO THE SITUATION OF MAUREEN THOMPSON WHOSE SUBMISSION IS IS IN THE APPENDICES TO THIS REPORT.

In a volatile, crisis laden, violent marriage a planned rational separation is not easy to effect and applications for "ex parte" injunctions should not be considered "unmeritorious" because the danger the woman is in is not considered likely to result in serious injury. The fact that she has been injured and believes she will be again should suffice.

The amendments to the Family Law Act providing for a power of arrest and extending the courts injunctive powers are welcome improvements.

However what is required is State law extending similar protections to co-habitees; a central data bank accessible to police recording all restraining injunctions and the terms of the order; enforcement by State as well as Federal police; adequate Family Court and State statistics on separate categories of injunctions, actions for breach, outcomes such as sanctions applied and follow-up studies to determine the effectiveness of such sanctions. A complaint for a breach of an injunction should not put the burden on the applicant who has sought the restraining order that has been breached. It would be preferable that a separate Family Court enforcement branch dealt with matters of contempt of court and sanctions for the breach of an order. In matters of administration and judicial interpretation "ex parte" applications should not be considered "unmeritorious" on the ground that the danger of serious injury is not imminent. All likely injury is serious and the right of a spouse who has suffered "bodily harm" to protect herself from further assault, must take precedence on occasions where the husband's right to be heard is in the balance. Divorced spouses should be considered still entitled to injunctive protection so long as marital disharmony continues to erupt into assaults and harassment. Decisions to oust violent partners from the matrimonial home should be based on what is "fair, just and reasonable in all the circumstance" including the difficulties a woman with children will experience in obtaining alternative rental accommodation. Standards which measure whether the degree of violence has created an "intolerable"

"impossible" or "inescapable"[39]. situation are unacceptable, as they propose a higher standard than that proposed in the amended Family Law Act which is an assault which has caused "bodily harm" and is likely to be repeated.

Sanctions need to be effective deterrence. They will be ineffectual if they are not readily enforceable.

Judicial notions that injunctive powers are "draconian" and the expulsion of a violent spouse from the home "a grave and drastic order" need to be put into perspective.

These injunctions are merely temporary restraints of less than 6 months duration. They arise out of grave and intolerable situations of violence which are no less criminal assaults because they happen in private homes within marriage. It is intolerable that battered wives are driven from their homes to seek refuge. Notions of fault no longer apply to grounds for dissolution of marriage but one of the criteria in determining the exclusion of a spouse involves

> "conduct...which may justify the other party in leaving the home or in asking for the expulsion of the first party".[40].

Circumstances such as the discrimination against low income women with children in renting accommodation must be acknowledged. It is no longer satisfactory for judicial opinion not to take cognizance of social realities by stating that they can make no comment on such issues. A function of the Institute of Family Studies should be to keep judges and practioners informed on such matters to improve the capacity of the court to arrive at fair and correct decisions.

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39. See note 32.

40. DAVIS v DAVIS (1976) FLC 90-062 p. 75 @ 309.

Diversion of a criminal assault through the civil family law system should not cloud perceptions about the seriousness of such assaults nor the use of sanctions be abdicated in favour of counselling as a means of moving the problem sideways out of the court.

SANCTIONS FOR BREACH OF A FAMILY COURT NON-MOLESTATION INJUNCTION

Breach of an injunction or order is not an offence punishable with a term of imprisonment, but is a contempt of court which may result in a committal to prison. Imprisonment at first instance is very rare; if the husband is proved to be in contempt he might receive a suspended sentence but he would more likely be reprimanded and referred to counselling. S114 (4) provides penalties for contravention including a fine not exceeding $1,000. Such penalties for contravention do not prejudice the power of the court to punish for contempt. The specific powers of the Family Law Act to punish for contempt[1.] are directed towards punishment of the offender rather than protection of the victim. Contempt of court with the possibility of commital to prison is a quasi-criminal offence; the court may issue a warrant for the arrest of a person to face the charge of contempt if he does not appear after having been served with notice of the application for contempt.[2.]

This complaint procedure can be extremely expensive, emotionally debilitating and time consuming for the woman who has already obtained a non-molestation injunction to protect her from further assaults and found that her efforts have been futile. She may call the police expecting to have the order enforced following another assault, only to be advised to take personal action through her solicitor to complain of the breach.

In all situations where a personal safety order requires enforcement, it is essential that the system remove from the victim the financial and other burdens associated with enforcing court orders.

The Family Law Council[3.] has recommended to the Federal Attorney-General that the Act or Regulations be amended to allow a procedure whereby contempt proceedings can be brought before the court on the application of a Federal law officer.

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1. S35
2. Regulation 137
3. Family Law Council, 6th Annual Report. 1981-82 p. 25 para. 151.

This is commendable as it would place the responsibility for the enforcement of such orders back into the court system through a Federally appointed law officer and release the applicant who sought the initial orders that were contravened from pursuing personally an action founded on contempt.

Combined with a readiness to attach a power of arrest and police co-operation in effecting arrests for breach, a system of making the complaint about contraventio to the Federal law officer who then initiates the contempt proceedings, should ensure stronger enforcement practices.

This is more likely to have a salutary effect deterring the more compliant person or one who measures the chances of getting away with assaulting his wife against the possible repercussions, particularly now that a cruelty petition is no longer a matrimonial cause for divorce and his violence against his spouse is unlikely to be revealed. A Federal enforcement officer would leave the courts relatively free to deal with the more intractable and persistent offenders who will stop at nothing to continue to assault, harass and abuse their estranged or ex-spouses or children.

The image of a conciliatory court and civil process should never disguise the criminality of the assaults which the injunctions seek to restrain. Even an "ex parte" non-molestation injunction only enjoins what is assault which is illegal in any event.

The persistent and intractable offender who is immune to counselling, persuasion or appeals to reason should be dealt with as a serious offender and if necessary imprisoned.

Parnos,[4.] who has moved away from a "treatment" model towards strong law enforcement writes:

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4. R.J. PARNAS. "The relevance of the criminal law to inter-spousal violence" in M.D.A. FREEMAN (editor) FAMILY VIOLENCE p. 126-31).

"Even more important than our criminal law's traditional escalation of meaningless slaps on the wrist until too late, is recognition of the need for a breakthrough at the outset to the consciousness of the disputants as to the seriousness of their behaviour.....

In my judgement, only the coercive, authoritative harshness of the criminal process can do this. Efforts at therapy can, and I suppose should, be included in the process but should not be given undue emphasis, for there is simply no evidence that we know how to diagnose, much less treat, disputants' problems in a manner that will prevent repetition. Simply put, we must go on with what we know. And we know that we cannot ignore or condone acts or threats of imminent violence. We know that the police are best equipped to protect others and themselves. We know how to punish, whether by fine, incapacitation, other denials of full liberty, embarrassment, inconvenience, etc. And we know punishment is a clear statement of the personal responsibility of the offender and the condemnation and retribution of society."

Under the contempt of Court provisions of the Family Law Act imprisonment is available but generally would only apply in exceptional cases as a last resort.

The civil jurisdiction of the Family Court does not oust the State criminal jurisdiction. If the person who has sought an injunction is assaulted, then that assault is a criminal matter and the police have a right and duty to intervene regardless of the injunction. S114(6) recognises that State law is unimpeded by providing that a person liable for punishment for contempt of the Family Law Court's orders and injunctions and who has been prosecuted and convicted under another law, will not be liable to be punished twice. It has also been held that the contempt power should only be invoked where the act contravening

the injunction cannot be dealt with under any other offence provision.[5.]

On the other hand the person who has sought an injunction for her own protection or the safety of a child may not wish to involve the police and her former partner in criminal proceedings and may prefer to pursue the contravention of the injunction as a civil matter through the Family Law Courts. This personal option needs to be balanced against societies' interest in seeing the criminal law enforced with due respect being given to the petitioner's wishes who may see divorce as the only real solution to the violence in the marriage particularly if other attempts at conflict resolution have failed. Or alternatively, the petitioner may wish to remain married and view the injunction as the least detrimental option to her need to be protected from assault yet not act in a way detrimental to her marital interests. This is perhaps the most important reason why contravention of a non-molestation injunction and consequent contempt proceedings should be brought before the Court by a federal law officer and not the woman herself.

Senator Evans has stated[6.] that this matter is still being considered "particularly from the viewpoint of resource implications." However, he did note that the amendment Bill currently before Parliament gives the Judges a rule making power in relation to

> "the procedure of a court exercising its powers under S108 to deal w t h a person for contempt of the court."

This may be a valuable interim measure, but its value will depend somewhat on the prepardness of particular Judges to utilize the power.

In regard to the imposition of sanctions the Full Court of the Family Court has established principles for the punishment of persons for contempt

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5. In the marriage of S (1977) 23 Fam. L.R. 475.

6. SENATOR EVANS, In a letter in relation to a number of matters arising under the Family Law Act (1975) to the Domestic Violence Review August 1983.

constituted by wilful disobedience of its orders, stating that the punitive powers should be exercised sparingly and imprisonment invoked only as a last resort.

The figures available from the Family Court reflect those principles: since 1976 only 140 terms of imprisonment have been imposed for contempt and many of these terms of imprisonment were only of a number of days duration.

In 1981 of 14 contempt commitals only two were for breach of a non-molestation order and involved 3 months and 7 days imprisonment, respectively.

In the 18 months period between January 1982 and June 1983, a breach of a restraint order resulted in 15 out of the 26 committals. Of these committals 5 were in New South Wales; 5 in Victoria; 4 in Tasmania; and one in South Australia. In the 18 months no offenders were imprisoned in the Australian Capital Territory, Western Australia, Northern Territory and Queensland and aggragating the previous 12 months, no committals took place in these States other than in Canberra for a breach of custody.[7.]

The inference is not that New South Wales, Victoria, and Tasmania have a greater proportion of brutal spouses than the other States but probably that the judges making these decisions are more aware of the realities of spouse abuse.

Homicide statistics where the relationship is marital, an ex-spouse or estranged, and the assailant overwhelmingly male and the victims female, indicate the necessity of courts being able to act authoritively to restrain acts of violence. Even if this means that in Family Courts the public awareness of the possibility of committal, enters into their concept of what the Court is. At present the image of a "helping" court becomes somewhat tarnished if its

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7. INFORMATION FROM THE SECRETARY OF THE FAMILY LAW COUNCIL. 31 August 1983.

remedies and sanctions are ineffectual in limiting violence against marital partners and children.

THE NEW ZEALAND DOMESTIC PROTECTION ACT (1983)

The non-molestation orders and remedies of the Family Proceedings Act (1980) SS 176-179, were not considered adequate and a New Zealand DOMESTIC PROTECTION ACT came into force in March 1983.[1.]

It covers legally married and those living together in an informal union, as well as other persons in the household. [Cl. 11 (2)]. Any of these applicants may apply to the Family or District Court for an order granting the applicant the right to live in "the household residence"; such occupation orders will only be made where the court is satisfied that it is necessary for the applicant's protection or in the best interests of a child of the family. "Tenancy orders" are also made.

If a "non-violence order" in in force police may arrest without warrant a person suspected of having breached the order (Cl. 7) if it appears necessary for the further protection of the person for whom the protection order was made. Limits are placed on bail; provision is made for "ex parte" applications for interim orders.

Although New Zealand is a unitary not a federal system it is possible for similar provisions to protect co-habitees from domestic violence in Tasmania including "tenancy orders".

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1. RECENT LAW AUG. 1982 P.227 P.R.H. Webb. "The Domestic Protection Bill" 1982.

CHAPTER SIX

THE ROLE OF THE POLICE IN DOMESTIC DISTURBANCES

(1) Summary.

This section discusses the duality of the traditional police law enforcement role and the expanding police service role. As police are virtually the only "front-line" agency capable of authoritive intervention on a 24 hour basis they work on the interface of domestic violence and other crisis. Such work requires training in crisis intervention, mediation, and the capacity to refer to other agencies while retaining authoritive intervention and law enforcement functions where necessary.

A critical view is taken of the world-wide phenomena of police reluctance to prosecute domestic assaults and the underlying reasons. Suggestions are made as to police powers of entry, arrest, personal accountability, bail and the compellability of spouses in criminal proceedings. Such reforms are directed at reducing intimidation of the victim-witness, and aiding police powers of investigation.

At the same time this traditional police reluctance to act on domestic assault matters is put into the context of the entire court system and alternative social support system in order to indicate the widespread inadequacy of the legal and social agencies response to domestic violence. This in turn reinforces the police reluctance to prosecute particularly because of the high standard of proof required in criminal cases and the lack of collaborative evidence due to the assault normally taking place on private premises.

Reference is made to the incisive role of the South Australian Police following the 1982 domestic violence law reforms; the creation of their Restraint Order Unit and their co-operation with the Crisis Care Unit.

(2) THE ROLE OF THE POLICE

The traditional view of the police force is that it is an agent of social control, responsible for maintaining civilian order, law enforcement and crime prevention, detection and punishment.

Increasingly police work has become a highly complex mixture of traditional police force work and community service involving a social support function. This duality between the police force and police service role is one of the most fundamental issues facing police affecting their status and role in relation to other agencies and the community in general.

The issues are very competently discussed in Inspector John Avory's book "Police Force or Police Service?" Social control by coercion in a democracy is viewed somewhat as a fallacy and the means of making the criminal justice system more effective is

> "to shift the emphasis from a hierarchial social control system to a more democratic system wherein the citizens bear some of the burdens associated with law enforcement, keeping the peace and maintaining order."[1.]

The attempts to democratise the social control process involves developing strategies for police and community co-operation to reduce the alienation and increase the support necessary to maintain a reasonable balance between civilian order and civil liberty.

Such strategies may be as simple as requiring police to wear name-plates on their uniforms as a means of reducing the social distancing that anonymity gives and at the same time controlling possible police misdemeanours by giving civilians a means of identifying an officer in relation to a complaint.

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1. AVORY. "POLICE FORCE OR POLICE SERVICE?" p. 75 Ch. 13 The Fallacy: Social Control by Coercion in a Democracy.

Courtesy and police skills in social service areas needs to be given the same value, rewards, and promotional opportunities as crime solving. The career system must be geared to attracting and maintaining high quality recruits, and blending educational qualifications and in-service training opportunities with operational experience. Police wages and staffing levels need to be increased and recognition given to their "front-line" role in many situations involving trauma, neglect, deprivation and degradation and the "burn-out" associated with work of that nature.

A re-assessment needs to be made of the use of women police. About half the total calls to police call for non-violent police service. A significant totality of police time is involved in family crisis calls invariably involving women victims and frequently children in crisis situations. Lynne Foreman refers to these special capacities women police often have which give them skills in interviewing and supporting rape and sexual abuse victims, and people in crisis situations and which in turn is likely to influence the community's perception of the police as rendering aid and assistance to victims at the same time as seeking to bring offenders to justice. She writes that:-

> "The continued deployment of women staff with suitable characteristics in this specialised area will certainly enhance the client's perception of police and add to police efficiency in the area of community assistance which is not purely crime control or crime prevention."[2.]

In writing of the social work role of the police Avory points out the dilmena inherent in the police role as primary contact in various crisis and the types of skills required.

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2. FOREMAN "At the Crossroads?" Oct. 1978 report to the Criminology Research Council on the functions and welfare role of women police in Victoria.

"While (the police) are not professional social workers they almost unconsciously provide psychological first aid to accident victims, mental patients, rape victims and victims of other assaultive crimes, to neglected and illtreated children and others before they reach more professional medical, psychiatric and psychological care.

It is essential that police training adequately equip them to provide these services to the community." (p. 87)

Other police have pointed to the glaring deficiencies in the other social support services who are not responsive to crisis on a 24 hour basis or indeed geared to crisis intervention as a service response, hence leave the police exercising a "de facto" welfare role. A comprehensive package of policies and provisions including 24 hour family crisis centres are called for;[3.] in essence so police can intervene but also act as referral agents within an overall scheme of social, welfare, and medical agencies. This obviously requires co-ordination, co-operation and agency responsiveness preferably on a 24 hour basis.

Police have some cause to resent agency criticism when they attempt to assume a welfare counselling role in response to a crisis when no appropriate agency is available. In turn police

"Being hesitant to acknowledge full social role commitment, often become very critical of the perceived failures of the formal social services." (PUNCH 1975: 88).

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3. J.E. WILLIS "Domestic Violence: The Role of the Police. POLICE LIFE Oct. 1982 pp 4-5.

R.H. GUY. Domestic Crisis. AUSTRALIAN POLICE COLLEGE JNL. 1979. p. 50, 53.

This mistrust and antagonism between professionals working in over-lapping situations is not uncommon but comes into sharper focus in situations of personal abuse such as rape, child abuse and interspousal violence. Not only are many agencies involved - social, legal, medical, welfare, counselling, victim support groups, refuges etc. - but many have vested interests in the attitudes and philosophies they hold which respond to these situations of abuse. Such reactions may range from abhorrence and sympathy through to disbelief and holding the victim responsible.

Potentially this means that collaboration between agencies is difficult to achieve not just because of adverse stereotyping and "demarcation disputes" as to territory, but also because of the sometimes fundamentally different approaches to situations of personal abuse. The health and welfare agencies are criticised for not "shouldering their responsibilities" and

> "many police feel they are becoming the repository for too many diffuse and distasteful tasks cast out by other agencies better able to deal with them."[4].

Recognition is required of the multi-dimensional nature of police calls in family crisis situations. The potential for such disputes to escalate into serious, life endangering situations requires police to act in response to all calls involving family violence even though they may perceive the conflict as inter-personal and beyond their capacity to bring about any real change.

Their presence and action does in fact effect change. This may not always be a change for the better if for instance "quietening things down" then departing is perceived by the agressor to be the extent of the sanctions for beating his wife, he may believe that his assaultive behaviour is in effect condoned.

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4. INSPECTOR C.H. FOGARTY. Interpersonal Violence - The Police Role: Paper delivered to the 11th International Conference of Health Education. August (1982) p. 7.

The implicit approval and lack of deterrence may consequently result in a more vicious attack as a reprisal for the woman having sought to involve an agency (the police authority and the criminal justice system) potentially threatening to him. The woman in turn "learns" the salutory lesson that the only agency capable of offering her enforceable protection against assault has in effect treated the problem as a "marital tiff", a personal, private "kiss and make-up" matter.

By resorting to a law enforcement agency for protection against her partner's assault and finding that no effective assistance appears available until she is seriously injured, she in turn learns the extent of her vulnerability. That in effect no agency appears available to provide her with the means of remaining married and controlling her husband's abuse of her.

It has been pointed out that

"If the function of the family is to love, nuture and support its members, then violence in the family would seem detrimental to its mission."[5].

It is essential therefore that interventionist, effective action is taken at the outset, before the assaults become an established pattern of assaultive behaviour, intractable to change and resulting in long term suffering and harm.

While a mediation and arrest-avoidance approach may not be intended to be discriminatory two issues predominate. An assault remains a crime regardless of whether victim and offender are strangers or intimates, or the location public or private. And secondly in a domestic violence context where the potential for repeated assaults and possible homicide is a known factor, then police intervention actually constitutes crime prevention and offender immunity cannot be granted because of marital status.

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5. R.H. GUY. DOMESTIC CRISIS. AUSTRALIAN POLICE COLLEGE JNL. 1979. p. 45.

It is accurately stated that

"Both the urgency and distructive potential of interpersonal conflict require that kind of authoritatively lawful response capability that is unique to the police. No other social service organisation is capable of providing equivalent protection to citizens under these often life-threatening circumstances."[6.]

Parnas, who initially favoured a treatment approach to domestic violence offenders advances similar reasons why such cases should be treated authoritively by the criminal justice system and not diverted into the welfare counselling area.

It appears essential that if police are going to exercise a proper crisis intervention function then they not only have to have the skills and training to de-escalate violent situations, they also have to have the means of acting authoritively to bring the offender into a legal system that is providing an appropriate response to the domestic violence offender. At the same time they have to be able to activate a responsive social welfare support system to provide assistance to the parties; including the perpetrator of the violence as well as the victims.

These parallel responses of legal action and social support are not necessarily antithetical. However, in the absence of appropriate legal responses and inadequate social support services the police responses will invariably be that of peace-keeping; to quieten things down and to leave, no doubt with a sense of futility and frustration in the face of a major problem that consumes considerable police-time with little effective change for the better having resulted.

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6. FOGARTY - Ibid p. 6.

(3) SPECIALIST POLICE CRISIS INTERVENTION UNITS: THE NORTH AMERICAN RESPONSE

In the United States awareness that some

"22% of police killed in the line of duty, are slain while intervening in "disturbances" among people, most frequently in families"[7.]

gave impetus to programs directed at protecting police in crisis intervention situations.

Police were taught to identify and more accurately judge violence that was potentially dangerous; such danger was viewed

"as the predictable outcome of certain antecedent and concurrent conditions;"[8.]

and hence was to a degree predictable. Police behaviour was seen to play a role in either escalating or defusing the violence; status degradation of the offender by police resorting to "fear inspired premature power displays" were considered likely to provoke a "wild-beast" response from the assailant in a reactive escalation of violence either directed at the police or the victim.

As the emphasis changed to developing a police service program for family crisis intervention, the mediation techniques were still fundamental but the approach broadened to utilize the police as "psychological intervention agents" with knowledge and skills relating to referring people to the agencies designed to assist them.

The pioneering work of Mortan Bard[9.] provided the model upon which many later specialist intervention units and police training in crisis intervention was based.

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7. F.B.I. LAW ENFORCEMENT BULLETIN (1963) p. 130. Note: The figure of police killed while intervening in interpersonal conflict situtaions has remained constant.
8. SARBIN (1967) "The Dangerous Individual an Outcome of Social Identity Transformation" BRITISH JNL. OF CRIMINOLOGY (July 1967).
9. BARD. TRAINING POLICE AS SPECIALISTS IN FAMILY CRISIS INTERVENTION: FINAL REPORT: Washington DC U.S. Govt. Printing Office (1970 - a)

Intensive training included some "acting out situations"; role playing to heighten awareness of how the same set of circumstances could have entirely different outcomes, dependent upon the nature of the intervention.

Although participants had been specially selected on the basis of their motivation, sensitivity and stability

> "Particular emphasis in training was placed upon sensitizing the men to their own values and attitudes about human behaviour in general and about disrupted families in particular."

The specialist team was allocated a "family car" which contained precinct files on previous interventions. A de-briefing session with the involvement of clinical psychologists was held once a week. Violence was a factor in about half the complaints; in about a third of the cases the police were requested to arbitrate, mediate or advise the disputants.

Absence of injury to police intervenors, the greater use of referral sources, the lower rate of arrests, and in chronic families (those with a history of five or more police calls) the last (and possibly final) call being attended by the trained as opposed to untrained units, were considered factors favouring such programmes.

Various State Police Departments evolved variations of the Bard - New York programme. In Oakland, California interventions were taped and re-assessed later; and in Richmond in 1971 a generalist training programme was introduced using consultants and advising the use of referral resources partly as a means of attempting to resolve disputes or rather limit police involvement to 20 minutes. During 1975 the Baltimore County Police Department established a specialist child abuse unit.

These generalist training techniques for family crisis intervention were

claimed to have the following positive results.

Trained recruits were considered:-

(1) more likely to negotiate settlement of problem or to make referral to outside agency;

(2) more likely to use long-term conflict reduction strategies as opposed to short-term strategies;

(3) more satisfied with their family crisis intervention training compared with experienced officers who received "traditional" training;

(4) reporting greater feelings of accomplishment on family crisis calls and greater willingness to get involved in such calls;

(5) less likely to conclude that couples in crisis should resolve their problem by living apart;

(6) less likely to hold negative attitudes about social agencies than untrained officers;

(7) less likely to perceive a high incidence of alcohol usage and to feel alcohol use by citizens impaired police handling of family crisis calls;

(8) likely to report decreases in violence and the use of force after training (as compared to pre-training experience);

(9) likely to report increases in citizen receptivity and satisfaction with their own performance after training (as compared to pre-training experience); and

(10) None of the above findings disappeared with time: trained recruits seven months after training did not differ from training recruits who had just completed training (both groups differed from untrained

officers).[10.]

