

**SOUTH AFRICAN LAW COMMISSION**

**RESEARCH PAPER ON DOMESTIC VIOLENCE**

**APRIL 1999**

## **INTRODUCTION**

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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## **PREFACE**

Domestic violence is a pervasive and frequently lethal problem that challenges society at every level. Violence of this nature is often hidden from view and devastates its victims physically and emotionally. Directly or indirectly it affects the quality of life of the whole society. Appropriate legislation to reduce and prevent domestic violence is therefore of critical importance.

This Research Paper is the concluding stage of a process that has involved a number of stages. During May 1996 the Law Commission published an Issue Paper to elicit responses and to serve as a basis for the Commission's deliberations. During February 1997 the Law Commission published a comprehensive Discussion Paper on Domestic Violence for general information and comments that was aimed at testing public opinion on problems and solutions identified by the Commission.

The Minister of Justice subsequently appointed a Project Committee on Domestic Violence consisting of external experts to assist with the processing of comments received on the Discussion Paper and to steer the process towards a Final Report and Draft legislation.

Due to Parliamentary time constraints, a draft Domestic Violence Bill emanating from the Project Committee was introduced in Parliament by the Minister of Justice prior to finalisation of the Commission's report. The Domestic Violence Act 116 of 1998 largely corresponds to the Bill drafted by the Project Committee, but it also contains provisions advanced by the Commission and developed by the Justice Portfolio Committee with the assistance of the Commission's researcher and the Department of Justice.

On 27 November 1998 the Commission decided that a report should not be published for the following reasons:

- \* The main aim of a report was to initiate legislation.
- \* Because legislation had already been enacted, the costs of publishing a report could not be justified.

The Commission, however, agreed that the report contained valuable research which could be made available to interested persons and institutions. It was subsequently decided to adapt the report and to make it available as a Research Paper in the Commission's research series.

The Research Paper contains important conclusions which could form the basis of legislative and other measures to alleviate the plight of victims of domestic violence. It is hoped that this Research Paper will provide relevant background information for any further development of legislation addressing the problem of domestic violence.

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## 1. INTRODUCTION

1.1 Domestic and family violence is a pervasive and frequently lethal problem that challenges society at every level. Violence in families is often hidden from view and devastates its victims physically, emotionally, spiritually and financially. It threatens the stability of the family and negatively impacts on all family members, especially the children who learn from it that violence is an acceptable way to cope with stress or problems or to gain control over another person. It violates our communities' safety, health, welfare, and economies . . . .

The above introductory remarks by the National Council of Juvenile and Family Court Judges (USA)<sup>1</sup> are an accurate reflection of the effects of domestic violence on society. Many different societies and their legal systems have grappled with the problem of domestic violence. This phase often coincides with a democratization process when issues of gender inequality are being addressed. It is therefore to be expected that at this point in South Africa's political and constitutional development, domestic violence is demanding the attention of law-makers and politicians.

1.2 Although victims of domestic violence are certainly not limited to women, the majority of victims of such violence are women. There are no reliable statistics on the extent of violence against women in South Africa, but, as the 1995 Human Rights Watch Report<sup>2</sup> states:

What is certain . . . is that South African women, living in one of the most violent countries in the world, are disproportionately likely to be victims of that violence.

1.3 The South African Government has committed itself to the eradication of violence against women. It has stated<sup>3</sup> that it intends to comply with the provisions of the Beijing Platform<sup>4</sup> and

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<sup>1</sup>National Council of Juvenile and Family Court Judges Model Code on Domestic and Family Violence Nevada: National Council of Juvenile and Family Court Judges 1994 v.

<sup>2</sup>Human Rights Watch/Africa Violence Against Women in South Africa - State Response to Domestic Violence and Rape New York: Human Rights Watch 1995 44.

<sup>3</sup>National Empowerment Policy Paper: Annexure on Governments Departments' Beijing Line Ministry Commitments 1996.

<sup>4</sup>Beijing Declaration and Platform for Action UN Doc A/Conf 177/20 (Adopted by the Fourth World Conference on Women and recommended to the UN General Assembly by the Committee on the Status of Women on 7 October 1995).

has ratified the Convention on the Elimination of All Forms of Discrimination Against Women<sup>5</sup> during 1995. It has entrenched the rights to gender equality<sup>6</sup> and freedom from violence<sup>7</sup> in the final Constitution, 1996. The Department of Justice has stated in Justice Vision 2000,<sup>8</sup> a strategy document for transforming the administration of justice, that it aims to achieve a criminal justice policy that addresses the special needs of vulnerable groups such as women and children. On 25 November 1996, International Day of No Violence Against Women, the Minister and the Deputy Minister of Justice launched an ongoing public campaign on preventing violence against women. The campaign was developed as a result of deep concern for the endemic problem of violence against women in South Africa.<sup>9</sup>

1.4 Appropriate legislation to give effect to and reinforce the aforementioned international and national initiatives is of critical importance. It is clear that the law cannot be employed as a panacea for the ills of a complex social phenomenon such as domestic violence. However, when victims of domestic abuse do turn to the law for protection, the law should be effective and efficient in its response. Having regard to the Constitution of South Africa and the international commitments and obligations of the State towards ending violence against women and children, victims of domestic violence should be afforded the maximum protection by ensuring that the substance and procedures of domestic violence legislation are well tailored to the needs of those suffering abuse in a domestic context.

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<sup>5</sup>Convention on the Elimination of All Forms of Discrimination Against Women UN Doc A/RES/34/180 1980. The Convention was adopted for signature and ratification and accession by the UN General Assembly on 18 December 1979 and entered into force on 3 September 1981.

<sup>6</sup>Section 9 of the Constitution of the Republic of South Africa Act 108 of 1996.

<sup>7</sup>Section 12(1)(c) of the Constitution, 1996.

<sup>8</sup>Department of Justice Justice Vision 2000 1997 58.

<sup>9</sup>Department of Justice Report Back on the Open Court Day for Women 1997 1.

## 2. BACKGROUND

### 2.1 Origin of the investigation

2.1.1 During July 1995 the Commission received representations from attorneys Pincus, Matz, Marquard and Hugo-Hamman to the effect that the Prevention of Family Violence Act 133 of 1993 (“the Act”) represents a radical and unjustified departure from the *audi alteram partem* principle. It is argued that it is a fundamental principle of our law and not one which should be abandoned under any circumstances. At most, particular circumstances may justify a temporary suspension of the principle. It is for this reason that the High Court has traditionally insisted that applicants make out a proper case for urgency and explain to the Court why such order should be granted without any notice to the other side.

2.1.2 It is pointed out that the consequences of granting orders in terms of the Act are often dire. Respondents may be excluded from their homes, prohibited from seeing their children or having access to their possessions. Moreover, there have been many examples of abuse of the Act in order to gain the upper hand in a matrimonial conflict.

2.1.3 The attorneys submit that the Act is in need of urgent revision to provide for a procedure more in keeping with traditional applications such as that orders should not be granted without notice to the respondent unless it is evident that it is justified in the circumstances and where interdicts are granted *ex parte*, they should be interim interdicts as normally provided for.

2.1.4 After canvassing the views of the Department of Justice, the Chief Family Advocate and the various Chief Magistrates on the matter, the Commission was convinced that the issue of domestic violence warranted further investigation and during February 1996 the inclusion of an investigation into domestic violence in the Commission’s programme was approved.

## **2.2 Issue Paper 2 on Family Violence**

In order to facilitate a focussed debate, Issue Paper 2 on Family Violence was published at the beginning of July 1996. The closing date for comments was 15 August 1996, but at the request of several role players the closing date was extended until 31 August 1996. Issue Paper 2 on Family Violence was the first issue paper on a matter in which people at all levels of society had a direct interest. The problems identified in the Issue Paper are canvassed in Chapter 5.

## **2.3 Discussion Paper 70 on Domestic Violence**<sup>10</sup>

During February 1997 a comprehensive Discussion Paper on Domestic Violence was published for general information and comment. The closing date for comments on Discussion Paper 70 was 30 May 1997. Further research and comments received on Issue Paper 2 on Family Violence were assimilated in the Discussion Paper. Additional concerns not dealt with in Issue Paper 2 on Family Violence were identified and investigated and are revisited in Chapter 6. Discussion Paper 70 on Domestic Violence also contained draft legislation.

## **2.4 Project Committee on Domestic Violence**

2.4.1 As suggested by Bonthuys,<sup>11</sup> it would be helpful for the Law Commission to co-operate with NGO's which have experience in working with the problem and can provide a broader insight into what victims of domestic abuse really need. Non-legal persons such as health and welfare workers may also be able to provide much-needed expertise and insights into possible ways to approach the problem.

2.4.2 During September 1997 the Minister of Justice appointed a Project Committee on Domestic Violence consisting of experts drawn from the community to assist with the processing

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<sup>10</sup>South African Law Commission Discussion Paper 70 on Domestic Violence ISBN 0-621-17650-8 February 1997.

<sup>11</sup>E Bonthuys "The Solution? Project 100 - Domestic Violence" 1997 SALJ 371 388.

of comments received on Discussion Paper 70 and to steer the process towards a final report and draft legislation. The members of the Project Committee are listed on page (i).

## **2.5 Workshops and briefings**

Members of the Project Committee and the researcher participated in a number of workshops and briefing sessions during which public opinion was gleaned on preliminary proposals for draft domestic violence legislation. The researcher participated in the following noteworthy workshops:

- \* Briefing of Chief Magistrates: 21 February 1998
- \* Centre for Legal Services (University of Zululand) and National Human Rights Trust workshop on domestic violence: 24 April 1997
- \* Commission on Gender Equality information and evaluation workshop: 6 May 1997
- \* Parliamentary Portfolio Committee on Justice public hearings on gender issues: 6 June 1997
- \* Institute for Multi-Party Democracy focus meeting on violence against women: 11 June 1997
- \* SADC conference on the prevention of violence against women: 5 - 8 March 1998
- \* Parliamentary Portfolio Committees on Justice and on the Improvement of the Quality of Life and Status of Women public hearings on gender issues: 20 March 1998
- \* Natal Women's Resource Centre workshop on gender policy considerations: 30 April 1998
- \* Malibongwe gender policy workshop: 6 - 7 May 1998

## **2.6 Research Paper**

2.6.1 Due to Parliamentary time constraints, a draft Domestic Violence Bill emanating from the Project Committee was introduced in Parliament by the Minister of Justice prior to finalisation of the Commission's report. The Domestic Violence Act 116 of 1998 largely corresponds to the Bill drafted by the Project Committee, but it also contains provisions advanced by the Commission



and developed by the Justice Portfolio Committee with the assistance of the researcher and the Department of Justice.

2.6.2 On 27 November 1998 the Commission decided that a report should not be published for the following reasons:

- \* The main aim of a report was to initiate legislation.
- \* Because legislation had already been enacted, the costs to publish a report could not be justified.

The Commission, however, agreed that the report contained valuable research which could be made available to interested persons and institutions. It was subsequently decided to adapt the report and to make it available as a Research Paper in the Commission's research series.

### 3. A BRIEF OVERVIEW OF THE ACT

3.1 The Act and the Regulations made in terms of section 7 thereof (“the Regulations”) came into operation on 1 December 1993. As stated by Thring J in **Rutenberg v Magistrate, Wynberg, and Another**<sup>12</sup>, one of the purposes sought to be achieved by the legislature “. . . was the laudable provision of a speedy, inexpensive, easily accessible and effective remedy for persons who find themselves threatened by violence within their family circle.”

3.2 Section 2(1) of the Act provides that any party to a marriage<sup>13</sup> (the applicant) or any other party who has a material interest in the matter on behalf of the applicant, may apply to a judge or magistrate in chambers for an interdict against the other party to the marriage (the respondent) in which the latter is prohibited from -

- (a) assaulting or threatening the applicant or a child living with the parties or with either of them [section 2(1)(a)];
- (b) entering the matrimonial home or other place where the applicant is resident, or a specified part of such home or place or a specified area in which such home or place is situated [section 2(1)(b)];
- (c) preventing the applicant or a child who ordinarily lives in the matrimonial home from entering and remaining in the matrimonial home or a specified part of the matrimonial home [section 2(1)(c)]; or
- (d) committing any other act specified in the interdict.

3.3 "Party to a marriage" is defined in section 1(2) as including a man and a woman who are or were married to each other according to any law or custom and also a man and woman who ordinarily live or lived together as husband and wife, although not married to each other.

3.4 The application must be made by way of affidavit which must state the facts upon which the application is based and the nature of the order applied for [regulation 2(1)]. Supporting

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<sup>12</sup>1997 4 SA 735 (C) 750.

<sup>13</sup>Although the Act is gender-neutral and family violence is sometimes perpetrated by women, the reality is that women and children are most often the victims of abuse.

affidavits by persons who have knowledge of the matter may accompany the application [regulation 2(2)], which must be lodged with the registrar or clerk of the court, who must submit it to a judge or magistrate in chambers [regulation 2(3)].

3.5 In granting the interdict the judge or magistrate must make the following orders [section 2(2)]:

- (a) A warrant for the arrest of the must be authorised, but it must be suspended on such conditions regarding the compliance with the interdict as the judge or magistrate sees fit [section 2(2)(a), (b)].
- (b) The respondent must be advised that he may, after 24 hours' notice to the applicant and the court concerned, apply for the amendment or setting aside of the interdict [section 2(2)(c)].

3.6 The interdict and orders have force only after service thereof on the respondent [section 2(3)]. The manner of service is prescribed in regulations 3 and 4. After service has been effected, the applicant must be furnished with a certified copy of the interdict and the original warrant of arrest to the applicant [regulation 3(2) and 4(7)].

3.7 If the applicant requires the execution of the warrant he or she must present an affidavit to a peace officer in which it is stated that the respondent has breached one or more of the conditions of suspension of the warrant [section 3(1)]. After the respondent has been arrested, he may only be released if his or her release is ordered by a judge or a magistrate. The respondent must, however, be brought before a judge or magistrate as soon as possible but not later than 24 hours after his or her arrest [section 3(2)]. A summary inquiry is then held by a judge or magistrate into the alleged breach of the conditions of the order suspending the warrant [section 3(4)]. If the respondent contravened the interdict he could be sentenced to a fine (no maximum is specified) or up to 12 months' imprisonment or both [section 6].

3.8 Section 4 of the Act further provides for an obligation to report the ill-treatment of children. Any person who examines, treats, attends to, advises, instructs or cares for any child in circumstances which ought to give rise to a reasonable suspicion that such child has been ill-

treated, or suffers from any injury the probable cause of which was deliberate, must immediately report such circumstances to a police official or a commissioner of child welfare or a social worker referred to in section 1 of the Child Care Act 74 of 1983.

**3.9 The Act is duplicated in “Annexure A”.**

## 4. CONSTITUTIONAL AND INTERNATIONAL HUMAN RIGHTS JURISPRUDENCE

### 4.1 Introduction

4.1.1 The Act came into operation before the enactment of the Constitution, 1993 and therefore, in reassessing this legislation, it is necessary to examine the potential influence of the Constitution, 1996<sup>14</sup> - most notably the Bill of Rights.<sup>15</sup> A consideration of South Africa's changed position in terms of international law is also essential.

4.1.2 Prior to the adoption of the Constitution, 1993, international law did not play a prominent role in the advancement of human rights in South Africa.<sup>16</sup> The Constitution, 1996, however clearly indicates that international law should be accorded a more significant position in South African law.<sup>17</sup>

4.1.3 During the last decade gender-based violence has received increasing attention in international human rights law,<sup>18</sup> with concomitant emphasis on the determination of state

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<sup>14</sup>This Chapter refers to the provisions of the Constitution, 1996 unless the contrary is expressly indicated.

<sup>15</sup>Several fundamental rights in the Bill of Rights are significant in the context of domestic violence. This chapter focuses on the right to freedom from violence (section 12(1)(c)), and the right to equality (section 9) - although, for example, the right to dignity as entrenched in section 10 may also be significant in the context of prevention of domestic violence. From the perpetrator's point of view, different rights (for example, the right to access to justice in section 34) should be considered.

<sup>16</sup>See generally J Dugard "The Role of International Law in Interpreting the Bill of Rights" 1994 SAJHR 208-210; H Combrinck "Positive State Duties to Protect Women From Violence: Recent South African Developments" 1998 Human Rights Quarterly [In press].

<sup>17</sup>See ss 39(1)(b), 231, 232 and 233 of the Constitution, 1996.

<sup>18</sup>See generally J Fitzpatrick "The Use of International Human Rights Norms to Combat Violence Against Women" in R Cook (ed) Human Rights of Women: National and International

obligations to address gender-based violence.<sup>19</sup> International human rights law may therefore be of specific significance in determining the nature of the duties of the South African government to address gender-based violence - including domestic violence.<sup>20</sup> In addition, international law may also be important in the interpretation of the fundamental rights entrenched in the Bill of Rights.

#### **4.2 Convention on the Elimination of All Forms of Discrimination Against Women<sup>21</sup>**

4.2.1 The Convention on the Elimination of All Forms of Discrimination Against Women prohibits all discrimination based on gender or sex “which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women... of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.<sup>22</sup> The South African government ratified the Convention in 1995,<sup>23</sup> and in terms of international law is therefore bound by the obligations created by it.<sup>24</sup> The government recently prepared its first report for submission

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Perspectives 1994 532-571.

<sup>19</sup>This is illustrated by the provisions of the documents discussed infra.

<sup>20</sup>While it is acknowledged that both men and women are victims of domestic violence, it should also be recognised that the vast majority of victims are women. It is therefore considered appropriate to include international documents which specifically focus on violence against women.

<sup>21</sup> UN Doc A/RES/34/180 (1980). The Convention was adopted for signature and ratification and accession by the UN General Assembly on 18 December 1979 and entered into force on 3 September 1981.

<sup>22</sup>Article 1.

<sup>23</sup>Ratification took place on 15 December 1995.

<sup>24</sup>Ian Brownlie Principles of Public International Law 4 ed 1990 12. Section 231 of the 1996 Constitution deals with international agreements and sets out in subsection (2) that an international agreement binds the Republic after it has been approved by resolution in both the National Assembly and the National Council of Provinces.

to the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) as required under the Convention.<sup>25</sup>

4.2.2 Although at least six articles of the Convention relate to violence against women in an indirect manner,<sup>26</sup> the document does not expressly mention violence against women. Due to pressure exerted by women's organizations,<sup>27</sup> CEDAW adopted a general recommendation and comments explaining the interpretation of the Convention in order to cover violence against women and setting out the nature of government obligations.<sup>28</sup>

4.2.3 General Recommendation Number 19 states that the general prohibition of gender discrimination includes “gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately”. CEDAW confirmed that violence against women constitutes a violation of women’s human rights (including the rights to life, liberty and security of the person, equal protection under the law and equality in the family), and noted the following:

States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and to provide compensation.<sup>29</sup>

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<sup>25</sup>Convention on the Elimination of All Forms of Discrimination Against Women: First South African Report (1997). This report has been criticised for its failure to acknowledge the exact nature of state obligations relating to violence against women incurred under the Convention - see Masimanyane CEDAW Working Group NGO Shadow Report to CEDAW 1998 16.

<sup>26</sup>Articles 2, 3, 6, 11, 12, and 16. See Fitzpatrick 532.

<sup>27</sup>F Kathree “Convention on the Elimination of All Forms of Discrimination Against Women” 1995 SAJHR 426.

<sup>28</sup>General Recommendation 19 (11th session, 1992), UN Document CEDAW/C/1991/L/1/Add.15 1992.

<sup>29</sup>General Recommendation 19 (11th session, 1992), UN Document CEDAW/C/1991/L/1/Add.15 1992 3.

4.2.4 CEDAW also recommended that in order to fulfill their duties under the Convention, states must take all measures necessary to provide effective protection to women, including comprehensive legal, preventive and other measures.<sup>30</sup>

### **4.3 Declaration on the Elimination of Violence Against Women**<sup>31</sup>

4.3.1 This Declaration, adopted by the UN General Assembly in 1994,<sup>32</sup> defines the term “violence against women” to include “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women... whether occurring *in private or public life*”.<sup>33</sup>

4.3.2 Article 4 of the Declaration declares that states should condemn violence against women and should pursue by *all appropriate means and without delay* a policy of eliminating violence against women. It also lists a number of measures similar to the legal, preventive and protective actions set out under General Recommendation Number 19.<sup>34</sup>

### **4.4 Beijing Declaration and Platform of Action**<sup>35</sup>

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<sup>30</sup>General Recommendation 19 (11th session, 1992), UN Document CEDAW/C/1991/L/1/Add.15 1992 3-7.

<sup>31</sup>Declaration on the Elimination of Violence Against Women, GAOR 48th Session, 23 February 1994, UN Doc A/Res/48/104/1994.

<sup>32</sup>It should be noted that a resolution of the UN General Assembly is not a treaty, which states may ratify and be bound by, but rather a non-binding resolution which sets out a common international standard that member states of the United Nations should follow - Brownlie 14; however, such declarations may provide a basis for the speedy consolidation of rules of customary international law.

<sup>33</sup>Article 1. Emphasis added.

<sup>34</sup>See article 4(a) - (q).

<sup>35</sup>UN Doc A/Conf.177/20 (recommended to the UN General Assembly by the Committee on the Status of Women on 7 October 1995).



4.4.1 The Beijing Declaration and Platform of Action sees its function as “an agenda for women’s empowerment”.<sup>36</sup> While the Platform is not a legally binding document, it does embody solemn political commitments by states.

4.4.2 The Platform identifies areas of particular concern as priorities for action.<sup>37</sup> In each of these critical areas of concern, strategic objectives are proposed, with concrete actions to be taken by various actors in order to achieve these objectives.<sup>38</sup> It is proposed that all actors should focus action and resources on the stated strategic objectives.<sup>39</sup>

4.4.3 Violence against women is one of the critical areas of concern in which governments, the international community and civil society (including non-governmental organizations and the private sector) are called upon to take strategic action.<sup>40</sup> The first objective here embodies “integrated measures to prevent and eliminate violence against women”. These measures are similar to those set out in article 4 of the UN Declaration, with a number of additional provisions relating to the obligations to prevent, investigate, punish and compensate for acts of violence against women.<sup>41</sup>

4.4.4 South Africa participated officially in the Beijing Conference through a delegation led by Health Minister Dr Nkosazana Zuma, and the South African government adopted the Platform without reservations. In a speech to the Conference, Dr Zuma confirmed that the South African

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<sup>36</sup>Paragraph 1.

<sup>37</sup>These special concerns have emerged from a review of progress since the Nairobi Conference in 1985 - Paragraph 45.

<sup>38</sup>Paragraph 45.

<sup>39</sup>Paragraph 5.

<sup>40</sup>Paragraph 46.

<sup>41</sup>Paragraph 124. For example, states are required to adopt and/or implement and periodically review and analyse legislation to ensure its effectiveness in eliminating violence against women, emphasizing the prevention of violence and the prosecution of offenders - paragraph 124(d); states are also required to provide women who are subjected to violence with access to the mechanisms of justice - paragraph 124(g).

government pledged itself to the full implementation of this programme as a major step to achieve a non-sexist South Africa.<sup>42</sup>

#### **4.5. Report by Special Rapporteur on Violence Against Women**

4.5.1 In 1994 a Special Rapporteur on Violence against Women, appointed by the UN Commission on Human Rights, was tasked to report on the causes and consequences of violence against women and to recommend ways of eliminating such violence.<sup>43</sup> The Special Rapporteur's first report, specifically dealing with domestic violence, clearly states that in the context of norms recently established by the international community, a state that does not act against crimes of violence against women is 'as guilty as the perpetrators'.<sup>44</sup> States are placed under a positive duty to prevent, investigate and punish crimes associated with violence against women.

4.5.2 The Special Rapporteur has also proposed a model framework for domestic violence legislation.<sup>45</sup> This framework was extensively consulted in the drafting of the Bill.

#### **4.6 Evaluation**

It is clear that these international instruments contain both *legally binding obligations* (in the case of the Convention) as well as *persuasive guidelines* (in the case of the UN Declaration and the Beijing Platform). Guidance may be found in the provisions explicating state duties to prevent, investigate, punish and compensate for acts of violence against women.

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<sup>42</sup>Department of Welfare Report on the South African Government's Commitments Arising out of the Fourth Un Women's Conference, Beijing 1995 3.

<sup>43</sup>Human Rights Watch 42-43.

<sup>44</sup>Preliminary Report Submitted by the Special Rapporteur on Violence Against Women, its Causes and Consequences UN Document E/CN.4/1995/42, 22 November 1994 at 18.

<sup>45</sup>United Nations Economic and Social Council (Commission on Human Rights) Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences - a Framework for Model Legislation on Domestic Violence UN 1996.

#### **4.7 International law and the interpretation of the Bill of Rights**

4.7.1 Section 39(1)(b) of the Constitution, 1996 provides that a court, when interpreting the Bill of Rights, “must consider international law”. This section does not limit a court's enquiry to treaties to which South Africa is party or to rules of customary international law which have been accepted by the courts: South African courts will be required to consult all the sources of international law recognized by article 38(1) of the Statute of the International Court of Justice, viz international conventions, international custom, the general principles of law recognized by civilized nations and judicial decisions and teaching of publicists.<sup>46</sup>

4.7.2 This approach, endorsed by the Constitutional Court in **S v Makwanyane**,<sup>47</sup> implies that courts are not required to conduct an enquiry into whether a particular principle contained in one or more human rights conventions is backed by sufficient practice and *opinio juris* to qualify as a customary rule binding on South Africa. Instead, guidance may be sought in the language employed in multilateral human rights conventions and the decisions of convention-interpreting bodies.<sup>48</sup> This means that a court called on to interpret, for example, the right to freedom from violence, could find guidance in CEDAW's Recommendation No 19 or the provisions of the UN Declaration.

4.7.3 In developing understanding of the right to freedom of violence entrenched in section 12(1)(c) of the Constitution, 1996, guidance is likewise to be found in the international documents referred to above.

#### **4.8 Constitutional jurisprudence: the right to equality**

4.8.1 The importance of the right to equality in the overall context of the South African Constitution and the Bill of Rights has been emphasised repeatedly in judgments recently handed

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<sup>46</sup>Dugard 1994 SAJHR 212.

<sup>47</sup>1995 6 BCLR 665 (CC) 686.

<sup>48</sup>Dugard 1994 SAJHR 213.

down by the Constitutional Court. In **Fraser v Children’s Court, Pretoria North and Others**,<sup>49</sup> the Constitutional Court (per Mahomed DP) confirmed this:

There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised.<sup>50</sup>

4.8.2 Sections 9(1) and 9(3) of the Constitution, 1996 provide extensive protection of equality interests. The objective of section 9(1), which states that everyone “is equal before the law and has the right to equal protection and benefit of the law”, has been expressed as follows:

... the state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest “naked preferences” that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation.<sup>51</sup>

4.8.3 Whereas it is therefore permissible under certain circumstances for the state to differentiate between persons or groups of persons, section 9(1) ensures that this differentiation is not based on arbitrary or irrational considerations.<sup>52</sup>

4.8.4 Section 9(3) of the Constitution provides that “[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender [or] sex...”. The recent decision in **President of the Republic of South Africa v Hugo**<sup>53</sup> is indicative of a recognition by the court that the goal of equality will not necessarily be achieved by the *identical* treatment of different social groups in all circumstances:

[T]he impact of the discriminatory action [upon the particular people concerned] [must be considered in order] to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.<sup>54</sup>

<sup>49</sup>1997 2 BCLR 153 (CC).

<sup>50</sup>Paragraph 20. See also **Brink v Kitshoff** 1996 6 BCLR 752 (CC) paragraph 40.

<sup>51</sup>**Prinsloo v Van der Linde** 1997 6 BCLR 759 (CC) paragraph 26.

<sup>52</sup>See also **Harksen v Lane** 1997 11 BCLR 1489 (CC) paragraph 43.

<sup>53</sup>**President of the Republic of South Africa v Hugo** 1997 6 BCLR 708 (CC).

<sup>54</sup>Paraphrase 41.

4.8.5 The court's emphasis on the differential impact of an impugned law on different social groups is of specific significance in the context of domestic violence. A substantive<sup>55</sup> conception of equality requires the examination of the effects of domestic violence and an understanding that non-identical treatment may be necessary to address entrenched "patterns of group disadvantage and harm".<sup>56</sup>

4.8.6 It is acknowledged, as required under the Convention on the Elimination of All Forms of Discrimination Against Women, that domestic violence constitutes a major stumbling block to the attainment of women's equality. A recognition of the far-reaching implications of the equality guarantees in sections 9(1) and 9(3) also underlies the conviction that the definition of "domestic relationship" should be extended to include, for example, same-sex relationships.<sup>57</sup>

#### **4.9 The right to freedom from violence**

4.9.1 Section 12(1)(c) of the Constitution provides that "[e]veryone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources". The inclusion of the phrase "from either public or private

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<sup>55</sup>The distinction between formal and substantive equality can be described as follows: formal equality means sameness of treatment - the law must treat individuals in the same manner regardless of their circumstances. Substantive equality takes these circumstances into account: the law must ensure equality of outcome. See De Waal et al The Bill of Rights Handbook 1998 154-155; C Albertyn and J Kentridge "Introducing the Right to Equality in the Interim Constitution" 1994 SAJHR 149-178; T Loenen "The Equality Clause in the South African Constitution: Some Remarks from a Comparative Perspective" 1997 SAJHR 401-420. There can be little doubt that section 9 must be read as setting out *substantive* conception of equality - see eg **Brink v Kitshoff** 1996 6 BCLR 752(CC) paragraph 42.

<sup>56</sup>**Brink v Kitshoff** 1996 6 BCLR 752 (CC) paragraph 42.

<sup>57</sup>It may be argued that the present exclusion of same-sex relationships from the ambit of the Act constitutes a violation of both section 9(1) ( in that it denies equal protection of the law) and section 9(3) in that it unfairly discriminates against same-sex partners on the basis of marital status and sexual orientation.

sources” clearly indicates that this section guarantees the right to freedom from domestic violence. (This is especially significant in the light of the “traditional” tendency to relegate domestic violence to the private sphere.)

4.9.2 In terms of section 7(2) of the Constitution, 1996, the state is required to “respect, protect, promote and fulfil the rights in the Bill of Rights”. It may be said that the provisions of section 7(2), read with section 12(1)(c), impose a positive duty on the state to provide protection against and punish acts of domestic violence.

4.9.3 In this respect, international human rights jurisprudence is again significant. It has been held that states have certain positive duties to establish and maintain the necessary legal and extra-legal institutions and remedies through which human rights can be guaranteed,<sup>58</sup> and that states should exercise due diligence in the discharge of these duties to prevent violations of human rights by private parties.<sup>59</sup>

4.9.4 Section 7(1) of the Constitution provides that the Bill of Rights “[a]ffirms the democratic values of human dignity, equality and freedom”. It has been argued on the basis of this provision, read with s 9(3) of the Constitution, 1996, that the right to equality is the foundation of all other rights enshrined in the Bill of Rights, including the right to freedom from violence.<sup>60</sup> Since the right to equality, substantively conceived, requires a court to consider the effect of an impugned provision in the social context in which disadvantaged parties live, and since the right to equality is the foundation of the right to freedom from violence, it follows that the right to freedom from violence must also be interpreted *substantively*. A substantive conception of the right to freedom from violence therefore necessitates not only the prevention of domestic violence, but also the eradication of the detrimental effects of such violence on victims.