Further being trained did not prolong intervention time. The hypotheses that

"the training program produced an increase in effectiveness without a loss of efficiency"

was considered proved in Reitz (1975) evaluation of the Ontario Family Consultant Service training program.

A review of the literature on "Domestic Crisis Intervention - domestic dispute intervention training programs" in North America has been the basis of a Vancouver Police research project.[11.]

These programs shared the common objective of

"changing an unknowledgeable and uncertain police intervenor into a more confident, assured and receptive source of assistance."[12.]

A second concern was reporting. Whereas many State legislature made reporting child abuse mandatory, reporting of known spouse abuse was not a requirement on hospitals or the medical profession even though estimates were that wife-abuse was massively under-reported.[13.]

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10. DUTTON: DOMESTIC CRISIS INTERVENTION: ATTITUDE SURVEY OF TRAINED AND UNTRAINED OFFICERS. Summary of Findings p. 91.

11. Canadian Police College Jnl. Vol 2 No. 2 1978. Bruce R. Levens p. 215 "Domestic Crisis Intervention Part I: Part II Vol. 2 No. 3 1978. p. 299.

12. REITZ, Willard e. "Evaluation of Police Family crisis Training and Consultation" London Ontario Research Bulletin 289 July 1975 p. 7.

13. U.S. Federal Bureau of Investigation 1973 estimate. "Unreported figure for rape is 10 x the reported incidence" and "wife abuse is more under-reported than rape.

Discovery and reporting of spouse-abuse was seen as a necessary step towards developing innovative approaches to deal with the problem. Concerns were expressed about public awareness and education; sensitizing intervenors and altering social norms that "legitimized" spouse abuse and the social and cultural conditions that gave rise to such abuse.

A Canadian Police program[14]. identifies the essential features of a reporting channel and the criteria it must meet to increase the reporting rate whether it be a crisis hot line, rape centre, police department, or Legal Aid. These are identified as:

Credibility - it must be helpful and maintain confidentiality:

Visibility - it must be highly publicized and known in the target area:

Accessibility - available 24 hours 7 days a week and ideally a mobile operation giving out to the client: and

Immediacy - no waiting or appointment lists for first contacts, a quick response to crisis.

In 1972 the Mobile Family Service Society was established in Saskatchewan to establish a 24 hour crisis intervention service, operated by a corporate board with service agencies represented on the Board. Self-referrals had increased to 42% in 1977 and police referrals droped to 27% as the community became more knowledgeable about the service. A refuge, "Regina Transition House" and a follow-up "Self-Help Club" developed from the program.

Other Family Consultant Services[15]. are located in police headquarters. Their availability co-incides with peak family crisis times e.g. noon to 4 a.m. on weekends and holidays. Their aim is common to most crisis intervention units;

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14. YOUTH SERVICES: ROYAL CANADIAN MOUNTED POLICE. REGINA. SASKATCHEWAN Cited in Eekelgar & Katz Family Violence C11. Gary Bell p. 208.

15. THE FAMILY CONSULTANT SERVICE WITH THE LONDON (ONTARIO) POLICE FORCE. Herlick R, R.C.M.P. Gazette 43(b) 1981 p. 22.

early intervention as a means of preventing serious, intractable dysfunction, facilitating referrals to agencies and securing their co-operation, providing informal in-service training to police and enhancing community awareness of the police service role, and evaluating the project as a model for similar services.

Their data reveals the primary claim of crisis intervention: That there is a definite relationship between the immediacy of agency contact following a crisis and the acceptance of appointments.

> "85% of the families/individuals referred to agencies by Family Consultants accepted appointments if the contact was 24 hours or less following the Family Consultant intervention. In contrast approximately 30% of families did not accept appointments with agencies if the time lapse between crisis intervention and agency contact was more than 24 hours."

This facilitating function increases the possibility that people in crisis will begin to receive help from the agencies whose function it is to assist them.

(4)
THE DISCRETION TO PROSECUTE

Investigations into domestic violence have focused on two themes: the passivity of the victim and the reluctance of the police to intervene and invoke the criminal sanction against offenders except in extreme cases.

While there is absolutely no doubt that the criminal law contains adequate provision for dealing with violence between persons irrespective of marital status, a typical complaint by battered wives is that police are reluctant to intervene, and refuse to arrest even in serious cases.[1.]

Underlying this accusation of police inactivity and selective law enforcement is the issue of victim passivity and the factors affecting the non-reporting of assault[2.] or withdrawal of a complaint by the victim. While the law is clearly adequate it is apparent that the closer the relationship between victim and offender the less likely the assault incident will be reported or officially recorded as such. This diminishes with the severity of the injury.

This reluctance to enforce criminal sanctions by the police and the relatively small proportion of charge cases brought directly by the police compared to summons taken out by the woman herself, is based on a belief that the woman may refuse to give the necessary evidence against the man when the case comes to court.

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1. M. Jobling "Battered Wives: A Survey" (1974) Social Services Quarterly 144.
U.K. Select Committee on Violence in Marriage H.C. 1974-75 pp xvii, 96, 97.
USA. Parnas "Law and Contemporary Problems p. 543.
Australia: Department of the Attorney-General & of Justice. N.S.W. Bureau of Crime Statistics and Research: Statistical Report 5 Series 2. "Domestic Assaults" 1975 p.21:
   - NSW: Task Force on Domestic Violence (1981)
   - SA: Report of the Committee of Inquiry on Victims of Crime (Adelaide: Government Printer 1981).
   - J. Scutt (ed.) Violence in the Family(Canberra. Institute of Criminology 1980).

   Victimology, 1981 (Canberra: Australian Institute of Criminology, 1981)

2. Refer to Section on the Incidence of Domestic Assaults: Factors Inhibiting Legal Action by the Victim).

In the N.S.W. study of 184 domestic assault cases handled by Chamber Magistrates at 22 courts between mid-April and the end of June 1975, of these cases brought before the court during that period "70% were summons cases and 30% were charge cases, brought directly by the police".[3.]

What is apparent is that a double standard applies in that there is a different attitude towards offences against children, the incapacitated or aged, and offences perpetrated by strangers, than applies when the victim is the wife or partner of the assailant. The perceived reluctance of the police to enforce the criminal law in clear cases of domestic assault, opens the way to viewing the police response to domestic assaults as constituting a separate category of assault where criminal sanctions are enforced selectively.

While there is imposed upon the police both a common law and statutory duty to act,[4.] the claim of "insufficient evidence" based on absence of other witnsses to collaborate the complainant's statement and the belief that the complainant will refuse to give evidence when the case comes to court are factors which influence the police discretion as to whether to initiate a prosecution or merely to advise the complainant to take proceedings herself.

This situation is not unique to Tasmania, or to any other State in Australia. It could virtually be said to be a universal western response of the criminal justice system to the problem of domestic assault, where the victim is or has been in an intimate relationship with the assailant.

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3. N.S.W. Dept. of A-G. (ibid) p. 21.

4. A wilful refusal or neglect by a police officer to perform a specific duty is a common law misdemeanour GRAY v CHILMAN (No. 2) 1935 SASP 359, indictable unde the CRIMINAL CODE (1924) S115, and punishable summarily POLICE REGULATION ACT (1898) S31 TASMANIA.

This disinclination to invoke the criminal sanction against offenders except in extreme cases is particularly significant

> "given that much domestic violence appears to occur in a chronic, repetitive basis, as opposed to a one-time, sudden assault. One overseas study[5.] showed that during the two years preceding an arrest for domestic assault or murder, police previously had been called to the scene of the crime at least once in 85% of the cases, and five or more times in over half the cases."[6.]

In the UNITED KINGDOM the SELECT COMMITTEE ON VIOLENCE IN MARRIAGE concluded that

> "If the criminal law of assault could be more uniformly applied to domestic assaults there seems little doubt that it would give some protection to the battered wife". (p. xvi)

The evidence of the Metropolitan Police to the SELECT COMMITTEE (pp. 375-376) indicated that whereas it is

> "a general principle of police practice not to intervene in a situation.... between a husband and wife in the course of which the wife has suffered some personal attack, any assault upon a wife by her husband, which amounted to physical injury of a serious nature is a criminal offence which it is the duty of the police to follow up and prosecute. Police will take positive action in every case of serious assault and will prosecute where there is sufficient evidence."

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5. DOMESTIC VIOLENCE & THE POLICE (WASHINGTON DC: THE POLICE FOUNDATION, 1977) p.23.

6. ATTORNEY-GENERAL'S DEPARTMENT. OFFICE OF CRIME STATISTICS. SERIES 11, No. 9 NOV. 1981 "HOMICIDE & SERIOUS ASSAULT IN SOUTH AUSTRALIA" p. 78.

By contrast battered wives evidence to the SELECT COMMITTEE and generally is of police reluctance to intervene and initiate prosecutions even where the injuries were relatively serious or the incident indicative of the potential for more serious injury or fatality.[7.]

Clearly in the United Kingdom it is police policy to advise the wife to initiative her own proceedings for common assault.

The outcome of the reported assault where no prosecution is undertaken is a "no crime" classification by the police. Two-thirds of the offences against the person so classified, involved assault between husband and wife and known acquaintances where it is claimed that the victim decided she (or he) did not wish the police to prosecute.

It has been said of police intervention in the United Kingdom, that it rarely results in an outcome satisfactory to either party but like their discretionary handling of most 'domestics' involving violence

> "the essence of the police 'no crime' decision was that these interpersonal disputes were in a real sense not the proper concern of the criminal law or the police, but ought to be sorted out privately in a different public arena e.g. divorce courts."[8.]

The exercise of this discretion not to prosecute is viewed overall as arbitrary decision-making justified by the claim of "insufficient evidence". To a large extent this discretion is unregulated; concern has been expressed about their decision-making process and advocates have recommended a complete divestiture by the police of all prosecuting decisions. References are made

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7. DIFFERENT PERCEPTIONS OF WHAT CONSTITUTES A "SERIOUS ASSAULT" ARE DISCUSSED IN THE N.S.W. BUREAU OF CRIME STATISTICS REPORT 5 SERIES 2. "DOMESTIC ASSAULTS" 1975.
8. COLMAN "POLICE CONCEPTIONS OF CRIME & "NO CRIME" CRIMINAL LAW REVIEW JUNE 1976.

to the Scottish system where the police have a duty to report to the appropriate Procurator Fiscal, all crimes and offences where sufficient evidence is available to establish a prima facie case. The Procurator examines witnesses himself and determines whether prosecution is justified.[9].

The general police policy not to prosecute in all but the most serious of domestic assaults, comes about partly by default as the English system is based on personal responsibility; under S42 of the Offences Against the Person Act 1861, only the person assaulted can lay information, unless he or she is

> "so feeble, old and infirm as to be incapable of instituting proceedings and is not a free agent but under the control of the person committing the assault."[10].

It has been suggested that given "the pressure and fear under which a wife may be when contemplating acting on her own to bring criminal proceedings" and that legal aid is not available for private prosecutions,[11]. a wife could be considered under the control of her husband and not a free agent thus the police should act on her behalf.

In some instances magistrates have referred cases back to the police for further investigation with the view to an application for an arrest warrant in cases where they have considered it inappropriate to proceed by summons. For example where the complaint contains evidence of unlawful wounding or causing actual or grevious bodily harm, and there is apprehension of further violence before the hearing.[12].

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9. BOWLEY "PROSECUTION. A MATTER FOR THE POLICE?" CRIMINAL LAW REVIEW AUGUST 1975.

10. SELECT COMMITTEE p.376 citing PICKERING v WILLOUGHBY (1907) 2 K.B. 296.

11. SUSAN MAIDMENT "THE LAW'S RESPONSE TOMARITAL VIOLENCE IN ENGLAND & THE USA" INTERNATIONAL & COMPARATIVE LAW QUARTERLY VIL. 26. APRIL 1977 p. 410.

12. 1973: LEGAL ACTION GROUP BULLETIN, 277.

The discretion whether to arrest and charge remains with the police, but a referral from a magistrate generally results in the police initiating the prosecution. Conditions may be attached to any subsequent bail aimed at protecting the victim from further assault.

In addition the powers given under the DOMESTIC VIOLENCE & MATRIMONIAL PROCEEDINGS ACT (1976) enable a power of arrest to be attached to an injunction and arrest without warrant for suspected breach.[13.]

UNITED STATES

In the US increasingly militant civil and legal groups are demanding stronger police measures in domestic confrontations and accusing officers who refuse to act or file complaints, as selectively enforcing the law in a manner discriminatory to victims of domestic violence.

Cases have been taken to court against Police, Probation, and Family Court Personnel where the complainant has alleged that Police Officers do not uniformly make arrests, even if physical evidence of assault is unmistakeable and undenied:[14] and in the Californian Oakland Case, that the inadequate response of the police deprived women in general and black women in particular of the legal protection of the law.

In each case the Court denied the Police Defendants motions for dismissal and summary judgement reminding them that the plaintiffs merely sought to compel the Police to exercise their discretion in each particular situation and not

> "automatically decline to make an arrest solely because the assailant and his victim are married".[15.]

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13. S2 (1-C): S2 (3)

14. BRUNO v CODD (1977) 90 misc. 2d Adv. Sh 1047, 396 NYS 2d 974.

15. BRESLIN, WARREN J. "POLICE INTERVENTION IN DOMESTIC CONFRONTATIONS" JOURNAL OF POLICE SCIENCE & ADMINISTRATION Vol. 6. No. 3 1978 p 293-302.

FORMULATION OF STANDARDS TO GUIDE ADMINISTRATIVE DISCRETIONS:

In the United States the formulation of standards to guide administrative discretions has been recommended by the President's Commission on Law Enforcement and Administration of Justice, the American Bar Association[16]. and the International Association of Chiefs of Police.[17].

The IACP guideline is a direct contrast to the concept that police should avoid making the arrest or actively discourage the victim from filing a complaint.

They state that:

"To minimize pressure on the prosecutor, courts, and social service agencies will only delay the time when adequate remedies and programs are provided. Ignoring the problem is an improper action of the police. Even if each family processed through the legal and social service system receives no help from them, initiating the process remains the proper action for the police until a better system exists."[18].

This represents a change from the traditional United States approach of regarding wife beating as a civil matter. Police were often advised

"Never create a police problem where only a family problem exists."[19].

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16. ABA STANDARDS "The Urban Police Function" 1973 S4.3
17. IACP Model Rules for Law Enforcement Officer's (1974).
18. IACP Training Key No. 245 "Wife Beating".
19. LANGLEY R, LEVY R. "Wife Abuse and the Police Response" F.B.I. LAW ENFORCEMENT BULLETIN 45 (5) MAY 1978 p4-9.

Informal police policies and practices of arrest-avoidance and discouraging the victim from filing a complaint effectively removed these assaults away from the mainstream of the criminal justice system. Battered women were described as "the missing persons of official statistics."[20.]

A growing awareness of the plight of the battered wife, the seriousness of the risk of injury to both victim and police intervenor, the paucity of police training in mediation, and the intractable nature of the problem given the inability of the criminal justice system and support services to arrive at satisfactory resolutions, has led to an analysis of the police role in crisis intervention.

Guidelines have been formulated to guide police discretions, and a non-arrest remedy is expected to apply only when this is likely to be effective. For example the Chicago Police guidelines provide that:

> "When there has been physical confrontation resulting in an intentionally inflicted serious injury, an arrest of the offending party for battery is required. If a disturbance has subsided, no one is seriously injured, and it is reasonably certain that a further confrontation will not ensue, police officers may decide upon other action in lieu of an arrest. However the non-arrest remedy may be utilized only when officers reasonably believe that it will be effective. If an injury is not serious and a non-arrest remedy is likely to be ineffective, an arrest for a lesser included offence, such as disorderly conduct, may be more appropriate."[21.]

However an increasingly militant public, dissatisfied with routine conciliatory alternatives and mediation rather than arrest and enforcement,

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20. LANGLEY, K. ibid.

21. Chicago Police Department XVIII "Domestic Disturbances" Training Bulletin No. 16. Dec. 26, 1977 - An adoption of guidelines formulated by Warren J. Breslin.

are demanding that the police concentrate on the criminal aspect of wife-beating. Those cases that have come before the courts - claiming that routine failure to enforce the criminal law of assault in cases of domestic violence constitutes selective law enforcement denying victims the equal protection of the law; - can only serve as a warning to police departments that clandestine policies and practices of arrest avoidance or even careful conciliatory alternatives may arose dissatisfaction in some sections of the community.

It would probably be fair comment that police reluctance to enforce criminal sanctions between intimates was not overtly discriminatory but has to be seen in the whole context of the pressures in society which create the conditions in which violence with families is perpetrated. Police as a law enforcement agency with the discretion to determine whether a criminal charge will be made, or alternatively whether the complainant will be advised to initiate her own civil action for assault, and who are on the front-line of intervention in a crisis, become a focal point of criticism partly because of the absence or ineffectiveness of virtually every other support service that could render assistance to the victim.

As stated earlier, the criminal law of assault is adequate but procedurally with respect to its operation inadequate protection is given to women who are victims of domestic violence. The police are only part of this system; whereas they have a vital role in intervention, mediation, arrest, bail and the decision to assume responsibility to prosecute domestic assaults, they in turn are influenced by the efficacy of the court system. If domestic assault cases are not expedited the pressures on the victim increase the probability of her intimidation and withdrawal and weaken the police case against her assailant. If the cases are time consuming as a result of frequent adjournments, the sanctions trivial and not commensurate with the crime or offer the victim no protection, then these factors will operate as disincentives upon the police

and increase their reluctance to prosecute.

Police frequently come into a disproportionate amount of criticism because they are the most visible agency and the one most victims appeal to for protection.

However until the entire criminal and civil justice system is made more responsive to dealing effectively with violence between intimates and adequate support systems exist, the role of the police will remain compromised.

Reference is made to the domestic violence law reforms in South Australia. Amendments to the Justices Act provide that the breach of a restraint order is an arrestable offence without warrant. In cases of domestic violence police act as complainants on the victim's behalf in all but 3% of the cases. A Restraint Order Unit has been formed within the South Australian Police Department to maintain a record for police of all orders of restraint. Statistical analyses were made in the first two quarters to "monitor the system and highlight any problems" prior to the present ongoing system of statistical collection being introduced. The Reports produced by the Special Projects Section are passed on to the Domestic Violence Committee; the officers in charge of Special Projects and the Policy Section were the Police representatives on the Domestic Violence Committee which supervised the introduction of the new restraint order system.

The operation of police patrols investigating domestic disturbances with the Crisis Care Unit has already been referred to.[22.] The South Australian police statistics indicate that they attend approximately 5,000 domestic disputes per year Statewide. A Domestic Dispute Report form has been developed for use by operational police officers replacing patrol log entries. This form constitutes the basis for police in applications for orders in the courts.[23.]

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22. Page 220-222

23. INFORMATION CONTAINED IN A LETTER TO THE REVIEW, 9th AUGUST, 1983 FROM THE S.A. ACTING COMMISSIONER OF POLICE.

Some concern in general is expressed about the possibility that crisis intervention with a mediation function operating in conjunction with the police may detract from the police enforcement function and deprive victims of legal remedies by diverting cases away from the justice system.

This does not appear to be the case in South Australia. The Acting Commissioner has written that

> "Crisis Care Unit operations are not intended to limit or inhibit proper police action when the circumstances reveal breaches of the law which require police intervention."
>
> ..."Police attending such incidents, where they believe that Crisis Care intervention may be of assistance, are to firstly advise the involved parties of the availability of the Unit and explain its role, and seek the co-operation of those involved and their agreement to a Crisis Care Counsellor attending. It is essential that both parties to the dispute are in agreement regarding the attendance of a Crisis Care Counsellor. Police then arrange the attendance of a Crisis Care Counsellor/s (through the Police Communications Centre), advise the persons involved and then resume patrol when order is restored."[24.]

It would appear from reviewing the South Australian response to domestic violence that the close level of co-operation has not distorted the function or role of the various agencies involved and in some respects has released these agencies from extraneous concerns more appropriately dealt with by other agencies. The relationship of the Police with the Crisis Care Unit does not appear to be antithetical to the interests of the victim, inasmuch as the Police may still proceed with a restraint order or criminal assault charge irrespective of the involvement of Crisis Care. Their law enforcement function in some

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24. LETTER FROM S.A. ACTING COMMISSIONER OF POLICE. 9th AUGUST, 1983.

respects becomes clear and the restraint order is dealt with in the lower courts only becoming an indictable offence on breach. It acts to protect the victim while restraining the offender but allowing the full rigour of arrest without warrant and sanctions for breach of the restraint order.

It seems that if a similar system existed in Tasmania; of reforms to the Justices Act, police powers of entry, the removal of personal liability for acts arising in the course of police duty; backed up by an appropriate social support system which could respond more immediately to crisis and render assistance then many of the existing accusations of police indecisiveness, arrest avoidance and reluctance to lay charges would diminish.

LEGAL ISSUES

POLICE POWERS AND INTERVENTION IN DOMESTIC VIOLENCE

(5)

POLICE POWERS OF ENTRY

At common law, whenever a police officer has the right to arrest, with or without warrant, he may enter upon private premises without the occupier's permission in order to effect that arrest.[1]

However the powers of the police to enter and remain on private premises without a warrant for the purposes ofmaking an investigation, are extremely limited. The reluctance of police to intervene in domestic violence situations is exacerbated by considerable legal uncertainty about the extent of police powers of entry and awareness that they are personally liable and may be sued for damages if they exceed their powers. They may be liable for trespass and wrongful arrest. Without this clear authority to enter and remain on private premises without a warrant, the police are compelled to resort to

> "a mixture of bluff, subterfuge and ignorance by the offender of his rights".[2]

They must ask to be invited in and once inside cannot remain if that invitation is revoked.

In the absence of any immediate fracas or visible signs or complaint of violence, the police in effect have no right to enter, unless they have reasonable grounds upon which base a belief that an offence has been committed. There is also the common law power to enter to prevent an apprehended breach of the peace.[3] A private citizen also at common law may arrest without warrant a person committing a breach of the peace, and the police right of entry to prevent an existing breach of the peace is well established.[4]

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1. HANDCOCK v BAKER (1800) 2 BOS & P 260; SMITH v SHIRLEY (1846) 2 C.B. 142;
2. WILLIS J.E. "Domestic Violence, the Role of the Police" POLICE LIFE OCT 1982 pp 4-5
3. THOMAS v SAWKINS (1935) 2KB 249
4. DOWLING v HIGGINS (1944) TAS. S.R. 32.

In domestic violence situations very real problems exist that inhibit the present capacity of the police to intervene. Calls frequently are made to the police by neighbours, family members or the victim at the height of the assault which has ceased by the time the police arrive.

> "Very often police find, upon arrival at the scene, that the husband opens the door and refuses them entry. No noise or other evidence of violence manifests itself from within the house or flat. Very possibly there is inside the residence a woman who has been beaten or injured."[5]

The fact that the assault has taken place on private property between intimate family members sets it in the context of the "private domain". The preservation of the private domain as a separate sphere with its own order excluding legitimate social control, is found in expressions such as 'an Englishman's home is his castle', and such attitudes are too easily confused with genuine civil liberties such as freedom from undue interference.

These attitudes towards marriage, privacy and private property underscore the legal uncertainty surrounding police powers to enter and remain on private premises and reduce legitimacy of police intervention to investigate domestic violence situations either in a law enforcement or preventive capacity.

The solution appears to be, to give police a restricted right of entry into private premises without warrant, to investigate a complaint of domestic assault.

While it is imperitive that civil liberties not be eroded by unnecessary expansion of police powers into citizens private lives and homes, it is also essential to recognize that the criminal law of assault exists to deter assailants and protect victims regardless of marital status or where the assault takes place. Regardless of matters such as which spouse holds the title to the property or the lease, for the purposes of the criminal law of assault and marital law,

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5. REPORT OF THE N.S.W. TASK FORCE ON DOMESTIC VIOLENCE. JULY 1981.

the private domain is not the exclusive province of either spouse.