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<sup>58</sup>**Velasquez Rodriguez** Case Judgment of 27 July 1988, Inter-American Court of Human Rights, Ser C, Vol 4, paragraph 166.

<sup>59</sup>**Velasquez Rodriguez** Case Judgment of 27 July 1988, Inter-American Court of Human Rights, Ser C, Vol 4, paragraph 166.

<sup>60</sup>Submission to the Commission by UWC Community Law Centre.

4.9.5 The constitutional duty to provide protection from violence includes a duty to enact legislative provisions which, firstly, are effective and, secondly, do not subject victims of domestic violence to secondary victimization.<sup>61</sup> Further, it is necessary to address the *effects* of domestic violence in the social context in which victims find themselves. This recognition should be balanced with an awareness of the constitutionally protected rights of the perpetrator of domestic violence. This includes, for example, the right to access to justice and the rights of an accused person set out in the Constitution, 1996.

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<sup>61</sup>Secondary victimization can be defined as the unsympathetic, disbelieving, and inappropriate responses (exacerbating the effects of gender-based violence) that women experience at the hands of society in general and at each stage of the criminal justice process - S Stanton & M Lochrenberg Justice for Sexual Assault Survivors? 1995 1.

## 5. PROBLEMS IDENTIFIED IN ISSUE PAPER 2 ON FAMILY VIOLENCE<sup>50</sup>

### 5.1 The *audi alteram partem* rule

#### A. Excerpt from Issue Paper<sup>51</sup>

Although the aim of the Act is laudable, the manner in which it provides for interdicts appears to be seriously flawed. Concern has been expressed at the apparent disregard for the *audi alteram partem* rule. There seems to be a general feeling that this problem could be solved if a rule *nisi* - an interim order with a return date - were granted.

#### B. Problem analysis

5.1.1 Strong feelings have been expressed that the Act is an unjustified departure from the *audi alteram partem* principle - the common law right for both parties to a dispute to be heard.

5.1.2 Dicker<sup>52</sup> contends that disregard for the *audi alteram partem* principle may be seen from the fact that, according to section 2 of the Act, the judge or magistrate is required to grant a final interdict, with potentially serious repercussions (including, in effect, an eviction order) against a respondent without having heard him. *Audi alteram partem* comes into the picture, as far as the respondent is concerned, only after service of the interdict and orders upon him. He may apply for the amendment or setting aside of the order, and he is given a hearing at the enquiry into his alleged breach of the interdict and orders.

5.1.3 However, in both an application for the amendment or setting aside of the interdict and orders, and at an enquiry into his alleged contravention of the interdict and orders, he is saddled with an onus of satisfying the judge or magistrate, on a balance of probabilities, that the interdict should be amended or set aside or that he is not guilty of the contravention of the interdict, as the case may be. In addition, in terms of Regulation 5 the applicant in whose favour the interdict was

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<sup>50</sup>This Chapter follows the sequence of headings in the Issue Paper.

<sup>51</sup>Issue Paper at 5.

<sup>52</sup>L Dicker “The Prevention of Family Violence Act: Innovation or violation?” 1994 De Rebus 213.



granted actually has an opportunity to contest the application for amendment or setting aside of the interdict before the application is considered or granted.

5.1.4 Dicker<sup>53</sup> concludes that the Act provides protection to the victims of violence within the family context “at an unacceptably high price”, and that the procedure provided in the Act and Regulations is so deficient that it might be struck down “when measured against an enshrined right to due process under a new constitution”.<sup>54</sup>

5.1.5 Fredericks & Davids<sup>55</sup> assert that it is clear that the Act violates the *audi* principle since the interdict is issued immediately but suspended. Temporary disregard of the *audi* principle may be warranted in suitable cases but the Act does not limit the right to *audi alteram partem* in accordance with section 33 (limitation clause) of the Constitution, 1993. The provisions are accordingly unconstitutional.

5.1.6 Stewart<sup>56</sup> supports some of Dicker’s arguments and discusses additional procedural and evidentiary difficulties experienced when attempting to have an interdict, issued in terms of the Act, set aside. She warns that<sup>57</sup>, because the Act shows a “blatant disregard of the application of natural justice”, it will be “struck down as unconstitutional in the near future” unless it is amended.

5.1.7 Stewart<sup>58</sup> argues that interim interdicts would be a more practical and just solution, especially in view of the fact that the legislature intended these remedies to be of a quick and

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<sup>53</sup>Dicker 1994 De Rebus 215.

<sup>54</sup>J D Sinclair The Law of Marriage Vol I Kenwyn: Juta 1996 136 fn 365 points out that there is no obvious due process clause in the Constitution, 1993 (Constitution of the Republic of South Africa Act 200 of 1993). Yet it does not seem unrealistic to read due process in section 11(1) (freedom and security of the person) and it may also be possible to argue that due process may be read into section 8(1) (equal protection of the law).

<sup>55</sup>I N Fredericks & L C Davids “The Privacy of Wife Abuse” 1995 TSAR 471 489.

<sup>56</sup>F Stewart “Family Violence Act Causes ‘Nightmarish’ Problems” 1994 De Rebus 721.

<sup>57</sup>Stewart 1994 De Rebus 722.

<sup>58</sup>Stewart 1994 De Rebus 722.

interim nature. She points out<sup>59</sup> that a magistrate in deciding on whether to set aside an interdict, is obliged to accept the original applicant's version of any facts in dispute as correct. Only the respondent's (applicant for setting aside the interdict in terms of section 2(2)(c) ) unopposed allegations should be accepted as correct by the magistrate. In order to convince the magistrate to set aside the interdict, the respondent is forced to deal with the allegations of fact on which the applicant originally relied. If the respondent placed the facts in the founding papers in dispute, his version would automatically be rejected, as those facts had already been accepted in the initial application for the interdict. Yet how would the respondent ever discharge the onus on him of proving that the interdict should be set aside without dealing with the allegations of fact originally set out in the applicant's founding affidavit?<sup>60</sup>

5.1.8 It is submitted<sup>61</sup> that applications to set aside interdicts should be treated on the same principles as interim interdicts; that is, the facts of the initial interdict are disregarded and, once the respondent makes certain allegations of fact, these are accepted as correct unless conclusively placed in dispute by the applicant in her replying affidavit. The applicant then cannot rely simply on her initial affidavit (which might be exaggerated or blatantly incorrect). In addition it also

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<sup>59</sup>Stewart 1994 De Rebus 721.

<sup>60</sup>This argument is in accordance with the **Rutenberg** case (1997 4 SA 735 (C) 752) in which Thring J remarked as follows :

It can safely be assumed that in most cases there will be material disputes of fact arising out of the respondent's denials of the allegations made by the original applicant in applying for the interdict. . . the respondent's application to have the interdict set aside would have to fail, for it would have to be decided on the basis of the original applicant's (the now respondent's) disputed facts, despite the fact that it was the original applicant who initially bore the onus of satisfying the magistrate that the facts deposed to by him or her were true. The original respondent would, of course, have to labour under the additional disadvantage that regulation 5 makes no provision for him or her to "lodge" a replying affidavit. Moreover, unlike the original applicant, he or she would not be entitled to bring his or her application *ex parte* (see regulation 5(4) and (5)).

<sup>61</sup>Stewart 1994 De Rebus 722.

forces her to raise disputes of fact, confirming that the respondent is a threat and therefore justifying the interdict order.<sup>62</sup>

5.1.9 Novitz<sup>63</sup> suggests that the objection to the *ex parte* application could simply be overcome by including a notional return date. Either magistrates could impose such a date or legislative amendment could include a return date in the Act. She submits, however, that such an amendment while arguably desirable is not overly compelling as it is always open to the respondent to seek amendment or setting aside of the interdict on 24 hours' notice (section 2(2)(c) of the Act).

5.1.10 In reaction to Dicker<sup>64</sup>, Coetzee<sup>65</sup> points out that the *audi alteram partem* rule is not always applied, or not always applied strictly. In exceptional circumstances natural justice does not require that the respondent be given an opportunity to be heard before the decision is taken. In **Administrator, Transvaal v Traub**<sup>66</sup> Corbett CJ held as follows:

Generally speaking . . . the *audi* principle requires the hearing to be given before the decision is taken by the official or body concerned . . . Exceptionally however, the dictates of natural justice may be satisfied by affording the individual concerned a hearing after the prejudicial decision has been taken . . . This may be so, for instance, in cases where the party making the decision is necessarily required to act with expedition, or where for some other reason it is not feasible to give a hearing before the decision is taken.<sup>67</sup>

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<sup>62</sup>This suggestion is echoed by B Clark "Cold Comfort? A Commentary on the Prevention of Family Violence Act" 1996 SAJHR 587 595.

<sup>63</sup>T Novitz "Interdicts in the Magistrates' Courts: An Analysis of the Content and Implementation of the Prevention of Family Violence Act", document produced for the Law, Race and Gender Project at the University of Cape Town, September 1994 at 51.

<sup>64</sup>Paragraph 5.1.2 - 5.1.4 above.

<sup>65</sup>M Coetzee "Die Wet op die Voorkoming van Gesinsgeweld, 1993: Noodsaaklik, Tydig en Vernuwend" 1994 De Rebus 623.

<sup>66</sup>1989 4 SA 731 (A) 750.

<sup>67</sup>Commenting on Coetzee's reliance on the **Traub** case to justify the deviation from natural justice rules in the Act, Stewart 1994 De Rebus 722 submits that a more valid interpretation of the **Traub** case would be that natural justice rules may be temporarily dispensed with when urgency demands - that is, in the granting of an urgent interim interdict.

5.1.11 Coetzee<sup>68</sup> submits that the unique relief which is sought in terms of the Act, as well as the urgent nature thereof, justifies a departure from the general *audi* rule. He submits that the Act does not negate the *audi* rule, but alters it to satisfy the needs of society. The respondent is given an opportunity to react to the allegations against him at a later stage. In **Visagie v State President**<sup>69</sup> it was held as follows:

When expedition is required, it might be necessary not to give the affected person the opportunity of presenting his case prior to the decision, but only after. He thus obtains the opportunity of persuading the official to change his mind.

5.1.12 Burman<sup>70</sup> argues that if the enormity of family violence, the deleterious effect on the victim and the harm to the community are taken into account, extraordinary, even revolutionary, measures are needed to prevent yet further violence on those so vulnerable. There are in any event very severe penalties for perjury, maliciously setting the law in motion and other common law crimes linked with abuse of the judicial system which should act as a deterrent.

5.1.13 In the **Rutenberg** case<sup>71</sup> Thring J gave an incisive exposition of the granting of interdicts in our law and the application of the *audi alteram partem* principle to the Act. It is deemed necessary to quote extensively from the judgment:

First, our Courts do not, as a general rule, grant even interim or provisional interdicts *ex parte* unless a case of urgency is made out by the applicant concerned. Whilst it must immediately be conceded that in many applications for interdicts brought under the Act there will be genuine urgency present, this will not always be the case . . . a departure from the accepted requirement of notice could not normally be justified.

Secondly, it is not the practice of our Courts to grant final interdicts *ex parte*, even where urgency is present: in such cases, the almost invariable practice is for a rule *nisi* to issue, which is then served on the respondent, and in which he or she is afforded an opportunity, on the return day, to show cause before the Court why the rule should not be made final. To protect the applicant's rights in the meantime, a provisional order is granted which operates as an interim interdict. On the return day, the respondent bears no onus: it is for the applicant to persuade the court that he or she should be granted final relief.

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<sup>68</sup>Coetzee 1994 De Rebus 625.

<sup>69</sup>1989 3 SA 859 (A) 865.

<sup>70</sup>D Burman "Prevention of Family Violence Act: Criticism Misses the Point" 1994 De Rebus 317.

<sup>71</sup>1997 4 SA 735 (C) 752 - 753.

5.1.14 The judge continued by referring to the “potentially grossly inequitable results” which could ensue if the Act were strictly applied:<sup>72</sup>

Those results are even more startling when regard is had to the fact, first, that the final interdict granted under section 2(1) may enjoin the respondent not to commit “any other act” specified in the interdict ( section 2(1)(d) ): thus, for example, if the parties are both employed at the same premises, and there is a complaint by the applicant that the respondent harasses him or her at work, the respondent could be finally prohibited, in perpetuity, from entering the premises of his or her employer, with obviously far-reaching consequences, including, probably, the loss of his or her employment. Secondly, in terms of section 2(1)(b) the respondent may be finally enjoined, in perpetuity, “not to enter the matrimonial home . . . or a specified area in which the such home . . . is situated.” This is tantamount to an *ex parte* ejection of the respondent forever from what may be his or her own property. Moreover, he or she may similarly be prohibited even from entering the area in which his or her erstwhile home is situated. Thirdly, and again on the strength of the applicant’s *ex parte* application, it is mandatory for the magistrate to authorise the issue of a warrant for the respondent’s arrest (section 2(2)(a) ) . . . consequently, from that moment the respondent is in jeopardy of being arrested and incarcerated for up to 24 hours. Again, the arrest will be effected on the untested strength of an affidavit placed before a policeman without notice to the respondent, in which it is stated that the latter has breached “ any of the conditions” contained in the relevant order (section 3(1) ).

5.1.15 Thring J conceded<sup>73</sup> that there would be cases where the granting of the kind of interdict envisaged under the Act would be amply justified in the circumstances. However, he found it startling that it could have been suggested that the legislature had intended that there should have been such fundamental departures from those procedures as a matter of course, in every case brought under the Act. That would have resulted in the Act and Regulations having created legal machinery which would have been crude, potentially highly unfair, unjust and unreasonable to respondents, inviting abuse by unscrupulous applicants and, furthermore, that the legislature had intended that machinery to be used rigidly in every case brought under the Act. Although Thring J had no doubt that the Act was prompted by the highest and most noble of motives, viz to combat the battering of women and children within the family circle, he held that it could not have been Parliament’s intention to achieve that objective at the price of a wholesale and probably unconstitutional denial of procedural justice of all alleged perpetrators of such conduct.

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<sup>72</sup>**Rutenberg v Magistrate, Wynberg** 1997 4 SA 735 (C) 753.

<sup>73</sup>**Rutenberg v Magistrate, Wynberg** 1997 4 SA 735 (C) 753 - 754.

5.1.16 Thring J concluded his judgment concerning the application of the *audi alteram partem* rule to the Act as follows:<sup>74</sup>

It is only in exceptional cases, for example, where there is urgency, where the *audi alteram partem* rule will be departed from, and even then final relief will not usually be granted until parties who will be materially affected by the order sought have been afforded an opportunity to be heard . . . Thus the *ex parte* procedure for granting final relief which is apparently sanctioned in section 2(1) of the Act, read with regulation 2 and the relevant prescribed forms, constitutes a radical departure from the *audi alteram partem* rule, which is regarded in our law as a fundamental tenet of natural justice. This being so, it seems to me that the legislature must be taken to have intended that procedure to be used very sparingly, and only in those cases where a departure from the ordinary procedure is clearly justified in the circumstances of a particular case.

There is nothing . . . in the Act or regulations to prevent a magistrate, in his discretion, when dealing with an application for an interdict under section 2(1) of the Act, from declining to grant the interdict *ex parte*, that is to say, refusing to grant it until the respondent concerned has been given what the magistrate regards as proper prior notice of the application. There is also . . . no reason why, in an appropriate case, the magistrate should not, again, at his discretion, in granting an *ex parte* application, follow the procedure laid down in Magistrate's Court Rule 56(5)(a) and issue a rule *nisi* calling upon the respondent to show cause on the return day of the order why the provisional interdict being granted against him should not be made final. In such a case the procedure provided in section 2(2)(c) of the Act for amending or setting the interdict aside would simply be an additional remedy open to the respondent. Nowhere in the Act or regulations am I able to find any prohibition against the following of this, the normal procedure expressly prescribed by the Magistrate's Court Rule 56(5)(a): the effect of the Act and regulations in this regard . . . is no more than to provide that a magistrate **may** depart from it if, in the circumstances, he sees fit to do so; not that he **must**. (Own underlining.)

5.1.17 The judge emphasised<sup>75</sup> that he was not saying that a judge or magistrate should in all cases brought under the Act apply the normal procedure. There might be instances in which a departure therefrom would be justified, in the particular circumstances. In such cases the judge or magistrate concerned was afforded the discretionary power by the Act to depart from the normal procedure, if he saw fit to do so. The power should, however, be sparingly and carefully exercised.

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<sup>74</sup>**Rutenberg v Magistrate, Wynberg** 1997 4 SA 735 (C) 754 - 755.

<sup>75</sup>**Rutenberg v Magistrate, Wynberg** 1997 4 SA 735 (C) 755.

5.1.18 Lehmann<sup>76</sup> observes that Thring J's judgment has succeeded in sowing confusion amongst magistrates' courts in the Western Cape. Whereas certain courts continue as a matter of course to grant family violence interdicts in accordance with the provisions of the Act, others first grant rules *nisi*, and only in urgent cases family violence interdicts. Disquietingly, it is reported that some magistrates refuse to grant even rules *nisi*, insisting on proper notice as a matter of course. This lack of uniformity is not only undesirable as a matter of policy, but may be of considerable practical consequence to applicants.<sup>77</sup>

5.1.19 In **Robinson v Rossi**<sup>78</sup> Stegmann J was also thoroughly disconcerted by the family violence interdict granted in terms of the Act. He interpreted the procedure under the Act as follows:<sup>79</sup>

When an application under section 2 of the Act is brought to a judge (or magistrate) in chambers, his first duty is to consider whether a *prima facie* case has been made out for the proper use of his powers under the Act to grant a summary interdict *ex parte* . . . The ordinary rule of practice is, of course, to follow the requirement of natural justice: *audi alteram partem*; or at least give the respondent the opportunity to be heard before an interdict is ordered and the issue of the associated warrant of arrest is authorised; and not to depart from that requirement unless there are substantial grounds for believing that prior notice to the respondent would be likely to precipitate the very evil which the

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<sup>76</sup>K Lehmann "Rutenberg v Rutenberg" 1997 SAJHR 154 158.

<sup>77</sup>Following the **Rutenberg** judgment, the Western Cape branch of the National Institute for Crime Prevention and the Rehabilitation of Offenders (NICRO) conducted an investigation into the effectiveness of interdicts granted in terms of the Act (J Keen & C Vale An Investigation into the Effectiveness of Interdicts granted in terms of the Prevention of Family Violence Act 133 of 1993 NICRO 1997). The research findings are based on data taken from one hundred women who applied for interdicts at the seven courts in the Cape Town area. NICRO notes that since the **Rutenberg** case, the tendency in the Western Cape is not to grant final interdicts with suspended warrants of arrest, but rather to grant temporary interdicts with return dates and with no suspended warrants of arrest, or to give the applicant and the respondent notice to appear in court to have the final interdict issued. NICRO expresses the concern that the practice of issuing temporary interdicts without the suspended warrant of arrest leaves the victim just as vulnerable to abuse as before she applied for the interdict, or even more so.

<sup>78</sup>1996 2 All SA 349 (W).

<sup>79</sup>**Robinson v Rossi** 1996 2 All SA 349 (W) 364 - 365.

applicant has come to court to try to forestall . . . A judge (or magistrate) in chambers . . . will only accede to the applicant's request if he is satisfied that there is good reason to believe that giving prior notice to the respondent would be likely to precipitate the evil which the applicant seeks to avert . . .

5.1.20 If the grant of a *ex parte* order does not appear to be justified:<sup>80</sup>

The is nothing in the Act which disempowers a judge (or a magistrate) from doing what the rules of natural justice, and every instinct implanted by his training and experience, enjoin him to do *viz* before he makes any order affecting the rights of liberties of any person, to give that person a reasonable opportunity to put his side of the case . . . the Act does not disable a judge (or magistrate) in chambers from adopting a more flexible approach and using his discretion to direct that the matter should be dealt with as seems most appropriate to the circumstances of the case . . .

5.1.21 Stegmann J went on to describe the procedure under the Act as "draconian":<sup>81</sup>

Section 2(1) of the Act makes provision for the grant upon an *ex parte* application of an interdict which, unless set aside at the instance of the respondent, will apparently be a final interdict, enforceable against the respondent for all time to come . . . a warrant of arrest *must* be issued and conditionally suspended under section 2(2). The respondent is thereby secretly delivered into the hands of the applicant until she chooses to strike at him . . . The provision is rightly to be regarded a Draconian. Therefore it seems to me that a judge or magistrate, when approached to grant such an order *ex parte*, should always require to be satisfied that some impending peril is likely to be precipitated by prior notification to the respondent that the interdict is to be applied for, before acceding to the request for an *ex parte* order. It is important to remain alive to the essential injustice involved in making an order which is calculated to affect the freedom of another person without having observed the rule of natural justice enshrined in the maxim *audi alteram partem*.

5.1.22 The *obiter* view was held<sup>82</sup> that the High Court could look outside the Act and, in the exercise of its ordinary jurisdiction, grant the applicant a temporary interdict pending the outcome of a further hearing at which the decision to grant or refuse final relief is to be made.

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<sup>80</sup>**Robinson v Rossi** 1996 2 All SA 349 (W) 366.

<sup>81</sup>**Robinson v Rossi** 1996 2 All SA 349 (W) 372.

<sup>82</sup>**Robinson v Rossi** 1996 2 All SA 349 (W) 375 - 376.



5.1.23 Barnes<sup>83</sup> concludes that the effect of **Rutenberg v Magistrate, Wynberg**<sup>84</sup> and **Robinson v Rossi**<sup>85</sup> is to deprive the Act of all meaning. She asserts that Thring J and Stegmann J do not consider domestic violence a serious issue. Nor do they consider do they consider domestic violence to be inherently urgent. Thring J and Stegmann J's obliviousness to the seriousness of domestic violence explains their disconcertion at the Act's novel interdict procedure. The judges' trivialisation of domestic violence caused them to be affronted at the family violence interdict and to circumscribe it out of existence. According to Barnes,<sup>86</sup> on the ground the effect of these decisions has been dramatic and the family violence interdict has been flung into a state of utter confusion. Some judicial officers continue to follow the provisions of the Act. Many, however, now follow ordinary court rules, granting either interim interdicts with rules *nisi*, or mandatory lengthy application proceedings.

5.1.24 Barnes<sup>87</sup> emphasises that the judgments assume the interdict granted in terms of the Act to be final. If it were interim, it would violate the *audi alteram partem* rule no more than do all interdicts granted *ex parte* in South African law. However, she cautions<sup>88</sup> that an interim interdict without a warrant of arrest is not an acceptable option for battered women, since it leaves them in danger without enforceable legal protection unless and until confirmation.

### C. Comparative survey of laws

*United Nations framework for model legislation on domestic violence*<sup>89</sup>

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<sup>83</sup>H Barnes An Evaluation of the Effectiveness of the Family Violence Interdict LLM Research Dissertation 1997 46 - 48.

<sup>84</sup>1997 4 SA 735 (C).

<sup>85</sup>1996 2 All SA 349 (W).

<sup>86</sup>Barnes 50.

<sup>87</sup>Barnes 49.

<sup>88</sup>Barnes 53.

<sup>89</sup>United Nations Economic and Social Council (Commission on Human Rights) Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences - a Framework for Model Legislation on Domestic Violence United Nations 1996 paragraph 36.

5.1.25 Emergency relief would include an *ex parte* temporary restraining order, to remain in effect until a court order is issued but for not more than 10 days after the *ex parte* temporary restraining order has been issued.<sup>90</sup> On 24 hours' notice to the plaintiff, the defendant may move for a dissolution or modification of the temporary restraining order.<sup>91</sup> Judges should be required to conduct hearings within 10 days of the complaint and application for a protection order.

#### *England*

5.1.26 The Law Commission (England)<sup>92</sup> emphasises that there are a number of inherent drawbacks to *ex parte* orders. The danger of misconceived or malicious application being granted or the risk of some other injustice being done to the respondent is inevitably greater where the court has only heard the applicant's side of the story and the respondent has had no opportunity to reply. Also, on *ex parte* applications, the judge has no opportunity to try and resolve the parties' differences by agreed undertakings or otherwise to reduce the tension of the dispute. Equally, there is no opportunity to bring home the seriousness of the situation to the respondent and to underline the importance of complying with the order.

5.1.27 The Law Commission (England), however, points out that despite the accepted need for caution, it is well recognised that there are occasions when *ex parte* orders are both necessary and desirable. In cases of imminent physical violence it is difficult to think of a more compelling justification, in a proper case, for permitting concern about the inherent dangers of *ex parte* orders to be outweighed. It accordingly recommends<sup>93</sup> that the court should retain a general discretion to grant orders without prior notice to the respondent where in all the circumstances it would be just and convenient. There should, however, be a requirement to take the following factors into account:

- (a) The risk of significant harm to the applicant or a child if the order is not made immediately.

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<sup>90</sup>UN Framework paragraph 30.

<sup>91</sup>UN Framework paragraph 31(c).

<sup>92</sup>The Law Commission (England) Report on Family law, Domestic Violence, and Occupation of the Family Home Law Com. No. 207 London: 1992 42.

<sup>93</sup>Law Com. No. 207 44.

- (b) Whether it is likely that the applicant will be deterred or prevented from pursuing the application if an order is not made immediately.
- (c) Whether there is reason to believe that the respondent is aware of the proceedings but is deliberately evading service and the applicant or a child will be seriously prejudiced by the delay involved in effecting service or substituted service.

### *Australia*

#### *The Australian Capital Territory*

5.1.28 An *ex parte* interim order may be obtained at short notice. The order is valid for 10 days.<sup>94</sup>

#### *New South Wales*

5.1.29 An *ex parte* interim order may be obtained quickly. The defendant is summoned to appear at a hearing as soon as possible, at which hearing the court may either confirm, vary or revoke the order.<sup>95</sup>

#### *Northern Territory*

5.1.30 The court may grant an *ex parte* interim order. The defendant is summoned to show cause why the order should not be confirmed.<sup>96</sup>

#### *Queensland*

5.1.31 An *ex parte* interim order (which is called a “temporary order”) may be obtained quickly. The order usually lasts for 30 days but may be extended.

#### *South Australia*

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<sup>94</sup>J A Riordan (Editor in chief) The laws of Australia (Title 17 Family Law) Sydney: The Law book Company 1995 paragraph [61].

<sup>95</sup>Laws of Australia paragraph [65].

<sup>96</sup>Laws of Australia paragraph [69].

5.1.32 An interim *ex parte* order may be made at short notice. After such an order is made the defendant is summoned to appear to show cause why the order should not be continued. An interim order is binding once it is served on the defendant<sup>97</sup>.

*Tasmania*

5.1.33 An interim *ex parte* order may be made by the court at short notice in emergency cases. The order, which is not binding until served, operates for a maximum of 60 days or until further order of the court.<sup>98</sup>

*Victoria*

5.1.34 An *ex parte* interim order may be made in emergencies. An interim order is binding on the defendant once it is served. The order operates for the time specified by the court or until a further order is made.<sup>99</sup>

*Western Australia*

5.1.35 An interim *ex parte* order may be made at short notice. The order is binding on the defendant once it has been served. The defendant is summoned to show cause why the order should not be confirmed.<sup>100</sup>

*Canada*

*Alberta*

5.1.36 To obtain a restraining order *ex parte*, the applicant must clearly demonstrate a situation of urgency. It must be established that taking the time to give notice would compromise the safety of the applicant or the applicant's children. The inference of an apprehension of immediate danger

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<sup>97</sup>Laws of Australia paragraph [77].

<sup>98</sup>Laws of Australia paragraph [81].

<sup>99</sup>Laws of Australia paragraph [85].

<sup>100</sup>Laws of Australia paragraph [89].

must be borne out by the information contained in the affidavit.<sup>101</sup> The Alberta Law Reform Institute<sup>102</sup> concludes that emergency conditions would obviously have to be present before an order would be given on an *ex parte* basis. It should be possible to grant an emergency *ex parte* order if it has been determined that domestic abuse has occurred or has been threatened; and the order is needed immediately to protect the safety of the claimant or of a child to the claimant or a child for whom the claimant has parental responsibility.<sup>103</sup>

### *New Zealand*

5.1.37 A protection order may be made on an application without notice if the court is satisfied that the delay that would be caused by notice would or might entail a risk of harm or undue hardship to the applicant or a child of the applicant's family or both. A protection order made on application without notice is a temporary order that becomes final by operation of law three months after the date on which it is made. The respondent may notify the court that he wishes to be heard on whether a final order should be substituted for the temporary protection order.<sup>104</sup> A hearing date must then be assigned which must be as soon as is practicable but not later than 42 days after receipt of the respondent's notice.<sup>105</sup> The court may also of its own motion require a hearing before the order becomes final.<sup>106</sup>

### *USA*

5.1.38 Professor J T R Jones,<sup>107</sup> Associate Professor of Law at the University of Louisville School of Law, maintains that family violence situations are extraordinary ones in all cases, justifying the

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<sup>101</sup> Alberta Law Reform Institute Domestic Abuse: Toward an Effective Legal Response Report for discussion No 15 Alberta: Alberta Law Reform Institute 1995 15 - 16.

<sup>102</sup> ALRI Report for Discussion No 15 53.

<sup>103</sup> Alberta Law Reform Institute Protection Against Domestic Abuse Report No 74 Alberta: Alberta Law Reform Institute 1997.

<sup>104</sup> Domestic Violence Act 86 of 1995, section 13.

<sup>105</sup> Domestic Violence Act 86 of 1995, section 76.

<sup>106</sup> Domestic Violence Act 86 of 1995, section 78.

<sup>107</sup> Submission to the Commission.

temporary *ex parte* issuance of interdicts notwithstanding the usual rule of *audi alteram partem*. Jurisdictions in the USA long have recognised this fundamental fact, and as a result grant protective orders (the USA equivalent to family violence interdicts) on an *ex parte* basis despite the principles of USA due process law which are equivalent to *audi alteram partem*.

#### **D. Recommendation 1 in Discussion Paper 70**

5.1.39 In Discussion Paper 70 it was recommended that the legislation provide:<sup>108</sup>

- (a) For the granting of interim interdicts *ex parte* and a rule *nisi* calling upon the respondent to show cause on the return day of the order why the provisional interdict granted against the respondent should not be made final.
- (b) That the presiding officer shall grant an interim interdict unless he or she is convinced that a *prima facie* case has not been made out.
- (c) That the fact that the respondent has not been given prior notice of the application shall not be a ground for refusing to grant an interim interdict.

#### **E. Submissions on Recommendation 1 in Discussion Paper 70**

##### *General*

5.1.40 It is interesting to note that the Law Commission investigation into the problem of domestic violence stemmed from a concern, not with the rights of the applicant, but rather with the potential infringement of the rights of the respondent. The procedure provided for in the Act is indisputably the most contentious of all its provisions. As a result, the recommendation to provide for an interim interdict to be confirmed on a return day seems, in principle, to be supported by the majority of respondents to the Discussion Paper. Only four respondents, three of whom are NGO's, do not support the recommendation.