If in domestic violence situations the right of one family member to protection from physical injury can be bought only at the expense of erosion of the assailants right to privacy, then clearly that is the price that has to be paid.

WARRANTS

The urgency of the situation makes it futile to respond to a domestic crisis call by first obtaining a written judicial search warrant from a justice of the peace.

Further any standard procedure requiring a warrant to be obtained before a domestic violence complaint was investigated would be exceptional in that most arrests are effected without a warrant.[6]

The N.S.W. Task Force reporting on Domestic Violence,[7] recommended a clarification of police powers of entry,[8] and in recommendation 4, that:

> "A specific power of entry should be given to allow entry into private premises without warrant by police to investigate a complaint that an assault has occurred on certain premises, where there are reasonable grounds to suspect that such an assault has occurred".

This does not constitute an extension of powers that the police already have, providing they can base their suspicion or belief that an offence has occurred on reasonable grounds.

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6. AUSTRALIAN LAW REFORM COMMISSION 1975 INTERIM REPORT NO. 2 "CRIMINAL INVESTIGATION" p. 12: A study of 3,520 arrests in the A.C.T. in 1974-75 revealed only 260 (7.4%) were by warrant.
7. Ref. p.5
8. Ibid. Recommendation 3 p47.

However a specific statutory power of entry to investigate a complaint of domestic assault, combined with reforms granting the police immunity from personal liability for acts in excess of their powers,[9] ought to legitimize police entry for the purpose of investigation in those cases where the violence has ceased prior to the police arrival and superficially all appears quiet and the victim is not in sight.

The N.S.W. Task Force suggested two other options. The first placed the onus upon the victim, who in anticipation of further assaults and desiring police protection, would make out a warrant of entry to their premises valid for 3 months, to be retained at the police station enabling police to effect entry if called to a domestic dispute.

This is a resolution of the problem with benefits to those battered wives sufficiently assertive to initiate this request for future police intervention by fronting up to the local police station and informing police of their anticipated need to organise protection for themselves from their spouses anticipated assault. It would assist only a minority, but nonetheless should not be disregarded for that reason. The reality of domestic violence is however that most spouses seek police protection during the immediacy of their husband's assault upon them, and in an on-going marital relationship are ambivalent about insisting upon or aiding a prosecution.[10]

The second option involved the Police contacting a duty magistrate who could authorize the issue of a warrant by phone, and this along with other instructions and information, such as the outcome of the investigation and source of the complaint could be recorded in the Domestic Violence Book both for statistical purposes and as the police 'brief' in any subsequent prosecution.[11]

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9. REFER: THIS REVIEW. SECTION ON VICARIOUS LIABILITY.
10. TASMANIAN REVIEW ON DOMESTIC VIOLENCE. REFER TO SECTION ON "THE DECISION TO PROSECUTE".
11. NSW TASK FORCE Ibid. p. 45-47, Recommendation 6, p.48.

The recommendations of the New South Wales Domestic Violence Task Force have been partly enacted by the New South Wales CRIMES (DOMESTIC VIOLENCE) AMENDMENT ACT (1982) No. 116. Schedule 2 amends the CRIMES ACT in relation to police powers of entry to private premises in cases of domestic violence.[12.]

Police powers of entry are currently under consideration in South Australia and by the Legal Remedies Sub-Committee of the Premier's Domestic Violence Committee in Victoria.

The New South Wales reforms concerning police powers of entry appear to be an appropriate model for Tasmania, as it clarifies the situation on invitees in relation to the occupier of the dwelling. Once authority for an initial entrance is given the evidence of assault may be apparent and the victim herself can authorise police to remain for the purpose of investigating an alleged assault and this overrides the revocation of the occupier. If evidence of assault is not apparent and the victim not present the occupier's revocation of police entry can be overcome by police obtaining a telephone warrant. But the power to enter or remain on premises is limited. In effect it lasts "only as long as is reasonably necessary" (S357H) to investigate the complaint, render aid, exercise any lawful power of arrest, and prevent the further commission of the offence.

In the Domestic Violence law reforms in New South Wales, South Australia, and Queensland, a police power of arrest attaches automatically to the restraint order, breach of which is an offence enabling the police to arrest without a warrant.

In England the Domestic Violence and Matrimonial Proceedings Act (1976) S2 (1-C), provides that a power of arrest may be attached to an injunction and in the case of a suspected breach, under S2 (3) a constable may arrest without warrant.

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12. REFER TO: A SUMMARY OF DOMESTIC VIOLENCE LAW REFORMS IN N.S.W., SOUGH AUSTRALIA AND QUEENSLAND AND THEIR APPLICABILITY TO TASMANIAN LAW REFORM: Page 5, 6.

Proposed amendments to the Australian Family Law Act give judges a similar discretion in[13.] instances where the violence exists in a formal marriage relationship.

This right to arrest brings into play statutory and common law powers where a police officer, with or without a warrant may outer into private premises without the occupier's permission in order to effect that arrest.

For the purpose of clarifying police powers of entry amending legislation modelled on the New South Wales CRIMES ACT amendments of 1982 are necessary. Such an approach balances civil libertarian concerns about privacy and freedom from undue interference while granting restricted powers of entry onto private premises for the purposes of investigating a domestic violence complaint.

It acknowledges that family members subject to violence have a right to have their complaint investigated irrespective of whether the assault is domestic and takes place on private premise between intimates. It places personal safety before the legal occupier's property "rights", but restricts entry only to domestic violence complaints and limits this intervention.

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13. REFER TO "THE FAMILY LAW COURT' NON MOLESTATION INJUNCTIONS" page 110. S114AA(b)

(6)

POWERS OF ARREST

At common a power of arrest is conferred upon both the private individual and the police officer in instances where a treason or felony has actually been committed or is being attempted; or where there is reasonable suspicion of such being committed providing, in the case of arrest by a private citizen, that the crime has actually been committed.

The common law power of arrest also exists where a breach of the peace has actually been committed in the presence of the citizen or where a breach of the peace is reasonably apprehended. Only the police can arrest for an anticipated breach of the peace.

In all Australian jurisdictions the common law powers of arrest have either been actually supplanted by express statutory provisions or substantially supplanted by statute.

In Tasmania the powers are contained in the CRIMINAL CODE ACT (1924) S27, and POLICE OFFENCES ACT (1935) S55. No general power of arrest exists for the purpose of questioning a suspect and the powers of arrest exist only in respect of stated offences.

In cases of domestic assault a real problem is a reprisal and continuance of the assault by the assailant as punishment for the victim having sought police protection, yet preventive detention is considered abhorrent and in normal circumstances cannot be justified.

The VICTORIAN CRIMES ACT[1] was amended to enable an arrest to prevent the continuance or repetition of the offence for which the person was arrested; "to preserve public order" and to arrest rather than proceed by summons if "necessary for the safety or welfare of members of the public".

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1. VICTORIAN CRIMES ACT 1958, as amended (Vic) S458(1)(a)(i) following recommendations by the Statute Law Revision Committee '1968): "Arrest without Warrant on related Matters" : For commentary refer G. Evans "Arrests without Warrant in Victoria (1972) LAW INSTITUTE JOURNAL (Vic) 507.

The Australian Law Reform Commission[2] considered such powers unnecessarily wide, however in the context of domestic violence assaults and the close proximity of victim and offender in a crisis situation with the ever present risk of commission of further offences, some compulsory separation appears necessary.

The physical removal of the victim and her children to a refuge is not always the most appropriate remedy given that it disrupts the families normal domestic routine, schooling, work, transport and child-care arrangements and relations with neighbours.

It would appear preferable to introduce an amendment similar to the Victorian provision[3] and arrest if commission of a further offence seems likely, than to rely on bail provisions or alternatively to arrange an alternative form of accommodation for the assailant on the undertaking he not return home for a specified time. This removal of the offender on bond to alternative supervised accommodation, appears preferable in most cases to assisting the victim to a refuge and could assist in the counselling of both parties.

As noted previously, in the domestic violence law reforms in New South Wales, South Australia and Queensland a police power of arrest attaches to restraint orders. The breach of such an order is an offence enabling police to arrest without a warrant. Discretion to attach a power of arrest to a Family Law Court non-molestation injunction is a proposed amendment to the Family Law Act.[4].

Similar amendments to the Tasmanian Justices Act creating restraint orders to which a power of arrest attaches, are necessary to adequately protect the victim who is subject to repeated assaults or harassment.

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2. CRIMINAL INVESTIGATION: INTERIM REPORT NO. " para. 41 p. 18

3. S458(a)(A)(i)

4. N.S.W. CRIMES (DOMESTIC VIOLENCE) AMENDMENT ACT (1982) NO. 116 Schedule 3.
   S.A. JUSTICES ACT AMENDMENT ACT NO. 2 (1982)
   QLD. PEACE AND GOOD BEHAVIOUR ACT (1982)
   FAMILY LAW ACT AMENDING LEGISLATION. S114 AA

(7) BAIL IN RELATION TO DOMESTIC ASSAULT

As with arrest, deprivation of liberty is a serious matter and should not be prolonged more than absolutely necessary. The law governing bail enables in most instances, a person who has been taken into custody for an alleged criminal offence to regain his liberty by entering into a recognizance to appear before a magistrate or judge at a later date and in default forfeit a sum of money to the Crown. The power to release on bail is also exercisable in some instances by police officers. If bail is refused then the person charged must be brought before a justice forthwith.[1.]

The criteria on which bail is granted or refused cover a range of factors of varying relevance.[2.]

The main determinants should be the probability of the accused's appearance, the interests of the accused,[3.] and the protection of the community.

The concern for protection of members of the community is expressed in the VICTORIAN CRIMES ACT[4.] and the New South Wales BAIL ACT (1978). The Victorian Act will consider continued detention necessary "to prevent the continuation or repetition of the offence or the commission of further offence, or for the safety or welfare of members of the public or the offender", while in New South Wales the grantor under S32 (2-b) is required to have regard to the likelihood of the person on bail committing an offence involving violence or an offence likely to be serious by reason of its likely consequences.

Form 4A of the New South Wales BAIL ACT (1978) gives effect to some of the New South Wales Domestic Violence Task Force recommendations concerning bail[4A]

1. TASMANIA JUSTICES ACT (1959) S34 (2)
2. R v LIGHT (1954) V.L.R. 152 Scholl J.
3. Studies indicating that refusal of bail or financial inability to take bail when granted (MILTE) (1968): AUST & N.Z. JNL CRIMINOLOGY affects accused prospects of acquittal or severity of sentence (BAILEY).
4. VICTORIAN CRIMES ACT '1958) S460 (amended 1960, 1970, 1972(?).

4A. REFER TO: A SUMMARY OF DOMESTIC VIOLENCE LAW REFORMS IN NEW SOUTH WALES, SOUTH AUSTRALIA AND QUEENSLAND. Page 95.

following domestic assault cases.

The New South Wales Task Force on Domestic Violence recommend[5] an amendment to S32 of the BAIL ACT (1978) enabling a compulsory 12 hour detention to give respite to the victim of 'domestic violence' where the assailant has been arrested for assault; or is in breach of a condition of an injunction or an "apprehended violence" order.

The laws of each State in relation to police powers to admit arrestees to bail vary considerable in the criteria and amount of discretion the officer exercises as well as the nature of the offence and its seriousness as a determinant of whether the question of bail will be a police or judicial matter. For instance in some States the criterion for release on bail is that the police officer concerned deems it 'prudent' to admit the arrestee to bail.[6]

Under S34 of the Tasmanian Justices Act (1959) bail may be refused if the police officer concerned considers the offence to be of a 'serious nature'.

It would be preferable if the principles and criteria governing the grant or refusal of bail by police officers be systematically laid down by legislation[7], and that criteria relating to the safety and welfare of members of the public, intimidation of witnesses and the likelihood of commission of a further offence involving violence, make a specific reference to domestic assaults. The reason being that the concept of preventive detention is of greater validity where the assaultive behaviour is likely to continue should the arrestee be allowed home to a potential conflict-crisis situation with the violence and anger he feels is exacerbated by the arrest. Also the police are uniquely situated to judge whether the person arrested is likely to continue to be violent, whether he

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5. N.S.W. TASK FORCE ON DOMESTIC VIOLENCE: RECOMMENDATION 8, 9.

6. ACT POLICE ORDINANCE 1927-1975 S24; QUEENSLAND JUSTICES ACTS 1886-1968 SS69A; 92(2) + (3); SOUTH AUSTRALIA POLICE OFFENCES ACT (1953-1967) SS78 & 80; WESTERN AUSTRALIA POLICE ACT 1892-1970 S48 & JUSTICES ACT 1902 as amended S64.

7. AS RECOMMENDED BY THE AUSTRALIAN LAW REFORM COMMISSION. REPORT NO. 2 (INTERIM REPORT) "CRIMINAL INVESTIGATION" 1975 para 173.) and as provided in Form 4A drafted in respect to domestic assaults, under the N.S.W. BAIL ACT (1978)

is perhaps affected by alcohol, and the state of the victim, her children and the household generally. If the household is in disorder, the victim injured, upset and the children frightened then the situation is not one which the assailant should be allowed to return to until some relative calm has been restored.

With respect to those principles governing discretion developed by the magistracy and judiciary, it would also be preferable that the criteria on which bail is granted be reviewed and possibly codified in legislation.

The English CRIMINAL JUSTICE ACT (1967) S18 provides that in certain defined circumstances magistrates shall not refuse bail in respect of offences punishable, on summary conviction, by imprisonment of not more than 6 months. But bail may be refused in certain situations including where the offence charged involves violence, possession of offensive weapons, and where the arrestee is likely to commit an offence if he is granted bail.

As with legislation on police powers with respect to admitting the arrestee to bail, any codification of criteria governing the factors that court is required to take into consideration before bail is granted, should include a specific reference to assault in a domestic context; the likely commission of a further offence and the safety of the victim.

Previous attempts by state Attorney-Generals to prescribe relevant criteria and the issue of these to all magistrates and police stations, have been considered an executive encroachment upon a judicial function.[8] However it seems a matter within the province of the State Attorney-Generals, to attempt to develop some uniformity between State bail conditions and to determine which criteria are necessary particularly in relation to the balance between the presumption favouring bail and the need to protect the victim of assault from further assault.

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8. MILTE (1968) 1 AUST. & N.Z. JNL. CRIMINOLOGY @ 234-5 cited in CAMPBELL & WHITMORE FREEDOM IN AUSTRALIA re. FIC. A-G's Instructions, 1963.

In Tasmania the JUSTICES ACT gives magistrates power to make orders related to bail; including under S35 (3-e) an order

"controlling the conduct of the defendant, requiring him to report at specified places at specified times, and limiting his movements and social intercourse."[9].

While the predominant purpose of bail provisions is to secure the appearance of the defendant in court at a later date and is premised on assumptions of innocence until proven guilty and a corresponding distaste for preventive detention or restrictions on the defendant's lifestyle, the realities of life are that some persons must be refused bail and others granted bail but with restricting conditions in certain carefully defined circumstances. As stated in recent Tasmanian cases[10]. the matters relevant to the decision to grant or refuse bail are equally relevant to formulating orders related to bail. While the section should not be used to impose restrictions on lifestyle pending hearing, a condition is not necessarily outside the ambit of the section because its effect is to impose restrictions on lifestyle; such restrictions may be warranted and must be balanced against perceived disadvantages to the applicant for bail.

This appears to be a necessary view particularly in its application to domestic assault cases where the likelihood of duress and intimidation, or a retaliatory attack by the alleged offender places the victim in an extremely vulnerable position. No other class of victims experiences the same degree of intimidation as a complainant or potential prosecution witness as does the victim of domestic assault who continues to cohabit with her assailant while seeking to invoke legal action against him.

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9. JUSTICES ACT (1959) as amended in 1974.

10. LEVY v STICKLAND, BRAIN v STICKLAND. Cox J. Serial No. 8. 1983.

Further almost one third of assault charges between inmates reaching the courts are by men upon their estranged partner. The difficulties of bail conditions being adhered to in these cases is illustrated by a recent case in New South Wales where a man who appeared on a firearm charge at the Penrith Court in July following an incident in which he had threatened his estranged wife, breached a condition of bail that he would not approach his wife. The man is charged with murder having shot his wife while she waited at a bus-stop.[11.]

In New South Wales a special bail form specifically draws the attention of the officer considering the bail application, to matters relevant to the domestic violence offender.[12.]

It is suggested that similar provisions be applicable for domestic violence offenders in Tasmania.

The 12 hour restraint which is a condition of bail in New South Wales enables the offender to be released but grants the victim some respite and the situation time to "cool-off".

In South Australia if the restraint order is breached and an arrest made provision is made for the person arrested to be brought before a court of summary jurisdiction within 24 hours;[13.] weekends and public holidays are excluded from this computation. On the other hand if the Police press criminal charges of assault or some other charge then bail may be granted.

The detention in custody for a set time before bail is considered may appear an undue restriction on the offender's liberty, however this applies only when the restraint order is breached. That is, when the person has repeated the assault on the very person that the restraint order is intended to protect. In doing so the assailant compromises their "right" to seek their release on bail for a specified period.

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11. THE MERCURY 1st Sept. 1983. "Left Wife Dying after bus-stop Shooting. Police p. 28.
12. REFER: A SUMMARY OF DOMESTIC VIOLENCE LAW REFORMS IN N.S.W., S.A., & QLD. AND THEIR APPLICABILITY TO TASMANIAN LAW REFORM. p.95
13. REFER: A SUMMARY OF DOMESTIC VIOLENCE LAW REFORMS. p.90, 101

(8) VICARIOUS LIABILITY

THE ACCOUNTABILITY OF POLICE

RECOMMENDATION:

That the rule exempting the Crown or police authorities from vicarious liability for torts committed by police officers in the course of exercising independent discretions be abolished by statute.

The criminal law contains adequate provision for dealing with violence between two persons, irrespective of their marital status, yet complaints are made that police are reluctant to invervene in domestic disputes and discriminate between spousal assaults and other non-domestic assaults. It has been suggested that police view their law enforcement function with greater clarity in assaults between unrelated persons, but the complexities of inter-spousal violence prevail against police exercising a definite law enforcement role to the detriment of women who are the victims of such violence.

It is important therefore, to consider a range of factors militating against police intervention and law enforcement in cases of domestic assault, particularly as such reluctance viewed in the context of an informal policy policy or practice in relation to dealing with domestic assaults, exposes the police to criticism of selective law enforcement that adversely discriminates against women who are the victims of assaults and denies them the protection that the criminal law of assault affords to other assault victims.

One factor that inhibits police is the awareness that if they exceed their authority in the course by their duties they are personally liable, and it is the individual officer and not his or her employer who may incur civil and possibly criminal liability for their wrongful acts.

The heart of the docrine that the Crown is not vicariously liable for the wrongful acts of police, is based on the nature of the office of peace constables who were said to exercise independent discretions, such as the power

of arrest[1], by virtue of their public office and such discretions were not controlled by the municipalities that appointed such peace officers, and hence the relationship neither approximated that of master and servant, nor principal and agent where the superior controlling body would have been vicariously liable for the wrongs of the servant or agent.

The statutes, such as the Tasmanian CROWN REDRESS ACT (1891) which breached the Crown Immunity from suit, in that it gave a right of action against the Government for an actionable wrong in respect of

> "any act or omission, neglect or default of any officer, agent, or servant of the Government.."

were considered inapplicable to a police officer exercising what was said to be an independent statutory discretion.

The result was that although e.g. the POLICE REGULATION ACT (1898) empowered the executive through the Governor-in-Council to appoint a Commissioner of Police who, under Ministerial direction was responsible for the superintendence of the police force, and exercised aspects of control such as appointment, dismissal etc., this was not considered to have changed the nature of the police officers relationship to the State Government to the extent where the Government would be vicariously liable for police torts in instances where the police were said to be acting in a purported exercise of an independent statutory discretion arising by virtue of their office.

The High Court in ENEVER v R (1905) 3 CLR 969 endorsed the common law principle that a police officer exercising powers as a peace officer, exercised these powers by virtue of his office. Such powers were non delegatable, and could not be exercised on the responsibility of anyone other than that

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1. Fisher v Oldham Corporation (1930) Z KB 364
   Enever v R (1905) 3 C.L.R. 969
   Gerard v Hope (1965) Tas. S.R. 15

officer himself. This authority was considered an original authority hence as it wasn't delegated the law of agency and the vicarious liability of master for servant did not apply.

The police officer alone was personally liable for wrongful acts committed while exercising this authority in the course of his employment. Accordingly the Crown as represented by the State Government of Tasmania was not liable for the wrongful arrest and imprisonment of Enever and the officer along was personally liable for these wrongs even though they had arisen out of a mistake as to the identity of the person arrested in an otherwise proper exercise of his power of arrest in order to prevent a further breach of the peace.

The English common law notion of peace officers appointed by municipal authorities but possessing "original" powers derived directly directly from the law and not arising from their duties under a contract of employment does not fit the Australian situation.

In Australia various State Police Regulation Acts placed the superintendence of the police for under State Commissioners responsible to the State Government Minister.

The dissenting judgement of Clarke J. in ENEVER'S CASE analyses this distinction making it the basis for his view that the Tasmanian CROWN REDRESS ACT WAS INTENDED TO MAKE THE State Government vicariously liable for the actions of all its employees in the course of their employment.

It is interesting that some of the reasoning in the English judgements cited as authoritive by the majority of Judges in ENEVER'S CASE come closer to supporting the dissenting view that the CROWN REDRESS ACT rendered the State Government vicariously liable.

For instance Wills, J.[2.] considered the local municipalities should not

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2. STANBURY v EXETER CORPORATION (1905) 2 KB at 842

be responsible for the acts of negligence and misfeasance

> "If the duties to be performed by the officers appointed are of a public nature and have no particular local characteristics, (and) are really a branch of public administration for purposes of general utility and security which affect the whole kingdom;"

Clarke, J. in ENEVER considered that if the relation of the Crown to the State was

> "The maintenance of order within the Community"[3]

then

> "every public officer and servant who assists in the execution of the law is an agent or servant of the Crown for that purpose."[4]

The principles maintaining Crown immunity for vicarious liability for officers exercising independent discretions have been endorsed in later cases,[5] but anomolies exist in the law in that the State Government has been held liable for torts arising out of police Negligence in the exercise of duties which are considered more within the scope of the police authorities control.[6]

The situation where the State Government is not vicariously responsible and the police officer may be personally liable for wrongs committed in the course of his employment, is no longer tenable.

Over 30 years ago New Zealand abolished the rule exempting police authorities from vicarious liability for torts committed by police officers

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3. Anson LAW AND CUSTOMS OF THE CONSTITUTION Part II p. 1
4. Enever (1905) Tas L.R. @ 89
5. A.G. FOR N.S.W. v PERPETUAL TRUSTEE CO. LTD (1955) 92 CLR 113 @ 119
6. (e.g. Custodial Watch-house duties imposed by Regulation 604 Police Regulations (1939) JARVIS v A-G (1957) TAS.S.R. 220

in the course of exercising independent statutory discretions.[7]

The common law doctrine hasn't been applicable in the United Kingdom for the last 20 years.

The 1962 Royal Commission on the status of police recommended[8]:

"...that a police authority be made liable for the wrongful act of police officers in the same way as the Crown is liable, under the Crown Proceedings Act 1947, for the wrongful acts of an officer of the Crown".

As a consequence S48 of the POLICE ACT (1964) was enacted and modifies the common law in significant respects. S48(1) provides that:

"The chief officer of police for any police area shall be liable in respect of torts committed by constables under his direction and control in the performance or purported performance of their function in a like manner as a master is liable in respect of torts committed by his servants in the course of their employment, and accordingly shall in respect of any such tort be treated for all purposes as a joint tort feasor..."

In Western Australia such immunity from civil liability for police has been granted by statute for any purported exercise of powers under the POLICE ACT (1892-1970) unless there is direct proof of corruption or malice.

The Australian LAW REFORM COMMISSION[9] has recommended that the public be given a statutory right to recover from the government damages[10] in respect of the tortious acts of police officers, as if the employment relationship existed of master and servant.[11]

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7. S6(3) N.Z. CROWN PROCEEDINGS ACT (1950)
8. P. 65 para. 201
9. REPORT NO. 1 COMPLAINTS AGAINST THE POLICE. AGPS. 1975 P.62
10. 228 = ibid. NOTE: NOT exemplary damages.
11. 226 ibid.

The realities being that most police functions are performed in the pursuance of authority and instructions from member's superiors,[12] and the resulting responsibility of police authorities for their officers' acts would more likely result in more stringent control and discipline.

The claim that the officers personal liability for wrongful acts is a detterence is not a good argument against not making the police authorities vicariously liable as they have the capacity to seek indemnity from the officer should they elect to do so.

The present law is unjust to both police and claimant.[13] Civil cases against police may not occur often but they are not unknown.[14].

With respect to domestic violence which most frequently occurs within the context of private premises it is essential that police do not reinforce reluctance to intervene with uncertainty over their personal liability for trespass, unlawful arrest, false imprisonment etc. if they exceed their powers. It is essential that police authorities responsible for the proper functioning of the police force, be responsible for the acts of officers in the course of their employment.

In New South Wales S26A of the POLICE REGULATION ACT provides that

"A member of the police force is not liable for any injury or damage caused

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12. 224 ibid.

13. M.R. GOODE. "THE IMPOSITION OF VICARIOUS LIABILITY TO THE TORTS OF POLICE OFFICERS.

14. ALLENS v INNES 13/5/83. TASMANIA COURT REGISTRY (Unreported)

by him .... in the exercise or performance by him, in good faith, of a power, authority, duty or function conferred or imposed on him by or under this or any other Act or by law with respect to the protection of persons from injury or death or property from damage."[15].

In a modern State the ancient question "Quis custodes custodiet"? - "Who will guard the guardians"? requires that the legal responsibility for wrongful acts of officers in the course of their employment will rest on the State Government who in turn can seek recompense in appropriate cases, from individual officers.

CHAPTER SEVEN

COMPENSATING DOMESTIC VIOLENCE VICTIMS UNDER STATE CRIMINAL INJURY COMPENSATION SCHEMES

(1) Summary.

The section argues that compensation for criminal injury should be available to all victims irrespective of marital status. While the Tasmanian Criminal Injuries Compensation Act (1976) is generally satisfactory, concern is expressed in relation to S5 (1) which requires that regard must be had to any "Behaviour, .. attitude or disposition of the victim that appears ... to have directly or indirectly contributed to the injury ....".

The attitude persists that women who stay in violenc relationships must assume the risk and responsibility for her husband's criminal acts against her, despite the preponderance of evidence that many factors operate to prohibit women from terminating such relationships.

Two aspects of malicious property damage during domestic violence episodes are discussed. The first relating to prohibition on private insurance claims for malicious damage by a member of the insurer's family (even when estranged and co-habiting separately). The second to the rules of property concerning household goods where it is suggested that such property be deemed community property in equal shares and the party responsible for malicious damage be liable to the other to the extent of that person's share.

(2) COMPENSATING DOMESTIC VIOLENCE VICTIMS UNDER STATE CRIMINAL INJURY COMPENSATION SCHEMES

Compensation for victims of crime is a matter for State legislatures and considerable disparity exists between States. Victims of domestic assault are either excluded outright or in assessing the application and the amount of compensation the court is directed to have regard to whether the victim and offender are related or were married or members of the same household and whether they are still cohabiting. Further whether the victims conduct contributed in any way to the injury.

These concerns are said to arise from the possibility of collusion or fraud and ensuring that the offender doesn't benefit particularly when injuries done to children by parents are compensatable. But it is also obvious that when matters such as the contributory conduct of the victim, are taken into account, and whether the relationship survives the compensatable criminal injury in inter-spousal violence, that the legislatures have given to the courts liberty to distribute blame or moral responsibility for the injury back onto the victim. Just as less than a century ago the "volenti non fit injuria" doctrine placed no responsibility or duty of care on employers to take steps to protect employees from the dangers inherent in their work situation as it was assumed the worker accepted the risks as part of the job, the same concepts exclude related persons cohabiting from compensation for criminal injuries. The married woman loses her "victim status" when her assailant happens to be her husband, even though he has been convicted of a crime against her. The inference is that she has assumed that risk (of domestic violence) along with marriage and if she "chose" to stay in a violent relationship she must assume some responsibility for her husband's criminal acts against her. These attitudes persist despite the preponderance of evidence that many factors prohibit women from terminating such relationships.

The concept of State compensation for crime victims is relatively recent with compensation schemes emerging in the U.K. and N.Z. (1964) N.S.W. (1967), Queensland and South Australia (1969), Western Australia (1970), Victoria (1972), and the Northern Territory Ordinance and Tasmanian CRIMINAL INJURIES COMPENSATION ACT in 1976.

The Australian Institute of criminology Seminar[1.] amongst a number of resolutions recommended

> "That all victim compensation schemes should include care for victims of domestic violence."

The revised scheme in the U.K. now includes victims of family violence.[2.]

Growing concern about the escalation of violence during pregnancy and related injuries to unborn infants make it imperative that all persons will be entitled to compensation for injuries related to criminal charges, and their relationships not be a factor in assessing their entitlement. While many aspects of the Tasmanian Act are satisfactory S5(1) needs revision. This section states that

> " In determining whether or not to make an award ..
> .. regard to any behaviour, condition, attitude or disposition of the victim that appears .. to have directly or indirectly contributed to the injury or death, or the destruction of, or damage to, property ...."

is to be taken into account.

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1. CANBERRA 7-10M OCT. 1980 Resolution 16.15

2. FREEMAN, M.A. "Victims of FAMILY VIOLENCE AND THE COMPENSATION SCHEME: AN INTERIM REPORT OF THE FIRST FULLYEAR OF THE REVISED SCHEME (1982) 12 FAMILY LAW 45-46.

PROPERTY DAMAGE DURING DOMESTIC VIOLENCE EPISODES

Considerable difficulty exists with respect to "family assets" destroyed by one partner. The Family Law Act is not broad enough to provide remedies. The Full Court in ANTMANN v ANTMANN (1980) FLC 9 p. 75 considered that

"if a party has committed 'waste' of the matrimonial assets (this) may be a relevant fact or circumstance under S75(2)(O)"

in determining maintenance; that particular subsection referring to what "the justice of the case requires".[3.]

Household goods prima facie belong to the spouse who provided the purchase price, unless the item is a gift or there is an intention that it is to be owned by both, or when it is purchased out of a common fund the non-earning wife perhaps contributing out of her housekeeping allowance.

These rules take no account of the non-earning spouse's contribution of unpaid labour to the family. In terms of family assets each spouse should be deemed to share the equity in the property in equal shares and be liable for malicious waste; irrespective of the financial contribution.

Private insurance policies jointly-held, exclude a claim for damage arising from malicious damage by members of the insured's household. Sometimes the issue between estranged spouses who are still legally married may be that their status excludes them from making a claim for malicious property damage by the other spouse even though the policy holder may be the sole owner of those goods.

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3. AUSTRALIAN LAW NEWS MARCH 1982. "Compensatory Claims by Spouses - A proposed reform. B.H. Crawfore. p.8.

A preferable approach would be to deem all family assets jointly owned and make the party responsible for malicious damage liable to the other to the extent of that person's share. This would require redefining S7 and S7A(1) S(2) on remedies, actions and determinations of the MARRIED WOMEN'S PROPERTY ACT 1935 and the application of similar provisions to de facto spouses. This in turn would allow insurance companies to meet the claims of one spouse and exercise of right of recovery against the other.

A recommendation is made that the issue of compensatory claims for the malicious destruction of "family assets" by one spouse be investigated further.

LEGAL AID

THE PROVISION OF LEGAL ASSISTANCE UNDER THE AUSTRALIAN LEGAL AID OFFICE AND THE TASMANIAN LAW SOCIETY LEGAL ASSISTANCE SCHEME

(A) Summary.

This section briefly discusses the fragmentation of legal aid between the Commonwealth and the State; the problems of possible duplication or inequity that can exist when the entitlement to legal aid is allocated on different criteria by different organisations to people who are in virtually identical situations. Reference is made to the income test which takes into account the combined income and assets of spouses and the possible disadvantages this practice may have to the domestic victim who is economically dependant upon her spouse.

(5) LEGAL AID

In Tasmania the provision of legal aid for low-income people is both a Federal and a State matter. The Australian Legal Aid Office gives legal advice irrespective of income-tests but will only act or assign on a legally aided basis those matters considered to come within a Commonwealth ambit. For instance they will aid eligible Commonwealth pensioners and beneficiaries, or persons in a "Federal matter" such as a case before the Family Law Court, Federal Court or Australian Administrative Appeals Tribunnal.

The Legal Aid Commissions throughout Australia have varying means and income tests and even if otherwise eligible may not act in certain defined classes of actions or may decide on the merits of the case not to aid the applicant.[1.]

Although the means test has been liberalised and matters like child-care fees are deductions, a woman victim of domestic violence who seeks a Family Court non-molestation injunction may be disentitled to legal aid prior to separation as in the case of both formally married and de facto spouses, both parties income and assets will be taken into account even though the economically dependant spouse may have no separate income and in fact be without the means to afford legal representation.

Further aid is not generally granted for dissolution of marriage unless circumstances exist which make it imperative the marriage be dissolved. The A.L.A.O. response to a query whether the combined assets would disentitle an impecunious woman from legal aid when she sought a restraining order against her husband in the Family Court, was that she would probably have only her assets and income means tested and not the combined income of husband and wife.

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1. REFER GOLLEY D.J. "Evaluating Eligibility Criteria of the A.L.A.O. and Legal Aid Commissions throughout Australia".
A.G.P.S. Appendix V for Commonwealth Legal Aid Council A-G. Canberra. May 1982.

State civil and criminal court matters come within the province of the State Law Society. The various English, New Zealand and Australian State Law Societies Code of Ethics place an obligation on the lawyer to inform the client of the availability of legal aid, though this obligation does not have statutory force.[2.]
This is one area where a bias would operate favouring the likelihood that women would be informed by their lawyer of their possible eligibility for legal assistance, as women generally would be expected to be impecunious.

In respect to legal assistance Tasmania was the second Australian State to introduce such assistance and the Legal Assistance Act (1954) which provided and "approved scheme" to be administered by a Law Society incorporated under the Tasmanian Law Societies Act (1887), reproduced many of the features of the South Australian legislation. In 1962 the Legal Assistance Act was introduced following the unification of the Northern and Southern Law Societies. In 1974 a new Legal Assistance Scheme was approved extending the definition of "legal assistance" to permit a grant of aid whether or not proceedings were involved.

The eligibility for such state legal assistance is very wide. S4(1) provides that

> "any person shall be eligible for legal assistance under this Scheme if an area committee is satisfied in its discretion, on evidence supplied by the applicant ... that such person is unable to pay such legal cost as he would ordinarily be required to pay and if the area committee is satisfied in its discretion that the cause or matter which is the subject by the application is appropriate to be dealt with by a legal practitioner in Tasmania."

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2. QLD. TYPHOF CASE: Law Society Journal. June 1982 p.140.

The discretion is there to grant or refuse assistance and to determine the proper contribution to be made by the applicant. [S4(3)].

By the late 1960's the Federal Government had begun to make legal aid contributions and the setting up of the A.L.A.O. in 1973 reduced the number of cases handled by the State. The Tasmanian office opened in 1974.

By 1976 concern was being expressed about the delivery of legal aid and the problem of duplication and efficiency when legal assistance was being provided both through the A.L.A.O. and the State Schemes. The then Attorney-General, R.J. Ellicott Q.C., undertook a review with the intention of rationalizing and

> "establishing a comprehensive legal aid scheme involving a co-operative exercise between the Commonwealth and the States in the provision of Legal Aid."

In 1977 the Commonwealth Legal Aid Act established the Legal Aid Commission and gave it an advisory, co-ordinating and monitoring role. Western Australia, South Australia, and Queensland introduced legislation to establish Legal Aid Commissions followed by Victoria in 1981.

The Commission's purpose is to unify the provision of legal assistance. For example the Victorian Legal Aid Commission absorbed the four A.L.A.O. regional and central offices, the Public Solicitor's Office and the Legal Aid Committee of the Law Institute of Victoria, resulting in a merger of 60 solicitors and 92 support staff. The State Government also funds Victoria's Legal Aid Community Centres.

In 1977 the Tasmanian Government Committee of Inquiry into Future Legal Aid Services in Tasmania, under the chairmanship of John Driscoll, reviewed the provision of legal aid services and future options.

They considered

"the duplication of the A.L.A.O. and the Legal Assistance Scheme under the control of the Law Society has been confusing to the public."[3.]

They favoured the establishment of an independent State Commission in accordance with S21 of the Commonwealth Legal Aid Commission Act (1977). This in effect would absorb the functions of the A.L.A.O. and the Tasmanian Law Society Legal Assistance Scheme. The second option favoured was a joint Federal-State Aid Commission incorporating the existing functions of both bodies.

Judging from the submissions to the Inquiry and from the views expressed to me during the course of this review there is considerable support for the concept of a Commission unifying Commonwealth and State provision of legal aid, but the vagaries of funding and the possible future withdrawal of the Federal funding constitute the greatest hurdle to implementation. Those States with Legal Aid Commissions have been forced to accept public responsibility for the operation of the system whether funding is adequate or not.

The second issue relates to the cost-effectiveness of legal aid to low income people and the ever present question of whether such aid goes further by using salaried lawyers compared with subsidising the fees of legally assisted clients who use the services of private practitioners. A number of studies have been commissioned to analyse the cost of public versus private practitioners both in Australia and overseas.[4.]

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3. DRISCOLL REPORT. para. 3.4 page 27.

4. SUSAN ARMSTRONG "Can Legal Aid Afford Private Lawyers?" (1980) 5 L.S.B., 88.
"Legal Services - Comparing Costs" (1982) 7 LSB No. 4 p. 162.
"Labor's Legal Aid Scheme: the light that failed" in Scotton & Ferber (edit) Public Expenditures and Social Policy in Australia. Longman, Melbourne 1980 p. 220.
VCOSS. Policy Issues Forum: Post Budget Analysis 1982-83 p. 55.
"The Burnaby British Columbia Experimental Public Defender Project" An Evaluation Report. CANADA.
N.Z. Royal Commission on the Courts (1977). Submissions .. Justices Dept. envisaged assigned criminal work co-existing with the public defender scheme.

From statements made recently by the Federal Attorney-General Gareth Evans, it appears along with an increase allocation will be a direction for a greater proportion of the work to be undertaken by salaried officers rather than assigned. Whereas previously up to 80.3% of Federal legal aid expenditure was being paid to private lawyers on a fee-for-service basis.[5.]

The other concern in relation to Tasmania is the inequity that exists where the entitlement to legal aid is allocated on different criteria by different organizations to people who are in virtually identical situations. For example a pensioner may receive legal aid through the Commonwealth A.L.A.O. to appear in a State court on a particular matter, whereas a low-income person not a beneficiary appearing in the same court on the same charge is not entitled to legal aid through the A.L.A.O. but may be entitled to legal assistance through the State Law Society Scheme though not necessarily on the same criteria.

The Driscoll Report makes the pertinent comment that

> "If a number of people experiencing similar problems suffer from an inability to gain effective access to the legal system they have little chance of overcoming those problems and there is a danger that they will be subjected to systematic exploitation based on their ability to resist the practices perpetrated upon them." (p. 27).

In relation to domestic violence the police practice has been to advise victims to lay their own private information of assault rather than the police arrest, charge and prosecute. No other class of victims has been expected to bear the brunt of initiating their own private criminal law prosecutions. Until relatively recently the tendency was to limit legal assistance to

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5. VCOSS Post Budget Analysis 1982-83 p. 55.

defendant and not assist complainants.

It appears from information given to me that this is not the practice of the State Scheme and each application will be reviewed on its merits. It would probably be beneficial if the assistance were better advertised and the community more aware of the Scheme's operation. In the 1981/82 year $182,404 was distributed to solicitors to subsidise costs of legally assisted clients and $23,250 spent in administration. The expenditure in the 1982/83 financial year was $267,946-02 and $26,912-50 respectively. The fees charged by Tasmanian lawyers are also lower than the scale of fees in the other Australian eastern states. (CHAIRMAN OF THE TASMANIAN LAW SOCIETY. MR. W. ZEEMAN. Quoted in The Mercury 12/7/1983).
However lawyers are free to charge open fees for Lower Court and Criminal Court matters. This would affect those seeking to have a person bound over to keep the peace or laying information for Assault in the Criminal Court, who may not be entitled to legal assistance. Where clients receive legal aid the charges are however, set.

While both salaried and private practitioners have a significant contribution to make the fragmentation of legal aid between the Commonwealth A.L.A.O. and the State invariably creates some duplication and may affect access to legal services by determining peoples entitlement on differing criteria even though their actual income and their legal needs may be virtually identical. In the case of domestic violence victims it is essential that their particular position as complainants is recognised and legal assistance advocacy and representation be available to them.

CHAPTER EIGHT

SOFT OPTIONS THE ATTEMPTS TO AVOID THE PUNITIVE SANCTIONS BY DIVERTING SPOUSE ASSAULTS AWAY FROM THE COURTS INTO THE COUNSELLING AND TREATMENT AGENCIES

(1) Summary.

A range of American responses to domestic violence is discussed; some approaches such as the compulsory three day "cooling-off" period before a complaint can be filed, the "preliminary quasi-judicial forum" and pre-trial conference are restrictions serving the interests of the court system not necessarily the victim. Class actions have been taken to require law enforcement of spouse-assaults as failure to take such action has deprived married women of the equal application of the law and therefore of equal access to the protection of the law.

However the alternatives of counselling, conciliation, mediation, treatment programs, and the mandating of public agencies to bring the actions on the victim's behalf is becoming increasingly sophisticated. Such alternatives are viewed as essential providing that they recognise the inequality of power that exists between the assailant and victim and do not provide "solutions" that further oppress women who may be trapped in violent relationships.

The establishment of the New York Family Court was progressive two decades ago, however the Michigan legislation providing for warrantless arrests, sentencing flexibility, counselling etc; informed peace officers and a central board to fund and evaluate programs to alleviate violence, seem more appropriate reforms today.

The agency responses to domestic violence makes reference to the assistance women seek from the police, legal advisers, doctors, ministers, family counsellors and social welfare agencies and how inadequate support and help leaves women either trapped in the violent relationship without adequate protection or leaves her no recourse but divorce. The victim of family violence may not only be denied legitimate status as a victim, by Victim Support and Criminal Injury Compensation Schemes, but encounter attitudes from professionals in "helping" agencies that deny or playdown the reality of the violence experienced. Such attitudes further demoralise and isolate the victim.

The medical profession's symptom orientated approach and ready prescription of tranquillisers is criticised as creating a drug-induced stupor depriving the victim of being analytical about her predicament and gaining the confidence to deal with it.

The whole orientation of psychiatric and counselling care towards the victim rather than the perpetrator is questioned and therefore the provision of a group therapy program in South Australia to alter the behaviour of violent men is approved as providing a more comprehensive and complementary range of services than an approach limiting services to women and children.

The Community Justice Centre concept as an alternative forum for dispute resolution and voluntary settlement, is discussed and caution expressed as to the appropriateness of this approach in cases of family violence. It is noted that the U.S. Civil Liberties Commission rejects mediation of domestic violence as an alternative to prosecution; that subtle coercion to use such Centres is opposed to their supposed consensual approach; and that victims may seek the authoritive court process as a temporary redress from violence and not a resolution of the conflict.

The establishment of the Crisis Care Unit in South Australia and its collaboration with the Police Department in handling family crisis is discussed; in terms of its operational structure, budget, aims, and its ability to facilitate client access into other support services.

THE AMERICAN RESPONSE TO DOMESTIC VIOLENCE

(2)

The criminal justice system in the U.S.A. has been reluctant to confront the complexities of spouse abuse. The tendency has been to decriminalize spouse assault by diverting such assaults from the criminal courts to civil actions in line with the view that domestic violence is primarily a social problem rather than a criminal one. Various State legislatures have established Family Courts with broad injunctive powers and set up State agencies to provide counselling, mediation, and legal assistance. While it is recognized that a criminal charge on a single incidence of abuse does not adequately place domestic violence in context; it neither recognises the full extent of the criminality of violent assaults, sometimes over a period of years, nor the inappropriateness of sanctions that fail to protect and may even further endanger the victim. It is however, contended that the de-criminalisation of spouse assault may further endanger women victims.

Considerable emphasis has been placed on decriminalising family violence by State legislatures in the belief that a therapeutic approach through counselling, treatment and mediation is more appropriate than a punitive response.

The pendulum however has begun to swing towards demanding stronger law enforcement. Activists groups concerned with the bias inherent when women as a class of domestic violent victims are denied equal access to the process of law, have initiated class actions on the basis of this discrimination to compel police, prosecutors and court personnel to act and allow battered women equal access to their legal rights.

However many reforms were justifiably regarded as progressive when they were first initiated. For example, over two decades ago the New York state legislature created a family court with wide injunctive powers and jurisdiction over all family matters except separation, annulment and divorce. Judges were selected on the basis of their apparent aptitude for family matters. The Family Court Act creates a civil proceedings for family offences (S811)

authorising the Family Court to enter orders of protection and support, and contemplates conciliation proceedings. Certification of the order authorises police to take any measures "within his power to secure the protection which the order is intended to provide" including arrest for breach. The breach itself constitutes contempt of court with a sanction of 6 months imprisonment. Since 1977 there has been an option as to whether family offences are dealt with in the family court or criminal court jurisdiction.

The complainant could be the victim, police, authorised agencies or with the courts permission, other people. The probation service could attempt a preliminary "informal adjustment" but could not compel attendance. However the powers of the court were considerable; the petition could be dismissed, judgement suspended for 6 months, an order could be made for one years probation, and/or civil protection. (S841). The person before the court could be ordered to co-operate in seeking and accepting medical and/or psychiatric diagnosis and treatment, including family casework or child guidance for himself, his family or child.

Many of the more progressive features of the New York Family Court have been adopted in other common-law jurisdictions.

The Washington Family Court system established in 1971 provides that all complaints are made and screened through a Citizens Complaint Centre. If the criminal conduct complained of is within a family then a mandatory consultation is called between prosecuting attorneys from the U.S. Attorney's Office and social workers from the Director of Social Services. If civil action is considered more appropriate the matter is referred to corporation counsel (i.e. Local Government lawyers) to petition the Family Division of the Superior Court for a civil protection order. Once evidence in the civil proceedings has begun to be taken, criminal prosecution is banned.

The concept of public agencies bringing actions is traditionally a criminal law motion but increasingly public agencies are authorised to bring civil actions on behalf of private individuals. Particularly those who fall into a class where social justice requires that such action be brought on their behalf; e.g. Race Relations Boards and Anti-discrimination Tribunnals.

A variety of other responses have been adopted by other States. Some misdemeanour complaints Bureau's provide a "preliminary quasi-judicial forum" to screen domestic assaults, (DETROIT POLICE DEPARTMENT) whereas others provide for a compulsory 3 day "cooling-off period" between the filing of a complaint and the issue of a warrant. (MILWAUKEE MISDEAMEANOUR COURT). A pre-trial conference can also result in an adjournment either unsupervised or with a referral to probation for a specified period. No conviction is recorded if no further assaults occur within a specified time.

Some courts seek to formalise the conciliation process; the Conciliation Court of Los Angeles in California can compel attendance to counselling and a model conciliation agreement can be modified by the couple to suit their needs which can become the basis of a court order. Others such as the Chicago Court of Domestic Relations have social service departments attached; "peace bonds" are drawn up that are not legally enforceable but a breach can constitute an offence without a conviction being recorded.