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<sup>108</sup>Discussion Paper 70 paragraph 3.1.60.

*Interim orders versus final orders*

5.1.41 Many of the respondents who support the recommendation assume that the Act is unconstitutional. It is on this basis that many accept that the new procedure of granting interim interdicts is preferable. However, four of the respondents, namely, *The Black Sash, P Thwala, Tshwaranang Legal Advocacy Centre to end violence against women*, and *UWC Community Law Centre* question this premise, claiming that only the Constitutional Court of South Africa can make a final determination of this question, and until such time as it declares the procedure outlined in the Act to violate the respondent's rights, the Act is constitutional. These respondents claim that it is certainly arguable that the rights of the respondent can be limited by the rights of the applicant. One respondent, *Tshwaranang* claims that even if the procedure of granting final interdicts *ex parte* is a violation of the *audi alteram partem* rule, it is nonetheless a reasonable and justifiable limitation in terms of section 36 of the Constitution, since the applicant's rights to equality (section 9), human dignity (section 10) and freedom and security of the person (section 12) outweigh the respondent's rights. *The Black Sash* and *P Thwala* endorse this by submitting that the *audi* rule can be flouted to protect the interests of an abused person. *Tshwaranang* investigated the possibility of approaching the Constitutional Court for a declaration of rights to have section 2(2) of the Act declared constitutionally sound, however this process was temporarily suspended in the light of the Law Commission's investigation.

5.1.42 *The Department of Justice's Gender Unit* supports a system which allows final interdicts to issue at *ex parte* hearings, at least in some circumstances. The Unit proposes a procedure whereby an interim interdict is granted at the *ex parte* hearing and this becomes automatically final unless challenged by the respondent during a certain period. Another variation would be to allow final orders to be issued in some cases where the terms of the interdict are simple and do not impact on fundamental rights of the respondent.

5.1.43 *The Laws and Administration Committee of the General Council of the Bar* submits that the applicant must show sufficient cause why prior notice is not given to the respondent and she should have the onus to prove to the court that the prerequisite of prior notice could be dispensed with. If the applicant does not succeed with this requirement, the court could order that prior notice be given to the respondent before deciding on the matter.

5.1.44 The *Magistrate: Mitchells Plain* states that it often happens that either the applicant or respondent appears on the return date. When the respondent appears alone and indicates that he wants to oppose the application it becomes problematic. Logic and fairness (and provisions of the Magistrates' Courts Act) dictate that he must succeed in having the interim order set aside by default. The non-appearance of the applicant might, however, be a result of unforeseen circumstances (even threats of the respondent). The *Magistrate: Mitchells Plain* suggests that the interim order remain in force for a certain period after non-appearance and only then automatically cease to exist in the absence of reaction from the applicant.

5.1.45 The *Magistrates: Paarl* and *Durban* claim that the interim interdict should only be granted upon proof of urgency and not as a matter of course, in the same way as is the case with ordinary *ex parte* applications. Often no reason exists for the granting of an interdict before the matter has been aired properly. (*Magistrate: Paarl.*) The *audi alteram partem* rule would best be served if provision is made for motion proceedings. *Ex parte* applications should only be granted if there is some good reason for them in preference to motion proceedings. (*Magistrate: Durban.*)

5.1.46 The *Magistrate: Wynberg* makes a suggestion which seems to compromise between the two poles. He claims that a balance of the rights of the applicant and respondent could be struck by the granting of an interim interdict on notice to the respondent and the granting of a final order without notice to the respondent.

5.1.47 The *Association of Law Societies* and *Natal Law Society* stress the importance of ensuring that not only an interdict, but also a warrant of arrest be granted at the rule *nisi* stage. An interdict without a warrant of arrest has no teeth.

*Return day when interdict will be made final*

5.1.48 Some of the respondents express concern that the recommendation providing for an interim interdict would impact negatively on the very women the legislation is aimed at assisting. The *Department of Justice Gender Unit* submits that any legislative scheme which always requires the applicant to attend court twice to obtain protection against domestic violence is oppressive to the victim. Considering the difficulties faced by many South African women in obtaining



transport, it can be assumed that many applicants will not have the resources to return to court. The *Magistrate: Mitchell's Plain* simply raises the difficult procedural question facing a magistrate where one of the parties does not appear on the return day.

5.1.49 *Tshwaranang Legal Advocacy Centre* raises a host of problems that could arise on the return day. Firstly, will either or both parties be entitled to legal representation and if so, what are the potential discriminatory effects of legal representation of the respondent, but not the applicant? Secondly, no guidelines have been given for the basis on which a court 'may' grant or set the interdict aside and magistrates may therefore apply the criminal standard of proof, making it unlikely that many interdicts will be granted. *Tshwaranang* recommends that magistrates provide written reasons for a refusal of an interdict and that all refused applications go on automatic review. Thirdly, that it is unfair to allow the respondent a number of opportunities to bring the applicant before the court - he should only be given one opportunity to have the interdict set aside. Therefore, if a return day is provided for, the respondent should not be able to return to court at a later date to have the interdict set aside. To allow a respondent to return to court at any time to have the interdict set aside negates the possibility for the applicant of a stable existence under the protection of the interdict as she will constantly live in fear that her protection may be withdrawn. Fourthly, what happens when the court sets the interim interdict aside? Provision needs to be made to protect an applicant who has, for one reason or another, not been able to ensure that the interim interdict is confirmed.

#### *Onus of proof on the return day*

5.1.50 Some of the respondents identify that the procedure on the return day places the onus of proof on the respondent to show cause why the order should not be made final. *ML Kennedy* claims that this is an unwarranted shifting of burden of proof and that the applicant should bear the onus of proving on a preponderance of probabilities why it should be final.

#### *Magisterial discretion*

5.1.51 Respondents are divided over the question of magisterial discretion. Magistrates feel that the magistrate's discretion should be unfettered. For example, the *Magistrates: Pietermaritzburg* and *Pretoria North* claim that recommendation 1(b) limits the court's discretion and it should read

that the presiding officer "may" grant an interim interdict. However, NGO's who responded claim that untrained magistrates should not be left with an unfettered discretion, and that it is precisely magisterial discretion that lies at the root of many of the problems experienced by women in vindicating their rights under the present Act. This view is endorsed by the *Department of Justice Gender Unit* which submits that where there has been a finding of domestic violence, the granting of an interdict should be mandatory.

5.1.52 Recommendation 1 in Discussion Paper 70 is endorsed by:

*Cape Law Society*

*M Horton (Research advisor in the Deputy Ministry of Justice)*

*NICRO, Western Cape*

*SA National Council for Child and Family Welfare (57 respondents)*

*The Women's Lobby*

*UWC Community Law Centre*

## **F. Evaluation**

5.1.53 It is obvious that in many applications for protection orders there will be genuine urgency present, thus justifying the granting of protection orders *ex parte*. As argued by the Law Commission (England),<sup>109</sup> in cases of imminent physical violence it is difficult to think of a more compelling justification, in a proper case, for permitting concern about the inherent dangers of *ex parte* orders to be outweighed. Other jurisdictions recognise the granting of orders made without notice provided that a situation of urgency is demonstrated.<sup>110</sup>

5.1.54 In the **Rutenberg** case<sup>111</sup> it was held that urgency would not always be present and that a departure from the accepted requirement of notice could not normally be justified. Thring J concluded<sup>112</sup> that there was nothing in the Act or regulations to prevent a magistrate, in his

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<sup>109</sup>See paragraph 5.1.27 above.

<sup>110</sup>See paragraph 5.1.25 et seq above.

<sup>111</sup>See paragraph 5.1.13 above.

<sup>112</sup>See paragraph 5.1.16 above.

discretion, from declining to grant the interdict until the respondent concerned has been given what the magistrate regards as proper prior notice of the application.

5.1.55 An unrestricted discretion to decide what circumstances would justify an *ex parte* order, might give rise to legal uncertainty and the consequent denial of relief to many victims of abuse who should qualify for emergency protection. It is well known that the most dangerous time for any domestic violence victim is when she tries to separate herself from the abuser. Obtaining a protection order is exactly the type of action likely to trigger a violent response. To give the batterer advance notice of the victim's intended behaviour will prove catastrophic in many situations, and it will probably be impossible to predict when danger will arise.

5.1.56 It is submitted that the inherent drawbacks to *ex parte* orders and criticism that the Act is an unjustified departure from the *audi alteram* principle, would be allayed by providing for the granting of interim protection orders *ex parte* and a rule *nisi* calling upon the respondent to show cause on the return day of the order why the provisional protection order being granted against him should not be made final. In all the jurisdictions considered<sup>113</sup> orders made on application without notice are temporary orders.

5.1.57 All the concerns raised by the respondents to the Discussion Paper as to the effect of a return day on applicants are noted. However, a fair a balance should be struck between the rights of the abused person and the respondent. It is submitted that the applicant's rights be protected by the granting of an *ex parte* interim order, magisterial discretion to confirm the order on the papers even in her absence or the absence of the respondent, and the shifting of the onus of proof on the return day to the respondent. The only possible disadvantage for the applicant may be the requirement that she appear in court if the matter is referred for oral evidence. If she does not appear, the court will have no option, but to set the interim order aside. Though appearance may prove difficult for the applicant, it is procedurally impossible to protect her rights if she does not appear. The rights of the respondent should be protected by the granting of interim, and not final orders *ex parte*, and opportunities afforded to the respondent to apply to have the order set aside.

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<sup>113</sup>See paragraph 5.1.25 et seq above.

## 5.2 Applicability of the Act

### A. **Excerpt from Issue Paper**<sup>114</sup>

It seems that the applicability of the Act should be broadened to enable parents to obtain interdicts against their children and vice versa. The question arises whether there is a need to provide for some form of relief for family members who are not “parties to a marriage” as defined in section 1(2) of the Act. The Act also appears to be unconstitutional in that, by omission, it denies relief to a party in a homosexual relationship<sup>115</sup>.

The further question arises whether the Act should not be amended to include family members that fall beyond the immediate family scope, for example an aunt, uncle, niece or nephew. There seems to be the argument that such an amendment would negate the spirit of the Act which is to prevent violence between parties living together as a family.

### B. **Problem analysis**

5.2.1 Fedler<sup>116</sup> points out that the Act excludes women who have never lived with their abusers in a “marital relationship”. First, this affects domestic workers, who may be prohibited from living with men on their employers’ property, and who may thus never have lived as “man and wife” with their partners; secondly, teenage girls who reside with their parents but are experiencing dating violence at the hands of boyfriends; thirdly, partners in a gay relationship; and fourthly, prostitutes who are being harassed by particular “clients”.

5.2.2 According to Fedler<sup>117</sup> the Act does also not reflect international trends due to its omission of a number of other intra familial relationships from its protective ambit. Family violence occurs also between a variety of family members or people who live together. She suggests that it is not

<sup>114</sup>Issue Paper at 5.

<sup>115</sup>In terms of section 9(3) of the Constitution, 1996, the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.

<sup>116</sup>J Fedler “Lawyering Domestic Violence Through the Prevention of Family Violence Act 1993 - An Evaluation After A Year in Operation” 1995 SALJ 231 239.

<sup>117</sup>Fedler 1995 SALJ 239 - 240.

the particular relationship between the parties but rather the dangerous household environment that must be the unit of protection.

5.2.3 Clark<sup>118</sup> affirms that it is essential that relief in cases of domestic violence should be widely available. The Act does not expressly cover domestic violence in extended family situations. Le Roux<sup>119</sup> argues that an amplification of the applicability of the Act would be a big step in creating a culture of non-violence within all types of relationships.

### C. Comparative survey of laws

#### *United Nations framework for model legislation on domestic violence*

5.2.4 It is urged that States adopt the broadest possible definitions of acts of domestic violence and relationships within which domestic violence occurs, bearing in mind that such violations are not as culture-specific as initially observed, since increasing migration flows are blurring distinctive cultural practices, formally or informally. The broadest definitions should be adopted with a view to compatibility with international standards.<sup>120</sup> Domestic violence must be distinguished from intra-family violence and legislated for accordingly.<sup>121</sup> The relationships must include: wives, live-in partners, former wives or partners, girlfriends (including girlfriends not living in the same house), female relatives (including but not restricted to sisters, daughters, mothers and female household workers).<sup>122</sup>

#### *England*

5.2.5 The Law Commission (England)<sup>123</sup> asserts that there is no doubt that harassment and violence can occur in many types of relationship. Reference is made to an argument for having no limitations at all, on the basis that it is difficult to see why there should be any restrictions on the

<sup>118</sup>Clark 1996 *SAJHR* 592.

<sup>119</sup>J le Roux "Die Wet op die Voorkoming van Gesinsgeweld: 'n Evaluasie" 1997 *De Jure* 301 312.

<sup>120</sup>UN *Framework* paragraph 3.

<sup>121</sup>UN *Framework* paragraph 6.

<sup>122</sup>UN *Framework* paragraph 7.

<sup>123</sup>Law Com. No. 207 paragraph 3.8.

ground of relationship or residence if the main aim of the legislation is to provide protection from violence for people who need it. However, the Law Commission (England)<sup>124</sup> thinks that this goes too far. Family relationships can be appropriately distinguished from other forms of association. In practice, many of the same considerations apply to them as to married or cohabitating couples. Thus the proximity of the parties often gives unique opportunities for abuse to continue; the heightened emotions of all concerned give rise to a particular need for sensitivity and flexibility in the law; there is frequently a possibility that their relationship will carry on for the foreseeable future; and there is in most cases the likelihood that they will share a common budget.

5.2.6 The Law Commission (England)<sup>125</sup> prefers a middle path whereby the range of applicants is widened to include anyone who is associated with the respondent by virtue of a family relationship or something closely akin to such a relationship and recommends that a non-molestation order should be capable of being made between people who are associated with one another in any of the following ways:

- (a) They are or have been married to each other.
- (b) They are cohabitants or former cohabitants.
- (c) They live or have lived in the same household, otherwise than merely by reason of one of them being the other's employee, tenant, lodger, or boarder.
- (d) They are within a defined group of close relatives.
- (e) They have at any time agreed to marry each other (whether or not that agreement has been terminated).
- (f) They have or have had a sexual relationship with each other (whether or not including sexual intercourse).
- (g) They are the parents of a child or, in relation to any child, are persons who have or have had parental responsibility for that child (whether or not at the same time).
- (h) They are parties to the same family proceedings.

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<sup>124</sup>Law Com. No. 207 paragraph 3.19..

<sup>125</sup>Law Com. No 207 paragraph 3.26.

## *Australia*

### *The Australian Capital Territory*

5.2.7 A domestic violence protection order may be sought to protect a present or former *de jure* or *de facto* spouse of the violent party, a child of either party, a relative and a household member. “Relative” is defined to cover every kind of near relative. A “household member” means a person who normally resides, or who was normally resident, in the same household as the violent party (other than as a tenant or boarder).<sup>126</sup> The Community Law Reform Committee (Australian Capital Territory)<sup>127</sup> does not consider that it is desirable for the category of people who can be protected under domestic violence legislation to be extended to include people in non-cohabitating intimate relationships.

### *New South Wales*

5.2.8 An apprehended violence order may be obtained to protect any person who fears violence or harassment. Protection is therefore not confined to a particular class. However, for some purposes, the legislation does distinguish between domestic violence and violence between non-intimates. Domestic violence is defined to be when the victim is a former or existing *de facto* or *de jure* spouse of the defendant; a person, not being a boarder or tenant, living, or who has lived, in the same household as the defendant; a relative which is broadly defined; or a person who has had an intimate relationship with the defendant.<sup>128</sup>

### *Northern Territory*

5.2.9 A restraining order may be obtained to protect a limited class of people, namely an existing or former *de facto* or *de jure* spouse.<sup>129</sup>

<sup>126</sup>Laws of Australia paragraph [59].

<sup>127</sup>Community Law Reform Committee Domestic Violence: Civil Issues Report 11: Australian Capital Territory 1996 <http://www.dpa.act.gov.au/ag/Reports/CLRC/r11/dvind.html> (accessed on 28 October 1997).

<sup>128</sup>Laws of Australia paragraph [63].

<sup>129</sup>Laws of Australia paragraph [67].

*Queensland*

5.2.10 A domestic protection order may be obtained to protect a limited class of people. An existing or former *de facto* or *de jure* spouse or a person who, though not a spouse, is a biological parent of a child, may seek an order. A “relative” (includes a person whom the aggrieved spouse regards as a relative or who regards himself or herself as a relative of the spouse making the application) or “associate” (a person whom the spouse who is making the application regards as an associate or vice versa, such as a person who works with, or resides in the same house as, the spouse) cannot make applications in their own right but can benefit from an application made by a spouse if specifically named in the order.<sup>130</sup>

*South Australia*

5.2.11 Domestic violence restraining orders may be obtained by a family member, which means an existing or former *de facto* or *de jure* spouse, a child of whom such a spouse has custody, or a child who normally resides with such a spouse.<sup>131</sup>

*Tasmania*

5.2.12 Any person who fears future violence or harassment may apply for a restraint order. The legislation is therefore not limited to the protection of a specified class of people.<sup>132</sup>

*Victoria*

5.2.13 “Family members” may seek an intervention order against future violence or harassment. This term covers a former or present *de facto* or *de jure* spouse, a relative (all close relatives and those who would be such relatives if a *de facto* couple were married), a child who normally or regularly resides with the violent person, a child of whom the violent person is a guardian and another person who is or has been ordinarily a member of the household of the violent person. The latter is not defined and probably does not cover a boarder, tenant or lodger.<sup>133</sup>

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<sup>130</sup>Laws of Australia paragraph [71].

<sup>131</sup>Laws of Australia paragraph [75].

<sup>132</sup>Laws of Australia paragraph [79].

<sup>133</sup>Laws of Australia paragraph [83].



*Western Australia*

5.2.14 Any person in need of protection against future violence or harassment may seek a restraining order. The legislation is therefore not restricted to protecting a particular class of people.<sup>134</sup>

*Canada**Alberta*

5.2.15 The Alberta Law Reform Institute<sup>135</sup> makes the following notable observation:

The difficult task . . . is to define the realm of the domestic in such a way as to include all individuals viewed as being in need of the protective provisions of the act while at the same time ensuring that the scope of the act does not become too broad. We are seeking to limit the scope of the legislation to the domestic realm. However, we are also seeking to define the domestic realm in a way that includes those individuals whose intimate and domestic relations do not reflect the norm.

5.2.16 The reasons for seeking to deal specifically with domestic abuse and not with abuse in general are cited as the following:<sup>136</sup>

- (a) Domestic abuse is a serious social problem which has drastic and devastating effects on its victims.
- (b) There are numerous systemic barriers to victims of domestic abuse accessing the legal system.
- (c) It is assumed that individuals experiencing abuse in non-domestic relationships will not experience the same kinds of barriers to escaping the perpetrator or accessing legal remedies and therefore that such individuals may have recourse to the criminal and civil remedies already in existence.

5.2.17 In circumscribing a sphere of the “domestic” to which the legislation will apply one should seek to identify relationships which contain the key factors which give rise to the systemic barriers to obtaining legal protection. The Alberta Law Reform Institute<sup>137</sup> identifies the following indicia

<sup>134</sup>Laws of Australia paragraph [87].

<sup>135</sup>ALRI Report for Discussion No 15 91.

<sup>136</sup>ALRI Report for Discussion No 15 93.

<sup>137</sup>ALRI Report for Discussion No 15 94.

of vulnerability that should be considered in assessing the advisability of including the type of relationship in the legislation:

- (a) The intimate nature of the relationship.
- (b) The potential in the relationship for emotional intensity.
- (c) The reasonableness of the inference that the relationship would be presumed by the parties to be one of trust.
- (d) The reduced visibility of the relationship to others or the element of privacy which keeps the goings-on in the relationship unknown to others.
- (e) Dependency or lack of ability of one or both of the parties to unilaterally leave the relationship.
- (f) Ongoing physical proximity of the parties.

5.2.18 The Alberta Law Reform Institute<sup>138</sup> considers that the following relationships are characterised by the indicia of vulnerability:

- (a) Individuals sharing the same living quarters:
  - (i) Married and unmarried heterosexual cohabiting relationships.
  - (ii) Relationships of cohabitation between homosexuals.
  - (iii) Members of an extended family occupying a single residence.
  - (iv) Individuals suffering from abuse by others occupying the same residence but with whom they do not share any sexual, intimate or family relationship. (For example, disabled and elderly individuals may live with other adults who are not sexual partners or family members. Live-in nannies.)
- (b) Relationships beyond the shared residence:
  - (i) Former cohabitants.
  - (ii) Dating violence.

5.2.19 There may also be abuse in the following situations:<sup>139</sup>

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<sup>138</sup>ALRI Report for Discussion No 15 94 et seq.

<sup>139</sup>ALRI Report for Discussion No 15 101 - 102.

- (a) Individuals acting as agents for a primary abuser. (Extended family members or friends of an abuser engaging in abusive conduct toward a victim in an attempt to bring the victim back to the abuser or punish the victim for attempting to leave the abuser.)
- (b) Abuse between individuals who neither share an intimate relationship nor live in the same residence. (For example the situation of the abuser who threatens or harms the friends or relatives of a spouse, notably after an abused spouse has left the abuser.)

5.2.20 A narrower approach is adopted in the final report.<sup>140</sup> The persons entitled to protection should be "cohabitants", defined as follows:

- (a) Persons who have resided together or are residing together in a family relationship, spousal relationship, or intimate relationship.
- (b) Persons who are parents of one or more children, regardless of their marital status or whether they have lived together at any time.

#### *Alaska*

5.2.21 The Alaska Code specifically includes dating relationships as well as the relation between household members whether they are sexual partners or not. It also expressly includes children.

Protection orders are made available to victims who are a -

spouse or former spouse of the respondent; a parent, grandparent, child, or grandchild of the respondent; a member of the social unit comprised of those living together in the same dwelling as the respondent; or a person who is not a spouse or former spouse of the respondent but who previously lived in a spousal relationship with the respondent or is in or has been in a dating, courtship, or engagement relationship with the respondent.<sup>141</sup>

#### *New Zealand*

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<sup>140</sup> ALRI Report No 74 55.

<sup>141</sup> Alaska Stat., section 25.35.060 quoted in ALRI Report for Discussion No 15 92.

5.2.22 The object of the New Zealand Domestic Violence Act 86 of 1995 is to reduce and prevent violence in domestic relationships.<sup>142</sup> For the purpose of the Act, a person is in a domestic relationship<sup>143</sup> with another person if the person -

- (a) is a partner of the other person; [“partner”, in relation to a person, means -
  - (i) any other person to whom the person is or has been legally married;
  - (ii) any other person (whether the same or opposite gender) with whom the person lives or has lived in a relationship in the nature of marriage (although those persons are not, or were not, or are not or were not able to be, legally married to each other);
  - (iii) any other person, in any case where those persons are the biological parents of the same person.]
- (b) is a family member of the other person; [“family member”, in relation to a person, means -
  - (i) any other person who is or has been related to the person by blood, marriage or adoption;
  - (ii) any other person who is a member of the person’s culturally recognised family group;
  - (iii) in the case of partners who are not legally married, any other person who would be a family member of that person pursuant to the preceding two paragraphs if the partners were, or were able to be, married to each other.]
- (c) ordinarily shares a household with the other person; [A person is not regarded as sharing a household with another person by reason only of the fact that -
  - (i) the person has a landlord tenant relationship, an employer employee relationship or an employee employee relationship with that other person; and
  - (ii) they occupy a common dwelling house (whether or not other people also occupy that dwelling house.)

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<sup>142</sup>Domestic Violence Act 86 of 1995, section 5(1).

<sup>143</sup>Domestic Violence Act 86 of 1995, section 4.

(d) has a close personal relationship with the other person. [A person is not regarded as having a close personal relationship with another person by reason only of the fact that the person has -

- (i) an employer employee relationship; or
- (ii) an employee employee relationship with that other person.

In determining whether a person has a close personal relationship with another person, without limiting the matters, the court must have regard to -

- (i) the nature and intensity of the relationship;
- (ii) the amount of time the persons spend together;
- (iii) the place or places where that time is ordinarily spent;
- (iv) the manner in which that time is ordinarily spent (it is not necessary for there to be a sexual relationship);
- (v) the duration of the relationship.]

### *USA*

5.2.23 Almost all of the states in the USA have legislation that covers former spouses. Twelve states have statutes granting protection orders to parties in dating (courting) relationships. Kentucky, Louisiana and Virginia are among the states that allow protection of the present or past sexual partners of the victim through protection orders. The domestic violence laws in forty-one states issue civil protection for unmarried parents who have a child in common.<sup>144</sup>

### *General*

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<sup>144</sup>Women, Law & Development International State Responses to Domestic Violence - Current Status and Needed Improvements Washington, DC: The Institute for Women, Law & Development 1996 73 - 75.

5.2.24 Women, Law & Development International<sup>145</sup> reviewed legislation created to address domestic violence in twenty-one countries.<sup>146</sup> They report<sup>147</sup> that in cases of violence against children or dependents, most of the laws reviewed allow a broader category of persons to lodge complaints on their behalf. Social workers of welfare officers, probation officers, parents and guardians and persons with whom a child ordinarily resides can make complaints on behalf of children.

5.2.25 It is important that a broad category of persons including, but not limited to, police officers, health care providers, and domestic violence assistance centres, be able to file a complaint, as the victim may be incapacitated, may not have access, or may be unable to file a complaint due to fear of retaliation.<sup>148</sup>

#### **D. Recommendation 2 in Discussion Paper 70**

5.2.26 In Discussion Paper 70 it was recommended that the legislation:<sup>149</sup>

- (a) Provide that a person (the applicant) may apply for an interdict against another person (the respondent) if the applicant is or has been associated with the respondent in any of the following ways:
  - (i) They are or were married to each other (including marriage according to any law or custom).
  - (ii) They (whether the same or opposite gender) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other.

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<sup>145</sup>State Responses 66.

<sup>146</sup>Argentina, Australia, Barbados, Bahamas, Belize, Cayman Islands, Chile, Cyprus, United Kingdom, Ecuador, Guyana, Hong Kong, Israel, Malaysia, New Zealand, Peru, Puerto Rico, Trinidad and Tobago, South Africa, St Vincent and the Grenadines, USA.

<sup>147</sup>State Responses 79 - 80.

<sup>148</sup>State Responses 80.

<sup>149</sup>Discussion Paper 70 paragraph 3.2.35.

- (iii) They are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time).
  - (iv) They are family members related by consanguinity, affinity or adoption.
  - (v) They would be family members related by affinity if the persons referred to in (ii) above were, or were able to be, married to each other.
  - (vi) They are or were in an engagement or dating relationship.
  - (vii) They share or shared the same household.
- (b) Retain the power to apply for an interdict “by any other person who has a material interest in the matter on behalf of the applicant” (section 2(1) of the Act).

#### **E. Submissions on Recommendation 2 in Discussion Paper 70**

5.2.27 All of the respondents to the Discussion Paper welcome the expansion of the categories of person who may apply for a protection order. However, despite the expanded definition, many respondents raise further concerns over those who may be excluded on the basis of the new expanded categorization, as well as problems with individuals, other than the abused person, applying for a protection order.

5.2.28 The *Department of Justice Gender Unit* suggests that in order to avoid a situation where certain relationships are excluded by the Act, the Act should commence with a strong preamble in which the social context of domestic violence is described and in which gender dynamics are explicated. The *Unit* also suggests that stalking should be addressed as a separate crime, as stalking is not premised on the existence of any particular relationship between the parties, and rather addresses the conduct of the stalker. If legislation were introduced to cover this particular conduct, this may obviate some of the need to try and ensure that every possible relationship is covered by the new Bill. The *Unit* also suggests that two different kinds of interdict be introduced, one to be used for family or domestic relationships, and one to provide for any other kind of interpersonal violence.

5.2.29 *M Horton (Advisor in the Deputy Ministry of Justice)* suggests that a definition of “relatives” or “family members” would aid to clarify the ambit of the Bill. Also, he suggests that some specific provision should be made to protect adoptive parents and adopted children from harassment by the birth parents.

5.2.30 *The Natal Law Society* suggests that couples married according to “any religion” ought also to qualify for protection.

5.2.31 *UWC Community Law Centre* expresses the view that the definition of a domestic relationship is flawed in that its gender-neutrality obscures the reality that the majority of survivors of domestic violence are women. They argue that this definition will not ensure substantive gender equality.

*The definition excludes certain categories of persons*

5.2.32 Some of the respondents claim that despite the broadening of the categories of persons protected by the Act, certain categories of vulnerable persons are not adequately covered:

*The elderly*

5.2.33 *Concerned Friends of the Frail and Aged* and the *Democratic Party* express their concern that the rights of the elderly are not expressly protected. The elderly are often abused by family members with whom they live, or by visitors, or by those in whose care they are entrusted, such as caregivers in an institution for the elderly.

*Dating relationship*

5.2.34 Though all respondents are in agreement with the sentiment behind including “dating relationships” to protect applicants who are teenagers, or who have not lived with the respondent, many of the respondents raise concern that the term “dating relationship” is insufficiently clear. Amongst those who stress the importance of clarifying this relationship are the *Magistrate: Paarl* who questions what is meant by a dating relationship and asks what would have to be proved by the applicant in order to qualify for protection, and *Tshwaranang Legal Advocacy Centre to end violence against women* which points out that this term does not adequately capture certain



cultural notions of relationships of a romantic kind. *SA National Council for Child and Family Welfare* raises similar concerns. The *Magistrate: Pietermaritzburg*, however, suggests that magistrates can use their discretion in giving meaning to this section.

#### *Children*

5.2.35 The *Durban City Police* and *SA National Council for Child and Family Welfare* express concern that the recommendations do not protect siblings where the violence occurs between them, nor children who are being abused by their parents.

#### *Person with a material interest applying on behalf of the applicant*

5.2.36 Many of the respondents, including the *Natal Law Society* and *SA National Council for Child and Family Welfare* express concern over Recommendation 2(b) in Discussion Paper 70, despite the fact that this process is already provided for in the Act.

5.2.37 The *Department of Justice Gender Unit* also expresses concern that this provision will exacerbate the disempowerment of individual women, but recognizes the utility of this provision in situations where a child or person with an intellectual disability requires protection. The *Unit* as well as *M Horton* suggest that this provision be limited to circumstances where the applicant is such a person, and that where women do not feel ready to commence legal proceedings, they should not be patronized by the interfering intervention of others who determine that they are acting in her interest. The *Unit* suggests that where a third party applies for an interdict on her behalf, this ought to be done on the express authority of the woman, so that she still retains ultimate control over the decision.

5.2.38 Recommendation 2 in Discussion Paper 70 is endorsed by:

*Cape Law Society*

*Magistrate: Bloemfontein*

*Magistrate: Pietermaritzburg*

*Magistrate: Pretoria North*

*M Horton*

*Natal Law Society*

*NICRO, Western Cape*

*P Thwala, University of Swaziland*

*The Women's Lobby*

*UNISA Health Psychology Unit*

## **F. Evaluation**

5.2.39 It is clear that the Act's definition of "parties to a marriage" is too narrow in scope and that many relations in the diverse South African society are excluded from the protection of the Act. In this regard the Act is not compatible with international standards.

5.2.40 Although the United Nations Framework for Model Legislation on Domestic Violence<sup>150</sup> urges States to adopt the broadest possible definitions of relationships within which domestic violence occurs, the obvious limitation is the realm of the domestic. The reasons cited by the Law Commission (England)<sup>151</sup> and the Alberta Law Reform Institute<sup>152</sup> for seeking to deal specifically with domestic abuse and not with abuse in general, are equally applicable to South Africa. However, as pointed out, the difficult task is to define the domestic realm in such a way as to include all individuals viewed as being in need of the protective provisions of the Act while at the same time ensuring that the scope of the Act does not become too broad.

5.2.41 The Law Commission (England)<sup>153</sup> submits that the range of applicants should include anyone who is associated with the respondent by virtue of a family relationship or something

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<sup>150</sup>See paragraph 5.2.4 above.

<sup>151</sup>See paragraph 5.2.5 above.

<sup>152</sup>See paragraph 5.2.16 above.

<sup>153</sup>See paragraph 5.2.6 above.

closely akin to such a relationship. The Alberta Law Reform Institute<sup>154</sup> identifies certain indicia of vulnerability that should be considered in assessing the advisability of including the type of relationship in the legislation. The New Zealand legislation<sup>155</sup> reflects a combination of these viewpoints.

5.2.42 It is submitted that there should be comprehensive inclusion of all those exposed to risk of domestic violence. In this regard it is worthwhile to take note of the recommendations and enactments of the jurisdictions referred to in the preceding paragraph. It is conceded that a broad definition of the class of persons eligible to seek protection could be criticised for including relationships that fall outside the “domestic” realm. However, since the aim is to provide protection from violence, a definition which is criticised for being too broad is preferable to a definition that is criticised for being too narrow. If a person who arguably falls outside the domestic realm is protected by invoking the provisions of domestic violence legislation, it would be a small price to pay, if any, for the assurance that victims who ought to qualify for the intended protection are entitled to apply for relief.

5.2.43 Vulnerable people, such as children, the disabled and the elderly ought to be offered special protection. It is submitted that the legislation should include a special provision that a child may apply for a protection order without assistance.

5.2.44 In terms of section 2(1) of the Act an application may also be made “by any other person who has a material interest in the matter on behalf of the applicant”. Where a third party applies for a protection order on behalf of the applicant, it is desirable for the applicant to consent to such application. This is to protect applicants from interfering third parties, such as family members, social workers and others who do not have regard for the applicant’s wishes. Even though certain applicants may refuse consent in circumstances in which third parties might reasonably want to override their wishes due to the danger posed to their lives, the consent of an applicant is integral to the effective operation of the protection order, especially since she is required to appear in court on the return date. However, where vulnerable persons are unable to provide consent due

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<sup>154</sup>See paragraph 5.2.17 above.

<sup>155</sup>See paragraph 5.2.22 above.

to, for example, incapacitation, the requirement of the applicant's consent should be dispensed with.

### 5.3 Jurisdiction

#### A. **Excerpt from Issue Paper**<sup>156</sup>

There appears to be some confusion as to precisely how jurisdiction is conferred on any particular court in terms of the Act as regards the initial application for an interdict. Under the normal rules of civil jurisdiction the applicant must apply to the court having jurisdiction over the respondent. Jurisdiction of the Magistrate's Court is governed by the Magistrate's Court Act, 32 of 1944, and the Magistrate's Court has jurisdiction only in respect of the persons as described in section 28 of the Magistrate's Court Act. It seems that under these circumstances section 28(1)(d)<sup>157</sup> is applicable since the whole cause of action arose in that court's jurisdiction. However, should this present problems in practice then jurisdiction should be spelt out explicitly in the legislation.

It seems that problems are being experienced in cases where an applicant leaves the jurisdiction where he or she obtained the interdict and is then advised that he or she must obtain a new interdict in the new area as the existing interdict does not apply. If this is the case then the legislation needs to be explicit in this regard.

#### B. **Problem analysis**

5.3.1 Both the Act and Regulations are silent as to geographical jurisdiction. In the **Rutenberg** case<sup>158</sup> it was held that if the powers and limitations of a magistrate who was called on to apply the provisions of the Act and Regulations could not be sought beyond the bounds of the Act and Regulations, it would follow that a magistrate would enjoy unlimited geographical jurisdiction, and the limits imposed thereon by the Magistrates' Courts Act would not apply. According to Thring J, that was an absurd result which could not have been intended by the legislature.<sup>159</sup>

<sup>156</sup>Issue Paper at 6.

<sup>157</sup>"The persons in respect of whom the court shall have jurisdiction shall be any person, whether or not he resides, carries on business or is employed within the district, if the cause of action arose wholly within the district".

<sup>158</sup>**Rutenberg v Magistrate, Wynberg** 1997 4 SA 735 (C) 751.

<sup>159</sup>See also J M van Rensburg "Interdikte in die Landdroshof met Betrekking tot Gesinsgeweld" 1994 The Magistrate 94 who concludes that the Act, ". . . behalwe vir sover 'n aangeleentheid in die Wet genoem op/deur of kragtens die Wet voorgeskrewe wyse gedoen moet word, nie die Landdroshowewet en -reëls uitsluit nie en dat die Wet dus in samehang daarmee in die praktyk toegepas moet word".

5.3.2 The meaning of “cause of action” and the jurisdiction of the Magistrate’s Court in terms of section 28(1)(d) of the Magistrates’ Courts Act 32 of 1944 was described as follows in **Herholdt v Rand Debt Collecting Co**<sup>160</sup>:

It must be shown, if a magistrate’s court is to have jurisdiction, that every event which is directly essential to the plaintiff’s right to relief took place within its area of jurisdiction.

Van Rensburg submits<sup>161</sup> that it is clear that a family violence issue which gives rise to an application for an interdict, falls within the meaning of the said description.

5.3.3 Section 4(3) of the Magistrates’ Courts Act 32 of 1944 provides that every process issued out of any court shall be of force throughout the Republic. Hence, there should be no problem where an applicant leaves the jurisdiction after an interdict has been granted.

5.3.4 As regards jurisdiction to conduct an enquiry contemplated in section 3(4) of the Act, Van Rensburg<sup>162</sup> points out that in terms of section 90 of the Magistrates’ Courts Act 32 of 1944 the court within whose district an offence has been committed, has jurisdiction in respect of that offence.

## C. Comparative survey of laws

### *United Nations framework for model legislation*

5.3.5 A complainant alleging an act of domestic violence may be filed in the judicial division where -

- (a) the offender resides;
- (b) the victim resides;
- (c) where the violence took place; or
- (d) where the victim is temporarily residing if she has left her residence to avoid further abuse.<sup>163</sup>

<sup>160</sup>1965 3 SA 752 (T) 754.

<sup>161</sup>Van Rensburg 1994 The Magistrate 98.

<sup>162</sup>Van Rensburg 1994 The Magistrate 104.

<sup>163</sup>UN Framework paragraph 18.

## **D. Recommendation 3 in Discussion Paper 70**

5.3.6 In Discussion Paper 70 it was recommended that the legislation:<sup>164</sup>

- (a) Afford the applicant a choice of jurisdictional factors as regards the conferment of jurisdiction in respect of the initial application for an interdict.
- (b) Provide that the court in whose area of jurisdiction -
  - (i) the applicant resides (permanently or temporarily), carries on business or is employed; or
  - (ii) the respondent resides, carries on business or is employed; or
  - (ii) the cause of action arose;
 shall have jurisdiction to entertain an application for an interdict.
- (c) Provide that an interdict granted in terms of the legislation is enforceable throughout the Republic.

## **E. Submissions on Recommendation 3 in Discussion Paper 70**

5.3.7 This seems to have been a very welcome recommendation, as all the respondents endorse it wholeheartedly, only adding and refining the recommendation. For example, the *Natal Law Society* suggests that temporary residence of the applicant should also include the place where he or she finds him or herself. The *Women's Lobby* adds that the motivation behind extension of jurisdiction should be the understanding that violence is directed at the applicant's person, not her geographical location. *UNISA Law Lecturers* recommend that the interdict should also be enforceable outside the Republic and that thought should be given to provisions analogous to those in the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963.

5.3.8 Two respondents, the *Department of Justice Gender Unit* and *UWC Community Law Centre* warn that a woman should be able to keep her address confidential in respect of the

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<sup>164</sup>Discussion Paper 70 paragraph 3.3.23.

respondent to protect her safety. *UWC Community Law Centre* suggests that the legislation provide that any court in the Republic has jurisdiction to grant interim or final interdicts, and that it should not be necessary that the interim and final interdicts be obtained in the same jurisdiction. This respondent's greatest concern lies with the safety of the applicant, and it strongly recommends that an applicant should not be required to provide a residential address to the court, and that she should be able to provide a reliable postal address so that the court can contact her. In the alternative, it is suggested that the applicant's address only be revealed with her consent.

5.3.9 Recommendation 3 in Discussion Paper 70 is endorsed by:

*Cape Law Society*

*Magistrate: Pietermaritzburg*

*Magistrate: Pretoria North*

*M Horton*

*NICRO, Western Cape*

## **F. Evaluation**

5.3.10 As regards the conferment of jurisdiction in respect of the initial application for a protection order, legislation must, in order to be effective, be geared to assist the applicant at all times and applicants should therefore be afforded a choice of jurisdictional factors. This is in line with the United Nations framework for model legislation on domestic violence.<sup>165</sup>

5.3.11 Cognisance should be taken of the reported instances where the applicant has left the jurisdiction where she obtained the protection order and has been advised to obtain a new protection order. It is submitted that it is obvious that a protection order for the prevention of domestic violence should be enforceable throughout the Republic, thereby obviating the need for any further application to court. The violence is directed at the applicant's person and not her geographical location.

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<sup>165</sup>See paragraph 5.3.5 above.



5.3.12 The question of jurisdiction in respect of an enquiry contemplated in section 3(4) of the Act is connected with the question of whether a section 3(4) enquiry is regarded as a matter which should be heard in the criminal court. In paragraph 6.1.22 below it is suggested that the contravention of the conditions of a protection order granted in terms of domestic violence legislation should be an offence which is prosecuted in the criminal court. Normal criminal jurisdiction would therefore apply in the event of a contravention of the conditions of the protection order.

## 5.4 Legal representation

### A. **Excerpt from Issue Paper**<sup>166</sup>

It would appear that the various magistrates' offices have different attitudes to legal representation at the various stages of the interdict. It depends to a large extent on whether or not oral evidence is allowed by the various magistrates. There is a feeling that the Act should be more specific about legal representation and allow it at all stages of the process.

On the other hand, the Act was promulgated to provide speedy and inexpensive relief to a party. The moment legal representation is allowed it is more or less incumbent on the other party to obtain such representation which causes costs to escalate. Supporters of this latter idea feel that legal representation should be expressly excluded, except as regards review and appeal procedures.

### B. **Problem analysis**

5.4.1 Although the Act does not expressly provide for legal representation, Coetzee<sup>167</sup> refers to the fact that the courts have on numerous occasions held that every person has the right to legal representation. This principle is confirmed in section 35 of the Constitution, 1996.<sup>168</sup>

### C. **Recommendation 4 in Discussion Paper 70**

5.4.2 In Discussion Paper 70 it was recommended that:

- (a) No legislation in respect of legal representation be introduced.
- (b) The Department of Justice investigate the matters of assistance by the Clerk of the Court or Registrar during the initial application phase and the issuing of uniform guidelines to promote effectiveness.

<sup>166</sup>Issue Paper at 6.

<sup>167</sup>Coetzee 1994 De Rebus 623.

<sup>168</sup>It should be noted that section 35 deals only with arrested, detained, and accused persons.

## D. Submissions on Recommendation 4 in Discussion Paper 70

### *Legal representation allowed or excluded?*

5.4.3 The recommendation is that there should be no legislation in respect of legal representation. Yet some respondents have taken this recommendation to mean that legal representation is thereby excluded, whereas others have interpreted it to mean that legal representation can be permitted. The *SA National Council for Child and Family Welfare* suggests that the legislation should be explicit: is legal representation allowed or excluded? It feels that to simply make no provision for legal representation leaves the situation unclear and will result in different courts doing different things. *UWC Community Law Centre* states that the legislation should make it clear that both parties are entitled to legal representation. The *Magistrate: Pietermaritzburg* interprets this recommendation to mean that legal representation should be excluded as is the case in the Small Claims Court. Although he endorses this, attention is drawn to the possible infringement of the respondent's constitutional rights. The *Natal Law Society* endorses the recommendation as long as it does not expressly exclude legal representation.

### *Legal representation for the applicant*

5.4.4 The *Department of Justice Gender Unit* warns that in domestic violence matters, it is important to ensure that the woman is entitled to have a legal representative with her if she so desires, especially if the respondent chooses to contest the interdict. This role could be filled by a paralegal, a police officer or a service provider in an NGO authorized by the applicant. However, lawyers should not be excluded from these proceedings and this should be overtly clarified in the legislation. It may be arguable that it is discriminatory to create a legal system where an accused person has the automatic right to legal representation, but a victim of domestic violence does not. *Tshwaranang Legal Advocacy Centre* and *UWC Community Law Centre* strongly endorse this, and claim that the state should have an affirmative duty to appoint a legal representative for the applicant. *UWC Community Law Centre's* submission states that:

. . . the provision of state-funded legal representation to an abused woman in interdict proceedings is founded on the need to reduce the effects of gender-based violence and does not constitute unfair gender discrimination against the respondent. By contrast, it rectifies that structural imbalance of power that exists between the parties.

*NICRO, Western Cape* suggests that where the respondent opposes the interdict and obtains legal representation, some provision ought to be made for the applicant to obtain legal aid.

*Assistance by the clerk of the court*

5.4.5 *The Natal Law Society* mentions a number of pilot initiatives in the Durban magistrate's court which will hopefully provide support to abused women seeking legal support. The *Cape Law Society* proposes that officers of the court and the police be issued with uniform guidelines to direct and control the ambit of assistance. *The National Human Rights Trust* as well as the *SA National Council for Child and Family Welfare* caution that the clerk of the court is too overloaded to take on the additional responsibility of assisting an abused woman.

5.4.6 Recommendation 4 in Discussion Paper 70 is endorsed by:

*Magistrate: Pretoria North*

*M Horton* (Legal representation should not be expressly excluded.)

*The Women's Lobby*

## **E. Evaluation**

5.4.7 Consultation suggests that there is strong support for the view that parties have the right to legal representation at all stages of the proceedings and that denying either an applicant or a respondent legal representation at any stage could be unconstitutional. There have also been suggestions that applicants should be entitled to legal aid on the same terms as an accused in a criminal case and that they should be informed of that right.<sup>169</sup>

5.4.8 Although the Constitution, 1996, does not explicitly entrench the right to legal representation in civil proceedings, any attempt to expressly exclude legal representation would be constitutionally offensive. It is submitted that the democratic values of equality and freedom dictate that legal representation should be allowed at all stages of the process. Although the status

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<sup>169</sup>Section 35(3)(g) of the Constitution, 1996, provides that every accused person has the right to a fair trial, which includes the right to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

quo allows for such legal representation, legislation should expressly provide for this to ensure legal certainty and uniformity of practice in magistrates' courts.

5.4.9 Considering the question of having a legal practitioner assigned to an applicant by the state and at state expense, regard should be had to the fact that the Constitution, 1996, grants such a right to arrested, detained and accused persons only.<sup>170</sup> It is submitted that extending the right to applicants in domestic violence civil proceedings, would pave the way for public demand that similar rights be afforded to other civil litigants, and an already overburdened fiscus having to foot the bill. Moreover, granting such a right to the applicant would probably encroach upon the respondent's right to equal benefit of the law.<sup>171</sup> The object of the Legal Aid Board, established in terms of the Legal Aid Act 22 of 1969, is to render or make available legal aid to indigent persons and to that end the services of legal practitioners can be obtained.<sup>172</sup> Indigent applicants would therefore be able to apply for legal aid.

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<sup>170</sup>Constitution, 1996, section 35.

<sup>171</sup>Constitution, 1996, section 9(1).

<sup>172</sup>Legal Aid Act 22 of 1969, section 3(a).

## 5.5 Hearing of oral evidence

### A. **Excerpt from Issue Paper**<sup>173</sup>

The Act appears not to allow for oral evidence. No uniform approach is applied by the different courts. The poor quality of the original affidavit made by an applicant at the time of applying for an interdict frequently necessitates oral evidence, particularly when an order is made for the eviction of the respondent from the matrimonial home.

On the other hand, it is argued that the hearing of oral evidence would again negate the spirit of the Act since it would only increase the workload of already overworked magistrates.

### B. **Problem analysis**

5.5.1 In the **Rutenberg** case<sup>174</sup> Thring J found that the procedure to be followed by a magistrate in terms of the Act was governed by the Magistrates' Courts Act and the Magistrates' Court Rules in so far as these were not inconsistent with the Act and Regulations. Reference was made to Magistrate's Court Rule 55(2)(a)<sup>175</sup> and it was held that this rule was not in any way inconsistent with any provision of the Act or Regulations.

5.5.2 Referring to Rule 56(3) of the Magistrates' Courts Rules,<sup>176</sup> Van Rensburg<sup>177</sup> argues that before the magistrate grants the interdict he may, in his discretion, require further oral evidence

<sup>173</sup>Issue Paper at 7.

<sup>174</sup>**Rutenberg v Magistrate, Wynberg** 1997 4 SA 735 (C) 755.

<sup>175</sup>“(2) Except where otherwise provided, an application need not be supported by affidavit but in the event of any dispute arising as to the facts, the court may-

(a) receive evidence either viva voce or by affidavit and try the issues in dispute in a summary manner;”

<sup>176</sup>“56. Arrests tanquam suspectus de fuga, interdicts, attachments to secure claims and mandamenten van spolie

(3) The court may, before granting an order upon such an application, require the applicant to give security for any damages which may be caused by such order and may require such additional evidence as it may think fit.”

<sup>177</sup>Van Rensburg 1994 The Magistrate 98.

or evidence by way of affidavit. This is a power of the magistrate and not a right of the applicant to supplement the affidavit.

5.5.3 The Magistrate: Pretoria agrees that there is nothing in the Act which prevents the hearing of oral evidence and a magistrate is therefore not precluded from calling for such evidence should circumstances require it. A magistrate can decide whether such evidence is necessary or not and act accordingly. The Magistrate: Pretoria is against an amendment making it obligatory to hear oral evidence in all matters, as this will only be a complicating factor.

5.5 Dicker<sup>178</sup>, on the other hand, submits that because neither the Act nor the Regulations allow for the oral examination of witnesses, there is no question in a Regulation 5 application (amendment or setting aside of interdict) of the applicant (original respondent) being able to avail himself of “his right to apply for the deponents concerned to be called for cross-examination”. The magistrate should therefore decide the application on the unopposed allegations of fact in the applicant’s (original respondent’s) affidavit and where there is a dispute of fact, the allegations of fact in the respondent’s (former applicant’s) affidavits must be accepted as being correct. In addition the original respondent is saddled with the burden of proof. If - on a conspectus of the facts that are common cause or cannot be disputed by the original applicant, and the version of the original applicant, in the case of any conflicts of fact - the original respondent cannot establish a case for the setting aside or amendment of the interdict, on a balance of probabilities, the application is doomed to failure.

### **C. Comparative survey of laws**

#### *Australia*

##### *The Australian Capital Territory*

5.5.5 The applicant must give oral evidence on oath to support the application for an interim order.<sup>179</sup>

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<sup>178</sup>Dicker 1994 De Rebus 215.

<sup>179</sup>Laws of Australia paragraph [61].

*New South Wales*

5.5.6 A complaint for an order may be made orally or in writing and must be substantiated on oath.<sup>180</sup>

*South Australia*

5.5.7 An interim *ex parte* order can be obtained on affidavit evidence. The applicant must be prepared to give oral evidence at the proceedings for confirmation of the order.<sup>181</sup>

*Victoria*

5.5.8 The applicant must be prepared to provide oral evidence of the urgency which justifies an *ex parte* interim order.<sup>182</sup>

*New Zealand*

5.5.9 In any proceedings under the New Zealand Domestic Violence Act 86 of 1995 the Court may, of its own motion, call as a witness any person whose evidence may, in its opinion, be of assistance to the Court.<sup>183</sup> The court may receive any evidence that it thinks fit, whether or not it is otherwise admissible in a court of law.<sup>184</sup>

**D. Recommendation 5 in Discussion Paper 70**

5.5.10 In Discussion Paper 70 it was recommended that the legislation provide that:<sup>185</sup>

- (a) Further oral evidence or evidence by affidavit may be required at the discretion of the judge or magistrate before an interdict is granted.

<sup>180</sup>Laws of Australia paragraph [64].

<sup>181</sup>Laws of Australia paragraph [77].

<sup>182</sup>Laws of Australia paragraph [85].

<sup>183</sup>Domestic Violence Act 86 of 1995, section 82.

<sup>184</sup>Domestic Violence Act 86 of 1995, section 84.

<sup>185</sup>Discussion Paper 70 paragraph 3.5.25.



- (b) The substance of oral evidence heard be noted.

#### **E. Submissions on Recommendation 5 in Discussion Paper 70**

5.5.11 Whilst respondents are mostly supportive of a discretionary power given to magistrates to supplement the information contained in the affidavits with oral evidence, some concerns are raised about the implications this would have for the applicant. The *Department of Justice Gender Unit* suggests that no new processes should be created which may have the effect of delaying the applicant's obtaining the interdict. The *SA National Council for Child and Family Welfare* and *Tshwaranang Legal Advocacy Centre* echo the concern that requiring oral evidence may unnecessarily delay the granting of an urgent interdict. There is also concern that the discretion of magistrates to hear oral evidence may work to prejudice applicants and may result in further secondary victimization of the applicant. *Tshwaranang* states that this recommendation should not be interpreted to allow the magistrate to require further oral evidence from the respondent as this will defeat the purpose of a speedy interdict to protect a victim's rights.

5.5.12 The *Magistrate: Pietermaritzburg* raises a different concern, namely that if an applicant is unrepresented and the magistrate tries to elicit oral evidence, the magistrate will be treading a very thin line between obtaining oral evidence and acting in a representative capacity to assist the applicant to place a *prima facie* case on record. This needs to be avoided.

5.5.13 *M Horton* recommends that standard form affidavits be devised to ensure that all relevant information is adduced by the applicant to obviate the need for oral evidence.

5.5.14 The *Natal Law Society* raises the question whether the oral evidence will be noted in chambers by the judicial officer or will be taped in open court.

5.5.15 Recommendation 5 in Discussion Paper 70 is endorsed by:

*Cape Law Society*

*Magistrate: Pretoria North*

*UWC Community Law Centre*

*Magistrate: Durban*

*NICRO, Western Cape*

## **F. Evaluation**

5.5.16 It is submitted that the argument for allowing the hearing of oral evidence before granting a protection order is convincing. This view is also supported by the majority of respondents. The judicial process cannot permit the refusal of relief against domestic violence for want of compliance by the applicant with requirements of the legislation, where such lack of compliance may be cured by the hearing of oral evidence. At the courses presented at Justice College for Registrars and Clerks of the Court they are fully instructed to advise the applicant sufficiently to supplement the affidavit to obviate the leading of oral evidence. However, this should not preclude a presiding officer to hear oral evidence to elicit more information where there is lack of clarity. This is also the position in Australia and New Zealand.<sup>186</sup>

5.5.17 Although the legal position appears to be that before the presiding officer grants the protection order he or she may, in his or her discretion, require further oral evidence or evidence by affidavit, legislation should clear away any uncertainty in this regard. In order to address any possible prejudice to respondents, presiding officers should be obliged to note the substance of oral evidence heard by them for the purpose of enabling respondents to reply thereto on the return date.

5.5.18 In paragraph 5.1.53 *et seq* above it is argued that provision be made for the granting of interim protection orders *ex parte* and a rule *nisi* calling upon the respondent to show cause on the return day of the order why the provisional protection order granted against the respondent should not be made final. On the return day the applicant and the respondent have the opportunity to present oral evidence.<sup>187</sup>

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<sup>186</sup>See paragraph 5.5.5 *et seq* above.

<sup>187</sup>H N Pretorius Burgerlike Prosesreg in die Landdroshowe Vol II Durban: Butterworth 1986 744.

## **5.6 Service of interdicts**

### **A. Excerpt from Issue Paper<sup>188</sup>**

The general feeling of magistrates is that warrants should be issued only where there has been personal service on the respondent and that the Act should be amended to make this clear.

However, there is also a feeling that personal service would defeat the main objective of the Act, namely to prevent violence.

The general feeling seems to be that provision should be made for service by the South African Police Service, which service is, at present, regarded as invalid.

### **B. Problem analysis**

5.6.1 In terms of section 2(3) of the Act the interdict shall have no force and effect until served on the respondent in the prescribed manner. The manner of service is prescribed in Regulations 3 and 4.<sup>189</sup>

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<sup>188</sup>Issue Paper at 7.

<sup>189</sup>If the respondent is present at the court the interdict may be served by the registrar or the clerk of the court [Regulation 3(1)]. Thereafter a certified copy of the interdict and the original warrant of arrest shall be delivered or sent by registered post to the applicant [Regulation 3(2)]. If the interdict is not served in this manner, it shall be delivered by the applicant to a sheriff for service [Regulation 4(1)]. The interdict shall be served by the sheriff by delivering a copy thereof to the respondent, or if the respondent cannot be found, by delivering it at his place of residence, work or business, to some person apparently not less than 16 years of age and apparently residing or working there [Regulation 4(2)]. If the respondent keeps his place of residence, work or business closed, it shall be sufficient service to affix a copy to the principal door [Regulation 4(3)]. The registrar or the clerk of the court shall notify the applicant of the service of the interdict [Regulation 4(6)]. After the interdict has been served, the registrar or the clerk of the court shall deliver or send by registered post a certified copy of the interdict and the original warrant of arrest to the applicant [Regulation 4(7)].

5.6.2 The applicant is responsible for the payment of sheriff's fees for the service of the interdict effected by the sheriff. The Magistrate may, however, after assessing the relevant circumstances, such as the financial position of the applicant, order that the State will be responsible for such fees.<sup>190</sup> Apparently this is done by way of the applicant making an affidavit stating her circumstances and why she cannot afford to pay the sheriff.<sup>191</sup> Clark<sup>192</sup> reports that although magistrates can order that the court should pay these fees, many victims are not informed that this option is available to them.

5.6.3 Fedler<sup>193</sup> points out that financial abuse and the withholding of funds are a common feature of battering relationships and that many women do not have enough money for transport, let alone an interdict. Sheriff's fees<sup>194</sup> are an unnecessary obstacle to the women's safety. She suggests an amendment to the Act to provide explicitly for the costs of service of the interdict to be borne by the State. Alternatively, the police should be legislatively mandated to serve the interdict.<sup>195</sup>

5.6.4 According to Novitz<sup>196</sup> the chief problem encountered by many applicants is the sheriff's fee for service. This fee varies according to the difficulty of the service. Applicants are left in ignorance of the option that the costs may be borne by the State. She argues for detailed provisions, either in the Act or Regulations, stating how one may apply for sheriff's fees to be waived.<sup>197</sup>

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<sup>190</sup>Van Rensburg 1994 The Magistrate 99; Justice Circular 50 of 1993 paragraph 4.3.

<sup>191</sup>M Daniels & L Muntingh NICRO Occasional Paper No 3: Report on A Survey of Women Who Applied for Interdicts Through the Nicro Women's Support Centre in Terms of the Prevention of Family Violence Act 133 of 1993 Cape Town: NICRO 1995 8.

<sup>192</sup>Clark 1996 SAJHR 596.

<sup>193</sup>Fedler 1995 SALJ 243.

<sup>194</sup>Le Roux 1997 De Jure 312 quotes the following figures: R150.00 if the interdict is to be served after hours or over weekends; R125.00 if the interdict is to be served urgently. Consequently numerous battered women simply cannot afford the interdict.

<sup>195</sup>This is supported by Clark 1996 SAJHR 598.

<sup>196</sup>Novitz 49.

<sup>197</sup>Novitz 58.

5.6.5 Human Rights Watch / Africa<sup>198</sup> reports that long delays are experienced as a consequence of an order that the fee for the interdict to be served be paid by the State. In cases where the applicant has been exempted from paying the fee, it appears that some sheriffs do not act until they receive the fee from the Department of Justice. Cases have been reported where women who had been granted an interdict had waited up to six weeks for the sheriff to deliver service, instead of the usual one to two days. For a woman at risk of violence, the delay may be life-threatening. Service of the interdict by the police has the advantage both of saving costs and of ensuring that the police are aware of the interdict at the exact moment that it comes into force.

5.6.6 Daniels & Muntingh<sup>199</sup> report that the time taken to serve the interdict is an issue of some concern as during this time the applicant will be unprotected, as she will not yet have received her copy of the interdict and the warrant of arrest. A survey in the greater Cape Town area revealed that the average time taken to serve the interdict after being granted was 8 days.<sup>200</sup> The average time taken to serve the interdict is too long considering the urgency of the matter. Also, the time lapse between the interdict being served and the applicant receiving a copy of the interdict and the warrant of arrest is too lengthy and in this period applicants are often left feeling vulnerable and powerless.<sup>201</sup>

5.6.7 Daniels & Muntingh<sup>202</sup> recommend that service of the interdict occur on an urgent basis, and should always be same-day service where possible. In this way the sheriff would furnish the court sooner with a return of service and an applicant would accordingly be in possession of the interdict and warrant sooner. Applicants should always be encouraged to obtain the interdict documents personally from the courts. Where postal service is necessary, court personnel should ensure that all the necessary documents are sent, and that they are sent immediately upon the court receiving the sheriff's return of service.

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<sup>198</sup>Human Rights Watch 71.

<sup>199</sup>Daniels & Muntingh 8.

<sup>200</sup>It is, however, important to note that the interdict is not necessarily served in the same area of jurisdiction where an application is made, but that this will usually be the case.

<sup>201</sup>Daniels & Muntingh 16.

<sup>202</sup>Daniels & Muntingh 16.

## C. Comparative survey of laws

### *Australia*

#### *The Australian Capital Territory*

5.6.8 An interim order is binding on the respondent once it is served by the police. The respondent must have been served with a copy of the order before he or she can be guilty of a breach. In the Australian Capital Territory, the police serve protection orders on the respondent.<sup>203</sup>

#### *New South Wales / Northern Territory / South Australia / Tasmania / Victoria / Western Australia*

5.6.9 Once the interim order is served on the defendant it is effective to protect the victim.<sup>204</sup> The defendant must have been served with the order before he or she can be guilty of a breach.<sup>205</sup>

#### *Queensland*

5.6.10 It is not necessary, as it is in other jurisdictions, that the respondent should have been served with a copy of the order. It is sufficient that he or she was aware of the order to the extent that it can be said that he or she “knowingly” breached the conditions.<sup>206</sup>

### *USA*

5.6.11 In most jurisdictions, law enforcement officials are responsible for serving protection orders.<sup>207</sup>

#### *Kentucky*

5.6.12 The adverse party shall be personally served with a copy of the emergency protective order, a copy of the notice setting the full hearing, and a copy of the petition.<sup>208</sup> An emergency

<sup>203</sup>Laws of Australia paragraph [61] - [62].