Diversion into counselling vascillates between coercion and persuasion. In Baltimore, Maryland the judge suspends the charge on the condition that the person attends the Therapy for Abusive Bahaviour program; there is theoret-

ically a choice not to attend but obviously a coercive element and it becomes questionable when the motivation to effect behavioural change is pressured by suspended court proceedings.

The reforms are becoming more sophisticated and comprehensive. For example

> "Michigan's response to the problem of family violence has included legislation designed to accomplish the following goals:
> First, to increase the capability of peace officers to make warrantless arrests when arriving at the scene of violence;
> Second, to increase sentencing flexibility, provide counselling alternatives to the traditional imposition of jail sentences, probation and/or fines;
> Third, to increase relevant information regarding prior offences for those peace officers responding to domestic crises; and
> Fourth, to create a central board with the authority to co-ordinate, fund and evaluate programmes designed to lessen the incidence and alleviate the problems attending acts of domestic violence."[1.]

In suitations where a peace bond or injunction is breached, police are empowered to arrest without a warrant. Hearings are expedited in the case of repeat offenders. First and second offenders pleading guilty to spouse assault may be placed on probation without a determination of guilt. However the legislation makes no provision for excluding the assailant from the home nor does it operate through a specialised family court system.

DIVERSION INTO TREATMENT PROGRAMS

The rationale for such programms focusing on the assailant is that "if

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1. BUZAWA & BUZAWA "Legislative Responses to the Problem of Domestic Violence in Michigan". Wayne Law Review 25 (1979) 859.

he is not changed, he will go on committing violent crimes, go on finding and injuring a succession of women .."[2].

What is essential to the success of such programs is that these violent men accept responsibility for their violent behaviour, understand its origins and learn ways of changing their behaviour. One of the critical issues in any attempts to help batterers is their poor motivation to seek change and their lack of insight into their own behaviour and the need for it to change. Their very use of violence to resolve conflict or establish their physical dominance through force, retards the emotional maturation which is a pre-condition of developing a satisfactory non-violent way of interacting in a personal relationship.

Further the voluntary nature of such treatment programs militates against their success though most therapists would be disinclined to favour coercive referrals on the basis that therapy is more likely to be effective in those limited number of cases where men genuinely wish to change their behaviour.

The U.K. Select Committee on Violence in Marriage recommended specialised counselling services for men who batter their wives, and 24 hour family crisis centres. Erin Pizzey from Cheswick's Womens Aid Shelter attempted to establish a "men's house" which was transient, as was the attempt to establish a "self-help, self-supporting" community for adolescent boys from violent families.

The South Australian Crisis Care Unit has also participated in establishing a counselling service for violent men.

In the U.S. programs such as the Domestic Assault Program (LAKE VETERAN HOSPITAL. TACOMA. WASHINGTON) initially attempted a residential treatment program where the men would volunteer to take "time-out" from their marriage

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2. REN'OIZE "Web of Violence" Penguin 1978 p119.

for 4 weeks while undergoing counselling; this was discontinued and continued as an out-patients program due to lack of volunteers prepared to live-in.

The "Emerge" Program in Massachusetts has been developed by women who work with the American Shelter Movement who have carried a feminist perspective into dealing with battering men. Their aim is to help men understand the social conditions, cultural milieu and personal history that encourage his behaviour and allow him to construct alternatives for dealing with his frustrations, anger and fears. The program also undertakes Community education and workshops as well as individual assistance.[3.]

Other programs have developed phone in hot-lines which men are encouraged to use. The Victims Information Bureau of Suffolk, New York also offers Counselling for couples with the emphasis on restructuring the relationship through modelling and teaching changes in behaviour.

One of the criticisms of this approach is that both parties are held equally responsible for the violence and made equally responsible for changing their behaviour rather than the man assume the responsibility for his own violent behaviour. Further, other agencies may be able to abdicate their responsibilities by referring the parties to counselling or mediation as a way of containing the problem. The very process of mediation if it fails to recognize the dependent and powerless situation of the victim, reinforces the inequalities where the violence of one spouse is negotiated against the safety of the other. There is a sexist assumption underlying such counselling that while women remain in violent relationships they must choose to be part of the solution. This avoids recognizing that some women are trapped and cannot leave a violent or otherwise destructive relationship; and the

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3. "Help for Wife Abusers" Response to Violence and Sexual Abuse in the Family: Centre for Women's Policy Studies. Washington D.C.

compromises that may be negotiated through mediation and an "agreement" between parties of unequal bargaining power, may further oppress the victim.

> "The success of mediation depends on a common interest in having the conflict resolved. But what common interests do a brutal husband and a terrorized wife have?.... Once within the Family Court setting and a social welfare counselling orientation we may lose track of the fact that wife beating may be a brutal criminal assault and not just a sympton of a troubled marriage."[4].

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4. M.D.A. FREEMAN

(3) AGENCY RESPONSES TO DOMESTIC VIOLENCE

The services most required by a woman seeking to free herself, even temporarily, from a violent relationship will be for protection, possibly refuge or alternative accommodation followed by an array of other extremely complex needs. These services are critical, but particular attention also has to be given to the needs of women who remain in violent relationships and the real issue will be whether the woman remains because she has no alternatives or remains in the hope that the abuse will cease.

One factor influencing the woman's decision to leave or remain will be the kind of services available to assist her.

Some studies indicate that women endure violent relationship hoping that their husbands violent assaults will cease, and only leave the marriage after a history of repeated conflict and reconciliation.[1.]

It is possible that appropriate intervention may have resulted in a viable marriage without violence. The question that needs investigating is which particular statutory and voluntary agencies did the woman turn to and what was the quality of the assistance given to them? Were there pressures exerted against the victim or services denied to her, that either directly or indirectly sought to contain her within the violent relationship while doing little or nothing to alleviate the abuse?

One of the standard responses is to deny or play-down the existence of family violence, particularly spouse assault and incest. Traditional beliefs in the sanctity of marriage, privacy, and the family as an institution beneficial both to society and to family members embarrass, and afront persons or agencies confronted with family violence. Regardless of whether this violence is manifested

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1. ELIZABETH TRUNINGER "Marital Violence" THE HASTINGS LAW JNL 23 (NOV 1971) p259: Richard GELLES "Why do they Stay?" JNL OF MARRIAGE & THE FAMILY 38 (NOV) 1976 p660.

as sexual, assaultive or psychological abuse and directed at infants, spouses, elders, dependants or siblings, a common approach is to contain the violence within the abusive family by denying or ignoring the reality of its existence. Traditionally society has placed upon women the moral responsibility of keeping the family intact; and viewed the family as a place of security and emotional regeneration which acts as a buffer to the stresses of the world outside. These traditional expectations of marriage which the victim shares bind her in silence to her assailant out of a sense of shame that her mate could abuse her, and a feeling of guilt, that she somehow is responsible for failing to prevent her husband's violence. Her anger and contempt for her husband's behaviour may turn inwards leaving her depressed, confused and lacking sufficient confidence to be assertive about taking steps to gain control of the situation. She is frequently totally economically dependant upon him which compromises her ability to act without his approval.

Her ability to seek assistance in many instances is rendered ineffectual by the policies and attitudes of the voluntary and statutory agencies and professional people from whom she has sought assistance.

Those services orientated towards the family as a whole may view the wife-abuse as a sympton of other family problems; the individual needs of the victim became subservient, as the focus shifts to more generalized issues enabling the abuse to be ignored. The "couple counselling" approach may work on the assumption that both are equally responsible for the violence and equally responsible for changing the violent spouse's behaviour. Such an assumption fails to recognize the fact that the abuse itself is a criminal act of assault which remains unpunished simply because the assailant and victim are married. While society through the criminal justice system rectifies an abuse of power by punishing an assailant who has used physical force to injure and subordinate a victim, the decriminalisation of spouse abuse into the "social problem" arena fails to recognize that the same disproportionate use of power and physical

force to subordinate the victim, exists between assailant and victim within the family. The victim may do everything within her power to effect change but to no avail, because the power to bring about change in the pattern of violence is predominately the responsibility of of the violent man. It is he who is responsible for his violent actions and for controlling his temper and agression and no one else.

The victims contact with various agencies may invalidate her experience as a victim of violence, yet offer no effective assistance. She is denied legitimacy as a victim. For instance, Victim Support Schemes have arisen as an adjunct to Criminal Injuries Compensation Schemes in recognition that victims of crime need special support and assistance and a demonstrable expression of the community's sympathy for their plight. However the domestic assault victim may be excluded from the categories of victims,[2.] the same way that victims of family violence were frequently excluded or limited under Criminal Injuries Compensation Schemes.[3.] The rationale for excluding spouse-assault cases from being acknowledged "victims" is similar to the rationale for decriminalizing spouse assault; that is, that such assaults are perplexing and exceptional "because of the absence of the usual crime related factors."[4.]

This rationale must be an anathema to the victim of domestic assault. The assault is a crime and the absence or presence of "crime related factors" doesn't make the assault itself any less or more a crime than it already is. Despite the clarity of the criminal law of assault, it is the family context of the crime which inhibits prosecution, enforcement and also access into many criminal injuries compensation and victim support schemes.

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2. 1977 LONDON: Guidelines for Developing a Victim Support Scheme. Dargel J.
3. Refer page ...
4. 1981. Victims of Crime Support Scheme. Pilot study. Randwick N.S.W. Probation & Parole Officer's Association.

Community Information brochures, such as the Victorian multi-lingual "Security Advice" pamphlet (SEPT. 1981) give advice on personal security and protection against crimes of violence. At no stage is domestic violence referred to despite the disproportionate amount of police calls and time involved. By inference assailants come from outside and not within the family.

The medical profession needs to question the practice of treating the victim's symptoms of stress with tranquillisers when such drug induced passivity does nothing to alter the source of the stress and dulls the woman's ability to comprehend, articulate and take action to resolve her situation. The use of drugs

"which result in drowsiness and loss of decision making ability at a time when women need help in making a decision about their future."[5.]

is another means of avoiding or obliterating dealing with the socio-medical aspects of family violence.

The impetus behind the move for Community and Women's Health Centres arises in part out of dissatisfaction towards G.P.'s who persist in treating only the medical aspects and offering only medical solutions, rather than taking a more comprehensive approach.

In relation to psychiatric care some studies have revealed that a considerable proportion of women referred for psychiatric treatment were victims of spouse assault without the referring doctor being aware of the violence that in most instances was the underlying cause. Again the appropriateness of treating the victim rather than the assaultive male is rarely questioned.

Services that have arisen in response to a specific need, such as Women's Health Centres and Sexual Assault Referral and Rape Crisis Centres are holistic in their approach but avoid subordinating the woman's needs as an individual to other related interests.

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5. ELSTON, FULLER & MURCH. "battered Wives Seeking Divorce" 1976 cited in Dobash. PANL .. cited in Borland "Leaving Violent Men".

The English Select Committee on Violence in Marriage recognized that

"one of the prime problems of the family in stress is the need to consult with several different professionals, in different places, employed by different agencies, very often not relating together very effectively."[6.]

Those Australian States that have established services such as Women's Health Centres are moving towards a more comprehensive and effective range of services for women. The Centres have been described as the first base of support, information and referral

"for women in crisis, such as, domestic violence, divorce, contraception, incest, rape, occupational disabilities, depression, acute stress and psychotic episodes."

Their aim is to

"provide health care in a sensitive, supportive environment based on an understanding of the conditioning and the life style that effect women and therefore influence their physical and emotional health."[7.]

Community education work-shops, and self-help programs are considered essential along with orthodox health care directed at individuals.

Where a specific service has grown out of a more comprehensive service, such as the Rape Crisis Centre in 1976 out of the South Australian Community Health Centre, the feminist objectives are written into the Articles of Association and while accountable to the Health department who is the conduit for State and Federal Funds, the Centre's mode of operation nevertheless favours collective decision making by consensus, to avoid the alienation that may result in a hierachial structure where decisions are imposed.

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6. PART X.

7. THE TASMANIAN MAIL. FEMAIL 1(S) 28.6.1983. "Women's Health Centres: Why We Need Them". Robyn Friend.

For the vast number of women who do not have access to such Centres their approach will be to the traditional agencies of police, legal adviser, doctors, ministers of religion, family counselling and social welfare agencies and informal sources such as neighbours, family, friends or work-mates.

Much will depend on the abused woman's initial contacts with such agencies and failure to gain the type of help needed or even more basically the recognition of the violence perpetrated against her.

If the family counsellor adopts a "family interaction perspective" and does not recognize the special concerns of the abused wife this may demoralize the woman and reinforce her sense of guilt that she somehow shares the responsibility for the violence against her. If individual social workers and counsellor are

> "lacking cognition in wife abuse treatment, the client's experience is played down in such a way as to alter its reality. This in turn serves to reinforce the client's lack of self-esteem and supports the system in which the violent behaviour is occurring."[8.]

This perspective may inhibit that counsellor co-operating with other agencies on behalf of the battered woman and leave her in the situation of finding out about and starting afresh with each new agency.

The futility of having sought assistance and found it useless may inhibit further attempts to remain in the relationship while attempting to prevent her partner's violent attacks. Yet the basis of crisis intervention and therapy is that the earlier the intervention prior to the assaultive behaviour becoming an established pattern, the greater the possibility of re-structuring a non-violent relationship, should the parties wish to remain married.

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8. Beverly B. Nicols. "The Abused Wife Problem" Social Casework 57 (Jan) 1976: pp. 27-33.

The provision of such services directed at alleviating family violence and strengthening the position of the woman in the family, or of the particular family member who is subject to abuse, should not be considered destructive of family life simply because the process of counselling may result in either party deciding to divorce. The counselling process should in part allow the person counselled to be realistic about their situation, to balance their options and to work through the origins of the violence, its destructiveness and the wrongness of such abuse of another person. If at the end of that process either decides the relationship is not viable then the decision to end the marriage has been approached within a framework with the assistance of counsellors The tragedy is that women seek such assistance to protect themselves and prevent the violence during their marriage to little avail, and it is the failure of the agencies' responses that ultimately leaves many women no recourse but divorce as the only means of protection open to them.

An escalation in the seriousness and frequency of assaults and the ever present fear of attack destroys whatever love that may once have sustained the relationship. The effect is cumulative; the situation becomes increasingly intolerable and often a violent episode forces the woman to flee with her children. Invariably the woman is turned out onto the streets without money, possessions or clothes with no-one to turn to. The most desperate seek refuge in shelters, and if they do return it is into an atmosphere of fear and insecurity Many factors including economic dependency inhibit the woman leaving but the reconciliation is rarely one in which the violence ceases. There is a failure to recognise that many women are trapped with few options to escape and begin new lives. They are often without work, without money, without skills; with a number of children dependant upon them, demoralised, stressed, and lacking in confidence. They are also realistic. They know how futile it is to seek protection and effective help. They also know the extent of their husband's violence and the terror they have experienced. They realise that to excape may actually endanger them to an even greater extent. A number of murders

and extremely serious assaults are perpetrated by estranged spouses, men upon their wives or former partners. The vengeance is unleashed because the woman subject to this reign of terror, had the audacity to attempt to leave him. He perceives himself as "her owner" and she does not have the "right" to elect to leave him regardless of what violence he uses.

People concerned with civil liberties express anxiety over some aspects of reforms to law which attempt to better protect victims of domestic violence, such as restrictions on application for bail to gain a "12 hour peace". As legitimate as such concerns are, so too are the legitimate concerns of victims for protection and safety. It is a far greater infringement on one's civil liberties to be bashed-up in one's home, than it is to be detained temporarily in custody or have conditions imposed on the grant of bail preventing the offender for a few brief hours from returning home; when such measures are designed to prevent the offender from repeating an imminent assault from which the victim cannot escape.

Only recently is the warped sense of priorities where victims are removed to a refuge or place of safety as a means of preventive detention while the assailant remains at home, being questioned.

The needs of the woman who has sought refuge are extremely complex.

It is critical that a high level of awareness, co-operation and co-ordination exist between the agencies. Only then will the domestic violence victim become better aware of her rights and the services available to give assistance.

There may be a range of medical, legal and practical matters to attend to scattered around town with transport, child-care, and financial problems to compound the trauma of being dislocated from home, a marital separation and the distress of being a victim of assault by an intimate.

The police may seek to press criminal charges but meet the woman's unwillingness because of matters such as her economic dependance on her spouse, the possibility of reconciliation and fear of a vengeance attack in retaliation for the assault charge. The woman may want to seek a Family Court injunction excluding her violent spouse from the house in order that she and her children can resume residency; or alternatively approach the Housing Commission or landlord in an attempt to get the tenancy transferred and the spouse evicted. Public income maintenance from the Commonwealth D.S.S. may have to be applied for, and the children placed in new schools. Invariably the violence has affected all family members and the children may be just as traumatized and just as much in crisis as the abused woman. The escape from the violent man does not mean the violence ceases; siblings may have been conditioned into violence against each other and their parents by their parents' abuse of them. An overlap exists between spouse abuse where a husband assaults his wife, and child abuse where the woman victim in turn can act in a stressful and often violent manner towards her children.

What will ultimately happen is unknown, but what is clear is that without effective help and assistance from the various statutory and voluntary agencies, professional people and the care and concern of the community generally, very little will be resolved.

The following pages discuss the various responses of crisis intervention units, community justice centres, legal aid, State support services and the policies of educational institutions training professionals likely to encounter situations of family violence requiring their action.

(4) COMMUNITY JUSTICE CENTRES

Community Justice Centres have risen in response to a recognition that legal sanctions and the adversary system are frequently unable to deal effectively with a range of minor criminal and civil disputes arising out of interpersonal conflict.

In 1981 the New South Wales Government established a two year community justice pilot project with centres at Wollongong, Bankstown and Redfern. The effectiveness of the scheme is being evaluated by the Law Foundation and the Attorney-General announced recently that funding will continue. Similarly in Victoria the Attorney-General announced a government financial commitment of $200,000 p.a. to Victoria's sixteen Legal Aid Community Centres. (Dec. 1981)

The community justice centres offer a forum to help disputants resolve their disagreements. The dispute resolution process is one in which a mediator with no formal coercive powers intercedes to promote a voluntary settlement by encouraging the parties towards their own solution. A solution which must be mutually acceptable to both parties. The Centres do not make orders handing down authoritative decisions and sanctions; they are not intended as a substitution but as an alternative to conventional legal processes, and participation in mediation does not affect any rights or remedies that a party to a dispute has. The mediators are not arbitrators and agreements are not enforceable. Their status and mode of operation is governed by statute.[1.]

Their advantages over formal legal processes are obvious, but in relation to domestic violence the issue is very non-negotiable. The mediation concept is one of consensus between reasonable people of some parity in bargaining power who will by a process of opening up channels of communication, come towards some negotiable, voluntary settlement of their dispute.

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1. REFER. N.S.W. COMMUNITY JUSTICE CENTRES (PILOT PROJECT) ACT 1980.

While successful resolution appears to a large extent to depend on the degree of compromise possible it is nevertheless claimed with some confidence

> "that mediation gives people involved in these types of very personal and often very bitter disputes a chance to salvage some family cohesion, their self respect and their dignity. At the same time, mediation can promote some understanding of the forces that create, escalate and continue the dispute."

The existence of alternative resolution despute mechanisms improves the choice of attempted remedies while not excluding existing legal remedies.

In America the movement has grown from 3 centres in 1971 to 180 in 1982 with complex funding and sponsor arrangements where some mediation services are annexed to the legal system and others are more closely tied to the community. About 18 States have legislation concerning mediation services, and since the Massachusetts ABUSE PREVENTION ACT in 1978 a number of States have domestic violence legislation.

The mediation service is generally integrated into a set of legal and social service remedies. For example in the District of Columbia, the citizens complaints centre takes complaints from individuals seeking criminal warrants or civil protection orders. In 1980 9889 men and women came to file complaints about husbands, wives, neighbours, lovers, parents and children. Where appropriate complainants were referred to mediation.

The mediation service insists that proper case screening is essential and routes serious cases to prosecution. There will be no mediation offered when the violence involves a serious injury, threats with a gun, repetitive assaultive behaviour and where insufficient parity exists in the bargaining power of the disputants.

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2. MS. WENDY FAULKES "Mediating Family Disputes" p.9. Community Justice Centre. I.F.S. Family Impact Seminar Nov. 1981.

Mediation as intervention before the domestic violence has become serious and protracted and is considered to have virtually the same success rate as other types of personal disputes. Since 1979 the Salem District Court mediation program has indicated similar results. Parties who are co-habiting in a disintegrating relationship referred by the court in a protection order hearing will participate more readily and negotiate more practical issues (such as maintenance and visitation rights to children) than those who have been separated some time and are still subject to persistent harassment and violence. The rate of mediation agreements and their success in this group was understandably, much lower. These findings emphasise that domestic violence referrals must be very carefully screened before mediation is proposed as an acceptable alternative.

The main reasons against viewing panacae is that the level of violence may range from sporadic assaults that can be contained by legal means to cases where a woman has to move interstate and alter her identity to safeguard her life and protect her children and to these assailants the court orders are mere scraps of paper.

Protracted and serious assaults should not be diverted from the criminal justice system irrespective of the victim's wishes.

For mediation to be fair assumes a rough parity in the bargaining power whereas a woman who has been victimised for years cannot participate as an equal in a discussion with an abuser whom she fears.

The U.S.A. Civil Rights Commission was emphatic in its rejection of mediation in domestic violence as an alternative to prosecution; stating that

> "Mediation and arbitration place the parties on equal footing and ask them to negotiate an agreement for future behaviour. Beyond failing to punish assailants for their crimes, this process implies that victims share responsibility for the illegal conduct and requires them to modify

their own behaviour in exchange for the assailants promises not to commit further crimes."[3].

Those who support mediation often recognize that

"coercion and intimidation of the victim are primary dynamics in abusive relationships .. that a battering relationship is often so dominated by the abuser that open communication is not an option ... and

Battérers tend to deny their violence even to themselves, and go to great lengths to conceal the violence from others if confronted."

Yet they consider that mediation structures that are designed to equalize the balance of power between the parties will improve the effectiveness of mediation. Suggestions cover individual counselling sessions, the presence of friends or advocates, a non conditional agreement not to use violence, periodic follow-up interviews and an encouragement of the victim to seek more formal remedies concurrent with mediation.[4].

The Community Justice Centre legislation in New South Wales was passed unopposed in a rare show of unanimity; however they were considered to provide an alternative rather than to

"provide any sort of panacea for problems within the legal system".[5].

They were said to avoid the "rigid adversary system" of the lower courts and the resolutions adopted would be mutually acceptable to both parties

"rather than one imposed by an outside authority."[6].

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3. UNITED STATES COMMISSION ON CIVIL RIGHTS "UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 96 (1982).

4. "Stopping Domestic Violence. A guide for Mediators. Lisa Lerman p.429. ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION. AMERICAN BAR ASSOCIATION. WASHINGTON.

5. Hansard 19.11.8[illegible] p3149

6. Hansard p3148

These and other assumptions about what Community Justice Centres are supposed to achieve, have not been accepted uncritically.[7.]

There has been a reaction to the C.J.C. concept in the United States and Britain, and a more realistic appreciation that mediation centres are no more likely to resolve intractable disputes than any other dispute resolution process and have not substantially reduced judicial caseloads. Participation is meant to be voluntary and non-coercive but as the success of the Centres is often judged by their capacity to relieve the lower courts of some of their burden of cases they must be seen to maintain high case-loads and evaluations have revealed subtle forms of coercion at work in complete contrast to their purported consensual ideology.[8.]

Fears have also been expressed in the U.S. that justice centres were creating a form of second class justice for blacks, women and the poor and

> "in Australia the high proportion of migrants being referred to these centres raises similar fears of their being quietly excluded from the formal justice system."[9.]

In respect to a domestic dispute Tomasic points out that the victims do not necessarily expect the courts to solve the problem ..

> "the women who bring domestic assault cases to the lower courts do so because they feel the authoritive court process gives them some capacity temporarily to redress an uneasy domestic situation."