<sup>204</sup>Laws of Australia paragraph [65], [69], [77], [81], [85], [89].

<sup>205</sup>Laws of Australia paragraph [66] [70], [78], [82], [86], [90].

<sup>206</sup>Laws of Australia paragraph [74].

<sup>207</sup>State Responses 86.

<sup>208</sup>Kentucky Revised Statutes, section 403.740(4).

protective order shall be reissued for a period not to exceed 14 days if service has not been made on the adverse party by the fixed court date and time.<sup>209</sup>

### *Minnesota*

5.6.13 A temporary order shall be personally served upon the respondent.<sup>210</sup>

### *General*

5.6.14 Women, Law & Development International<sup>211</sup> report that in most legislation, the order is to be served personally to the respondent by the applicant or her agent. Other laws specify that court or law enforcement agents serve the order. Some laws require the order to be filed with the police branch in the area in which the parties live.

5.6.15 By having law enforcement officials participate in the service process, perpetrators are reminded that their actions constitute a violation of the law.

## **D. Recommendation 6 and Request for Comment 1 in Discussion Paper 70**

5.6.16 In Discussion Paper 70 it was recommended that:<sup>212</sup>

- (a) The Regulations specify under what circumstances and how one may apply for the Sheriff's fees for the service of the interdict to be borne by the State.
- (b) The allegation that certain Sheriffs do not act until they receive the fee be investigated by the Department of Justice and be dealt with administratively.

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<sup>209</sup>Kentucky Revised Statutes, section 403. 740(3).

<sup>210</sup>Minnesota Domestic Abuse Act, 1992, section 8.

<sup>211</sup>State Responses 85 - 86.

<sup>212</sup>Discussion Paper 70 paragraph 3.6.29.

- (c) The Regulations retain the prescribed manner of service which allows for delivery of the interdict at the respondent's place of residence, work or business, to some person apparently not less than 16 years of age and apparently residing or working there (Regulation 4(2) ) or affixing a copy to the principal door (Regulation 4(3)).
- (d) The Regulations provide for service on the respondent, together with the interdict, of copies of the initial application, supporting affidavit and, in the event of oral evidence having been heard, a note by the magistrate/ judge giving particulars of the supplementary facts which emerged from such oral evidence.

5.6.17 In Discussion Paper 70 specific comment was requested on the Commission's view that the SAPS should be involved in the service of interdicts issued in terms of domestic violence legislation.<sup>213</sup>

#### **E. Submissions on Recommendation 6 and Request for Comment 1 in Discussion Paper 70**

##### *Sheriff's fees and costs of service*

5.6.18 *The Magistrate: Pietermaritzburg* observes that applicants all claim that they are unable to afford the costs of the sheriff's fees and therefore some test should be established to enable the presiding officer to determine whether this is indeed the case. *P Thwala* recommends that the financial status of the applicant ought, as a matter of course, to be determined at the outset and where it appears that she will need state assistance, this should be automatically provided for. *UWC Community Law Centre* suggests that the clerk should have a duty to inform the applicant of her right to apply for the costs of service to be borne by the state, and that the sheriff should be obliged to effect service regardless of whether or not the fees for such service have been paid. *Tshwaranang Legal Advocacy Centre* submits that costs of service for all interdicts, irrespective of the financial status of the applicant, must be borne by the state as a matter of course. Investigations into the financial status of the applicant merely deter the applicant from approaching the court and cause unnecessary delays in effecting service.

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<sup>213</sup>Discussion Paper 70 paragraph 3.6.30.



*Manner of service on respondent*

5.6.19 The *Cape Law Society* suggests that it should be possible to effect service by affixing a copy of the interdict to the door of the respondent's place of residence, work or business since applicants should be assisted as far as possible to have their safety protected. The *Magistrate: Pietermaritzburg*, however, strongly opposes this manner of service as this will make it impossible for the presiding officer to establish whether there has been proper service or not. *M Horton* recommends that the safest route is to ensure personal service on the respondent, even if it is costly and problematic as it will ensure that the respondent is aware of the terms of the order and will obviate the possibility of proceedings being unnecessarily delayed by a respondent who claims he was unaware of the terms of the interdict. The *Natal Law Society* recommends that provision should be made for personal service wherever the respondent may be found. *NICRO, Western Cape* recommends that the interdict should become effective from the moment it is granted and not only once it has been served as there are often delays in service.

5.6.20 The *SA National Council for Child and Family Welfare* recommends that a photograph be attached to the application for an interdict to facilitate service. The *Council* also raises the concern that often the interdict is not in the language of the abuser, and this may make it difficult to establish whether or not the abuser knows and understands the provisions of the order. *Tshwaranang Legal Advocacy Centre* argues that it is the duty of the sheriff to ensure that the respondent understands the contents of the interdict.

*Service by the SAPS*

5.6.21 The *Cape Law Society, Magistrate: Wynberg, P Thwala, UWC Community Law Centre* and the *National Human Rights Trust* strongly endorse that the SAPS should be involved in the service of interdicts and this should be done on a 24-hour basis. The *Laws and Administration Committee of the General Council of the Bar* submit that the police are already overburdened and should not be further burdened with having to serve interdicts. *UWC Community Law Centre* suggests that the additional duty will only cause a marginal increase in the role of the SAPS and if personnel resources are unavailable, resources and budget allocations must be adjusted in accordance with this priority. It appears that the objection by the SAPS to serving interdicts is the

contention that the interdicts are civil in nature. *UWC Community Law Centre* strongly disagrees with this.

*Investigation by Justice Department into service by sheriffs*

5.6.22 The *SA National Council for Child and Family Welfare* suggests that time-frames need to be set to ensure that service is timeously effected by sheriffs. It also recommends that standardized guidelines for the appointment of sheriffs be issued and enforced and that sheriffs be trained and supervised to ensure quality control of their services. *Tshwaranang Legal Advocacy Centre* goes even further and suggests that failure to serve the interdict within a reasonable time should be made an offence in terms of the legislation, unless failure is not due to any fault on the part of the sheriff. *UWC Community Law Centre* reiterates that the cornerstone of effective service is urgency and goes on to suggest that the legislation should provide that the sheriff has the duty to make personnel available to serve interdicts on a 24 hour basis and furnish the SAPS in the area of jurisdiction of the court with emergency telephone numbers for contacting such personnel to serve interdicts after hours.

5.6.23 Recommendation 6 in Discussion Paper 70 is endorsed by:

*The Laws and Administration Committee of the General Council of the Bar*

*Magistrate: Pretoria North*

## **F. Evaluation**

5.6.24 Since financial abuse and the withholding of funds are a common feature of domestic violence, it is obvious that the Sheriff's fee for service can present a problem to applicants and create an obstacle to their safety. Consultation suggests that applicants are often left in ignorance of the option that the costs may be borne by the State and that long delays are experienced as a consequence of an order that the fee for the protection order to be served be paid by the State. It is averred that some Sheriffs do not act until they receive the fee from the Department of Justice. For an applicant at risk of violence, the delay may be life-threatening.

5.6.25 Economic disempowerment of women lies at the root of many abusive relationships. The most common reason for women not leaving abusive relationships is their financial dependence upon their spouse or partner. Many women, under the Act, experience their economic disempowerment as the factor that stands between themselves and a protection order, as many women cannot afford the costs of service. Whilst it would be possible to build into the legislation a means test to ensure that only indigent women can receive economic assistance from the State in having the order served, this would place another hurdle for the judicial officer and the woman to overcome. It raises questions such as: Who bears the onus? What standard of proof is necessary? Proceedings will be delayed where, for example, the woman cannot produce any documentation as to her financial situation. Also, it would be problematic in situations where the applicant is not the victim of the domestic violence, but someone who applies on her behalf. In essence, it will deter applicants from utilizing the system and delay the proceedings which are designed to work as quickly as possible.

5.6.26 There are compelling arguments for involving the SAPS in the service of protection orders. Practical experience of legal practitioners and of frustrated applicants indicate that serious efforts should be undertaken to involve the SAPS in the service of protection orders. The SAPS should therefore be mandated to serve the protection order, as this will obviate the need for service fees and ensure that the police are aware of the protection order at the exact moment that it comes into force. The involvement of the SAPS will expedite service, especially after-hours.

5.6.27 It is recognised that a requirement of personal service would defeat the main objective of domestic violence legislation, namely to prevent violence. Respondents are known to evade personal service.

## **5.7 Duration of interdicts**

### **A. Excerpt from Issue Paper<sup>214</sup>**

The Act makes no provision for the automatic cancellation of interdicts after a certain period of time. The opinion was expressed that some sort of limit should be set on the duration of interdicts. Although this proposal is not without merit, it will, if implemented, cause a variety of administrative problems, for example giving notice to the applicant will be essential and in many cases the applicant will no longer be traceable on account of a change of address.

The question also arises whether the warrant for arrest would also lapse? A respondent who is arrested on a warrant issued in terms of an interdict that has lapsed would be in a position to sue for unlawful arrest.

### **B. Problem analysis**

5.7.1 An interdict granted under section 2 of the Act has no return date and need not be confirmed. It has force until it is successfully challenged in an application to have it set aside.

### **C. Comparative survey of laws**

#### *England*

5.7.2 The Law Commission (England)<sup>215</sup> asserts that fixed time limits are inevitably arbitrary and can restrict the courts' ability to react flexibly to problems arising within the family. In particular, it is important that orders should continue to be capable of enduring beyond the end of a relationship, although in some cases, short-term relief will be all that is necessary or desirable. The Law Commission does not think that a formal distinction between short and long term remedies is necessary and recommends that orders should be capable of being made for any specified period or until further order.

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<sup>214</sup>At 8.

<sup>215</sup>Law Com. No. 207 27.

*Australia*

*The Australian Capital Territory*

5.7.3 An interim order is valid for 10 days. The order lasts for 12 months unless the court specifies a shorter time.<sup>216</sup>

*New South Wales*

5.7.4 If an interim order is made, the defendant is summoned to appear at a hearing as soon as possible. The order may last for any period, but if the court does not specify a period then it lasts for six months.<sup>217</sup>

*Northern Territory*

5.7.5 The order may be made for any period which must be specified in the order.<sup>218</sup>

*Queensland*

5.7.6 An interim order usually lasts for 30 days but may be extended. The order remains in operation for two years or for a specified longer period if the court considers that there are special reasons why it should be for a longer period. The order may be renewed to take effect immediately upon the expiration of the original order.<sup>219</sup>

*South Australia*

5.7.7 After an interim order is made, the defendant is summoned to appear to show cause why the order should not be continued. No time limit is imposed on the duration of an order and the court is not required to specify how long the order will last.<sup>220</sup>

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<sup>216</sup>Laws of Australia paragraph [61] - [62].

<sup>217</sup>Laws of Australia paragraph [65] - [66].

<sup>218</sup>Laws of Australia paragraph [70].

<sup>219</sup>Laws of Australia paragraph [73] - [74].

<sup>220</sup>Laws of Australia paragraph [77] - [78].

*Tasmania*

5.7.8 An interim order operates for a maximum of 60 days or until further order of the court. The order lasts for such time as the court considers it necessary to protect the person who applied for the order.<sup>221</sup>

*Victoria*

5.7.9 An interim order operates for the time specified by the court or until a further order is made. The order lasts for 12 months or a lesser period as the court specifies.<sup>222</sup>

*Western Australia*

5.7.10 If an interim order is made, the defendant is summoned to show cause why the order should not be confirmed. The order lasts for 12 months or for such other period (including longer than 12 months) as the court specifies.<sup>223</sup>

*Canada**Alberta*

5.7.11 The Alberta Law Reform Institute<sup>224</sup> notes that there may be concerns about limiting the duration of *ex parte* orders. However, such considerations might not apply in the case of final orders. In some instances a very long-term or permanent order might be fair and desirable. Consideration should be given to the circumstances in which the duration of orders should be limited. The final recommendation is that orders should be made for a specified period, which may include orders that do not expire. Where no period is specified in the order, it should have effect for three years.<sup>225</sup>

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<sup>221</sup>Laws of Australia paragraph [81] - [82].

<sup>222</sup>Laws of Australia paragraph [85] - [86].

<sup>223</sup>Laws of Australia paragraph [89] - [90].

<sup>224</sup>ALRI Report for Discussion No 15 54.

<sup>225</sup>ALRI Report No 74 87.

*New Zealand*

5.7.12 A final protection order continues in force until it is discharged by the court on the application of the applicant or the respondent.<sup>226</sup>

*USA**Kentucky*

5.7.13 An emergency protective order shall be effective for a period of time fixed in the order, but not to exceed 14 days. Upon the issuance of an emergency protective order, a date for a full hearing shall be fixed not later than the expiration date of the emergency protective order.<sup>227</sup>

*New Jersey*

5.7.14 A final order may be dissolved or modified upon application, but only if the judge is the same judge who entered the order, or has available a complete record of the hearing or hearings on which the order was based.<sup>228</sup>

*Missouri*

5.7.15 After an *ex parte* order and at a hearing, the court issues a full order of protection for a period of time the court deems appropriate, but the order shall be valid for at least 180 days and not more than one year.<sup>229</sup>

*Model Code on Domestic and Family Violence*

5.7.16 An emergency order for protection expires 72 hours after issuance.<sup>230</sup> An order of protection is effective until further order of the court.<sup>231</sup>

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<sup>226</sup>Domestic Violence Act 86 of 1995, section 45(2).

<sup>227</sup>Kentucky Revised Statutes, section 403.740(3).

<sup>228</sup>New Jersey Prevention of Domestic Violence Act of 1991, 2C:25-29 13d.

<sup>229</sup>Missouri Revised Statutes, Chap 455, Sec 455.040.1.

<sup>230</sup>Model Code, section 305(5).

<sup>231</sup>Model Code, section 306(5).

#### **D. Recommendation 7 in Discussion Paper 70**

5.7.17 In Discussion Paper 70 it was recommended that the legislation:<sup>232</sup>

- (a) Provide that the return day to show cause why the interim interdict granted against the respondent should not be made final shall not be less than 10 days after service has been effected upon the respondent.
- (b) Set no time limit on the duration of a final interdict granted in terms of the legislation.
- (c) Retain the respondent's power to apply for the amendment or setting aside of the interdict after 24 hours' notice to the applicant and the court concerned (section 2(2)(c) of the Act) in respect of the interim order and the final order.

#### **E. Submissions on Recommendation 7 in Discussion Paper 70**

*Retain respondent's right to apply for setting aside of interdict*

5.7.18 *Tshwaranang Legal Advocacy Centre* points out that given the retention of the respondent's further right to apply to the court to have the interdict amended or set aside, the elaborate protection of the respondent's rights to *audi alteram partem* undermines the aims of the legislation which is to protect women and children from domestic violence. The *Judge President: Northern Cape* concurs with this, stating that if the respondent does not see fit to oppose the granting of a final interdict or if a final interdict is granted despite his opposition, there appears to be no valid reason why he should subsequently be given a second bite at the cherry unless new relevant information has come to his knowledge or unless circumstances justifying the amendment or setting aside of the final interdict have arisen subsequent to its being granted. The *Magistrate: Pietermaritzburg* raises the concern that this procedure will create an untenable situation in that a magistrate will have to sit in judgement on his/her colleague's decision if a respondent can apply to have the interdict set aside. The respondent should be entitled to anticipate the return day of

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<sup>232</sup>Discussion Paper 70 paragraph 3.7.26.



the rule *nisi* but should not be able to apply to have the interdict set aside once it has been made final. A final interdict should only be amended or set aside by a High Court in appeal and review proceedings.

*No time limit on duration of final interdict*

5.7.19 Many of the respondents who are in favour of Recommendation 1 in Discussion Paper 70, and even some who do not support it, express concern over the fact that the final interdict as provided for in terms of the Act is unlimited in duration, and this alone could render the Act unconstitutional. The *Cape Law Society* suggests that the duration of interdicts should be limited to two years. The *Magistrate: Durban* suggests five to ten years, with a provision that the interdict may be extended for a further period of time on application by the applicant. The *Magistrate: Pretoria North* submits that the time limit should be three or five years. He submits further that where good cause is shown for granting an extension to the time limit, a court should consider extending it. The *Magistrate: Verulam* raises the problem of storage of interdicts if there is no time limit set. He proposes that interdicts should be valid for ten years and if the interdict is not renewed by the applicant, it automatically expires. *M Horton* suggests that interdicts should last for one year and that courts should have a discretion to make a longer or indefinite order, but that courts should not have the discretion to make a shorter order except where the respondent is ordered to leave the home.

5.7.20 Those who support the recommendation that there should be no time limit on interdicts are the *Department of Justice Gender Unit*, *NICRO - Western Cape* and *UWC Community Law Centre* (which adds that the legislation should expressly provide that there is no time limit on the duration of final interdicts).

## **F. Evaluation**

5.7.21 In paragraph 5.1.53 *et seq* above it is argued that provision be made for the granting of an interim protection order *ex parte* with a return date. In terms of the Magistrates' Courts Rules,<sup>233</sup> an order made *ex parte* shall call upon the respondent to show cause at a time stated in

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<sup>233</sup>Rule 56(5)(a).

the order why the order should not be confirmed. Service of such *ex parte* order shall be effected on the respondent at least 10 days before the specified return date unless otherwise ordered by court.<sup>234</sup>

5.7.22 As appears from the comparative survey of laws,<sup>235</sup> the span of time for interim orders varies between 3 and 60 days. In a number of jurisdictions an interim order operates for the time specified by the court. The position as set out in the Magistrates' Courts Rules provides sufficient flexibility in respect of the duration of interim orders.

5.7.23 A final protection order in situations which do not deal with domestic violence, is one which is granted without (as a rule) any limitation as to time. It is granted in order to secure a permanent cessation of an unlawful course of conduct or state of affairs.<sup>236</sup> Protection orders in the context of domestic violence situations should be treated no differently. Violent incidents cannot be predicted and peaceful interludes are no guarantee that violence has ceased for good. As asserted by the Law Commission (England),<sup>237</sup> it is important that orders should endure beyond the end of a relationship.

5.7.24 If the court determines on the return day that the interim protection order granted against the respondent should be made final, it implies that final rights have been determined. Such rights require perpetual protection. A time limit on a final protection order in respect of domestic violence is impractical and a variety of administrative problems are anticipated.<sup>238</sup>

5.7.25 In terms of Magistrates' Courts Rule 56(6) the return day of an order made *ex parte* may be anticipated by the respondent upon 12 hours' notice to the applicant. In terms of section 2(2)(c) of the Act the respondent has the power to apply for the amendment or setting aside of

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<sup>234</sup>Rule 9(13)(b).

<sup>235</sup>See paragraph 5.7.2 et seq above.

<sup>236</sup>H J Erasmus & A M Breitenbach Superior Court Practice Kenwyn: Juta 1994 E8-3.

<sup>237</sup>See paragraph 5.7.2 above.

<sup>238</sup>See excerpt from Issue Paper above.

the interdict after 24 hours' notice to the applicant and the court concerned. The procedure of anticipating the return date can serve as an additional remedy open to the respondent.

## 5.8 Role of the South African Police Service

For the reader's clarification, an indication is given of the Chapters in which issues involving the SAPS are discussed:

- \* Service of the protection order - Chapter 5, paragraph 5.6 et seq.
- \* The execution of the warrant arrest issued under the proposed legislation - Chapter 6, paragraph 6.2 et seq.
- \* Duty to inform applicant of rights - Chapter 7, paragraph 7.1 et seq.
- \* Arrest without warrant - Chapter 7, paragraph 7.2 et seq.
- \* Seizure of arm or dangerous weapon - Chapter 7, paragraph 7.4 et seq.
- \* Notification of police station - Chapter 7, paragraph 7.5 et seq.

The following issues involving the SAPS are expounded in this discussion:

- \* Application for a protection order on behalf of the applicant.
- \* Accompaniment of the applicant to collect personal property.

### A. **Excerpt from Issue Paper**<sup>239</sup>

Two problems were raised in relation to the SAPS'S role in the interdict process. First, it would appear that the police are refusing to accept criminal charges, particularly of assault, until an interdict has been granted. Second, persons are being released with a warning after arrest by the police despite the fact that the Act makes it clear that no person may be released unless a judge or magistrate orders his or her release [section 3(2)(a)]. In addition, according to information at the Commission's disposal, the Police tend to regard family violence as a civil matter and are reluctant to intervene.

### B. **Problem analysis**

5.8.1 Human Rights Watch / Africa<sup>240</sup> maintains that in practice, the greatest problem with implementation of the Act appears to lie with the police. Ignorance about the law within the police continues to be prevalent. In addition, police response to domestic violence is often

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<sup>239</sup>At 8.

<sup>240</sup>Human Rights Watch 74.

unsympathetic or hostile.<sup>241</sup> Resources must be devoted to ensuring that police understand that domestic violence in a home is a community issue of priority that must not be condoned by the police in any way.<sup>242</sup>

5.8.2 According to Fedler's<sup>243</sup> experience it is not the magistrates, but the police, who are the weakest link in the interdict structure:

- (a) The police still do not treat domestic violence as a crime.
- (b) There is a lack of prompt response by the police when called upon to assist.
- (c) There is a reluctance on the part of the police to accept a charge of assault against a husband or boyfriend, an insensitive approach and a lack of commitment and vigour when it comes to investigating such a charge.

5.8.3 Clark<sup>244</sup> asserts that the effectiveness of the interdict system depends on the cooperation of the police and magistrates. What is urgently needed is a clarification of police duties in relation to family violence - either by an internal policy document or an Act of Parliament. Special measures need to be taken to ensure effective police support for victims in rural areas and townships. If urgent applications are to be heard, then the police need to be educated about the interdict system and how to assist with such. The police need special training in the manner of reporting a domestic violence case and they should be briefed on the seriousness of a domestic violence case. In addition, they would need to be instructed when to investigate and how to investigate such a case.

5.8.4 If we accept that a total strategy of combating domestic violence is needed, according to Bonthuys,<sup>245</sup> one of the methods which may be worth considering is authorising the police to act on behalf of the victim when requested to do so.

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<sup>241</sup>Human Rights Watch 76 *et seq.*

<sup>242</sup>Human Rights Watch 83.

<sup>243</sup>Fedler 1995 SALJ 246.

<sup>244</sup>Clark 1996 SAJHR 598.

<sup>245</sup>Bonthuys 1997 SALJ 385 - 386.

5.8.5 Clark<sup>246</sup> argues that the police should actively assist a woman and her children to leave the scene of a violent incident and seek to provide an escort for women to return to the family home to collect their belongings.

5.8.6 Women, Law & Development International<sup>247</sup> note that it is important that a broad category of persons, including police officers, be able to file a complaint, as the victim may be incapacitated, may not have access, or may be unable to file a complaint due to fear of retaliation.

### **C. Comparative survey of laws**

#### *Australia*

5.8.7 In all jurisdictions, the police have standing to apply for civil remedies under the domestic violence legislation.<sup>248</sup>

#### *New South Wales*

5.8.8 Police are obliged to apply for an order on behalf of a victim of domestic violence unless they are satisfied that the applicant is applying for an order or there is some other good reason for the police not to apply for an order. The police must record the reasons for not applying for an order on behalf of a domestic violence victim. If the victim is a child, the police must apply for an order.<sup>249</sup>

#### *Queensland*

5.8.9 Police may apply for an order on behalf of the victim where the officer reasonably suspects that the spouse has been subjected to violence. Police must apply for a protection order where the officer has arrested someone for violence against a spouse or property. In addition, police may represent a person seeking an order.<sup>250</sup>

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<sup>246</sup>Clark 1996 *SAJHR* 598.

<sup>247</sup>*State Responses* 80.

<sup>248</sup>*Laws of Australia* Chapter 5.

<sup>249</sup>*Laws of Australia* paragraph [63].

<sup>250</sup>*Laws of Australia* paragraph [71].

*South Australia*

5.8.10 It is a notable feature of the South Australian practice that in virtually all cases the police apply for an order on behalf of the victim.<sup>251</sup>

*England*

5.8.11 Commenting on the position in Australia, the Law Commission (England)<sup>252</sup> points out that the power of the police to apply for civil remedies is seen as having a number of advantages. In many cases, the victim is in a state of helplessness because of the violence and is unable to take any initiative herself. Giving the power to the police removes the burden of taking action from her, reduces the scope for further intimidation by the perpetrator and leads to far fewer cases being withdrawn. In addition, it is seen to be in the police's interests to take steps to stop further violence because this will eventually lighten their workload. The fact that the police are initiating the proceedings also has the beneficial effect of bringing home to the respondent the seriousness of the matter and giving civil proceedings the "weight" they can lack in the eyes of some of the less law abiding members of society. There is also an argument that having the power to bring civil proceedings encourages the police to upgrade the importance of domestic violence and become more aware and sensitive in relation to it. They may also be more prepared to arrest for breach if they themselves have initiated the proceedings and obtained the order.

5.8.12 The following reservations are expressed on giving such powers to the police:<sup>253</sup>

- (a) The intrusion of the police into the civil law.
- (b) The manner in which they might exercise their powers.
- (c) The degree of attention which would be paid to the wishes and interests of the woman involved.
- (d) Indiscriminate and insensitive use of such powers could place many women in a worse position.
- (e) Reluctance of the police to become involved.

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<sup>251</sup>Laws of Australia paragraph [75].

<sup>252</sup>Law Com. No. 207 paragraph 5.18.

<sup>253</sup>Law Com. No. 207 paragraph 5.19.

- (f) The undesirable effect of discouraging prosecutions in cases in which they might otherwise be brought.

5.8.13 The Law Commission<sup>254</sup> notes that the provision of support and assistance is rather different to actually taking legal proceedings on behalf of someone else and it is difficult to think of an alternative body which could fulfil the latter role. Often, the police will already be involved and will have witnessed the aftermath of incidents of domestic violence, if not the incident itself. They are accustomed to handling these problems and to participating in court proceedings. The police also represent the role of society in protecting individuals from violence and abuse. Extending standing to the police would give them greater flexibility in the way they respond to domestic crises without putting them under any obligation to apply for civil remedies or deterring criminal proceedings if these are more appropriate.

5.8.14 The Law Commission (England)<sup>255</sup> therefore recommends that where the police have been involved in an incident of molestation or actual or threatened violence, or its aftermath, they should have the power to apply for civil remedies on behalf of the victim. It is envisaged that the police would have power to apply for a civil order where they had attended at or following an incident of molestation or violence, and had reasonable cause to believe that such abuse had occurred. They could then apply for an order against the aggressor, provided that the people concerned fell within the relevant categories, and provided that the police consider this would be an appropriate course of action for them to take. There would be no obligation on the police to take civil proceedings, but the option would be available either as an alternative to or in addition to criminal proceedings.

5.8.15 The question of whether the victim's consent should be necessary before the police bring civil proceedings is also considered by the Law Commission (England).<sup>256</sup> On one view of the matter, it can be said that for an order to be effective, the active cooperation of the victim is required. On the other hand, requiring the victim's consent could be seen as undermining many

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<sup>254</sup>Law Com. No. 207 paragraph 5.20.

<sup>255</sup>Law Com. No. 207 paragraph 5.20 - 5.21.

<sup>256</sup>Law Com. No. 207 paragraph 5.22 - 5.23.



of the reasons suggested for giving the police power to bring the proceedings. A third alternative is to require the police to consult the woman concerned and take account of her views. This should give the victim a significant degree of influence over the conduct of proceedings by the police, but does not make her consent or approval the decisive factor in determining whether or not civil proceedings are issued. The police could then take action where the victim asks them to and would be in a better position to obtain the necessary information to enable them to distinguish cases where the woman genuinely does not want civil proceedings issued, from cases in which she does want some action taken against her assailant but does not dare to initiate or authorise it directly. The police could also properly emphasise to the assailant that the decision to issue civil proceedings is out of the victim's hands. As an additional safeguard it could be provided that when proceedings are taken by the police, the court should take account of the wishes of the victim before making any order.

5.8.16 The Law Commission (England)<sup>257</sup> accordingly recommends that the police should be under a duty to consult the victim and to take account of her views in deciding whether to issue and how to conduct any civil proceedings. In cases where proceedings are brought by the police, the court should have a duty to take the victim's views into account before making any order.

#### *Canada*

##### *Alberta*

5.8.17 The Alberta Law Reform Institute<sup>258</sup> refers to significant difficulties involving possession of personal property by victims of domestic abuse. It is often the case that they leave the residence in an emergency situation, going to a shelter or to the home of a friend, and they then face the difficulty of having left their personal possessions behind in the residence and have no way of returning to the residence in safety to collect them. The difficulty of setting up a new home without access to one's clothes and other personal effects in a situation of financial stress is a problem for many. Personal items like cots and highchairs are often essential to the victims' ability to take proper care of children that they have taken with them when fleeing the residence.

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<sup>257</sup>Law Com. No. 207 paragraph 5.23.

<sup>258</sup>ALRI Report for Discussion No 15 142 - 143.

5.8.18 It is recommended<sup>259</sup> that the legislation should empower the court to order a police officer to accompany the applicant to a specified residence to collect specified personal property. Since the assailant might intimidate the victim out of the sight of the police officer, such orders, if ultimately granted, should be clear that the police officer must remain with the applicant at all times. The recommendation is confirmed in the final report.<sup>260</sup>

*Nova Scotia*

5.8.19 The Nova Scotia proposed legislation<sup>261</sup> empowers the court to grant an order, which shall be restricted in duration, requiring that a police officer accompany either party to a residence or supervise the removal of personal belongings in order to ensure the personal safety of the victim.

*Saskatchewan / British Columbia*

5.8.20 Saskatchewan<sup>262</sup> and British Columbia<sup>263</sup> have similar provisions directing a peace officer to accompany, within a specified time, a specified person to the residence to supervise the removal of personal belongings in order to ensure the protection of the victim.

**D. Recommendation 8 and Request for Comment 2 in Discussion Paper 70**

5.8.21 In Discussion Paper 70 it was recommended that:<sup>264</sup>

- (a) The SAPS take cognisance of the criticism and guidelines for conduct.
- (b) The Department of Justice investigate, in consultation with the SAPS, the possibility of furnishing police stations with the necessary application for interdict forms and requiring the SAPS to assist applicants with the affidavits.

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<sup>259</sup>ALRI Report for Discussion No 15 144.

<sup>260</sup>ALRI Report No 74 72.

<sup>261</sup>Quoted in ALRI Report for Discussion No 15 143.

<sup>262</sup>Saskatchewan Victims of Domestic Violence Act S.S. 1994, c.V-6.02, section 7(1)(e).

<sup>263</sup>Quoted in ALRI Report for Discussion No 15 201 - 203.

<sup>264</sup>Discussion Paper 70 paragraph 3.8.37.

5.8.22 In Discussion Paper 70 specific comment was requested on empowering.<sup>265</sup>

- (a) The SAPS to apply for an interdict on behalf of the applicant.
- (b) The court to order a police officer to accompany the applicant to a specified residence to supervise the collection of specified personal property.

### **E. Submissions on Request for Comment 2 in Discussion Paper 70**

*SAPS applying for interdicts on behalf of the applicant*

5.8.23 *Concerned Friends of the Frail and Aged* particularly endorse this recommendation in respect of women, children and the elderly who are in need of support. The *Department of Justice Gender Unit* suggests that the SAPS be given authority to apply on behalf of an applicant, as this will open the door for increased police participation and assist them to develop confidence and understanding of the issues. Other respondents who support this recommendation are *M Horton*, the *Natal Law Society* (which raises concerns about training and personnel), the *National Human Rights Trust*, *NICRO - Western Cape*, the *Magistrate: Verulam*, the *Democratic Party and the Women's Lobby*. The *SA National Council for Child and Family Welfare*, the *Gender Advocacy Programme* and the *Department of Justice Gender Unit* are in favour of this on condition that police are properly trained in the field of domestic violence and gender sensitivity. The *Cape Law Society* and *Gauteng Members of the ALS Family Law Standing Committee* suggest that the circumstances in which the police can apply for interdicts on behalf of applicants be limited to circumstances in which the applicant is unable, by virtue of physical injury or emotional frailty, to personally make such application.

5.8.24 However, a number of respondents strongly oppose this recommendation. The *Laws and Administration Committee of the General Council of the Bar, P Thwala* and the *Magistrate: Pietermaritzburg* submit that it is not appropriate for the SAPS to apply for an interdict on behalf of the applicant, but rather that the SAPS should be given guidelines to assist applicants in obtaining an interdict.

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<sup>265</sup>Discussion Paper 70 paragraph 3.8.38.

5.8.25 *UWC Community Law Centre* states that the disadvantages of allowing the SAPS to apply for interdicts on behalf of applicants outweigh the advantages. The lack of attention that would be paid to the wishes and interests of the woman involved, the indiscriminate and insensitive use of such powers and the well-documented reluctance of the police to become involved in domestic violence cases militate strongly against this recommendation being successfully implemented. This organization is particularly concerned about the discretion that would be conferred on police officers to decide whether to apply for an interdict or not, and that the exercise of this discretion will inevitably be influenced by the very factors that make implementation of the Act problematic, namely lack of sensitivity, ignorance and indifference.

*SAPS accompaniment to residence to supervise collection of personal property*

5.8.26 This recommendation is endorsed by the *Laws and Administration Committee of the General Council of the Bar*, the *Democratic Party*, *Magistrate: Pietermaritzburg*, *Magistrate: Pretoria North*, *Natal Law Society*, *NICRO - Western Cape*, *P Thwala*, the *Women's Lobby*, *UNISA Health Psychology Unit*, *SA National Council for Child and Family Welfare*, *Gauteng Members of the Als Family Law Standing Committee* and *Centre for Peace Action*. The *Department of Justice Gender Unit* suggests that a directive be given to police requiring them to render assistance where they are requested to do so. *M Horton* proposes that the court should also be empowered to order the police to supervise the respondent's collection of property, especially in cases where he has been ordered to vacate the matrimonial home. *UWC Community Law Centre* suggests the addition of a provision which provides that the police officer remain with the applicant at all times and take appropriate steps to ensure her safety.

## **F. Evaluation**

5.8.27 There is extensive criticism of the role of the SAPS in combatting domestic violence. However, it is clear that little can be done by way of legislative intervention to remedy the situation. Continued education and training to clarify the SAPS's role are required to ensure effective policing in domestic violence cases.

5.8.28 In all jurisdictions in Australia the police have *locus standi* to apply for civil remedies under the domestic violence legislation.<sup>266</sup> The Law Commission (England)<sup>267</sup> has made a careful analysis of the advantages of empowering the police to apply for civil remedies on behalf of the victim in domestic violence cases. The conclusion is that such a power should be an option available to the police either as an alternative to or in addition to criminal proceedings. There is a strong argument in favour of empowering the SAPS to apply for a protection order on behalf of a victim of domestic violence.

5.8.29 In paragraph 5.2.44 above it is suggested that the legislation provide that the application for a protection order may be brought on behalf of the applicant by any other person who has a material interest in the well being of the applicant. Although one could probably argue that the police would have a material interest in the matter on behalf of the applicant, there should be no uncertainty as to the role of the SAPS in this regard and a power of this nature should be explicitly provided for in respect of the SAPS.

5.8.30 Concerns raised that the SAPS will exercise discretion in a random manner, and not necessarily with the applicant's interests at heart, are remedied by the provision that no person may apply on behalf of an applicant without consent.

5.8.31 The difficulties referred to by the Alberta Law Reform Institute<sup>268</sup> involving possession of personal property by victims of domestic abuse are equally applicable to the situation in South Africa. Consultation suggests that victims often have to leave the residence in an emergency situation without having access to essential personal possessions. Legislation should empower the court to order a police officer to accompany the applicant to a specified residence to supervise the collection of specified personal property. Jurisdictions in Canada<sup>269</sup> have provisions to this effect.

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<sup>266</sup>See paragraph 5.8.7 et seq above.

<sup>267</sup>See paragraph 5.8.11 et seq above.

<sup>268</sup>See paragraph 5.8.17 above.

<sup>269</sup>See paragraph 5.8.18 et seq above.

## 5.9 **Review, appeal and bail**

### A. **Excerpt from Issue Paper**<sup>270</sup>

The Act currently makes no provision for appeal or review, nor for bail pending review.<sup>271</sup> It is felt that the legislature should spell this out in the Act.

### B. **Problem analysis**

5.9.1 Dicker<sup>272</sup> argues that because the Act contains no provision for a right of appeal, the only recourse of an aggrieved party is by means of the procedure of common law review of an administrative act. This course of action would be available only in the limited circumstances that give rise to a right to have an administrative act reviewed by the High Court.<sup>273</sup> An application for review would have to be brought under Rule 53 of the Uniform Rules of Court.<sup>274</sup>

<sup>270</sup>At 8.

<sup>271</sup>It should be noted that, in addition to the question of bail pending review, it is also uncertain whether bail may be granted to a respondent where the enquiry into his alleged breach of the conditions of the order is postponed to a later date.

<sup>272</sup>Dicker 1994 De Rebus 215.

<sup>273</sup>See also Clark 1996 SAJHR 594.

<sup>274</sup>Rule 53(1) of the Uniform Rules of Court provides as follows:

“(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected-

(a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

(b) calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make, and to

5.9.2 In the **Rutenburg** case<sup>275</sup> it was held that a magistrate, in granting, setting aside or amending an interdict under the Act, acted in his judicial capacity as the officer presiding over his court. The jurisdiction, powers and procedure of that court were to be found, then, in the first instance, not in the provisions of the Act and Regulations, but in those of the Magistrates' Courts Act 32 of 1944 and the Magistrates' Courts Rules. The latter provisions did not cease to apply to a magistrate simply because, in a particular case, he was applying the Act and Regulations: he was basically governed by the relevant provisions of the Magistrates' Courts Act 32 of 1944 and the Magistrate's Court Rules which applied to and regulated the proceedings in his court. It was only where those were expressly or by clear implication extended or departed from in the Act and Regulations that they would not apply.

5.9.3 According to Coetzee<sup>276</sup>, section 83<sup>277</sup> of the Magistrates' Courts Act 32 of 1944 accords the respondent the right to appeal if his application for the amendment or setting aside of the interdict does not succeed.

5.9.4 Van Rensburg<sup>278</sup> states that the provisions of the Magistrates' Courts Act 32 of 1944<sup>279</sup> and the Criminal Procedure Act 51 of 1977<sup>280</sup> in respect of appeal and review are, with the necessary amendments, applicable to the interdict proceedings and the criminal investigation in terms of the Act.

notify the applicant that he has done so.”

<sup>275</sup>**Rutenberg v Magistrate, Wynberg** 1997 4 SA 735 (C) 750 - 751.

<sup>276</sup>Coetzee 1994 De Rebus 625.

<sup>277</sup>In terms of section 83(a) of the Magistrates' Courts Act 32 of 1944 a party to any civil suit or proceeding in a court may appeal to the provincial or local division of the High Court having jurisdiction to hear the appeal, against any judgment of the nature described in section 48. Jones & Buckle The civil Practice of the Magistrates' Courts in South Africa Vol I Eighth edition by H J Erasmus Cape Town: Juta 1988 at 192 observe that an interdict against the doing of something also falls within the scope of section 48.

<sup>278</sup>Van Rensburg 1994 The Magistrate 106.

<sup>279</sup>Chapter XI.

<sup>280</sup>Chapter 30.

5.9.5 Section 35(3)(o) of the Constitution, 1996, provides that every accused has the right to a fair trial, which includes the right of appeal to, or review by, a higher court.

5.9.6 It is clear to Van Rensburg<sup>281</sup> that a respondent arrested in terms of section 3(1) of the Act may at any time make an after hours application for bail. He refers to section 60 of the Criminal Procedure Act 51 of 1977<sup>282</sup> and to the Supreme Court of Appeal's<sup>283</sup> interpretation of the section. The provision that a respondent shall as soon as possible be brought before a judge or magistrate (section 3(2)(b) of the Act) will be interpreted strictly and accordingly it can be argued that the respondent is, in essence, in the same position as an accused who applies for bail.

5.9.7 Section 35(1)(f) of the Constitution, 1996, provides that everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions.

5.9.8 Section 60(11) of the Criminal Procedure Act 51 of 1977, after amendment by the Criminal Procedure Second Amendment Act 85 of 1997 (with effect from a date to be proclaimed) provides, inter alia, as follows:

where an accused is charged with an offence referred to-

(b) in Schedule 5<sup>284</sup> . . . the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.

### C. Comparative survey of laws

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<sup>281</sup>Van Rensburg 1994 The Magistrate 103.

<sup>282</sup>Section 60(1)(a) provides that an accused who is in custody in respect of an offence shall be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, unless the court finds that it is in the interests of justice that he or she be detained in custody.

<sup>283</sup>**Minister van Wet en Orde v Dipper** 1993 3 SA 591 (A).

<sup>284</sup>Schedule 5 lists, inter alia, the offences of murder, attempted murder involving the infliction of grievous bodily harm, rape, and indecent assault on a child under the age of 16 years.



*Australia**New South Wales / Tasmania / Victoria*

5.9.9 A respondent to an application for a protection order is treated for bail purposes as if he or she is facing criminal proceedings. This means that, if proceedings are adjourned or an order is not made immediately, the court may impose bail conditions to protect the victim.<sup>285</sup>

*New Zealand*

5.9.10 Where a person is arrested for breach of a protection order and charged with an offence of contravening a protection order, the person must not be released on bail during the 24 hours immediately following the arrest.<sup>286</sup>

**D. Recommendation 9 in Discussion Paper 70**

5.9.11 In Discussion Paper 70 it was recommended<sup>287</sup> that the legislation provide that the provisions in respect of appeal and review contained in the Magistrates' Courts Act 32 of 1944, the Supreme Court Act 59 of 1959, and the Criminal Procedure Act 51 of 1977, shall apply to the interdict proceedings and the criminal investigation.<sup>288</sup>

**E. Submissions on Recommendation 9 in Discussion Paper 70**

5.9.12 The *Natal Law Society* supports this recommendation in principle but advises that the procedure should be spelled out in the legislation so that unrepresented persons have immediate access to the procedures.

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<sup>285</sup>Laws of Australia paragraph [23], [27], [28].

<sup>286</sup>Domestic Violence Act 86 of 1995, section 51.

<sup>287</sup>Discussion Paper 70 paragraph 3.9.22.

<sup>288</sup>In Discussion Paper 70 it was recommended (paragraph 4.1.30) that the contravention of the conditions of an interdict granted in terms of domestic violence legislation be an offence which is prosecuted in the criminal court. This implies that the ordinary rules of bail would apply to a respondent arrested for a breach of the interdict.

5.9.13 *UWC Community Law Centre* claims that the recommendation fails to clarify the position of the applicant. This respondent recommends that the legislation provide that section 83(b) of the Magistrate's Court Act is applicable to interdict proceedings to ensure that both the refusal to grant a temporary interdict as well as the granting of an interdict are appealable. It is further argued that the application of the ordinary rules of criminal procedure, albeit advantageous to the accused, will unfairly disadvantage the abused woman by denying her the right to appeal against an acquittal. Because the complainant is not a party to the proceedings in criminal proceedings for contempt of court and domestic violence offences, she has no right of appeal. *UWC Community Law Centre* advocates a completely new approach based on the German **Nebenklagerin** procedure in which the complainant becomes an ancillary prosecutor with all the rights of a prosecutor, including the right to lodge an appeal against the judgement of the court independently from the prosecutor. This approach, it is argued, will substantially reduce the secondary victimization suffered by complainants in domestic violence cases and will promote the ideal of substantive gender equality.

5.9.14 The *Department of Justice Gender Unit* states that ordinary bail provisions apply after the arrest and if the hearing is postponed for any reason. Guidelines may be required in this regard because the appropriateness of bail in domestic violence situations can be quite difficult to assess. Men who are violent towards their partners may, in all other respects, appear to be model citizens. They may have a stable home and job, significant local family ties and no previous convictions. They may pose no risk to the general community but they represent a huge risk to one person and they know where she lives, works, visits and frequents. The *Unit* proposes that a special set of criteria, which prioritises the risk to the applicant as the most significant factor to be taken into account, should be devised.

5.9.15 Recommendation 9 is endorsed by:

*The Cape Law Society*

*Magistrate: Pietermaritzburg*

*Magistrate: Pretoria North*

*M Horton*

*NICRO, Western Cape*

**F. Evaluation**

5.9.16 It is clear that the absence of explicit provision for appeal and review in the Act gives cause for considerable confusion and that the legislation should provide for this. The Supreme Court Act 59 of 1959 and the Uniform Rules of Court; the Magistrates' Courts Act 32 of 1944 and the Magistrates' Courts Rules; and the Criminal Procedure Act 51 of 1977<sup>289</sup> contain detailed provisions for appeal and review in civil and criminal proceedings. For this reason it is not deemed necessary to encumber the domestic violence legislation with detailed provisions in this regard, except to provide that the parties to the proceedings have a right to appeal or to bring proceedings under review in accordance with the provisions of the aforementioned Acts.

5.9.17 The amendment to the Criminal Procedure Act referred to in paragraph 5.9.8 above in which an accused charged with a serious offence is required to adduce evidence which satisfies the court that he should be released on bail, may be equally applicable to situations in which a respondent is arrested for a breach of the protection order. Instances of domestic violence are part of a pattern of violence in South Africa and it can be argued that the legal system is therefore obliged to treat breaches of protection orders with the requisite punitive rigour.

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<sup>289</sup>In paragraph 6.1.22 below it is postulated that the contravention of a protection order granted in terms of domestic violence legislation should be an offence which is prosecuted in the criminal court.

## 5.10 Definition of domestic violence

### A. **Excerpt from Issue Paper**<sup>290</sup>

The Act does not adequately define the grounds upon which an interdict should be granted. A comprehensive definition of family violence is suggested which should include physical, mental and sexual abuse.

The Act offers no protection to a victim who is stalked by an aggressor. The aggressor follows the victim, monitors his or her daily movements and generally harasses him or her.

### B. **Problem analysis**

5.10.1 Human Rights Watch / Africa<sup>291</sup> points out that it is left to the individual magistrate to determine whether the abuse qualifies for an interdict. Section 2(1)(a) and (d) of the Act refers to “assault or threaten” and “any other act”. These sweeping provisions allow magistrates overly broad discretion to determine what constitutes abuse. This has resulted in a lack of consistency between various jurisdictions. It is also unclear whether most magistrates would view emotional or psychological harassment, not coupled with physical violence or threats of violence, as abuse.

5.10.2 According to Fredericks & Davids<sup>292</sup> the prevention of violence within the family is central to the Act, yet there is no definition of violence contained in section 1. The reference to “assault” or a “threat” in section 2(1)(a) of the Act is clearly inadequate as violence consists not only of the infliction of injury by way of physical force or a threat to harm or injure, but also the infliction of emotional, verbal and psychological abuse. According to the authors it is clear, however, that the Act is aimed only at physical violence and a threat is relevant only to the extent that it is ancillary to the violence.

5.10.3 Novitz<sup>293</sup> refers to a problem identified in the United States, namely that a survivor must prove that a substantial degree of violence has been used against her before she becomes eligible

<sup>290</sup>At 9.

<sup>291</sup>Human Rights Watch 70.

<sup>292</sup>Fredericks & Davids 1995 TSAR 487.

<sup>293</sup>Novitz 40 - 41.

for a restraining order.<sup>294</sup> One important issue is whether in practice, the lack of clarity in the Act will lead to similar burdens of proof being placed upon South African women. There needs to be clarification of the violence the Act is intended to address and the grounds upon which a magistrate may grant an interdict.<sup>295</sup> A related problem is the broad scope of section 2(1) which sets out the potential content of interdicts granted under the Act. The extent to which section 2(1)(d) can be used to introduce innovative requirements into an interdict, for example, to cease stalking, remains uncertain.<sup>296</sup>

5.10.4 Fedler<sup>297</sup> points out that, because the interdict is granted on the word of just one party, certain magistrates require proof of ongoing abuse in the form of doctors' reports, police documentation or disregarded peace orders. Many women are unable to produce the required proof. The requirement by some magistrates that women produce evidence of ongoing abuse is acutely at odds with the reality of the lives abused women lead. To ensure fairness there must be uniformity in the qualifying requirements for the interdict among the various magistrates' courts.<sup>298</sup>

5.1 Clark<sup>299</sup> points out that family violence is a global problem which cannot be narrowly defined. It should include verbal harassment in the form of constant threats; vicious criticism or demeaning insults either in private or in the presence of family members or visitors; inadequate allocation of the family resources so that the victim, because of her economically weak position is forced to remain in the home as a prisoner of the perpetrator of the violence.

5.10.6 No specific provision is made in the Act for the protection of an applicant who is stalked by the respondent away from the home. Stalking often forms an integral part of the abuse suffered by a battered woman and should be addressed directly.<sup>300</sup>

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<sup>294</sup>See also Clark 1996 SAJHR 593.

<sup>295</sup>Novitz 58.

<sup>296</sup>Novitz 42.

<sup>297</sup>Fedler 1995 SALJ 244.

<sup>298</sup>Fedler 1995 SALJ 244 fn 59.

<sup>299</sup>Clark 1996 SAJHR 593.

<sup>300</sup>Clark 1996 SAJHR 593; Bonthuys 1997 SALJ 385.

5.10.7 Le Roux<sup>301</sup> submits that the uncertainty as to what conduct qualifies as "domestic violence" can be remedied by the insertion of a detailed list describing the type of conduct that would constitute domestic violence. However, such a list should not purport to be a *numerus clausus* of types of conduct.

### C. Comparative survey of laws

#### *United Nations framework for model legislation*

5.10.8 It is urged that states adopt the broadest possible definition of acts of domestic violence with a view to compatibility with international standards.<sup>302</sup>

#### *England*

5.10.9 The Law Commission (England)<sup>303</sup> refers to three possible approaches to the issue of the definition of the criteria for non-molestation orders:

- (a) To define the criteria quite precisely, perhaps singling out the use or threat of violence.
- (b) To leave them undefined.
- (c) To adopt a broad statutory criterion, protecting the health, safety or well-being of the applicant or any child concerned.

5.10.10 It is recommended<sup>304</sup> that there should be no statutory definition of molestation. An acceptable degree of flexibility is provided by a model that empowers the court to grant an order where this is just and reasonable having regard to all the circumstances including the need to secure the health, safety or well-being of the applicant or a relevant child.<sup>305</sup>

#### *Australia*

<sup>301</sup>Le Roux 1997 *De Jure* 312.

<sup>302</sup>UN *Framework* paragraph 3.

<sup>303</sup>Law Com. No. 207 paragraph 3.3.

<sup>304</sup>Law Com. No 207 paragraph 3.1.

<sup>305</sup>Law Com. No. 207 paragraph 3.7.

*The Australian Capital Territory*

5.10.11 The applicant must establish that the respondent has engaged in violent conduct and is likely to do so again, or has threatened such conduct and is likely to carry out the threat.<sup>306</sup>

*New South Wales*

5.10.12 The applicant must establish that he or she has reasonable grounds to fear, and in fact fears, either violence or harassment. Unless otherwise ordered, every order is taken to prohibit stalking or intimidation.<sup>307</sup>

5.10.13 In New South Wales stalking, as defined, is a criminal offence. Stalking means the following of a person about, watching, frequenting of the vicinity of, or an approach to, a person's place of residence, business or work or any place that a person frequents for the purpose of any social or leisure activity.<sup>308</sup>

*Northern Territory*

5.10.14 It must be established that the defendant has caused, or threatened to cause, personal injury to the victim or damage to the victim's property, or has engaged in provocative or offensive conduct and is likely to repeat that conduct or carry out the treat.<sup>309</sup>

5.10.15 Stalking, as defined, is a criminal offence. It includes following, loitering outside where the other person is, interfering with property of the other person, keeping the other person under surveillance or acting in any other way that could reasonably be expected to arouse the other person's apprehension or fear.<sup>310</sup>

*Queensland*

<sup>306</sup>Laws of Australia paragraph [60].

<sup>307</sup>Laws of Australia paragraph [66].

<sup>308</sup>Laws of Australia paragraph [45].

<sup>309</sup>Laws of Australia paragraph [68].

<sup>310</sup>Laws of Australia paragraph [46].

5.10.16 It must be established that violence or intimidation has occurred or been threatened, and violence and intimidation are likely to happen again or the threat is likely to be carried out.<sup>311</sup>

5.10.17 Stalking, as defined, is a criminal offence. It includes following, loitering near, watching or approaching another person or their place of work, residence or where they visit, telephoning, interfering with property, giving or leaving offensive material, harassing, intimidating, or threatening another person.<sup>312</sup>

*South Australia*

5.10.18 The court must be satisfied that the defendant may, unless restrained, cause personal injury or damage to property or behave in an intimidating or offensive manner.<sup>313</sup>

5.10.19 Stalking is a criminal offence. The South Australian provision is similar to that of the Northern Territory, but it also includes giving or leaving offensive material.<sup>314</sup>

*Tasmania*

5.10.20 It must be established that the defendant has threatened violence and is likely to carry out that threat, or that he or she has been violent or harassing and is likely to repeat that conduct.<sup>315</sup>

*Victoria*

5.10.21 It must be established that the defendant has been violent or harassing to a family member, or has threatened violence, and is either likely to do so again or is likely to carry out the threat.<sup>316</sup>

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<sup>311</sup>Laws of Australia paragraph [72].

<sup>312</sup>Laws of Australia paragraph [47].

<sup>313</sup>Laws of Australia paragraph [76].

<sup>314</sup>Laws of Australia paragraph [46].

<sup>315</sup>Laws of Australia paragraph [80].

<sup>316</sup>Laws of Australia paragraph [84].



*Western Australia*

5.10.22 It must be established that the defendant has been violent or harassing and is likely to be so again or has threatened violence and is likely to carry out the threat.<sup>317</sup>

*Canada**Alberta*

5.10.23 The Alberta Law Reform Institute<sup>318</sup> is of the view that an understanding of the nature of abusive relationships is necessary to begin to make effective and reasonable decisions about what sort of conduct should be seen as giving rise to a need for protection. Ultimately the view is held that an individual should be entitled to apply for an order in any circumstance where the court is of the view that controlling and abusive behaviour is such as to justify the granting of a right to apply.<sup>319</sup> Examples of what ought to be specified as included in an understanding of abusive and controlling behaviour are identified. It is, however, emphasised that these examples should not be taken as limiting the notion of controlling and abusive behaviour that the court might properly take into consideration in making a just determination of whether an application should be allowed.

5.10.24 In any given case it might be that a single type of conduct might be sufficient to warrant the granting of an order. Thus, it ought not to be required that multiple types of conduct be present before an individual be entitled to apply for an order. However, where multiple types of abuse are present, the legal process should allow for a broad contextual view of that abuse to be taken by the court in assessing the nature of a need for protection. Any of the behaviours considered taken in isolation might lead the court to conclude that protection is unnecessary or that limited remedies will suffice to meet the needs of the applicant. However, the court must at all times consider the full context of the abusive relationship with a view to understanding the effect and threat posed by any accumulation of abusive and controlling conduct.<sup>320</sup>

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<sup>317</sup>Laws of Australia paragraph [88].

<sup>318</sup>ALRI Report for Discussion No 15 59.

<sup>319</sup>ALRI Report for Discussion No 15 71.

<sup>320</sup>ALRI Report for Discussion No 15 72.

5.10.25 The Alberta Law Reform Institute<sup>321</sup> takes the view that legislation should begin by setting out a general section which entitles an individual to apply for an order where they can demonstrate controlling and abusive behaviour. The legislation should give examples of such behaviour that would justify the right to apply. However, the examples which are singled out should not be exclusive and other conduct which does not fall within the identified categories of abuse should not be precluded from being raised. The following examples of controlling and abusive behaviour are identified:

(a) Physical assault.

It should be broadly defined and should include threat of physical assault and conduct which creates a reasonable apprehension of imminent physical harm. There should be no qualification that the assault cause a specific degree of physical harm.<sup>322</sup>

(b) Sexual assault.

Sexual contact of any kind that is coerced by force or threat of force. Threats to make unwanted sexual contact by force should also be included.<sup>323</sup>

(c) Destruction of property.

Damage to any property that is done with the intention of intimidating or threatening the applicant or which would reasonably be interpreted as a threat to the applicant.<sup>324</sup>

(d) Forcible or unauthorised entry into the residence of the applicant.

The forcible or unauthorised entry of the respondent into the residence of the applicant without the applicant's consent where the respondent and the applicant do not occupy the same residence.<sup>325</sup>

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<sup>321</sup>ALRI [Report for Discussion No 15 72 - 73](#).

<sup>322</sup>ALRI [Report for Discussion No 15 75](#).

<sup>323</sup>ALRI [Report for Discussion No 15 77](#).

<sup>324</sup>ALRI [Report for Discussion No 15 78](#).

<sup>325</sup>ALRI [Report for Discussion No 15 79](#).

## (e) Coercive action.

Compelling another against their will to perform an act which that person has the right not to perform or compelling another against their will to refrain from doing an act which that person has a right to perform.<sup>326</sup>

## (f) Harassment.

Making repeated telephone calls to the applicant's home or workplace; keeping a person under surveillance by following them or looking in their windows; repeatedly coming to the applicant's house, workplace or school; following the applicant in public places and so on.<sup>327</sup>

## (g) Emotional abuse.

Subjecting an individual to degradation and humiliation including repeated insult, ridicule or name calling, making repeated threats to cause the individual extreme emotional pain, making repeated threats in relation to the individuals children, family or friends, and consistently exhibiting obsessive possessiveness or jealousy in relation to the individual which is such as to constitute a serious invasion of the individual's privacy.<sup>328</sup>

5.10.26 The Alberta Law Reform Institute's final report<sup>329</sup> contains the following recommendation:

Domestic abuse should be defined as conduct that threatens or interferes with the physical, sexual or emotional integrity of the person subjected to it, or that makes that person incapable of independent functioning. It includes, but is not limited to, the following:

- any intentional or reckless act or omission that causes injury, or causes damage to property the purpose of which is to intimidate a claimant
- any act or threatened act that causes a reasonable fear of injury
- forced confinement
- sexual abuse (sexual contact of any kind that is coerced by force or threat of force, or the threat of coerced sexual contact)

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<sup>326</sup>ALRI Report for Discussion No 15 81.

<sup>327</sup>ALRI Report for Discussion No 15 83.

<sup>328</sup>ALRI Report for Discussion No 15 87.

<sup>329</sup>ALRI Report No 74 52 - 53.

- emotional abuse (a pattern of behaviour that deliberately undermines the mental or emotional well-being of the claimant, or; making repeated threats to cause extreme emotional pain to the claimant or the claimant's children, family or friends)
- financial abuse (behaviour of any kind that controls, exploits or limits a claimant's access to financial resources so as to ensure the financial dependency of the claimant, or that exploits the claimant's financial resources).

*New Zealand*

5.10.27 “Violence” is defined<sup>330</sup> as -

- (a) physical abuse;
- (b) sexual abuse;
- (c) psychological abuse, including, but not limited to -
  - (i) intimidation;
  - (ii) harassment;
  - (iii) damage to property;
  - (iv) threats of physical abuse, sexual abuse, or psychological abuse.

5.10.28 Without limiting the meaning of psychological abuse, a person psychologically abuses a child if that person -

- (a) causes or allows the child to see or hear the physical, sexual, or psychological abuse of a person with whom the child has a domestic relationship; or
- (b) puts the child, or allows the child to be put, at real risk of seeing or hearing that abuse occurring.<sup>331</sup>

5.10.29 Without limiting the meaning of violence -

- (a) a single act may amount to abuse;

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<sup>330</sup>Domestic Violence Act 86 of 1995, section 3(2).

<sup>331</sup>Domestic Violence Act 86 of 1995, section 3(3).

- (b) a number of acts that form part of a pattern of behaviour may amount to abuse, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.<sup>332</sup>

## USA

### *Model Code on Domestic and Family Violence*

5.10.30 “Domestic or family violence” is defined as attempting to cause or causing physical harm to another family or household member; placing a family or household member in fear of physical harm; or causing a family or household member to engage involuntarily in sexual activity by force, threat of force, or duress.<sup>333</sup>

### *Model anti-stalking code for the States*<sup>334</sup>

5.10.31 The model anti-stalking code development project has sought to formulate a constitutional and enforceable legal framework for addressing the problem of stalking. The model code encourages legislators to make stalking a felony offence; to establish penalties for stalking that reflect and are commensurate with the seriousness of the crime; and to provide criminal justice officials with the authority and legal tools to arrest, prosecute, and sentence stalkers.

## General

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<sup>332</sup>Domestic Violence Act 86 of 1995, section 3(4).

<sup>333</sup>Model Code, section 102(1).

<sup>334</sup>National Institute of Justice Project to Develop A Model Anti-stalking Code for States

Washington: US Department of Justice 1993 43 et seq.

5.10.32 The legislation reviewed<sup>335</sup> by Women, Law & Development International<sup>336</sup> reveal the following trends:

- (a) All the legislation reviewed have provisions prohibiting physical violence.
- (b) Psychological violence is prohibited in most of the laws reviewed. In some laws it is explicitly defined, but in others it can be inferred from certain provisions.
- (c) Verbal abuse, which can be interpreted as psychological violence, is also prohibited in some of the legislation reviewed.
- (d) Less than half of the laws reviewed contain explicit prohibitions for sexual violence.
- (e) Some of the laws reviewed categorize the willful destruction or seizure of property as an act of violence.

#### **D. Recommendation 10 in Discussion Paper 70**

5.10.33 In Discussion Paper 70 on Domestic Violence it was recommended that the legislation.<sup>337</sup>

- (a) Define domestic violence as including, but not limited to -
  - (i) physical abuse or threat of physical abuse;
  - (ii) sexual abuse or threat of sexual abuse;
  - (iii) intimidation;
  - (iv) harassment; or
  - (v) destruction of property.
- (b) Direct presiding officers to take account of the fact that -
  - (i) a single act may amount to domestic violence;

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<sup>335</sup>Twenty-one States: Argentina, Australia, Barbados, Bahamas, Belize, Cayman Islands, Chile, Cyprus, United Kingdom, Ecuador, Guyana, Hong Kong, Israel, Malaysia, New Zealand, Peru, Puerto Rico, Trinidad and Tobago, South Africa, St Vincent and the Grenadines, USA.