The courts are not being called upon to solve these problems but to provide an authoritive intervention.

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7. DR. ROMAN TOMASIC "Formalised 'Informal' Justice - A Critical Perspective on Mediation Centres". institute of Criminology Syndey Uni. No. 51 C.J.C.

8. U.S. JUSTICE DEPARTMENT'S NEIGHBOURHOOD JUSTICE CENTRES FIELD TEST - Cook, etal., 1980: 102 U.S. DEPT. OF JUSTICE, National Institute of Justice.

9. DR. TOMASIC ibid. p.59

The concept of mediation and consensus between disputants ignores the social structural basis and the broader social issues from which disputes arise.

The individual treatment of each case as an interpersonal dispute may cloud injustices that can only be remedied by collective action and law reform. The nature of C.J.C. prohibits them from advocating such reform; their stance is one of neutrality and their mode of operation informality, compromise and accommodation. This may ultimately deny access to justice.

Reginar Graycar writes that this access of the poor and powerless to justice will only be achieved by legal aid resources focusing

> "on those strategies which have the most potential for broad reaching and effective redress"

and a crucial factor in this

> "will be the ability of the agencies to identify and to aggregate like claims, so that injustices can be remedied on a broader scale than is contemplated by the dyadic nature of the dispute resolution model."[10.]

The Community Justice Centres do have a place as an alternative forum for processing certain disputes where there is parity of bargaining power, where people elect to use the Centre, and where the case is appropriate. They are not a panacea for an ailing court system and any purpose they serve is complementary within the justice system. The problems of the lower courts must be rectified and the existence of Community Justice Centres not grasped as an excuse for not undertaking such reform.

In respect to crimes of violence including domestic violence, serious doubts exist as to the appropriateness of mediation by Community Justice Centres. It is more appropriate to expand the sentencing options in the criminal and

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10. REGINA GRAYCAR "INFORMAL" JUSTICE & LEGAL SERVICES. SYDNEY UNI. INSTITUTE OF CRIMINOLOGY NO. 51. C.J.C. p.73.

lower courts and provide for a referral to counselling or to the C.J.C. irrespective of the rest of the sentence and to abandon the notion of being "punished twice for the same offence" when a coercive referral cosntitutes part of the sentence imposed by the court, for the assault.

CRISIS INTERVENTION

(5) THE SOUTH AUSTRALIAN CRISIS CARE UNIT

While considerable debate exists as to the value of crisis intervention as a treatment model, there is increasingly considerable support for the practice of skilled counsellors intervening to give support and practical assistance at the height of a crisis where the level of stress is such that the people in crisis can no longer endure the trauma and have not sufficient personal or alternative resources to cope unaided.

Early theorists tended to view the legitimacy of crisis intervention as therapeutic on the basis that the nature of a crisis - with its associated grief, precipitating event and inability to cope - created a situation of stress, tension and energy where the individual was more receptive and highly motived to suggestions of adaptive behaviour likely to assist in resolving the crisis.

Modern practitioners of crisis intervention programmes are more utilitarian in their approach. Crisis intervention is defined as a short term intensive helping process which

> "focuses on resolution of the immediate problem through use of personal, social and environmental resources", [1.]

and as

> "intensive work over a short period of time with emphasis on the concrete facts of the current situation and on the client's own efforts at changing it. The crisis interventionwork is aimed at resolving the crisis in a healthy and successful way."[2.]

The focus of being on the client's "home ground" during the immediacy of the crisis has enormous advantages in that client-worker relationships of familiarity and acceptance are established with some rapidity, and in the

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1. LEE-ANN HOFF "People in Crisis: Understanding & Helping".
2. D.A. PURYEAR "Helping People in Crisis" Jossey Bass (1979) p2.

stress and height of the crisis the events that precipitated the crisis are likely to be revealed and denial less prevalent than in the clinical detachment of consulting rooms some months later.

Crisis intervention services which evolved in America had some parallels in Australia, Life-Line providing one of the earliest 24 hour crisis contact services. Specialist crisis services e.g. Child Protection, Rape and Sexual Offences Crisis Centres, have been developed however in South Australia a generalist crisis care unit has been established with a significant contribution being made to the delivery of social and welfare services as a result.

THE SOUTH AUSTRALIAN CRISIS CARE UNIT

During the mid 1970's the South Australian Police Department had become increasingly concerned about the amount of time patrols were spending in dealing with domestic disputes, the number of recalls and futility of police involvement. A statistical survey was undertaken in July 1975 and then the Social Planning Unit of the Department of Community Welfare was commissioned to undertake a feasibility study. Very active negotiations and discussions took place between the D.C.W. and Police department with police insistance on a true 24 hour service and Unit mobility. A submission was put to Cabinet for a Crisis Unit staffed by professionals skilled in the social welfare, psychology and counselling areas who would co-operate with the police in dealing with personal crisis which were then constituting about 60% of Police patrol work. In 1975 a Supervisor was appointed with a Crisis Care Unit with seven workers commencing in 1976. There is a sophisticated radio communication system linked with the police radio room and the high level of co-operation acknowledged by both Crisis Care and the Police Department must have much to do with the Unit's success.

The Acting Supervisor of the Crisis Care Unit writes that in the past 12 months the Unit has received approximately 39,000 crisis telephone calls

and provided an "in home" crisis counselling service to about 2,100 individuals and families.

Seventy-five percent of the "in home" response is of a domestic nature, i.e. between wife and husband or de facto, parent/child conflicts.

In regard to the manner in which the Unit co-operates with other agencies such as the Police and Marriage guidance it is said that:

> "There has always been considerable energy directed towards maintaining creative and constructive links with our Police Force. The Police account for about one third of all requests for "in home" counselling. When the Police request involvement from Crisis Care in domestic situations, the normal procedure is for the Police to initially intervene where there is domestic violence. They will "stabilise" the situation then request Crisis Care intervention. A worker will then attend and begin counselling. The eventual outcome could be to refer to an agency such as Marriage Guidance Counselling or providing assistance in obtaining alternative accommodation."[3].

The Police comments on their interaction with the Crisis Care Unit seems to support the view that the co-operation is mutually constructive and beneficial to the people in crisis who have sought their assistance.

The Police generally send a "mixed patrol" comprising one male and one female officer to a domestic dispute, if arrest is not sought or warranted yet if police feel unable to leave because of concern about the situation or fear of renewed aggression, the Unit is contacted. In 80% of the calls a Crisis Care Worker arrives in less than 30 minutes enabling the Police to leave and subsequently the Unit recontacts the Police to let them know the

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3. Letter from Crisis Care Acting Supervisor, Brian Gitsham 29th July, 1983.

outcome. The close working relationship between Crisis Care and the Police appears not to have caused problems so far as the client population sees each as having a separate identity and each in possession of different sets of of objectives.

The Police consider the Crisis Care Unit

"overcomes the lacuna between potential danger and circumstances falling short of legal remedy."[4.]

I was concerned whether crisis intervention, counselling and mediation might divert some domestic assaults from the criminal justice system in situations where a punitive response condemning the violence, may have been more appropriate; and secondly that such diversion might ultimately oppress the victims of domestic assault who may be constrained by a process of counselling that infers each are equally responsible and equally able to change the violent behaviour and by inference, that seeking protection through the criminal assault law is inappropriate.

Brian Gitsham in response to these queries writes

"With regard to Crisis Care intervention, possibly diverting domestic assaults from the criminal justice system, this I believe, if often difficult to assess. As the procedure stands at the moment, with Police intervening quite often in the first instance, their acceptance of the restraining orders under S99 of the Justices Act and then our involvement, does ensure some degree of justice. I certainly do not believe that as a result of our intervention that we would by intent avert any criminal action that may be appropriate."

Further that

"A number of the Crisis care workers would adhere of feminist ideology and also strongly support social work as a profession."

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4. INSPECTOR JOHN MURRAY - OFFICER IN CHARGE OF POLICY SECTION, RESEARCH AND DEVELOPMENT GROUP OF THE SOUTH AUSTRALIAN POLICE:- PAPER.

The Unit is staffed by 15 Crisis Care workers, 1 Psychologist, a Deputy Supervisor and Supervisor, as well as two clerical officers. All the Crisis Care workers and Supervisors are qualified in social work with two holding additional qualifications in psychology.

Originally the professional staff were backed by about 40 volunteers with the service operating 24 hours, 7 days a week on 3 nine hour shifts with workers over-lapping an hour at the beginning and end of each shift. The volunteers release the workers for "in home" counselling. The Unit is highly selective accepting about 2 in every 10 volunteers and providing them with about 26 to 30 hours intensive training at a practical and theoretical level. There are currently about 35 volunteers, but the Unit would prefer a pool of about 55 as volunteers are rostered after-hours, evenings and weekends.

The Unit is seen as capable of stabilizing most crisis situations and offering resources to assist the clients in resolving problems. While crisis counselling is their primary function another function is their practical assistance by way of emergency cash, accommodation, child-care, transport and assisting victims of violence to a refuge. The Unit refers and follows up client referrals to other agencies; partly because of the Unit's crisis 24 hour availability and mobility it has become part of other programmes who in turn along with Police, refer clients to Crisis Care. Part of the Crisis Care Unit's function is to act as an afterhours service for the Department of Community Welfare, though in relation to long-term counselling

> "experience has shown that the District Office social workers in the D.C.W. are either unwilling or unable (in most cases) to provide the kind of crisis follow-up that is necessary."[5].

This interaction of the Crisis Care Unit with other agencies is extremely important as it has the ability to facilitate the manner in which these other agencies can improve their service response to those who seek their help.

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5. "The C.C.U. in South Australia" or "Where did you say you were from -?" Andrew Paterson, Supervisor C.C.U. 1981. p.9.

This interaction of the Crisis Care Unit with other agencies is extremely important as it facilitates the service delivery by these agencies to people who need their help. For instance, each day the Shelters will contact the Unit to inform them who will be on call and how many vacancies exist. It is said that the Shelters rely heavily on the Unit's assessment before accepting many referrals. The Unit also provides an after hours support to the shelters if they experience difficulties with particular clients.

Also as children are often present and deeply traumatised by their parent's violence family discussions take place with crisis counsellors and great

> "care is taken to make sure that Education Department school counsellors as well as family therapy units in the State are used to maximum effectiveness."[6].

The Marriage Guidance Council also was radically restructured to enable referrals from Crisis Care to be transacted within 24 hours, in comparison to the previous six weeks lapse before a client would have access to the service.

In cases of sexual assault or rape, the Police have a special Rape Enquiry Unit that handles all reported cases of rape in the Adelaide Metropolitan Area. This Unit will contact the Crisis Care Unit to provide immediate counselling and support. There exists a very strong liaison between Crisis Care, the Rape Enquiry Unit and the Sexual Assault Referral Unit at the Queen Elizabeth Hospital.

The Unit is very aware of the importance of educating community and professiona awareness of its philosophy and function. Pamphlets and posters advertise the service and there has been a corresponding drop in Police statistics on domestic violence calls and an increase in people contacting the unit directly.

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6. A. PATERSON p. 5 Ibid.

The Unit is involved in the education programmes in the Police Force, University, Institutes of Technology, Colleges of Advanced Education and the Flinders Medical Centre and has had considerable consultation with other States considering establishing crisis intervention services.

The Crisis Care Unit workers are chosen on the basis of their apparent flexibility, self-reliance, assertiveness, ability to function under stress and commitment to the objectives of crisis intervention as a method of using the real and constructive opportunities for creative change that arise in crisis situations.

The common problems that the Unit deals with are:

- Marital or family disputes with or without violence
- Runaway children and teenagers
- Violent assaults on or neglect of children by parents or guardians
- Alcoholics in need of treatment
- Homelessness
- Parent/child disputes
- Rape, incest and other sexual assault counselling
- Bereavement
- Attempted suicide
- Overdose and drug reaction
- Psychiatric disturbance
- Emergency provision of: financial/food/transport assistance.[7.]

It would be fair comment that the Crisis Care Unit as a co-ordinating agency operating in unison with the Police and other social welfare agencies within the framework of South Australian domestic violence law reforms, goes a considerable distance towards alleviating the plight of domestic violence victims and people in crisis.

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7. C.C.U. November 1980.

It could be said to be the most comprehensive service structure to date in Australia, to grapple with family violence and as such it can be commended.

It's benefits include the following:-

The Crisis Care Unit supplements the broad range of services provided by the South Australian Department of Community Welfare, and works in conjunction with the South Australian Police when called to intervene in crisis situations. As a multi-department, multi-disciplinary service it is considered to have been

> "effective in increasing access to counselling welfare services at times and in places that are most relevant to those in need."[8].

It has a facilitative effect in that its direct and immediate response and agency nature is likely to overcome client inhibitions about approaching other welfare services that could assist in bringing about more fundamental changes over a period of time.

However there are concerns which may detract from the value of this range of solutions formulated in South Australia and only time and experience will reveal these.

The same concerns exist about crisis intervention in domestic violence situations as exists in relation to mediation; that the inequality of bargaining power between the two parties is so disproportionate that they have little common ground upon which to reconcile their differences. This ultimately may further oppress the victim as the crisis intervention and counselling is seen as a more appropriate response to marital assaults and to a degree the victims personal safety becomes negotiable or dependant upon the social counselling agencies' ability to effect behavioural changes in the violent man. There is not at present any clear indication that such therapy exists

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8. A. PATERSON. NOV. 1979. Australian Institute of Criminology Seminar. 'Children and Family Violence". p.6.

to change violent agressors to passive ones or even that such change will be desired by these people. The efficacy of separate therapy or counselling programmes for men has not yet been established.

Further some criticism exists about the precise ideology, area of operations and relationships with other services and the difficulty of evaluating the Unit.[9].

Perhaps what has happened is that social work has "moved indoors". Field-workers may have imperceptibly become case workers with the emphasis shifting to recording the case on file rather than the face to face involvement with the people they are mandated to assist. What the Crisis Care Unit may in fact be is a sophisticated "in the field" extension of Community Welfare as a response to the bureaucratisation of the welfare service. An attempt to break down the rigid 9-5 availability and the inhibitions faced by a client in crisis who is expected to come to the city in the alienating environment of Public Offices to seek out possible solutions to his or her personal problems.

Comment has been made that with 3 million Australians on pensions and benefits, an increasing amount of State Social Welfare and voluntary relief agencies time is spent administering cash relief schemes as a consequence of large numbers of people being unable to cope with poverty line incomes. Further that the social worker in Community Welfare involved with long-term casework

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9. "ISSUES IN THE EVALUATION OF SOCIAL WELFARE PROGRAMS: Ch. 9. Marie Mune "Issues in the evaluation of the Crisis Care Centre".

is not responsive to providing immediate back-up to Crisis Care's referral in many instances due to the way their work is structured. These kinds of issues will no doubt have to be worked through.

The Unit's budget for 1982-83 was $461,800 for salaries and wages including penalty rates, and $31,000 for contingencies such as transport, phone etc.

A knee-jerk response may be that this figure represents a healthy slice of the State welfare budget and cost-effectiveness is always difficult to quantify in the delivery of welfare services involving personal counselling. Further certain social costs are less easy to determine. If a marital relationship which was both destructive and in imminent danger of breakdown becomes viable due to crisis intervention and subsequent counselling then this has obvious implications in terms of Federal income-maintenance as well as in terms of individual and family relationships and welfare.

(6) COUNSELLING VIOLENT MEN

Priority has been given to securing the safety of the women and children exposed to violence, and to making the legal system more responsive to their needs. However shelter, support and legal protection are essential short term reactive responses to the violent crisis. They are essential rescue operations providing escape routes in intolerable situations.

What is also necessary is some means of altering the man's violence. Many women in the "phone-ins" state that leaving is a last resort; they do not want to leave their marital relationships - they desperately want the assaultive behaviour to stop but see they have virtually no means of bringing this about. For a variety of reasons it seems about one-third of women passing through shelters reconcile sometimes repeatedly with their violent spouses before many of them finally come to the understanding that the violence will not cease and their

only option is to leave.

Less attention has been directed at the men who are violent and who will continue their brutality in subsequent relationships harming a series of women and children. Ignoring these men helps perpetrate the problem. What is necessary to complement existing Shelter programmes and domestic violence law reform is a programme for altering the behaviour of abusive men.

Because the problem is viewed as intractable and the full rigour of the law has not applied to domestic assaults, therapy programmes directed at limiting or stopping the violence is treated with scepticism the attitude being that such efforts are likely to be futile; that they misdirect scarce funds; that little evaluation exists to support the hypothesis that therapy can prevent such violence; and that it shifts the focus from the real victims and panders to assailants and in doing so diverts the only protection otherwise available to the woman through the criminal justice system.

As well-founded as much of this criticism is, it cannot override the necessity of seeking some solution by working with violent men to alter their assaultive behaviour.

In this regard a pilot intervention project to trial and evaluate a group therapy approach for men violent toward women with whom they live, has been funded by the South Australian Health Commisison.

The proposal was submitted by David Wehner[10.] and funded by the Health Commission in September 1982 with additional funds coming from the Australian Institute of Criminology and a Local Council.

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10. David M. Wehner. Group Therapy for Men Violent Toward Their Mates. A Pilot Project. Grant proposal Sept. 1982: Interim Report and Budget Proposal. June 1983. to S.A. Health Commission.

In January of this year several agencies made referrals and a far higher proportion of men than initially expected self-referred into the project. This has been perceived as a feature distinguishing the project from overseas experience inasmuch as the men exhibited a willingness to discuss and accept responsibility for their violence rather than blaming it on others and voiced an unhappiness with their behaviour and lack of control.

Possibly this receptiveness might not be part of mandatory court referrals into counselling.

Prior to group therapy commencing an extensive interview is undertaken with psychometric testing to obtain a case history and background data. The woman is also interviewed but separately. A similar assessment is done at the end of the six month group therapy course with a six month follow-up and it is hoped, also a 12 month follow-up to establish whether any change is sustained over time.

The initial group was conducted by a clinical psychologist and social worker within a Transactional Analysis framework. A second therapy group with 12 members and two social workers commenced in March. This focus is on the man's anger and how it relates to their violence; the aim is to teach specific strategies including relaxation, communication and other interspousal skills, to prevent further incidence of violence. The client retention rate appears significantly higher in this group and may relate to client's perception of relevance of the programme approach to their desire to find new coping mechanisms to change.

As well as the two treatment groups a third non therapy mutual support group with a social worker as a facilitator and discussion leader is being trialed for comparison along with a fourth non-treatment, non-meeting control sample to evaluate alongside the other approaches and to see to what extent violence will cease spontaneously in amongst a group where a desire has been

expressed to enter into a programme whose aim is to teach violent men to control their violent responses in relation to the women with whom they live.

The project is still in the evaluation phase but indications are that the initial hypothesis is correct; that is that group therapy is a preferential vehicle for teaching violent men to control their violence against their mates, than individual therapy.

The estimated costs of Domestic Violence in South Australia were considered to be in the vicinity of $7-10 million per year; including Housing Trust Shelter operations, the Crisis Care and Department of Community Welfare, Legal Service Commission and Family Law Costs, Medical Costs particularly casualty, Police costs, and Social Security Income Maintenance costs. A more precise evaluation is yet to be conducted; such costs of course are only fiscal and take no account of the personal suffering, dislocation and long term effects of family violence.

CHAPTER NINE

PROFESSIONAL EDUCATION

(1) SOCIAL WELFARE DEGREE AND DIPLOMA COURSES

It was considered very relevant that the Review examine the training of personnel who are likely in their future professional capacity, to encounter and be required to deal with situations arising out of Family Violence.

Initially all Police Academies and tertiary institutions offering a Degree and Diploma Course in Social Welfare were contacted.

Replies were received from the Social Work Faculties of the following Universities: Monash, Melbourne, Sydney, Western Australia and Queensland. Regrettably La Trobe University and the University of New South Wales did not provide details of their course work and curricula.

While none of the Universities contained a specific unit on Family Violence most included a rather abbreviated lecture and tutorial course within a more general unit usually in the 3rd or 4th year. Child abuse and maltreatment however, was explicitly dealt with. It would probably be fair comment that welfare professionals have become "sensitized" to child abuse in the decade following Kempes pioneering work, whereas the seriousness of more widespread violence amongst family members is only currently in the process of having the shroud removed. Further that where legislation exists, such as Child Welfare, Child Protection, and Family Law acts, the course can more readily find a structure than where legislation and social welfare responses are still emerging.

Colleges of Advanced Education and Institutes of Technology with Schools of Social Work were also contacted. Replies were received from the Brisbane, Darwin, Newcastle, Milparra, Mitchell and Tasmanian Colleges, and from the New South Wales, Phillip, Western Australian and Hobart Institutes of Technology. Regrettably the Riverina, South Australian Colleges and the Chisolm, South Australian and Gippsland Institutes did not reply so a comprehensive picture

of the curriculum, number of teaching hours allocated, methodology and expectations of outcomes could not emerge. Appreciation is, however, expressed for the very comprehensive and thoughtful replies from many of the institutions.

Generally speaking Family Violence was not a specific unit and was either referred to informally or was integrated in courses on family functioning, social problems or legal issues. It was more likely to be part of the Degree course than the Diploma course and could be either chosen as an independant topic or was sometimes offered as a final year option (e.g. Western Australian Institute). Only one Australian course appeared to locate violence within the philosophical framework of a "Gender, Culture and Power" Unit (the New South Wales Institute). The Newcastle College Social Work II included a Police Studies course to develop police understanding of crisis, and the needs of people in crisis situations.

The teaching hours allocated were generally one or two lectures followed by a tutorial or discussion for a further two hours. Some institutions were reviewing their Units on The Family to include a more comprehensive segment on Family Violence. Details of the curricula offered have been placed in a reference file in the Department for Community Welfare, Hobart.

POLICE TRAINING

The Police Academies in all States were contacted. At the time of writing information had bee received from the Australian Federal Police College, the South Australian, Queensland and Tasmanian Police Academies, and the Victorian Police Academy indicated that information would be received in due course.* An Australian over-view isn't possible until the material from New South Wales and Western Australian Police academies is available. It was nevertheless intersting to note that Domestic Violence in South Australia formed a specific

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* Material from the Victorian Police Academy has been received, and differs considerably from the approach in other States.

and comprehensive part of the police training course to a far greater extent than it did the Social Work Degree and Diploma Courses in Universities and Colleges.

The South Australian Academy at Fort Largs taught three modules relating to Family Crisis; these are Domestic Violence, Community Service and Crisis Intervention which embraced other topics. The instructions session last 45 minutes and there were 13 sessions on domestic disturbances, 11 on Crisis Intervention, and 39 on the Psychology module. In the last 2 months of recruit training simulated domestic disputes, role playing with drama group assistance and video-replays reinforce previously taught procedures. The week live-in workshop in the Psychology module includes similar participatory teaching techniques. Visiting lecturers from referral agencies are used and the recruits required to have a sound knowledge of the social agencies interacting with the police, and in their Community Service and Crisis Intervention module, be able to describe the functions of crisis care and shelters. They are sensitised to

> "analyse common myths concerning domestic violence situations and to point out reasons why positive police action is required".

Vocational training courses are held at periods of 3 and 7 years after training and cover graduated assaults, sexual offences, and the competency and compellability of spouses in domestic disputes.

A Statewide instructional program was undertaken by the Training and Education Branch to familiarise all operational members of the new domestic violence restraint order legislation.

In the States where domestic violence law reform hasn't been effected the training reflects the kinds of problems that surround police powers of entry and crisis intervention techniques to calm down the situation and secure police safety as well as that of the disputants. While proper concern is

expressed about projecting the image of a well-trained professional officer and not creating an impression "of disinterest, cynicism or belittlement"[1] of their problems, the underlying theme is one that less serious assaults are extraneous to work where police have a clear-cut function and are basically "family problems". Hence instruction is given to recruits to point out the ramifications of arrest e.g. "that loss of income would result if he were jailed" and "the unsoundness of an arrest as a method of solving a family problem."[2]

This ambivalence about how best to manage domestic disputes arises from a concern that police intervention followed by a charge and court action may worsen the situation and perhaps lead to family breakup. Therefore recruits are instructed that

> "a charge should be made as a last resort unless the situation is so serious as to dictate the action. An experienced officer will satisfactorily, if temporarily, solve most situations and restore calm and order."[3]

The Queensland Police Academy caters for two streams of pre-service trainees, an 18 month course for "cadets" and an intensive 6 months course for older recruits.

> "Sociological and psychological factors of domestic violence came into the field of the Human Relations segment of both cadet and probationary training. The findings of sociological and psychological research with respect to domestic violence are covered along with various theories of violence and family dynamics. However, major emphasis is placed upon intervention skills."[4]

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1 & 2. "Police Intervention in Human Crisis. Family Disputes." Recruit Training Branch, Australian Federal Police College, Weston.

3. "Family Crisis Intervention - Police Involvement" Tasmanian Police Academy para. 31.

4. Letter from T.M. LEWIS. POLICE COMMISSIONER. 7 SEPT. 1983.

The teaching techniques of simulation, role play, mediation, listening and conflict resolution skills are essentially the same as those taught in Tasmania, and the Australian Capital Territory academies. As no unit similar to the South Australian Crisis Care Unit exists in Queensland emphasis is placed on teaching recruits and cadets to learn about and make appropriate referrals to other agencies.

It would seem that the use of role playing, drama group students, videos and the general level of instruction formerly part of the recruit cadet course at the Tasmanian Academy was an extremely good course, as is the range of in-service courses available. However there exist two flaws: while the supporting agencies that interface with family crisis can't respond with immediacy there is no sure way of facilitating a police referral so that the person needing assistance actually gets to that agency, the police will operate with a sense of frustration and will limit most actions to quietening things down and leaving.

Secondly not until domestic violence law reforms are enacted in Tasmania, giving the victims effective remedies and the offender the possibility of some organised professional help, will the police have a clear cut approach to the less serious assault. Whereas the serious assault clearly requires a criminal law enforcement function the less serious assault has been confused by extraneous matters (such as the possibility the assaultive male may loose his job etc.).

Domestic violence law reforms which provide that

a repetition of the assault constitutes an arrestable offence, clarifies police decisions as to whether an arrest is warranted; the restraint order procedure gives the offender a "second chance" inasmuch as he is only arrested for a breach which is a repetition of the offence, and the police know that the court procedure will be speedier, more effacicious and accessible giving better protection than currently exists. This in turn influences police action.

Only when these two conditions are fulfilled will the training emphasis shift from the

"restoring calm and leaving as soon as possible"

approach, which is often not perceived as helpful by the woman who may endure years of assaults, to a more integrated approach.

It had been my intention to seek information from University Faculties of Law, Medicine, Psychiatry and Psychology in order to review the extent to which Family Violence is perceived as an issue in training personnel who are likely to encounter and be required to deal with situaitons arising out of Family Violence. After some preliminary discussion it became evident once again that although child-abuse was given some attention including sexual assaults, spouse-assault was rarely dealt with and most often simply as a side-issue relevant to a more general topic.

Reference is made to recommendation 13 of the British House of Commons Select Committee on Violence in Marriage:-

> that medical schools and nursing colleges should give special attention to the social dynamics of family life, and to the medical correlates of marital disharmony.

CHAPTER TEN

FACTORS INHIBITING WOMEN LEAVING VIOLENT RELATIONSHIPS AND ESTABLISHING THEIR OWN HOUSEHOLDS

(1) Summary.

This section discusses how women are trapped in or committed to marriage by a complex inter-relationship of factors and how any provision of services must encompass the needs of women who wish to remain married as well as those who wish to leave.

Resourced based assistance at adequate levels would include:

emergency and longer term accommodation
bond and rental assistance
child care services and fee subsidisation
means tested rebates on statutory charges
assisted health, life, and property insurance
appropriate legal remedies and aid
major structural changes in education and employment aimed at reducing the income differentials between males and females in the workforce.

Community education is considered a priority; and poverty considered one of the most critical factors trapping women in violent relationships. Private and public income maintenance and housing issues are discussed.

Discrimination in rental housing and home loans is a primary factor in segregating lone females and their children into the worst private sector housing at a relatively high cost, or into public housing where the standard of housing may be high but the estate isolated and the surrounding neighbours segregated into family types rather than representative of the wider community.

Issues relating to the status of women are considered fundamental to the issue of violence against women and moves to improve women's status will diminish violence. Vulnerability and violence are viewed as meshed together.

(2) SOME FACTORS PREVENTING WOMEN LEAVING VIOLENT RELATIONSHIPS AND ESTABLISHING THEIR OWN HOUSEHOLDS

Women are trapped in or committed to marriage by a complex interrelationship of factors and any provision of services must encompass the needs of women who wish to remain married as well as those who wish to leave. The services must be multifaceted ranging from personal counselling and advisory services, effective law enforcement and protection ... through to resource based assistance, such as emergency and longer term accommodation, bond and rental assistance, child care services and fee subsidisation, means-tested rebates on statutory charges (rates, Telecom, H.E.C. etc.) assisted health, life, and property insurance, and major structural changes in educational and employment areas aimed at reducing the income differentials between males and females in the workforce.

Many women do not desire to leave their marital relationships; some are bound by emotional ties to their husbands, and are committed to the principle of a two parent family with a male "breadwinner" and female "mother and homemaker". They do not wish to deprive their children of their father or substitute a step parent for the natural parent in a second marriage. Many are fearful of reducing their children to poverty if they leave knowing, in most cases, that their life will be a struggle against poverty, stigma and the burden of sole responsibility of parenthood without a partner.

The position has been stated clearly by the following respondant to the Review:

> "There is no question in my mind that fear of bringing the children up without a father living in the household, thereby damaging the children's lives, was the main factor that kept me in the marriage. As I began to see the distress caused them by his intimidation and violence towards me, I had to really re-think what kind of lives I wanted for us in the future. Also, I had a positive horror of having to go out to work full

time and leaving the children in child care centres or with baby sitters ... I think also, the idea of being married and a "dependant" was just built into my psyche until very recently. I couldn't see myself as functioning happily and separately from a man."

This person also writes of the difficulty of separating despite certain advantages in education and past work experience; e.g.

"I had gone to university, got a degree, had a good job and financial independence for years before marriage, and it was still hard for me to pull out - how much harder it must be for someone who has always been financially dependent to leave a bad marriage. I don't wonder that some wives put up with some pretty violent, distressing situations. It was also hard, too, for me to overcome the shame that my marriage had broken down, but overcome it - and not repress it ...".

Many women have been socialised to accept marriage as a vocation. Consequently they make a high emotional investment and are more likely to view the violence as a personal failure due to some inadequacy in themselves for failing to prevent the violence. Their guilt, helplessness and sense of shame prevents them discussing and seeking the support of relatives and friends. Instead they seek to conceal the abuse, becoming more and more isolated and insular within the marriage. This process increases the woman's dependancy upon her husband and her vulnerability at his hands as she lacks a supportive net-work of people who will assist her. This is reinforced by the constancy with which domestic violence respondants refer to their husband's irrational jealousy which can trigger violent abuse often involving sexual assaults. The woman has invested her self-esteem in the role of "wife and mother". When the marital relationship fails and this is manifested in the violence directed at her, she assumes most of the responsibility and guilt. Not infrequently this is reinforced by the "helping" agencies who share many of the same attitudes of female responsibility for matrimonial harmony, and because they either cannot or will not assist, often end up

demoralizing the woman even further while leaving her without effective assistance in an untenable situation.

In some cases in which women could put up with physical violence directed at themselves, their tolerance was stretched beyond endurance when their partners also attacked the children.

For women victims of domestic violence who wish to remain in their marriages but wish their husbands assaultive behaviour to cease, adequate and accessible counselling and legal protection is essential. Community education is a priority.

The South Australian pamphlet "Is There Violence in Your Home" is distributed through many outlets including baby health clinics and two major supermarket chains. Recorded information through Telecom primarily to tell victims who to approach for direct advice, is essential and it's success dependant on trained and skilled advisors being available and also being mobile and capable of travelling to the caller's home. Perhaps a "Women's Information Switchboard" could be part of Community Health or preferably Women's Health Centres established in Launceston and Hobart. Trained Family Crisis Counsellors need to be appointed to act as agency co-ordinators to facilitate client access into services and to be on-call working in conjunction with the police on a 24 hour basis, at least during the peak risk periods from friday evening through the weekends and public holidays. Law reforms need to be effected that would facilitate the swift and inexpensive access of domestic violence cases before the courts and provide realistic and enforceable remedies. Legal aid should be available to the domestic assault victims irrespective of combined family income but tested on the victim's income alone and not assets.

The woman who elects to take her children out of the violent relationship or who is forced out needs a range of services in addition to those already described.

".. the primary need is for the provision of the basic requirements of existence outside the relationship. Unless this need is met, no amount of improvement in services like counselling or legal advice can really help to give the woman a genuine choice about escaping from violent physical abuse."[1.]

This report also speaks of the isolation that poverty breeds in conjunction with the fear and mistrust that the women have learned. That some who leave eventually find their situation even more unbearable than the memory of violence and return to their assailants. Others are unwilling to expose their children to financial hardship, or to lose a home to which they have contributed considerable money and work. The problems of paying heavy bonds, high rents and the other necessities of starting anew are often insurmountable particularly where the family income is low or the woman totally economically dependant on the man.

(A)
POVERTY AND INCOME DISPARITIES BETWEEN MALE AND FEMALE HOUSEHOLD HEADS

Poverty is a critical factor inhibiting women leaving violent husbands and setting up their own households.

Poverty for sole female household heads is as endemic in Tasmania as elsewhere. Reference is made to the 1981 Census. Of the 8,611 sole females with dependants 7,298 (84.74%) earnt less than $10,000 p.a. and 8,105 (94.12%) earnt less than $15,000. The ratio of female to male sole parents was over 6:1 but the male incomes fared better only 39.71% being under $10,000 but still with a significant group of more than three quarters of single fathers (79.64%) earning $15,000 or less.

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1. DOMESTIC VIOLENCE: SOME FACTORS PREVENTING WOMEN LEAVING VIOLENT RELATIONSHIPS. N.S.W. Bureau of Crime Statistics & Research 1981
Jane Crancher, Sandra Eggar, Wendy Bacon. p.8.

By comparison married couple households with dependant children fared far better. Of the 20,500 households where the male partner filled out the Census form only 42.16% earnt $15,000 or less and where the female partners in the remaining 76% households filled out the Census a corresponding proportion (43.22%) earnt $15,000 or less.[2.]

In looking at poverty issues in relation to domestic violence and why women are trapped in violent relationships, it is important to focus on the poverty of sole parent families in comparison with married couple families who have dependant children, rather than comparing sole parent families with all other households including those with no dependants.

The Tasmanian 1981 Population Census indicates that the ratio of sole parent to the traditional nuclear family of married couple with dependants and no extended kin is 1:5.1, and when additional adults are present the ratio is virtually identical.[3.] In other words when Tasmanian families with dependant children only are compared, the sole parent families constitute 16.54% of all families with dependant children.

The Institute of Family Studies working paper (October 1982) identifies 13.2% of all families as being sole parent families. The 1982 A.B.S. Survey on Australian Families indicates that although 88.1% of Australian families are married couple families (3,564,600) only 52.9% of these had dependant children present. (1,885,673).

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2. A.B.S. 1981 CENSUS OF POPULATION AND HOUSING. TABLE 47. Family heads - Family Income by Occupational Status by number of Dependants by Income Unit Type by Sex.

3. SOLE PARENT FAMILIES 7,913 WITH OTHER 2,083 TOTAL 9,996 = 16.54%
MARRIED COUPLE WITH DEPENDANTS 40,157 WITH OTHER 10,268 TOTAL 50,425 = 83.46%
RATIO OF 9,996 TO 50,425 = 1:5.04.

Further A.B.S. figures and analysis (such as the General Social Survey of Australian Families, 1975) reveal an enormous income differential between the incomes of male and female household heads. Such disparities in male and female income exist between persons in comparable occupations despite those States with anti-discrimination, equal pay and equal opportunity legislation.

Factors such as the occupational segregation of the labour market, disincentves and lower expectations, aspirations and investment in educational and promotional opportunities for females largely based on stereotyped expectations of female dependency and the male as the primary "breadwinner", and woman's double workload all serve to disadvantage all women and in particular women who have sole responsibility for dependant children.

The disadvantages to women can be seen explicitly in the A.B.S. Average Weekly Earnings of Employees in Tasmania for the June quarter 1983. The weekly total earnings of all females was $201.90c compared with $332.90 for all males.

The income gap is $131 a week with female average weekly incomes over one third less than the average, Tasmanian male weekly income.[4.]

The situation has changed very little since the 1973 National Family Survey and the Commission of Inquiry into Poverty revealed the extremely precarious position of Lone Parent families. The first main Report concluded that

> "when poverty before and after housing costs are considered, fatherless families are clearly the poorest group."

About a third of all fatherless families were in poverty compared with 10% of all families.

The income gap in addition to the considerable number of lone parents whose main or only source of income is the D.S.S. pension or benefit, is the main reason why the 1981 Tasmanian Census shows that 94.12% of female lone parents earned less than $15,000 p.a.

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4. A.B.S. Canberra 18 August, 1983 Cat. 6302.0 "Average weekly Earnings, States and Australia. June quarter 1983.

The status of women and equality both in the public and private sphere, in the workforce and at home are extremely important in relation to domestic violence. The economically dependent woman is vulnerable and her dependency frequently resented by her spouse. There is no equity in families where the husband is viewed as the "bread winner" and all other family members as "bread eaters" in a parasitical, subordinate relationship. Only when true value is ascribed by society to parenting and the respective and equal roles of wife and mother and husband and father, will the stereotypes of the husband's "right" to dominance and the wife's subordination alter.

Politically the passage of the Sex Discrimination Bill (1983) (Cth.) to give effect to the 1945 United Nations declaration which later became the Convention on the Elimination of all Forms of Discrimination Against Women, is essential to women's status. Australia signed the treaty in 1981 and once the convention is ratified it will formally acknowledge equal rights in law between men and women in political, social, economic, cultural and civil life.

This convention seeks to protect women's freedom of choice and their right to share equally with men the responsibilities and benefits of marriage, parenthood, employment and participation in public life. Discrimination on the ground of sex, marital status or pregnancy will be unlawful in specified areas, such as employment and education, and will help deter discriminatory practices by giving those people disadvantage by those practices some means of redress.

The Federal Government has expanded the Office of the Status of Women and established a taskforce whose members are permanent heads of various Departments. A green paper is planned setting out options for affirmative action programmes in employment. Some business corporations, such as ESSO, have introduced their own affirmative action programmes; Commonwealth and State Public Services have either implemented limited equal opportunity plans or have appointed Inspectors to investigate complaints of discrimination and sexual harassment in their workplace.

The Australian Human Rights Commission has endorsed the Australian National Women's Advisory Council Plan of Action which adopts the U.N. Program of Action formulated at the world conference in Copenhagen in 1980. This states that

> "improvement in the status of women requires action at the national, local and family levels. It also requires a change of men's and women's attitudes towards their roles and responsibilities in society. The joint responsibility of men and women for the welfare of the family in general and the care of their children in particular must be reaffirmed."

The Australian attitude to formal equality and the reality of paying more than lip service to such rights is somewhat ambivalent. Despite opinion polls indicating that 75% of Australians are of the opinion that the quality of a woman's life improves if she has a job,[5.] and women's participation in the workforce increasing, women are still perceived as an "industrial reserve army" to be called upon in times of labour shortage and made redundant in times of economic recession. (1971 29.2% married women in the workforce, 1981 41.4%). Though women are increasingly part of the labour force, they experience particular forms of oppression and isolation in it. On the whole they are consigned to the lowest paid, least satisfying and most vulnerable jobs in the economy. Shiftwork, outwork and part-time employment are the only "choice" for many women given the fact that they still bear the main responsibility for domestic work and child care.

The Joint Parliamentary Committee on Unemployment Report (tabled 30.6.1983) considered the overwhelming reason most married women worked was economic necessity and estimated that only 23% would continue if otherwise financially secure. Though surveys of males in the workforce would probably reveal a similar result, the committee was concerned that adequate support be given to single income families without detracting from the right of married women to work as

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5. Public Opinion Polls 19.1.1983 On the Status of Women in Society.

"any moves to entice married women out of the workforce should not simply take the form of replacing one set of unemployed with another."

In times of recession it is considered by some to be an advantage if women do not believe in equality in the workplace, and there emerges an ideological emphasis on the importance of women's home role and pressures for "income splitting", increased dependent spouse rebates, and reducing Family Allowances along with moves for payments for women at home.

In a materialistic society where a person's value is often measured by money and their self-esteem bound up with paid employment, it is exceedingly difficult to both have the status of a person who elects to be a homemaker and child carer recognised as equal to a workforce participant. This will invariably involve support and compensation for homemakers and affirmative action programmes for such people should they resume in the workforce after child-bearing.

Programmes to break down the occupational segregation in the workforce and the economic and other barriers between work at home and elsewhere are necessary to increase the options and choices men and women can make, and to decrease the present vulnerability and low status of the women at home which in part arises from her economic dependency upon her husband. A dependency which he can resent which manifests itself in violence against her.

The Finner Report established that single parent families headed by women were one of the most impoverished groups in Britain.[6.]

"The idea of living on the poverty line was obviously a strong deterrent against leaving a violent man in those cases where his financial provision for the family was adequate."

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6. FINNER REPORT ON THE COMMITTEE ON ONE PARENT FAMILIES (1975) LONDON HMSO.
HARKELL, G. LEAVING VIOLENT MEN WOMEN'S AID FEDERATION. LONDON. p.10

Refuge workers are very aware that beyond the refuge does not lie 'a viable new life in the community'.

"There lies an abyss of lonliness and poverty, with its attendant anxiety and depression."[7].

The situation in the United States is similar to Britain. It has been estimated that

"All other things being equal, if the proportion of the poor in female householder families were to continue to increase at the same rate as it did from 1967 to 1978, the poverty population would be composed solely of women and their children before the year 2000."[8].

The consequences of poverty are not just fiscal. The Australian National Crime Victims Survey[9]. indicated that the assault rate was 47 times higher among separated and divorced women as compared with married women; i.e. single women of whom a substantial proportion would be parents, have a high probability of being crime victims.

Children in poverty are also victims; not of crime but of social injustice and social stratification. Their plight as a class of victims is treated with indifference by the more affuent. What research exists links factors such as poverty with high infant death rates.[10].

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7. THE LAST RESORT. A WOMEN'S REFUGE: Vivien Johnson. Penguin Books 1981.p7.

8. U.S. NATIONAL ADVISORY COUNCIL ON EQUAL OPPORTUNITY, 1982.

9. REFER TO SECTION ON "INCIDENCE OF DOMESTIC VIOLENCE p. 8.

10. KEN DYER - ADELAIDE UNIVERSITY SENIOR LECTURER IN SOCIAL BIOLOGY: Research cited in NATIONALTIMES "Poor Kids Die Young" Ann Harding 1.12.1979. DR. POWLES - Study in Port Melbourne also indicates adult death rate in males between 25-34 5 x higher than in more affluent areas.

The life chances of these children are circumscribed by poverty, and although there appears to be more violence directed at women who are at home with children and are economically dependant upon their spouse, it is understandable that many women endure the violence "for the sake of the children." Ultimately this may prove to be a wrong and harmful decision, but without adequate support and income it may appear to the woman that she has no other option. The mythology of such economic oppression and forced dependancy is contained in sayings such as "Barefoot in winter, and pregnant in summer," and "a man's home is his castle".

(B)
PUBLIC INCOME MAINTENANCE: PENSIONS AND BENEFITS.

Many women are unaware of the existence of statutory income maintenance through the Department of Social Security, or may be under a misconception that they will have to institute a private maintenance action against their spouse before they will be eligible.

However a woman will not be entitled to the Sole Parents Benefit or Widow's Pension while she cohabits with her spouse, and a woman with no separate source of income has almost insurmountable problems if she attempts to leave unassisted.

As well as advice, information, counselling and legal and Police protection she will need accommodation and material assistance with bonds, advance rents etc.

In Tasmania in August 1983 6,738 of the total widows and Sole Parent beneficiaries, had dependant children.

Almost half these sole parents exist on the pension with no other form of assistance. This is indicated by the fact that 3,285 sole parents were in receipt of Supplementary Assistance. This assistance of up to $10 a week is available for those paying $30 or more board or rent in the private sector. It is strictly means-tested reducing 50c for every $1 earned, so a pensioner with $20 income is no longer entitled to Supplementary Assistance. It is also no longer granted to Housing Commission tenants though an anomalous situation exists where those who were already tenants in receipt of Supplementary Assistance retained that Assistance when the decision was made to exclude future Housing Commission tenants.

The remaining 3,453 Widows and Sole Parents with children do not receive Supplementary Assistance. The majority of these would have earnings or some other income under about $12,500 p.a. when the pension ceases.

The main concerns for women seeking to escape violent relationships are firstly, that statutory income maintenance reduces such families to a poverty-line existence.

Secondly, that female wages are extremely low and any attempt to work part-time to supplement the pension is partly wasted effort because of the disincentives inherent in the D.S.S. income maintenance and tax system and factors such as the non tax deductability of child-care costs incidental to earning a living.

For example, the pension reduction is calculated on Gross Income; neither tax nor child care costs can be deducted before calculating the reduced pension. $20 income looses the $10 Supplementary Assistance, then depending on the number of children gross income from about $30 reduces the pension by 50c for every $1 earnt in addition to tax at about 30c in the $1. Generally only full pensioners are entitled to reductions on statutory charges (such as rates, Telecom, H.E.C.

MTT etc.) and other fringe benefits are progressively lost e.g. from about $199 GROSS the sole parent ceases to be entitled to the Health Care Card and may have to purchase private medical insurance, even though she or he remains entitled to some portion of a pension until other income reaches about $12,500 p.a.

Also disincentives are present in relation to private and public income maintenance inasmuch as e.g. Child Maintenance paid by the non-custodial parent is deemed the pensioners income and is taken into account in reducing the pension. As the non-custodial parent has already paid tax and transfers "nett" maintenance, this money is subject to a double impost before it can be used for the child's benefit.

Payments aimed at the "working poor" such as the tax free Family Income Supplement of £520 p.a. per dependent child frequently end up going to the more astute leaving many who are eligible untouched.

In August 1983 only 46 sole female parents were in receipt of the Family Income Supplement despite an intensive media coverage. As the income ceiling for a sole parent with two children is $213 and the Tasmanian female average weekly income $201.90c, there are obviously eligible parents who haven't applied. Similarly some pensioners who are earning income close to the F.I.S. and Health Care Card cut-off point may in fact be better-off ceasing to be beneficiaries and receiving the Family Income Supplement.

(C)
PRIVATE MAINTENANCE AND PROPERTY DISTRIBUTION

Only married couples and their children come within the ambit of the Family Law Act; and considerable disadvantages exist for persons in a "de facto" relationship. Some 167,200 couples in the ABS 1982 survey reported a "de facto"

relationship and 35.7% of these had children present.[11.] Further, of the married couple families (3,564,000) in 14% at least one partner had been previously married and about a quarter of these had children present from a previous marriage. Still others had ex-nuptial children present. The pattern is one of different family patterns and family types emerging and being reconstituted so that even in the one family some children can be within the jurisdiction of the State Supreme Courts and others the Commonwealth Family Law Court.

This division of the wardship powers of the Supreme Court controlling guardianship, custody, access, paternity and maintenance actions and the similar powers under the Family Law Courts appear an unnecessary, complex and confusing duplication. All the States, with the exception of South Australia, have failed to alter significantly the legal status and relationship of ex-nuptial children with respect to the rights and obligations of fathers.