<sup>336</sup>State Responses 77 - 79.

<sup>337</sup>Discussion Paper 70 paragraph 3.10.41.

- (ii) a number of acts that form part of a pattern of behaviour may amount to domestic violence, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.

## **E. Submissions on Recommendation 10 in Discussion Paper 70**

### *Recommendation 10(a) in Discussion Paper 70*

5.10.34 *UWC Community Law Centre* states that violence against women is defined in Article 113 of the Beijing Platform of Action as "[a]ny act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in private or public life". It is therefore argued that since the South African government has accepted the Beijing Platform, the meaning of "violence" in section 12(1)(c) of the final Constitution and of "domestic violence" in the legislation must reflect this definition. This respondent does not approve of a list of specific kinds of abusive behaviour in the absence of general criteria to be applied to determine whether conduct that is not enumerated in the list constitutes domestic violence. It is recommended that the general criterion should be "controlling and abusive behaviour that harms the health, safety and well-being of the applicant or any child in her care".

5.10.35 The *Department of Justice Gender Unit* points out that the definition is unclear about the extent to which threats towards or direct abuse of a child in the care of an applicant constitute domestic violence and this is an essential way in which the definition should be extended.

5.10.36 The *Department of Justice Gender Unit* and *Tshwaranang Legal Advocacy Centre* strongly recommend that the definition section be more closely linked with the section which sets out the types of orders which can be made.

5.10.37 *M Horton and Tshwaranang Legal Advocacy Centre* recommend that where there is evidence of domestic violence, the magistrate should not have the discretion to refuse to grant an interdict, but this should be mandatory.

*"Intimidation and harassment"*

5.10.38 The *Cape Law Society*, *Concerned Friends of the Frail and Aged* and the *Democratic Party* submit that intimidation and harassment are only two forms of psychological abuse and that the proposed definition is inadequate and needs to be expanded. *Gauteng Members of ALS Family Law Standing Committee*, *Tshwaranang Legal Advocacy Centre* and the *Women's Lobby* recommend that these terms need to be defined and expanded and should not be left to the discretion of the police officer or magistrate who may have no clear understanding of the dynamics of domestic violence and what conduct may amount to harassment or intimidation. *UWC Community Law Centre* goes even further, pointing out that these acts do not constitute substantive offences in South African criminal law and that definitions of sexual assault, intimidation and harassment/stalking ought to be employed to define these forms of violence in the legislation. *Tshwaranang* recommends that harassment should include enforcing involuntary mediation. The *Department of Justice Gender Unit*, *Magistrate: Verulam*, *Mpumalanga Provincial Government*, *Natal Law Society*, *SA National Council for Child and Family Welfare* and *UWC Community Law Centre* recommend the expansion of the definition to include verbal, emotional and psychological abuse. The *Democratic Party*, the *Department of Justice Gender Unit*, *Tshwaranang Legal Advocacy Centre* and *UWC Community Law Centre* urge that stalking be indicated as a particular form of domestic violence.

*"Financial abuse" absent from definition*

5.10.39 Many respondents are of the view that the definition is lacking due to the absence of financial or economic abuse as a form of domestic violence. Those who support the expansion of the definition to include financial abuse include the *Centre for Criminal Justice*, *Concerned Friends of the Frail and Aged*, *Department of Justice Gender Unit*, *Tshwaranang Legal Advocacy Centre* and *UWC Community Law Centre*. *Tshwaranang* claims that any legislation which genuinely attempts to find solutions to battered women's predicament must necessarily recognize economic abuse as a form of abuse.

*"Destruction of property"*

5.10.40 The *Department of Justice Gender Unit* suggests that the qualification "in which the applicant may have an interest" is potentially limiting. When property is destroyed in the



context of domestic violence the real intention is to intimidate, not to destroy something owned by another. A man may break a chair or table which belong to him and in which the woman has no technical legal interest, to frighten her. It is recommended that the criteria should be damaging property "used by or in the possession of the applicant".

5.10.41 Recommendation 10(a) in Discussion Paper 70 is endorsed by:

*Magistrate: Pietermaritzburg*

*NICRO, Western Cape*

*Recommendation 10(b) in Discussion Paper 70*

5.10.42 The *Magistrate: Paarl* asserts that this recommendation seems to want to force recalcitrant presiding officers to take account of certain facts. All that is necessary is a proper definition clause.

5.10.43 *Tshwaranang* recommends that recommendation 10(b) be redrafted to read as follows: "a presiding officer may not refuse to grant an interdict solely on the basis that a single act or threat has been made by the respondent; or on the basis that the acts or threats when viewed in isolation appear to be minor or trivial". *Tshwaranang* further urges that any finding by a magistrate that any of the enumerated forms of abuse have occurred ought to justify eviction of an abuser from the shared residence.

5.10.44 Recommendation 10(b) in Discussion Paper 70 is endorsed by:

*The Cape Law Society*

*Magistrate: Pietermaritzburg*

## **F. Evaluation**

5.10.45 The fact that the Act does not adequately define the grounds upon which an interdict should be granted clearly makes it difficult for presiding officers to decide whether or not an interdict is warranted. The result is legal uncertainty and a lack of consistency. The inclusion of a comprehensive definition of family or domestic violence in legislation is therefore endorsed.

5.10.46 The Law Commission (England)<sup>338</sup> recommends that a broad statutory criterion, protecting the health, safety or well-being of the applicant or any child be adopted. It might be argued that a detailed list describing the type of conduct that would constitute domestic violence could purport to be a *numerus clausus* which would serve to limit, rather than broaden, the definition. On the other hand, an approach in terms of which the types of abusive behaviour are precisely, but not exhaustively defined, could promote legal certainty and uniformity.

5.10.47 A proper understanding of the nature of abusive relationships requires that emotional or psychological abuse, not coupled with physical violence or threats of violence, should also be included in behaviour warranting protection. A comprehensive definition of domestic violence which includes physical, emotional, verbal, psychological and sexual abuse is in line with the United Nations framework for model legislation<sup>339</sup> which urges States to adopt the broadest possible definition of acts of domestic violence with a view to compatibility with international standards. The examples identified by the Alberta Law Reform Institute<sup>340</sup> and the legislation of New Zealand<sup>341</sup> also reflect a wide range of controlling and abusive behaviour.

5.10.48 Research and submissions by respondents suggest that economic abuse must be included as a form of domestic violence for which a protection order may be granted.

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<sup>338</sup>See par 5.10.9 - 10 above.

<sup>339</sup>See par 5.10.8 above.

<sup>340</sup>See par 5.10.25 above.

<sup>341</sup>See par 5.10.27 et seq above.

5.10.49 In certain jurisdictions “stalking” is recognised as an offence.<sup>342</sup> Although stalking is often associated with domestic violence, it is a problem which is much broader than the domestic sphere. Stalking in the context of domestic violence could be included as a form of conduct which may be prohibited by a protection order.

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<sup>342</sup>Australia (New South Wales, Northern Territory, Queensland, South Australia) and the Model Anti-Stalking Code for the States.

## 5.11 24 - hour service

### A. **Excerpt from Issue Paper**<sup>343</sup>

Regulations under the Act should make clear provision for the procedure to be followed after hours since a 24-hour service is not available to applicants.

### B. **Problem analysis**

5.11.1 Novitz<sup>344</sup> refers to the fact that most violent family incidents take place during the weekend or in the evening when courts are not in session. In theory, an after hours system has been set up. A police officer faced with an urgent application is supposed to call the on-duty prosecutor who will then contact the magistrate on duty and arrange a hearing. However, in practice, it seems that this system is seldom put into operation.<sup>345</sup> Police tend to lack the necessary forms, or are not aware of the procedures. Women have been advised to come back first thing in the morning.

### C. **Recommendation 11 in Discussion Paper 70**

5.11.2 In Discussion Paper 70 it was recommended that:<sup>346</sup>

- (a) Proposals regarding the procedure to be followed after hours be kept in abeyance until clarity is obtained on the question of empowering the SAPS to apply for an interdict on behalf of the applicant.
- (b) The Department of Justice take steps to promote the efficiency of the after hours system which has apparently been set up.

### D. **Submissions on Recommendation 11 in Discussion Paper 70**

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<sup>343</sup>At 9.

<sup>344</sup>Novitz 50.

<sup>345</sup>See also Clark 1996 SAJHR 596.

<sup>346</sup>Discussion Paper 70 paragraph 3.11.8.

5.11.3 The *Cape Law Society* endorses this recommendation and suggests that the feasibility of making the relief available on a 24-hour basis be further investigated. *Gauteng Members of the ALS Family Law Standing Committee* recommend that retired judicial officers, active or retired police officers and lawyers should be considered for secondment to assist in the issue and service of interdicts. The *Natal Law Society* proposes that a duty roster be drawn up to ensure that this service is made available to needy applicants. The *SA National Council for Child and Family Welfare* reiterates the point of the need for trained and sensitive personnel, and recommends that a special task team trained in dealing with domestic violence be set up. It also states that delays in issuing interdicts may be one of the reasons for the withdrawal of applications.

5.11.4 The *UWC Community Law Centre* does not support the recommendation as it stands, and claims that it assumes that the present system is the correct one to adopt. It is not necessarily the case that the SAPS will be the first contact point an abused woman will have with the system. The legislation should impose a duty on the clerk of the court and magistrates to ensure accessibility and availability on a 24-hour basis, since it is they who constitute the court personnel involved in interdict applications. A rotating roster should be drawn up and this information should be made available to service providing organizations.

5.11.5 Recommendation 11 in Discussion Paper 70 is endorsed by:

*Magistrate: Pretoria North*

*National Human Rights Trust*

*NICRO, Western Cape*

*Women's Lobby*

## **E. Evaluation**

5.11.6 It is evident that many victims are abused over weekends and in the evenings, outside court hours. Therefore the legislation should specifically provide that an application for a protection order may be brought outside ordinary court hours. Such a provision, combined with

the power of the SAPS to apply for a protection order on behalf of the applicant (paragraph 5.8.32 above), will contribute significantly to the protection of victims of domestic violence.

## 5.12 Penalties under the Act; sentencing options; rehabilitation and counselling for perpetrators of violence

### A. **Excerpt from Issue Paper**<sup>347</sup>

The Act does not address the issue of rehabilitation and counselling for perpetrators of violence.

### B. **Problem analysis**

5.12.1 Section 6 of the Act provides that contravention of an interdict constitutes an offence, punishable by a fine or imprisonment for a period not exceeding 12 months or both such fine and such imprisonment. It should be noted that the Act, read with section 297 of the Criminal Procedure Act 51 of 1977,<sup>348</sup> does appear to allow for rehabilitation and counselling as a

<sup>347</sup>At 9.

<sup>348</sup>The relevant provisions read as follows:

“(1) Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion-

(a) postpone for a period not exceeding five years the passing of sentence and release the person concerned-

(i) on one or more conditions, whether as to- . . .

(dd) submission to instruction or treatment; . . .

(ff) the compulsory attendance or residence at some specified centre for a specified purpose;

(gg) good conduct;

(hh) any other matter,

and order such person to appear before the court at the expiration of the relevant period; or . . .

(b) pass sentence but order the operation of the whole or any part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph

(a) (i) which the court may specify in the order; . . .”

sentencing option. Novitz<sup>349</sup> reports that compulsory individual counselling has been used by Cape Town magistrates as a sentencing option.

5.12.2 Novitz<sup>350</sup> submits that magistrates can and should explore sentencing options<sup>351</sup> other than a straightforward term of imprisonment, but that a suspended sentence<sup>352</sup> may not be the preferable alternative. Periodical imprisonment<sup>353</sup> and community service<sup>354</sup> should also be considered. Counselling may be most effective as part of a sentence which, for example, includes community service, periodical imprisonment and a suspended sentence.<sup>355</sup>

5.12.3 The effectiveness of programmes for the rehabilitation of abusers and counselling is, however, the subject of controversy. Fedler<sup>356</sup> asserts that experience worldwide indicates overall that these programmes cannot be relied upon to stop the violent behaviour of the abuser. The following factors militate against counselling as remedial action in cases of family violence.<sup>357</sup>

- (a) The abuser's decision to go into counselling has an inordinate influence on a woman's decision to return to the relationship.
- (b) Abusers often use counselling as a form of manipulation rather than change.
- (c) Success rates depend on the abuser's completing the programme and more than half drop out before completion of the treatment.
- (d) Programmes are more effective when conducted with volunteers.

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<sup>349</sup>Novitz 20.

<sup>350</sup>Novitz 56.

<sup>351</sup>In *S v M* 1996 2 SACR 127 (T) the court rejected a submission that correctional supervision, the suspension of a sentence, placing an accused under the supervision of a probation officer, etc, were not true punishments. The court held that all those sentencing options were forms of punishment and they were so in every sense of the word.

<sup>352</sup>Section 297(1)(b) of the Criminal Procedure Act 51 of 1977.

<sup>353</sup>Section 285 of the Criminal Procedure Act 51 of 1977.

<sup>354</sup>Section 297(1)(a)(i)(cc) of the Criminal Procedure Act 51 of 1977.

<sup>355</sup>Novitz 57.

<sup>356</sup>Fedler 1995 SALJ 238.

<sup>357</sup>Novitz 20 et seq; Fedler 1995 SALJ 238 - 239.



- (e) Joint counselling will be inappropriate where the survivor feels threatened or intimidated, and has difficulty in being in the presence of her spouse.
- (f) There is a danger that joint counselling will merely perpetuate the power of one party over the other. The factors which feed into this danger are the passivity of the battered woman; the non-mutual nature of violence; the serious nature of spousal violence, which makes it more accurately classified as a crime rather than a dispute.

5.12.4 The factors mentioned above should inform a court's recourse to the option of compulsory individual or joint counselling, or family mediation.

5.12.5 Clark<sup>358</sup> contends that the penalties under the Act should be modified to include compulsory counselling.

5.12.6 Daniels & Muntingh<sup>359</sup> report that their research shows that in all the cases where the interdict was violated and the abuser brought to court, a suspended sentence was imposed. It is recommended that more creative sentencing options be looked at by the courts in combatting domestic violence, for example coupling sentences with court-mandated treatment programmes aimed at rehabilitating abusers.

5.12.7 Questionnaires distributed by Barnes<sup>360</sup> were completed by 60 victims of domestic violence. The questionnaires reveal<sup>361</sup> that 93% of the respondents who appeared in court and faced the summary enquiry under the Act were convicted of the offence of violation of the interdict. One was acquitted. The sentences were mild in the extreme: 31% were fined. The standard appeared to be R300. Only one abuser was fined in excess of this - R1 000. 38% were given suspended sentences, generally three months or six months suspended for two or three years. 23% were fined and given suspended sentences. A single abuser was incarcerated. He was

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<sup>358</sup>Clark 1996 SAJHR 597.

<sup>359</sup>Daniels & Muntingh 17.

<sup>360</sup>Barnes 56.

<sup>361</sup>Barnes 66.

sentenced to 12 months, the maximum penalty under the Act (the man stabbed his wife with a screwdriver so that she was in a coma for 10 days and confined to a wheelchair thereafter).

### **C. Comparative survey of laws**

#### *Canada*

##### *Alberta*

5.12.8 The Alberta Law Reform Institute<sup>362</sup> refers to the view that empowering the court to mandate counselling for an individual who has engaged in abusive conduct is too extensive an evasion of the autonomy of the individual respondent. The view opposing court requirement for counselling focuses on the fact that counselling is a deeply personal process requiring the participation of the individual and that therefore it cannot be effectively enforced by the justice system. The question of how to enforce a system of court mandated counselling is raised as a significant hurdle. The final recommendation<sup>363</sup> is that there should not be a provision under which it may be required that the respondent receive counselling.

#### *New Zealand*

5.12.9 On making a protection order, the court must direct the respondent to attend a specified programme, unless the court considers that there is good reason for not making such a direction.<sup>364</sup> Such programme has the primary objective of stopping or preventing domestic

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<sup>362</sup>ALRI Report for Discussion No 15 150 - 151.

<sup>363</sup>ALRI Report No 74 85.

<sup>364</sup>Domestic Violence Act 86 of 1995, section 32(1).

violence on the part of the respondent.<sup>365</sup> Fees for programmes are paid out from money appropriated by Parliament for the purpose.<sup>366</sup>

#### **D. Recommendation 12 in Discussion Paper 70**

5.12.10 In Discussion Paper 70 it was recommended<sup>367</sup> that the legislation should not provide for state sponsored mandatory rehabilitation and counselling programmes for perpetrators of domestic violence.

#### **E. Submissions on Recommendation 12 in Discussion Paper 70**

5.12.11 The *Department of Justice Gender Unit* endorses the recommendation, stating that:

Concepts of mandatory counselling are quite controversial worldwide. There seems to be no question that courses and counselling for violent men should be part of the Correctional Services fabric in any society. But the extent to which benefit is gained by forcing people to attend mandatory counselling at the time of granting an interdict or dealing with a breach is not clear. Resources need to be allocated to programmes for violent men as part of the whole response to domestic violence but attendance at such programmes should probably be voluntary. Perhaps as more is learnt about the effectiveness of such programmes in the South African context, this question can be revisited.

The *Women's Lobby* expresses the same sentiment.

5.12.12 *The Gender Advocacy Project* recommends that the legislation should make provision for optional rehabilitation and counselling programmes for abusive men. In similar vein, *M Horton* suggests that the range of sentencing options available to the court should be enumerated so that the best option is selected in the individual case.

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<sup>365</sup>Domestic Violence Act 86 of 1995, section 2.

<sup>366</sup>Domestic Violence Act 86 of 1995, section 44.

<sup>367</sup>Discussion Paper 70 paragraph 3.12.16.

5.12.13 The *Cape Law Society* believes that the discretion of the magistrate to impose whatever penalty he or she thinks is appropriate, including ordering state-sponsored rehabilitation or counselling, should be left unfettered.

5.12.14 By contrast, several respondents are strongly in favour of including state sponsored mandatory rehabilitation and counselling programmes as well as community service for abusers. Those in favour are the *Centre for Criminal Justice*, *National Human Rights Trust* and the *UNISA Health Psychology Unit*. The *SA National Council for Child and Family Welfare* seems on the whole to be in favour of counselling and rehabilitation but many of the counsellors differ over whether this should be mandatory or optional, at the state's expense or at the expense of the perpetrator.

5.12.15 *NICRO Western Cape* suggests the introduction of mandatory minimum sentencing of community service or correctional supervision with the alternatives of a minimum fine of R1000 or 3 months in prison should the abuser fail to serve any alternative sentence prescribed by the magistrate or judge.

5.12.16 The *UWC Community Law Centre* holds the view that the only effective method of immediately ending the violence is a sentence of imprisonment coupled with an order for rehabilitative counselling. It argues that mandatory counselling should be a supplement, rather than an alternative to imprisonment, and that these programmes should be funded by the state.

5.12.17 Recommendation 12 is supported by the *Magistrate: Pietermaritzburg*.

## **F. Evaluation**

5.12.18 In paragraph 6.1.22 below it is suggested that a contravention of the conditions of a protection order granted in terms of domestic violence legislation should be an offence which

is prosecuted in the criminal court. The court would therefore have a discretion to apply sections 297,<sup>368</sup> 285<sup>369</sup> and 297(1)(a)(i)(cc)<sup>370</sup> of the Criminal Procedure Act 51 of 1977.

5.12.19 In light of the fact there is no reliable evidence that demonstrates the success of rehabilitation and counselling efforts in respect of perpetrators of violence, state sponsored mandatory rehabilitation and counselling programmes should be ruled out as an effective legal response to domestic violence. Moreover, in the absence of a thorough assessment of available rehabilitation and counselling services and the cost implications,<sup>371</sup> mandatory referral would certainly be refutable.

5.12.20 The present position which provides for a maximum penalty of twelve months imprisonment for contravening the terms of a protection order is wholly inadequate, and fails to give recognition to the gravity of situations in which abuse is committed despite the existence of a protection order. Given the importance of ensuring that protection orders issued pursuant to the legislation are adhered to by the respondents, coupled with the international obligations imposed by the Convention on the Elimination of All Forms of Discrimination Against Women and the Beijing Platform of Action to eradicate violence against women, it is submitted that the penalty for contravening the terms of a protection order be increased from twelve months to five years.

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<sup>368</sup>See footnote 348 above.

<sup>369</sup>Periodical imprisonment.

<sup>370</sup>Community service.

<sup>371</sup>In New Zealand, Parliament appropriates money for programmes.

### 5.13 Exclusion of the respondent from the matrimonial home

#### A. Excerpt from Issue Paper<sup>372</sup>

The exclusion of the respondent from the matrimonial home - should this be allowed and under what circumstances?

#### B. Problem analysis

5.13.1 Section 2(1)(b) of the Act provides that an interdict may be granted enjoining the respondent not to enter the matrimonial home or other place where the applicant is resident, or a specified part of such home or place or a specified area in which such home or place is situated. “Matrimonial home” is defined as the house, flat, room or other structure in which the parties to a marriage ordinarily live or lived together.

5.13.2 In terms of section 26(3) of the Constitution, 1996, no one may be evicted from their home without an order of court made after considering all the relevant circumstances and no legislation may permit arbitrary evictions.

5.13.3 In the **Rutenberg** case<sup>373</sup> section 2(1)(b) of the Act was interpreted as follows:

. . . in terms of section 2(1)(b) the respondent may be finally enjoined, in perpetuity, “not to enter the matrimonial home . . . or a specified area in which such home . . . is situated.” This is tantamount to an *ex parte* ejection of the respondent forever from what may be his or her own property. Moreover, he or she may similarly be prohibited even from entering the area in which his or her erstwhile home is situated.

5.13.4 Novitz<sup>374</sup> states that one of the greatest problems identified by magistrates is that they are unclear as to their authority to make an order evicting a respondent from property which he owns. However, it seems vital that a magistrate, convinced of past violence and recent threats, can take action to protect the survivor and her children. Where there is a serious risk to life, protection of the applicant and children should take priority over property rights.<sup>375</sup>

<sup>372</sup>At 9.

<sup>373</sup>**Rutenberg v Magistrate, Wynberg** 1997 4 SA 735 (C) 753.

<sup>374</sup>Novitz 42.

<sup>375</sup>Novitz 43.

5.13.5 Le Roux<sup>376</sup> observes that magistrates are hesitant to use the power to evict a respondent from the matrimonial home. Moreover, evicted respondents, who are often the registered owners of the matrimonial home, may as an act of vengeance cease to make further mortgage payments. She suggests that the court should be empowered to make an order compelling the evicted respondent to continue mortgage payments.

### C. Comparative survey of laws

#### *United Nations framework for model legislation on domestic violence*

5.13.6 The court order may provide that the defendant be instructed to vacate the family home, without in any way ruling on the ownership of such property.<sup>377</sup>

#### *England*

5.13.7 The Law Commission (England)<sup>378</sup> recommends that the court should have the power to make an occupation order with a variety of possible terms. Regulatory orders (orders which control the exercise of existing rights) available would, inter alia, be those -

- (a) requiring one party to leave the home;
- (b) suspending occupation rights and/or prohibiting one party from entering or reentering the home or part of the home;
- (c) requiring one party to allow the other to enter and/or remain in the home;
- (d) regulating the occupation of the home by either or both of the parties;
- (e) terminating occupation rights; and
- (c) excluding one party from a defined area in the vicinity of the home.

5.13.8 It is noted<sup>379</sup> that in cases of domestic violence an order ousting the respondent from the home will often be the only way of giving the applicant effective protection.

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<sup>376</sup>Le Roux 1997 *De Jure* 311 - 312.

<sup>377</sup>UN Framework paragraph 38(b).

<sup>378</sup>Law Com. No. 207 paragraph 4.2.

<sup>379</sup>Law Com. No. 207 paragraph 4.6.

5.13.9 The Law Commission (England)<sup>380</sup> recommends that the court should have power to grant a regulatory occupation order in any case after considering all the circumstances of the case and in particular the following factors:

- (a) The respective housing needs and resources of the parties and of any relevant child.
- (b) The respective financial resources of the parties.
- (c) The likely effect of any order, or of any decision by the court not to make an order, on the health, safety and well-being of the parties and of any relevant child.

However, the court should have a duty to make an order if it appears likely that the applicant or any relevant child will suffer significant harm if an order is not made and that such harm will be greater than the harm which the respondent or any relevant child will suffer if the order is made.

5.13.10 It is further recommended<sup>381</sup> that the court should have the power to impose on either party obligations regarding the discharge of rent, mortgage instalments and other outgoings, where it is just and reasonable to do so. In deciding whether an order is just and reasonable, the court should take into account the parties' financial resources and any financial obligations which they have or are likely to have in the foreseeable future, including any financial obligations to each other or to any relevant child.

#### *Australia*

5.13.11 In all jurisdictions it is possible to make an order to exclude the respondent from the home.<sup>382</sup>

#### *The Australian Capital Territory / Northern Territory / Western Australia*

5.13.12 It is possible to exclude the respondent from the home, notwithstanding any legal or equitable interest which the respondent might have in the property.<sup>383</sup>

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<sup>380</sup>Law Com. No. 207 paragraph 4.33.

<sup>381</sup>Law Com. No. 207 paragraph 4.42.

<sup>382</sup>Laws of Australia Chapter 5.

<sup>383</sup>Laws of Australia paragraph [62], [70], [90].



*New South Wales / Northern Territory / Queensland*

5.13.13 The court must weigh up the accommodation needs of the parties, the effect which such an order will have on any children and the consequences for the victim and any children if such an order is made.<sup>384</sup> In Queensland any existing orders relating to guardianship, custody or access may also be taken into account.<sup>385</sup>

*Canada**Alberta*

5.13.14 According to the Alberta Law Reform Institute,<sup>386</sup> a factor which would suggest a need for allowing exclusion of abusive individuals from the residence is the demand on public funds created by victims of domestic abuse having to flee from their residences to shelters. Where shelters are forced to turn away a large number of the victims due to lack of funds and lack of space, it would seem that anything that could provide an alternative to the victims having to flee to shelters would be desirable. Also, where the perpetrator's abuse has made continuing cohabitation unsafe, it is certainly arguable that it should be the perpetrator, not the victim, who should bear the burden of the upsetting of the status quo brought about by the abuse.

5.13.15 The Law Reform Institute<sup>387</sup> states that there are concerns as to the suitability of the remedy of exclusion from residence. The view which opposes the inclusion of such a remedy within a domestic abuse statute focuses on the invasive nature of the remedy and the extreme consequences that it will have for a respondent both in terms of the violation of property rights and the violation of the individual's right to peaceful and secure enjoyment of their home. Such a remedy could also give rise to opportunities for vexatious litigation by vindictive applicants. The concern to protect victims of abuse could be harnessed by mischievous litigants to obtain the advantage in property disputes. By allowing such a remedy, one could be allowing public outrage at domestic abuse to be used to create a legal carte blanche to be given to anyone alleging abuse. A further concern with the remedy is that it could obscure the need for funding to battered

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<sup>384</sup>Laws of Australia paragraph [66], [70].

<sup>385</sup>Laws of Australia paragraph [72].

<sup>386</sup>ALRI Report for Discussion No 15 140.

<sup>387</sup>ALRI Report for Discussion No 15 141 - 142.

women's shelters. The existence of the remedy could create a false perception that safe houses for victims of domestic abuse were no longer necessary.

5.13.16 As regards orders permitting the respondent to remain in the same residence as the applicant but limiting the respondent's use of the residence, the Alberta Law Reform Institute<sup>388</sup> notes that there are obvious difficulties surrounding the compliance and enforcement of such an order. In a family situation there would generally be no external observer to monitor the respondent's compliance with the order. Unless the breach of the order were also to constitute an offence such as assault, there would be a great deal of difficulty in determining after the fact whether a breach of the terms of the order had taken place. It is therefore recommended that a power to grant orders restricting the use of a residence should not be created.<sup>389</sup>

5.13.17 The Alberta Law Reform Institute's<sup>390</sup> final recommendation is that there should be a provision that the respondent may be removed from the residence. However, because it would be difficult to enforce orders that grant the use of only part of the residence, the recommendation is against such a provision.

*Nova Scotia*

5.13.18 Proposed Nova Scotia legislation<sup>391</sup> provides that the court may make an order "granting the victim exclusive occupation of the residence regardless of whether the residence is jointly or solely owned by the parties or jointly or solely leased by the parties". The proposed legislation<sup>392</sup> also provides for an order which permits the victim and respondent to occupy the same premises but limits the respondent's use thereof, provided that the court is satisfied -

- (a) that the victim voluntarily requests such an order;

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<sup>388</sup> ALRI Report for Discussion No 15 111.

<sup>389</sup> ALRI Report for Discussion No 15 112.

<sup>390</sup> ALRI Report No 74 71 - 72.

<sup>391</sup> ALRI Report for Discussion No 15 196, clause 4(1)(b).

<sup>392</sup> Section 4(1)(p) quoted in ALRI Report for Discussion No 15 198.

- (b) the victim is informed by the court that the order may not provide the same protection as an order excluding the respondent from the premises and may be difficult to enforce; and
- (c) satisfactory conditions are imposed on the respondent to ensure against the repetition of domestic violence and which are agreed upon by the parties.

*Saskatchewan*

5.13.19 An emergency intervention order and a victim's assistance order may contain a provision granting the victim and other family members exclusive occupation of the residence, regardless of ownership.<sup>393</sup>

*New Zealand*

5.13.20 The court may make an occupation order granting the applicant the right to personally occupy a specified dwelling house, or an order vesting in the applicant the tenancy of a specified dwelling house, if it is satisfied that the order is necessary for the protection of the applicant or is in the best interests of a child of the applicant's family.<sup>394</sup>

5.13.21 A temporary occupation order or a tenancy order may be made on application without notice if the court is satisfied that the respondent has physically or sexually abused the applicant or a child of the applicant's family, and the delay that would be caused by proceedings on notice would or might expose the applicant or a child of the applicant's family to physical or sexual abuse.<sup>395</sup>

*USA*

*Model Code on Domestic and Family Violence*

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<sup>393</sup>Saskatchewan Victims of Domestic Violence Act S.S. 1994,c. V-6.02, sections 3(3) and 7(1).

<sup>394</sup>Domestic Violence Act 86 of 1995, section 53 and 57.

<sup>395</sup>Domestic Violence Act 86 of 1995, section 60.

5.13.22 A court may remove and exclude the respondent from the residence of the petitioner, regardless of ownership of the residence.<sup>396</sup> A respondent may be ordered to pay rent or make payment on a mortgage on the petitioner's residence.<sup>397</sup>

*General*

5.13.23 The Alberta Law Reform Institute<sup>398</sup> notes that all the American Codes, except that of Delaware, make provision for an order excluding the perpetrator of domestic abuse from the residence. Some States simply provide that the court may order a respondent to vacate the home. Others note that the order may issue whether the residence is jointly or solely owned or leased by the parties.