The South Australian and Queensland domestic violence law reforms include "de facto" couples and in New South Wales de facto couples who are cohabiting come within the protective provisions of the legislation. Prior to these recent reforms only the Family Court of Western Australia could deal specifically with violence between unmarried persons who are the respective parents of a child.

> "To this intent the Family Court of Western Australia has jurisdiction in relation to domestic violence between de facto married couples and separated de facto married couples."[12.]

There are similar problems in "de facto" marriages in relation to property and maintenance. The New South Wales Law Reform Commission Report on De Facto Relationships, August 1983, recommended rights to sue for property settlement and maintenance and several other rights similar to those between parties to

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11. ABS Canberra 24.12.1982 Cat. No. 4407. Australian families (1982).

12. FAMILY LAW COUNCIL TH ANNUAL REPORT 1981-82 p35.

a formal marriage. The Commissioners were divided as to whether such rights would accrue after 2 or 3 years. It would appear preferential to make the existence of the relationship presumed on 12 months co-habitation as 12 months constitutes the period evidencing irretrievable breakdown under the Family Law Act; and tests such as where one party has altered their position to their own detriment to the advantage of the other, to be utilized in determining respective rights.

(D)
CHILD MAINTENANCE

As single parent families headed by women form one of the largest impoverished groups in Australia the issue of both parents contribition to the child's maintenance is crucial in relation to family poverty.

Because of the inadequacy of the present system of maintenance determination, collection and enforcement; the division of jurisdiction between Commonwealth and State concerning children born within marriage and ex-nuptial children; and the inappropriateness of the adversary system and absence of skilled actuarial advisers to the courts - the burden of both care and cost falls inequitably on the sole parent. This inequity is to the detriment of the child's welfare and to the fiscal advantage of the non-custodial parent. The philosophy many Family Law Court Judges have developed as a convenient response to endemic maintenance defaulting is that Statutory income maintenance is an appropriate alternative; that the custodial parent must expect to bear the major costs as well as the responsibility entailed in rearing the child,[13.] and that the child's right is residual inasmuch as only bare necessities of a hand to mouth existence is a "right",

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13. Family Law Court Pamphlet.

The working sole parent is often disadvantaged firstly by not being entitled to Legal Aid and secondly, the actual costs of deriving that income when children are present are rarely accurately quantified. A maintenance application of $50 a week per child would in the vast majority of cases be considered excessive yet this is the average non-tax deductable fee the sole parent must pay for child care in order to earn a living.

The 5th Family Law Council Report pointed to

"the ineffectiveness of present enforcement procedures for the collection of maintenance from persistent defaulters."

Their next Report (1981-82) strongly supported the establishment of a national collection agency to be carried out by a Collector of Maintenance on the basis of the Western Australia and South Australia models.

The National Consultative Committee on Social Security following a Lone Parents Task Force Report and consultation with all State Consultative Committees, recommended a National Collection agency for Maintenance Payments (November 1982).

"The Council :-

1) Supports the collection of maintenance payments by means which do not place the onus of initiating action on the custodial parent.

2) Recognises that children should have the right to be supported financially by both parents.

3) Believes that all maintenance collected should be directed to the person for whom it is being paid."

Further that any proposed scheme should apply universally and cater for custodial parents and children emerging from all styles of relationships; and it should operate uniformly and comprehensively throughout all States and Territories.

The Attorney-General, Senator Evans, has announced the Government's intention to establish a national agency for maintenance collection. Ultimately this should help to rectify the situation where, by default, the custodial parent bears the entire burden of care and cost while the non-custodial parent retains their entire income regardless of the needs of their children.

(E)
MATRIMONIAL PROPERTY

The Attorney-General has also responded to the Joint Select Committee on Family Law recommendation in 1980 concerning property rights in marriage; by referring the issue to the Australian Law Reform Commission (16.6.1983) to conduct a major Inquiry.

The issues are only relevant to domestic violence inasmuch as inequity in distribution combined with discrimination against sole female parents who apply for housing loans, both constitute reasons why some women remain and endure violent relationships or escape and find they cannot establish viable economic households. The issues are discussed in the Australian Journal of Social Issues.[14] The papers illustrate that

> "The employment disadvantages women suffer as a consequence of domestic responsibilities are not consistently reflected in judgements under the present system." (p. 143).

Further, there is a failure to compensate for the effect that marriage or rather workforce exclusion, has on the potential earnings of most women. An analysis of the Californian community property has shown that starting with an equal division at the point of divorce does not produce equity. Women with children slip further into poverty whereas men who have retained their careers and work

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14. Vol. 18 No.2 MAY, 1983.

and training experience gained while the marriage continued, regain their original standard of living within a few years. The woman's poverty is compounded by limited child support and frequent default, and workforce participation limited by children.

(F) NATIONAL MAINTENANCE ENFORCEMENT AGENCY

While it was generally conceded that Australia had a high rate of maintenance default and compliance was the exception rather than the rule, the rather sanguine attitude by those not directly affected was that sole parents could resort to statutory income maintenance and that enforcement was hardly worth the courts and legal aid funds time and expense. Consequently vast numbers of sole parents and their children were relegated to a poverty-line existence while the non custodial parentsabdicated their responsibilities aided by ineffective maintenance enforcement mechanisms in all States other than South Australia and Western Australia.

Only in response to the massive increase in the welfare budget as a consequence of statutory income maintenance for sole parents, has attention focused on the issues of parental maintenance responsibilities, and methods of assessment, counselling, collection and enforcement.

The Attorney-General's Department has prepared an Option's Paper to stimulate a response to their inquiry and will be reporting to the Attorney-General in December. The paper cites the South Australian model conducted by the Department of Community Welfare who negotiate and assist with maintenance applications and if necessary appears on behalf of a client in court in the capacity of Assistant Collector of Maintenance pursuant to S89A of the Family Law Act. Contested matters are generally referred to the Legal Services Commission. The Department acts as a collection and payment agency.

The Family Court in Western Australia has established a central organization for the collection and enforcement of maintenance which involves the receipt, disbursement and accounting of maintenance monies. A discretion exists under r 18 of the Western Australia regulations not to act on an enforcement application where this appears unreasonable and this is used to justify a policy not to

enforce outstanding arrears accrued earlier than the preceding 12 months or where there is no longer a current order in force. This would tend towards enforcing compliance against the more amenable while letting off the persistent defaulter.

The options paper looks at whether the system could be established within the Taxation, Family Court, Social Security or State Social Welfare Departments or as a separate entity and whether such maintenance should be collected on behalf of general revenue, as in the New Zealand Liable Parent Contribution Scheme or whether "rights" should be assigned to the State who would then pay non equivalent support benefits as in some U.S. states.

Generally speaking opinion in Australia seems to favour such maintenance being collected by the State on the individual's behalf.

Issues of equity are involved concerning the rights of children to be supported by contributions from both parents and the sharing of the burden of such responsibility between the custodial and non-custodial parent. The thousands of children in Tasmania alone who are in single parent families or who will during their dependency experience poverty as a consequence of the dissolution of their parents' marriage makes it essential that both issues of private income maintenance and statutory income maintenance become matters of public concern and an appropriate system of maintenance collection and enforcement is established.

HOUSING

Housing is one of the most critical issues facing women who have no alternative but to leave violent men and set up a separate household.

While refuges provide shelter to women in crisis they essentially provide short term accommodation; many are at times grossly overcrowded and most have rules concerning the maximum length of stay. The absence of flow-on housing creates pressures on the refuges' ability to shelter women in need of immediate protection and, emergency accommodation and related support services. Pressures are also created upon women who become aware of the difficulties they face in gaining access into adequate housing at a reasonable rent to house themselves and their children. Many women reconcile with violent men only to suffer repeated beatings and brutality. Their reconciliation is viewed by many as evidence that the woman accepts the violent relationship and justifies inaction and a failure to render assistance if she seeks protection in a subsequent battering. There is a failure to conceptualise just how limited the options are for an older woman, often unemployed, with children to set up a viable separate household and how poverty and discrimination in rental practices combine to defeat her attempts to leave a violent relationship.

SOLE PARENT FAMILIES IN RENTAL HOUSING

Claims are sometimes made, based on occupancy rates, that there is no housing shortage in Hobart.

However there is a critical shortage of low rent adequate accommodation that is available equally to all groups of tenants. Low rent properties are no longer an economic investment in the property market and consequently poorer families and groups are finding they are competing fiercely for an ever diminishing pool of cheaper rental accommodation. As a result landlords can both charge

a higher rent relative to the value and standard of the dwelling, and can discriminate against particular groups of tenants.

To be poor, single, female and a mother of children renders one automatically eligible to belong to one of the most discriminated against, exploited, and least competitive groups seeking rental accommodation in the private rental sector.

Various surveys have indicated that such discrimination is widespread. A Tasmanian Tenants Union[1.] survey of an inner city area of Hobart in 1977 revealed that 25% of tenanted dwellings had at least one child in the household and half of these tenants stated that they had experienced discrimination in obtaining accommodation because they had children.

Surveys of Mercury 'To Let' ads in 1976[2.] and 1982[3.] reveal that while only approximately 6% specifically exclude children, a range of other specifications are in fact euphemisms for no children e.g. married couple only, mature adults, business couple, suit professional person etc. Such specifications render about 20% of the ads discriminatory inasmuch as they forbade children.

Such overt discrimination is only the tip of the iceberg, as sole female parents who approach real estate agent and landlords soon realise. The extent of private rental discrimination renders such families so non-competitive on the private rental market that they form a disproportionate number of applicants for public housing, or in the private sector they inhabit substandard and low grade accommodation for a relatively high rent in comparison to rent values in the middle range of the rental market.

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1. TENANTS UNION OF TASMANIA - Landlord - Tenant Law Reform Submission (1977) 21.
2. LEE, Dr. Trevor "Choice & constraints in the housing market: the case of one-parent families in Tasmania" ANZ Jnl. of Sociology, 13, 1 (1977) pp 41-46.
3. Humphries, P. "Discrimination in Rental Housing" 1982.

Studies by A.C.O.S.S., the Brotherhood of St. Laurence, the Inquiry into Poverty, and by MacCallum[4.] and Bradbrook[5.] also indicate that the problem of discrimination in rental housing because of the presence of children exists Australia wide.

In Tasmania Landlord and Tenancy Law reform is in limbo, the former Labour government having failed to secure the passage of proposed legislation. In some other States reforms have been enacted establishing Residential Tenancies Boards, with conciliation and enforcement powers and provision for Bond lodgement schemes etc. These tenancy law reforms operate in conjunction with anti-discrimination legislation to prohibit discrimination of grounds such as sex, race an marital status in accommodation and housing.[6.]

Such reforms assist in reducing endemic discrimination in that some redress is given to those who can prove that they were unlawfully discriminated against. In the long term anti-discrimination that has enforceable provisions combined with public education can act as a positive change agent to produce a more egalitarian society.

As well as discrimination experienced by sole female parents in the rental market, a major problem for all low-income tenants is that of the security deposit system (i.e. bonds) and either excessive rents or rents which constitute a disproportionate amount of that tenant's entire income. Some States have introduced Landlord and Tenancy Law Reform where the interest from a Bond Fund

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4. (MacCallum & Bradbrook "Discrimination Against Families in the Provision of Rented Accommodation" 1977, 6 Adelaide Law Review p. 439.

5. Bradbrook "Poverty and the residential Landlord Tenant Relationship A.G.P. 1975 p. 52. Poverty Inquiry.

6. RACIAL DISCRIMINAITON ACT (1975) Cth;
RACIAL DISCRIMINATION ACT (1976) & SEX DISCRIMINATION ACT (1975) S.A.;
ANTI-DISCRIMINATION ACT (1977) N.S.W.;
EQUAL OPPORTUNITY ACT (1977) VICTORIA;

has been used to administer a scheme whereby the landlord conducts an inspection and the inventory is checked and signed by the tenant at the beginning and end of the tenancy. Bond monies are automatically returned after fourteen days unless a complaint is registered whereon the dispute if referred to the Residential Tenancies Board for investigation.

Arguments against such reforms take a "free market" approach - that any controls will decrease the supply of rented accommodation as they will reduce return on such investments.[7] Such contentions have proved unsound interstate where tenancy reforms have benefitted the smaller property owner by providing accessible and inexpensive Tribunnals to determine respective rights, at the same time as achieving a more equitable relationship between the parties to a tenancy contract.

The problem of poverty and low-income earners in the private rental sector has been recognised for some years. The Housing Allowance Voucher experiment (the H.A.V.E. Scheme was scheduled to be trialled in Melbourne and Tasmanian centres but abandoned in 1978, primarily due to concerns that rent subsidies to low-income tenants would ultimately constitute an income-transfer to landlords by inflating private market rents to the detriment of low-income tenants.

The Poverty Inquiry recommended that an annual tax-credit be paid to needy renters to avoid this income-transfer problem created by a weekly rent subsidy.

Pensioners renting in the private sector paying over $30 receive $10 Supplementary Assistance a week from the D.S.S.

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7. MERCURY 11.2.1980. Real Estate Institute of Tasmania; Residential Property Manager of L.J. Hookers: Compaign to block Labour Governments proposed legislation for tenancy law reforms.

The findings of the Poverty Inquiry, the A.B.S. Household Expenditure Survey (1975-76), the A.B.S. Survey of Home Rental and Ownership (November 1978) and studies by bodies such as the Urban Research Unit[8.] indicate that the highest housing costs for both lone parents and other households with children were associated with renting on the private market. Further that lone mothers had to devote nearly half their incomes to housing, and even if they obtained accommodation in the cheapest 10% of the market, rent alone would comprise between one-third and a half of the Widows Pension or Sole Parents Benefit.

This awareness of the relationship between family poverty and private rent has resulted in the introduction of the PRIVATE RENT SUBSIDY SCHEME. This Federally funded Scheme is administered in Tasmania by the Housing Division. It provides a 12 month subsidy for low income families to assist with private rent payments.

On the 30th June, 1983 there were 364 recipients 203 of whom were sole parents with dependants. The initial pilot project was limited to sole parents not paying in excess of $60 rents; the eligibility categories were later extended to cover those paying a higher rent and all low income families.

The average income of private rent subsidy recipients is $122 a week, and their average rents $58. This indicates that almost all would have only the pension as income and be paying half of their pension in rent leaving a meagre $64 to provide heating, electricity, food, clothing and all the basic necessities for a family with children.

The problem with the private rent subsidy is that it is a limited fund. Currently applicants can only commence receiving the subsidy if a current recipient moves "off the list" into public housing. The 12 months expiry date

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8. Neutze M. & Kendig H. "Occupancy of the Australian Housing Stock Adelaide Study. Urban Research Unit. ANU.

is drawing near and the majority of subsidised tenants will revert to their previous position of paying half their income in private rents. Some however, will have had some respite for 12 months and this would have assisted to tide them over while waiting on the Housing Commission public housing lists.

The allocation for the Private Rent Subsidy Rebate is guided by a point system to determine priority. Factors to determine the greatest need, such as rent paid in proportion to income, are applied, however, vast numbers of eligible tenants are not currently receiving the subsidy e.g. 203 sole parents are in receipt of the rent subsidy yet over 3,000 sole parent pensioners in Tasmania receive Supplementary Assistance. As such assistance is only available to persons paying more than $30 rent or board and cuts out when other income reaches $20 indications are that thousands of sole parents in Tasmania are paying at least one third or more of their pension in rent and not currently receiving the benefits of the private rent subsidy. Many other low income families are in exactly the same situation.

The Homeless Persons' Advisory Committee recommendation[7.] was that it should be

> "possible for any homeless person or beneficiary, when being granted a pension or benefit which may become a long term prospect, to be eligible also for a bond or rental supplement, sufficient to allow a permanent dwelling to be obtained".

The private rent subsidy rebate is one small step in that direction. Funds have also been made available to the Department for Community Welfare to administer bond and rental scheme initially as a pilot[8.] project.

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7. Projects and Development Section. D.S.S. Melbourne June 1981 "Homeless Persons Agencies: Interviews with Clients & Staff" Recommendation 4. Bond and Rental Supplement.

8. 1983: $55,000 was made available to the Dept. for Community Welfare through the Agricultural Bank: Cth. Budget allocation.

In the absence of a Residential tenancies Board and with an inadequately funded tenancy advisory service, the problem is that many low income tenants and agencies are unaware of the existence of either the rent subsidy rebate or the bond assistance and the fact that they are administered by the Housing Division on one hand and Community Welfare on the other, does tend to fragment rent relief. Possibly the private rent subsidy will eventually tend to subsidise tenants on the Housing Division waiting list, and bond assistance be utilized by clients already "within" the State Social Welfare system.

A further $30,000 has been allcoated by the Commonwealth through the Agricultural bank to Community Welfare to distribute to community groups to assist them in finding accommodation for their clients. This also can be used to subsidise bonds and rents.

A "Bond rental Subsidy Scheme" (B.R.A.S.S.) has been operating a similar project in Launceston in recent years.

Advertising and community advisory services about the existence of financial and other relief is essential. In the case of the economically dependant woman trapped in a violent relationship, knowledge of such assistance and aid in making the application is essential. The mere fact that it becomes community knowledge that dependant people can extracate themselves from these situations and they are therefore less vulnerable, will in itself be a factor in limiting the anger and the violence directed against them. It appears that the violence often contains inherent contradictions; a resentment that the woman is dependant upon the man, and at the same time, a desire to subject the woman to the man's dominion over her by physical aggression and render her subordinate and dependant. When the victim is given social assistance which renders her less vulnerable the power balance in the relationship shifts and by putting her in a position whereby she can escape the violence the man looses the complete control he desires to have and the possibility is that he may attempt to control his violence

if the woman with whom he lives is free to leave.

HOME ACQUISITION

An Inquiry into Matrimonial Property has been announced by the Federal Attorney-General which may result in more equitable settlements for custodial parents, and a more realistic appreciation of the economic disadvantages incurred by females who have reduced their earning potential in order to be homemakers and who suffer discrimination in acquiring private finance to purchase homes.

Schemes, such as the Low Deposit Purchase Scheme (inaugurated in October 1981) and the subsidised low interest home loans through the Agricultural Bank are eligible only to those households with dependant children who have never had title or an interest in a former home.

This effectively excludes low-income parties whose marriage has been dissolved even though their assets are negligible and the sale of their home bought them no capital gain. Given that sole parent families constitute about 16% of all families with dependant children it would seem preferable to remove this exclusion based on previous home ownership and determine eligibility on criteria which determines need; such as income, assets, dependants, the availability of alternative finance and balance this against any speculative or other capital gain from previous home ownership.

The Agricultural Bank policy adopted some four years ago of increasing or decreasing interest rates according to annual income is commendable as it can accommodate changes in financial circumstances over a life-time and prevent those who subsequently become affluent from benefiting from subsidised home loan interest rates intended for lower income earners.

However, concern exists about the number of sole female household heads

granted loans[9]. and whether the lowest income earners of eligible applicants are in fact receiving the loans or whether funds are going to be better of strata who possibly could have obtained private home-loan finance. State comparisons on interest-rates indicate that the interest rates paid by mortgagees with subsidised home loans in Tasmania are higher than interstate counterparts.[10].

PUBLIC HOUSING

The sole parents' difficulties in the private sector leads to a dependence uponpublic housing. When the precipitating event of homelessness is domestic violence the woman is likely to be in urgent need of immediate accommodation, financial assistance, and longer term housing.

A return to the marital home even with non-molestation injunctions and orders excluding the man from the home may not be feasible at the outset of the parties being estranged. The woman may need alternative accommodation solely to prevent harassment particularly if she believes her former partner may retaliate to the point where her life is threatened.

The logical solution is to secure the woman and children in possession of their home and exclude the violent partner perhaps with some provision for single accommodation on an interim basis for these men. However, until the woman can be adequately protected this will not always be an option, and the distorted action of police assisting the injured woman and her child ren to a refuge and the assailant remaining in secure housing will prevail.

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10. Refer to footnote 11, page 270.

The private market is not structured to provide for emergency accommodation for families. While refuges are one option and tenancy advice and bond and rental subsidies useful, other alternatives including registers of all vacant government and council housing stock that can be utilized for short term housing for people who are likely to be given priority allocation in public housing.

Sole parent families are disproportionately represented in public housing. The National Family Survey indicated that 16% of lone parents were in public housing compared with 5% of two parent families. The Tasmanian Housing Division has experienced a substantial increase in recent years of lone mothers applying for rental housing, particularly on a priority allocation basis.

Lone parents represented 20.8% of total applicants in 1974-75, 30% in August-November 1977, and % in 1983. The proportion of lone mothers applying for priority allocation in urgent cases of housing need has correspondingly increased; from 31.6% in 1974-75, 41.1% in 1977 and % in 1983. Being required to leave the women's shelter is not considered to constitute homelessness for the purpose of priority allocation, in the same way that recent or imminent eviction does.

The ability of the Tasmanian Housing Division to meet demand is influenced by complex factors including past policy decisions on sale of rental stock and allocation of Commonwealth-State Housing Agreement funds to rental or sale; land purchase policies; the type of housing constructed based on anticipated demand and practices of social mix, building diversity and rent rebate policies.

The current policies of suburban in-fill and housing co-operatives based on spot-buying and leasing to co-operative members will integrate public housing tenants within the wider community and reduce the social problems and stigma of public housing ghettos.

The Inquiry of the State Parliamentary Select Committee on Public Housing (1983) will possibly make some contribution to the current attempts to diversify public housing options. One recommendation is that covenants should attach to the title of public housing stock offered for sale on a subsidised interest basis, giving the Housing Division first re-purchase option on an agreed formulae thus retaining housing stock but enabling some benefits of private ownership.

Not only are emergency accommodation and flow-on housing available to women's shelters a necessary component of a sound housing policy, the Housing Division must also revise its policies in relation to existing tenants who separate. In particular the Division needs to revise its policy in respect of tenants who are forced from their home by the violence of their partners. Although joint-tenancy agreements acknowledge equal rights as tenants, consideration needs to be given to the joint responsibility for rent-arrears that accumulate after one spouse has been "evicted" as a consequence of the other's violence. In effect that tenant has no way of occupying the dwelling and the responsibilities of the Housing Division as lessor are somewhat different from that of private landlord. It is suggested that Housing Agreements similar to those used by the South Australian Housing Trust be adopted rather than the traditional weekly tenancy agreements, and that conditions relate to the rights of occupancy of both parties and waiver of accrued rents following forcible "eviction" as a consequence of family violence. Interim housing should be provided prior to final determination of child custody, and dwelling transfers effected with fees waived if an appropriate dwelling becomes available prior to these legal issues being resolved. Consideration also should be given to emergency housing for men made temporarily "homeless" as a result of marital breakdown.

Contracts with private landlords to secure head leases to be sub-let to tenants and administered by the Housing Division needs to be tried. The South Australian Housing Trust currently has some 147 private houses sub-let under such a Scheme.

Family violence invariably means family dislocation. Housing issues are complex and intertwined. Obviously if the family needs some temporary respite from the violent man, or if the separation is final, then it is essential that alternative board or hostel temporary accommodation be available for these men who are better able to readjust and be competitive in the private rental market than their wives and children.

In discussing home loans to low income groups, it has been a criticism that Tasmania's lending policies under the Home Purchase Assistance Scheme, are the most disadvantageous to the least well-off and the most generous to higher-income families. For instance in the three lowest income groups (those earning $150 or less, between $150-$179, between $180-$209) the Agricultural Bank loans constitute 1%, 5% and 14% of loans granted; yet almost 50% of loans granted are to applicants with income of $270 and above. In the first 3 income groups the portion of loans as a percentage of the total is lower than other States, and in the highest income group the Tasmanian proportion of loans granted is higher than all other States.

This invariably segregates the lower income groups in public sector housing and effectively out of the home purchase area as these are the least competitive in seeking private finance.

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11. ROGER AMBROSE "HOME PURCHASE ASSISTANCE SCHEME -- AGRICULTURAL BANK PRACTICES COMPARED WITH OTHER STATES" -- Paper, Source of Statistics. Dept. of Housing Annual Report 1980-81 HOusing Assistance Act (1978).

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