**D. Recommendation 13 in Discussion Paper 70**

5.13.24 In Discussion Paper 70 it was recommended that the legislation:<sup>399</sup>

- (a) Empower the court to exclude the respondent from the shared residence. ["Shared residence" is to be defined as the residence in which the applicant and respondent (whether the same or opposite gender) live or lived together in a marriage relationship or in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other, regardless of whether the parties are solely or jointly entitled to occupy the residence.]
- (b) Provide that orders of this nature may only be made if it appears likely that the applicant or any relevant child will suffer significant harm if an order is not made and that such harm will be greater than the harm which the respondent will suffer if the order is made.

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<sup>396</sup>Model Code, section 305, 306(2)(c).

<sup>397</sup>Model Code, section 306(3)(d).

<sup>398</sup>ALRI Report for Discussion No 15 140 - 141.

<sup>399</sup>Discussion Paper 70 paragraph 3.13.41.

- (c) Empower the court to impose on either party obligations regarding the discharge of rent or mortgage instalments.
- (d) Provide that the discretionary power in (c) may only be exercised after taking into account the parties' financial resources and any financial obligations which they have or are likely to have in the foreseeable future, including any financial obligations to each other or to any child.

## **E. Submissions on Recommendation 13 in Discussion Paper 70**

### *Exclusion of respondent from the shared residence*

5.13.25 All the respondents, except for the *Magistrate: Pretoria*, support this recommendation in so far as it empowers the court to make an order evicting a respondent from the shared residence. Many respondents have concerns over the procedure that will be adopted, especially in relation to the "significant harm" test. The *Natal Law Society* asks "how abused does a person have to be?"

5.13.26 The *Department of Justice Gender Unit* is in favour of exclusion orders, but comments that these orders should generally not be made on an *ex parte* basis except in the very short term to deal with emergency situations. Consideration needs to be given to provisions which allow a lease to be transferred to the name of the woman with the written consent of the lessee where the premises are rented. The *Gender Unit* states emphatically that if the woman and children do not have alternative accommodation and there is a risk to their well-being if the abuser remains in the home, he must be evicted. *Tshwaranang Legal Advocacy Centre* insists that until such time as the applicant has alternative accommodation by way of state shelters, she should never be the evicted party from the matrimonial home.

5.13.27 *UWC Community Law Centre* argues that even if an unconditional power to evict a respondent infringes the right not to be evicted without an order of court made after considering all the relevant circumstances, it is a justifiable limitation in terms of section 36(1) of the Constitution.

*"Significant harm test"*

5.13.28 The *Department of Justice Gender Unit, UWC Community Law Centre* and *Tshwaranang Legal Advocacy Centre* express concern over the "significant harm" test, asking how a court will balance the physical and emotional harm that might be caused to a woman and her children who are forced to live in a home with a violent man against the harm that could be caused to the man by requiring him to find new accommodation. *UWC Community Law Centre* is particularly concerned about the wide discretion given to magistrates to determine when harm is "significant", and claims that this discretion will seriously undermine the protection of the applicant. This test will impose an additional evidentiary hurdle to her before she can be granted legal protection. Similar sentiments are expressed by *M Horton* who states that the proposed Bill does not contain a definition of harm. He suggests that harm should be defined in some way to maintain the emphasis on welfare and safety.

5.13.29 The *UWC Community Law Centre* addresses the question of the constitutionality of an order excluding the respondent from the matrimonial home. It argues that the scarcity of council housing in townships and shelters for abused women coupled with the economic disempowerment of many South African women make it difficult for women to find accommodation. The stringent requirement of "significant harm" violates the applicant's right to freedom from violence by exposing her to the probability of further violence. It is acknowledged that all the relevant circumstances need to be considered, but the only circumstance relevant to the decision to evict is whether or not the applicant will be safe.

5.13.30 The *Natal Law Society* states that the issue of financial hardship should play a secondary role to the issue of the actual violence.

5.13.31 The *Magistrate: Pietermaritzburg* asserts that the fact that practical problems might exist in the implementation of this recommendation, should not detract from the necessity of such provision.

*Obligations in terms of discharge of rent or mortgage*

5.13.32 The *Magistrate: Pietermaritzburg* comments that this order should only be sparingly used as it can have far-reaching and devastating effects, and that it should be linked to a time period, otherwise it could be open to serious abuse. He suggests that if no final order of divorce or other High Court order is made within a specified time, the order should lapse and the respondent should be able to return to the shared residence.

5.13.33 *M Horton* and *Tshwaranang* consider that the obligations should not be limited to rent and mortgage, but to other household expenses, such as electricity and water bills. *M Horton* raises the concern that if the respondent does not abide by the terms of the order, non-payment will be a criminal offence for which one of the possible sentences is imprisonment. He questions whether this is constitutional.

5.13.34 *UWC Community Law Centre* claim that in view of the realities of unemployment and economic disempowerment of women, this recommendation should not apply to "either party", but that the respondent should be required to pay all mortgage or rent payments unless the applicant is in a financial position to pay her share.

*Court to take into account parties' financial resources in determining obligations to discharge rent or mortgage*

5.13.35 Concern is expressed by various respondents as to how the magistrate will determine the financial situation of parties and what procedure is envisaged. The *Magistrate: Paarl* asks how the court will enforce this recommendation if the respondent does not show up. The *SA National Council for Child and Family Welfare* is concerned about how the respondent will be prevented from concealing his or her financial resources in an attempt to avoid payment, especially where the respondent is self-employed. The *Department of Justice Gender Unit* and *M Horton* make the point that some mechanism must be put in place to enforce the rendering of these payments given the problems with collecting maintenance under our present legal system - there is no point in repeating a similarly ineffective system under this legislation. *UWC Community Law Centre* states that this requirement will in effect mean that such an order will rarely, if ever, be made at an initial *ex parte* application, and recommends that the court be given a discretion to grant emergency relief where this is warranted by the circumstances. The *Magistrate: Pretoria*

is of the opinion that this aspect of the order takes the court outside its area of jurisdiction of family violence and forces the court to enter into civil disputes.

5.13.36 Recommendation 13 in Discussion Paper 70 is endorsed by the *Women's Lobby*.

## **F. Evaluation**

5.13.37 The approach allowing for exclusion of respondents from the matrimonial home appears to command substantial support. All the foreign jurisdictions surveyed have legislation to this effect. Although it is conceded that the inclusion of such a remedy in the legislation might have extreme consequences for a respondent, it seems clear that in cases of domestic violence an exclusion order will often be the only way of giving the applicant effective protection. Where there is a serious risk of physical violence, protection of the applicant and children should take priority over property rights.

5.13.38 Eviction from a home in consequence of a court order made after considering all the relevant circumstances is conceivable in terms of the Constitution, 1996, but no legislation may permit arbitrary evictions.<sup>400</sup>

5.13.39 In the **Rutenberg** case<sup>401</sup> reference was made to “an *ex parte* ejectment of the respondent forever”. This criticism is redressed by the argument in paragraph 5.1.53 *et seq* above.

5.13.40 Because of the seriousness of the remedy, it is considered imperative that the legislation should provide for an appropriate criterion to be applied by the courts, such as that the court may impose the prohibition only if it appears to be in the best interests of the applicant or any child.

5.13.41 The issue of the continuance of rent or mortgage payments by the respondent after an order preventing the respondent from entering the residence has taken effect, needs to be

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<sup>400</sup>Section 26(3).

<sup>401</sup>See paragraph 5.13.3 above



clarified. In times of crisis, financial matters are often a cause of great concern to applicants. In such circumstances, it seems fair that where the respondent has created a violent home environment, he should continue to pay rent or payments on mortgage bonds on the property. In appropriate cases the court should therefore have the power to impose on the respondent obligations regarding the discharge of rent or mortgage instalments. It is further suggested that it would promote consistency if it is provided that these discretionary powers should only be exercised after having regard to the financial needs of the parties.

## **5.14 Application by applicant for amendment or setting aside of the interdict**

### **A. Excerpt from Issue Paper<sup>402</sup>**

The Act does not allow for the applicant to apply for the amendment or setting aside of the interdict.

### **B. Problem analysis**

5.14.1 In terms of section 2(2)(c) of the Act the respondent may, after 24 hours' notice to the applicant and the court concerned, apply for the amendment or setting aside of the interdict.

5.14.2 Daniels & Muntingh<sup>403</sup> point out that the Act and Regulations do not make provision for an eventuality where, for example, an applicant would like the protection of the interdict extended to children who are being abused or threatened, or where an applicant decides subsequently that an eviction order is necessary to remove an abusive partner from the premises or make sure that a former partner does not enter the premises. Although the Act does make provision for the children of an applicant to be protected by the interdict, applicants may not realise this at the time the interdict was granted and may subsequently want the protection of the interdict extended to any children living with them. Changes to the interdict need also to be made where, for example, an applicant has an eviction order included in the interdict but then moves - the new place of residence is not protected by the interdict. To apply for a totally new interdict, and then have this served, would seem to be a cumbersome and costly exercise.

5.14.3 It is suggested<sup>404</sup> that clarity should be provided as to the manner in which an applicant could make changes or add new orders once an interdict has already been granted and served. A procedure should be outlined whereby a respondent could be notified of any changes made to the original interdict or any new conditions imposed, without an applicant having to make application

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<sup>402</sup>At 9.

<sup>403</sup>Daniels & Muntingh 14 - 15.

<sup>404</sup>Daniels & Muntingh 16.

for the interdict *de novo* , which is time-consuming and would involve paying the sheriff's fee again.

### **C. Comparative survey of laws**

#### *Australia*

5.14.4 In all jurisdictions either party may apply to have an order varied or revoked.<sup>405</sup> In Queensland, someone authorised by either party or a police officer may also apply to have an order revoked or modified.<sup>406</sup> In Victoria, in addition, “any other person” may with leave of the court apply for a variation, revocation or extension, for example, where the original applicant was a person providing assistance to the victim.<sup>407</sup>

#### *New Zealand*

5.14.5 The court may, if it thinks fit, on the application of the applicant or the respondent, vary or discharge a protection order.<sup>408</sup> An application for variation or discharge or the defending of such application made by the respondent may be made on behalf of a protected person.<sup>409</sup>

### **D. Recommendation 14 in Discussion Paper 70**

5.14.6 In Discussion Paper 70 it was recommended that the legislation:<sup>410</sup>

- (a) Allow for the applicant to apply for the amendment of the interdict, but not for the setting aside of the interdict.
- (b) Empower any other person who has a material interest in the matter to apply for the amendment of the interdict on behalf of the applicant.

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<sup>405</sup>Laws of Australia Chapter 5.

<sup>406</sup>Laws of Australia paragraph [74].

<sup>407</sup>Laws of Australia paragraph [82].

<sup>408</sup>Domestic Violence Act 86 of 1995, sections 46 - 47.

<sup>409</sup>Domestic Violence Act 86 of 1995, section 48.

<sup>410</sup>Discussion Paper 70 paragraph 3.14.12.

## **E. Submissions on Recommendation 14 in Discussion Paper 70**

5.14.7 The *UWC Community Law Centre* maintains that whilst the possibility of manipulation by the respondent is a real concern, the court can address this issue by hearing oral evidence to ensure that the application to have the interdict set aside is made freely and voluntarily. In this way, a woman retains the autonomy to make decisions while the context of domestic violence and the potential for coercion by an abuser is recognized. The *Department of Justice Gender Unit*, *NICRO - Western Cape* and the *Magistrate: Pietermaritzburg* echo this sentiment.

5.14.8 Various counsellors at the *SA National Council for Child and Family Welfare* are divided over the question of whether the applicant should have the right to set the interdict aside. Some are of the opinion that victims of family violence are not capable of making decisions in their best interests and therefore they should not be allowed to be manipulated into setting the interdict aside, whilst others ask ‘if we make choices on her behalf, how empowered is she?’

5.14.9 Some of the respondents, including *M Horton* and the *Natal Law Society* are concerned about the rights of a person with a material interest having the right to amend the interdict, and suggest that this should only be done with the consent of the applicant, and if it is in her best interests. The *Magistrate: Pretoria North* does not support this recommendation.

5.14.10 Recommendation 14 in Discussion Paper 70 is endorsed by:

*Magistrate: Mitchell’s Plain*

*Women’s Lobby*

*UNISA Health Psychology Unit*

## **F. Evaluation**

5.14.11 In paragraph 5.7.25 above reference is made to the fact that the return date may be anticipated by the respondent.

5.14.12 It is recognised that allowing the applicant to apply for the amendment or setting aside of the protection order might open the door for manipulation by the respondent. On the other hand, the present situation might be prejudicial to the applicant. The opinion is held that despite concerns that an applicant may be manipulated at a vulnerable period, she should be allowed the autonomy at any stage of the proceedings to either amend or set the protection order aside. In order to address the concern that undue pressure may be put on the applicant to set the protection order aside, a provision should be included to ensure that the court must be convinced that the application is made freely and voluntarily.

## **6. CONCERNS NOT DEALT WITH IN ISSUE PAPER 2 ON FAMILY VIOLENCE**

### **6.1 The State as party to criminal prosecutions**

#### **A. Problem analysis**

6.1.1 It would seem that the question of whether the Act provides a civil, criminal or “hybrid” remedy causes uncertainty in practice.

6.1.2 Section 3(4) and (5) of the Act provides as follows:

(4) The judge or magistrate before whom a respondent is brought in terms of subsection (2) shall enquire into the respondent's alleged breach of the conditions of the order made in terms of section 2 (2) and may at the conclusion of such enquiry -

- (a) order the release of the respondent from custody; or
- (b) convict the respondent of the offence contemplated in section 6.

(5) The provisions of the Criminal Procedure Act, 1977 (Act 51 of 1977), relating to the procedure which shall be followed in respect of an enquiry referred to in

section 170<sup>411</sup> of that Act, shall apply mutatis mutandis in respect of an enquiry under subsection (4).

6.1.3 In **S v Chaplin**<sup>412</sup> the applicant appealed against a conviction and sentence imposed in terms of the Act. Scott J analysed the application of section 170 of the Criminal Procedure Act to an enquiry under section 3(4) of the Act as follows:<sup>413</sup>

What this section contemplates is that the mere failure to appear will justify a conviction in the absence of an explanation. In other words, what is presumed is that the failure to appear was wilful in the sense that it was due to the fault of the accused person. It follows that an accused person must be informed of the onus upon him, otherwise he might be justified in tendering no explanation, in the belief that his mere failure to appear did not in itself indicate that he was at fault and that the State had failed to establish fault on his part. The reference in s 3(5) of the Act to s 170 of the Criminal Procedure Act indicates, I think, that in the absence of an explanation by the respondent, a conviction under s 6 of the Act will be justified at a s 3(4) enquiry, once it is shown that the respondent engaged in conduct which prima facie was in conflict with the provisions of an interdict, previously granted and served. In other words, in order to procure a conviction it will not be necessary to establish a wilful breach of the terms of the interdict, even in circumstances where it is conceivable that there may be an innocent explanation for the conduct.

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<sup>411</sup> “Failure of accused to appear after adjournment or to remain in attendance

(1) An accused at criminal proceedings who is not in custody and who has not been released on bail, and who fails to appear at the place and on the date and at the time to which such proceedings may be adjourned or who fails to remain in attendance at such proceedings as so adjourned, shall be guilty of an offence and liable to the punishment prescribed under subsection (2).

(2) The court may, if satisfied that an accused referred to in subsection (1) has failed to appear at the place and on the date and at the time to which the proceedings in question were adjourned or has failed to remain in attendance at such proceedings as so adjourned, issue a warrant for his arrest and, when he is brought before the court, in a summary manner enquire into his failure so to appear or so to remain in attendance and, unless the accused satisfies the court that his failure was not due to fault on his part, convict him of the offence referred to in subsection (1) and sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.”

<sup>412</sup>1996 1 SA 191 (C).

<sup>413</sup>At 195.

Wilfulness will be presumed in the absence of an explanation by the respondent. In such circumstances, that is to say where wilfulness is to be presumed, justice and common sense require that the presiding officer should inform the respondent that in an absence of an explanation he will be presumed to have acted wilfully. The reason for this is that, unless warned, an undefended respondent may conceivably think that a case of wilful breach of the interdict has not been made out against him.

6.1.4 Van Rensburg<sup>414</sup> exemplifies that an enquiry under section 3(4) of the Act takes place in a summary manner and the State is not directly involved in proceedings under this provision. The magistrate must explain to the respondent that it *prima facie* appears that the interdict was served on him, that he breached a condition regarding compliance with the interdict and that there is a burden on him to rebut such *prima facie* facts. The respondent's rights regarding legal representation must be explained to him and he must be informed that he may call witnesses or testify personally.<sup>415</sup> Although the prosecutor is not directly involved in the enquiry, Van Rensburg<sup>416</sup> contends that it is standard procedure that the prosecutor is given an opportunity to give evidence and to cross-examine the respondent if the latter gives evidence under oath.

6.1.5 Daniels & Muntingh<sup>417</sup> state that according to a survey, where the respondent had legal representation at the stage of the criminal enquiry, the matter was postponed. As no state prosecutor is involved, an imbalance will be created where the "defence" (respondent) is represented in court but the "prosecution" is not. They recommend<sup>418</sup> that the enquiry should be conducted in the form of an ordinary criminal trial and not in the form of an enquiry referred to in section 170 of the Criminal Procedure Act 51 of 1977. In this way the victim's interests would be better served as a state prosecutor interested in obtaining a conviction would be present in court in addition to the presiding officer.

6.1.6 Magistrate A F Botha<sup>419</sup> sees the main problem as the adulteration and total separation of the criminal act or acts that give rise to the application for an interdict and the procedure in

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<sup>414</sup>Van Rensburg 1994 The Magistrate 104.

<sup>415</sup>Van Rensburg 1994 The Magistrate 105.

<sup>416</sup>Van Rensburg 1994 The Magistrate 105.

<sup>417</sup>Daniels & Muntingh 15.

<sup>418</sup>Daniels & Muntingh 17.

<sup>419</sup>Submission to the Commission.



dealing with a breach of the interdict. It is contended that initial prosecution and trial would resolve and preempt the application procedure in terms of the Act and also create a culture and awareness of the issues concerned. The opinion is held that the creation of a specific enquiry (section 3(4) of the Act) has contributed in creating a safe haven for many offenders shielding them from real prosecution and the full extent of criminal procedure. It has also isolated a division and contributed to a specific attitude and perception amongst offenders, victims and even magistrates. Taking the offenders back to the criminal court would be the first of many corrective measures to instill more universal condemnation and uniform procedure. Whether this court is specially assigned or erected, the main consideration should be the role of the prosecution, as regulated by statute.

## **B. Comparative survey of laws**

### *Australia*

6.1.7 In all jurisdictions, if the order is breached, the respondent is guilty of an offence.<sup>420</sup> In the Australian Capital Territory, for example, the Domestic Violence Act 1986, does not contain any provision relating to enquiry proceedings after contravention of a protection order. It is merely provided that where the respondent contravenes the order in any respect, he or she is guilty of an offence, punishable, on conviction, by a fine or imprisonment, or both.<sup>421</sup>

### *New Zealand*

6.1.8 The Domestic Violence Act 86 of 1995 contains no reference to enquiry proceedings. Contravention of a protection order is an offence and any person who commits such an offence is liable on conviction to imprisonment or to a fine.<sup>422</sup> Where a person is arrested for breaching a protection order, he or she is charged with an offence against contravention of a protection order.<sup>423</sup>

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<sup>420</sup>Laws of Australia Chapter 5.

<sup>421</sup>Australian Capital Territory Domestic Violence Act 1986, section 27.

<sup>422</sup>Domestic Violence Act 86 of 1995, section 49.

<sup>423</sup>Domestic Violence Act 86 of 1995, section 51.

*Canada**Alberta/Saskatchewan*

6.1.9 The most effective way of enforcing domestic abuse orders is to treat violation of an order as a breach of the Criminal Code. Such a violation is an indictable offence. Breaches of orders under domestic violence legislation should therefore be prosecuted under the Criminal Code.<sup>424</sup>

**C. Recommendation 15 in Discussion Paper 70**

6.1.10 In Discussion Paper 70 it was recommended<sup>425</sup> that the contravention of the conditions of an interdict granted in terms of domestic violence legislation be an offence which is prosecuted in the criminal court.

**D. Submissions on Recommendation 15 in Discussion Paper 70**

6.1.11 This recommendation is widely endorsed. The *SA National Council for Child and Family Welfare* states that prosecution in a criminal court will act as a deterrent to those who contravene the conditions. The *Natal Law Society* and the *Cape Law Society* warn against a situation similar to that of criminal prosecutions in terms of the Maintenance Act which is reluctantly enforced by criminal courts and seldom successful. *M Horton* suggests that enforcement should be in the same court that made the original order.

6.1.12 The *UWC Community Law Centre* does not accept this recommendation for a number of reasons. Firstly, the abused woman is recast as a complainant witness rather than an applicant for relief. She is denied the right to legal representation and because the Attorney-General, and not she directs the prosecution, she is denied control over the proceedings. Her interests as a victim are not recognized when she appears as a witness and as a complainant, she is subject to gender

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<sup>424</sup>ALRI Report No 74 90.

<sup>425</sup>Discussion Paper 70 paragraph 4.1.30.

bias and secondary victimization by the criminal justice system. Secondly, due to delays in the criminal justice system, her need to be protected from immediate and ongoing violence is not adequately accommodated. However, the *Centre* recognizes the importance of emphasizing the criminality of domestic violence. It proposes that the proceedings take place in the criminal court, subject to two qualifications: firstly, the respondent must be charged with both contempt of court and a domestic violence offence; and secondly, the abused woman must be regarded as an ancillary prosecutor and equipped with the right to legal representation. Alternatively, it is suggested that dual proceedings - a civil action for contempt of court and a criminal action for domestic violence, be considered. It also recommends that the interdict court and criminal court are given concurrent jurisdiction over conduct that constitutes a contravention of an interdict.

6.1.13 The *Centre* further argues that in view of the fact that the *sui generis* nature of contempt of court proceedings is firmly entrenched in South African case law, the legislature erred by providing that the proceedings for interdict contraventions take the form of an inquiry that is governed by the provisions of section 170 of Act 51 of 1977. This section, it is argued, regulates a separate and different form of contempt of court, namely failure of an accused to appear at court, and is not relevant to contempt of court that takes the form of the violation of a court order. By contrast, it is correct in law that the latter form of contempt be adjudicated by way of a judicial hearing governed by a *sui generis* procedure that contains both civil and criminal elements and in which the applicant is a party to the suit. It is suggested therefore that the proceedings should embody a combination of ordinary civil application procedure and the procedure in a summary criminal trial. The presiding officer should hear oral evidence from both parties and give judgement in a summary manner.

6.1.14 The *Department of Justice Gender Unit* asserts that breach of an interdict should be a criminal offence which is prosecuted by the state as a crime. To alleviate likely problems, it is recommended that where a victim chooses to, she can elect to prosecute the action herself and alternative procedures should be provided in the new legislation. Prosecutions could be heard in the same courts as interdict cases to avoid some of the concerns about the lack of sensitivity of judicial officers in ordinary criminal courts. The proposed family courts could provide an appropriate forum for these hearings.

6.1.15 *The Democratic Party* recommends that prior breaches of interdicts be made available to a court sentencing an abuser, and that a national registry of all known spousal and family abusers be compiled.

6.1.16 The *Magistrate: Paarl* appears not to favour this recommendation, stating that criminal prosecutions will make the process more cumbersome and at the same time contravene one of the stated objects of the Act, namely to decriminalize the whole process.

6.1.17 Recommendation 15 in Discussion Paper 70 is endorsed by:

*Magistrate: Pietermaritzburg*

*Magistrate: Pretoria North*

*NICRO, Western Cape*

*Women's Lobby*

## **E. Evaluation**

6.1.18 Because a domestic violence protection order is founded in civil law, this does not preclude an interpretation that the Act contains provisions which are, as a rule, identified with criminal proceedings. Specific provision is made that a person who contravenes the protection order or other order granted by a judge or magistrate shall be guilty of an offence and liable to conviction to a fine or imprisonment (Section 6 of the Act). An argument that a section 3(4) enquiry should be interpreted as being in the nature of a criminal trial is therefore not devoid of merit. Consultation suggests that the view that the State is not or should not be involved in an enquiry under section 3(4) of the Act presents a number of pressing problems:

- (a) It is expected of a presiding officer to play an inquisitorial role and to execute the functions of a presiding officer and prosecutor.
- (b) Contravention of a protection order is a serious offence with a maximum penalty of a fine or 12 months imprisonment or both such fine and imprisonment. It appears to be inappropriate to conduct an enquiry of such serious nature in the

dual capacity of presiding officer and prosecutor. This can detract from the impartiality of the bench.

- (c) For practical considerations it may often be necessary to make use of the services of the prosecutor. This fact is conceded by the Attorneys-General: Cape Town and the Free State.<sup>426</sup>
- (d) An imbalance is created where the respondent is represented in court and there is no prosecutor who has the objective of obtaining a conviction.

6.1.19 The applicability of section 170 of the Criminal Procedure Act 51 of 1977 to a section 3(4) enquiry<sup>427</sup> presents further problems. As interpreted in **S v Chaplin**,<sup>428</sup> in the absence of an explanation by the respondent, a conviction under section 6 of the Act will be justified at a section 3(4) enquiry, once it is shown that the respondent engaged in conduct which *prima facie* was in conflict with the provisions of an interdict. Wilfulness will be presumed in the absence of an explanation by the respondent. The respondent is therefore burdened with an onus to prove on a balance of probabilities that he did not violate the terms of the interdict. Should he not satisfy the burden of proof, he might be convicted and sentenced to a fine or imprisonment or both.

6.1.20 In terms of the Constitution, 1996, everyone who is arrested for allegedly committing an offence has the right to remain silent<sup>429</sup> and every accused person has the right to a fair trial, which includes the right to be presumed innocent, to remain silent, and not to testify during the proceedings.<sup>430</sup> In **S v Zuma**<sup>431</sup> proviso (b)(ii) to section 217(1) of the Criminal Procedure Act 51 of 1977 was scrutinised by the Constitutional Court. Kentridge AJ held that the words “unless the contrary is proved” placed an onus on the accused which had to be discharged on a balance of probabilities. He did not discharge the onus by merely raising a doubt. If, at the end of the

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<sup>426</sup>Submissions to the Commission.

<sup>427</sup>As provided by section 3(5) of the Act.

<sup>428</sup>1996 1 SA 191 (C).

<sup>429</sup>Section 35(1)(a).

<sup>430</sup>Section 35(3)(h).

<sup>431</sup>1995 2 SA 642 (CC).

trial-within-a trial the probabilities were evenly balanced the presumption prevailed. Kentridge AJ reached the following conclusion:<sup>432</sup>

. . . the common-law rule in regard to the burden of proving that a confession was voluntary has been not a fortuitous but an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession, and the right not to be a compellable witness against oneself . . . Reverse the burden of proof and all these rights are seriously compromised and undermined . . . I therefore consider that the common-law rule on the burden of proof is inherent in the rights specifically mentioned in s 25(2) and 3(c) and (d), (of the Constitution, 1993)<sup>433</sup> and forms part of the right to a fair trial.

It was accordingly held that section 217(1)(b)(ii) violated the provisions of the Constitution, 1993.

6.1.21 If the reasoning in the **Zuma** case were applied to section 170 of the Criminal Procedure Act 51 of 1977, the section would probably not survive constitutional scrutiny. Naturally, this conclusion casts doubt upon the constitutionality of section 3(4) and (5) of the Act.

6.1.22 Accommodating the enquiry into the respondent's alleged breach of the protection order in the criminal court, would obviate many of the problems experienced at present. Making the contravention of a protection order granted in terms of domestic violence legislation an offence which is prosecuted in the criminal court, thus resulting in a criminal record, would also send out a clear message to respondents upon whom a protection order has been served that the continuation of domestic violence has serious consequences for them.

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<sup>432</sup>At 659.

<sup>433</sup>Comparable to section 35 of the Constitution, 1996.

## 6.2 Warrant of arrest

### A. Problem analysis

6.2.1 In granting an interdict the judge or magistrate shall make an order authorising the issue of a warrant for the arrest of the respondent and suspending the execution of such warrant subject to such conditions regarding compliance with the interdict as he may deem fit (section 2(2)(a) and (b) of the Act). The interdict and the order shall have no force and effect until served on the respondent in the prescribed manner (section 2(3) of the Act). After the interdict has been served, a certified copy of the interdict and the original warrant of arrest shall be delivered or sent by registered post to the applicant (regulations 3(2) and 4(7) ). The warrant of arrest may be executed by a peace officer upon receipt of an affidavit in which it is stated that the respondent has breached any of the conditions contained in the order (section 3(1) of the Act).

6.2.2 Fedler<sup>434</sup> emphasises that the cooperation of police officers in arresting the abuser for breach of the interdict is pivotal to the efficacy of the Act.

6.2.3 According to Van Rensburg<sup>435</sup> the peace officer should execute the warrant of arrest if it *prima facie* appears from the affidavit that a condition contained in the order has been breached. He also suggests<sup>436</sup> that, for the applicant to enjoy perpetual protection, she should be provided with a duplicate warrant of arrest and a certified copy of the interdict after the conclusion of the enquiry in terms of section 3(4) of the Act.

6.2.4 Daniels & Muntingh<sup>437</sup> recommend that there should be clarity about the issuing of second or further warrants of arrest once the interdict is violated. In the meantime applicants are left vulnerable and unprotected as the interdict is toothless without the attached warrant of arrest.

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<sup>434</sup>Fedler 1995 SALJ 246.

<sup>435</sup>Van Rensburg 1994 The Magistrate 102.

<sup>436</sup>Van Rensburg 1994 The Magistrate 106.

<sup>437</sup>Daniels & Muntingh 16.

6.2.5 Novitz<sup>438</sup> remarks that the Act is curious in that it places no duty upon police to respond to domestic violence, unless an affidavit in the proper form has been signed and delivered to them, stating that the interdict has been breached. Moreover, the police officer may execute the conditional warrant of arrest, leaving the officer with a discretion as to actual execution. There should be provision for police to arrest a violent abuser without a second affidavit where circumstances clearly warrant action.<sup>439</sup>

6.2.6 Clark<sup>440</sup> suggests that the police should issue a clear policy statement providing grounds upon which they will exercise the discretion to execute a warrant of arrest upon receipt of an affidavit.

## **B. Comparative survey of laws**

### *England*

6.2.7 The Law Commission (England)<sup>441</sup> recommends that where there has been violence or threatened violence the court should be required to attach a power of arrest to any specified provisions of an order in favour of any eligible applicant unless in all the circumstances the applicant or child will be adequately protected without such a power. Once a power of arrest has been attached to an order, a constable may arrest the respondent without a warrant if he has reasonable cause to believe that there has been a breach of the provisions to which the power of arrest was attached.<sup>442</sup>

### *New Zealand*

6.2.8 Where a protection order is in force, any member of the police may arrest, without warrant, any person whom the member of the police has good cause to suspect has committed a

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<sup>438</sup>Novitz 45.

<sup>439</sup>Novitz 58.

<sup>440</sup>Clark 1996 SAJHR 598.

<sup>441</sup>Law Com. No. 207 paragraph 5.14.

<sup>442</sup>Law Com. No. 207 proposed clause 15(4).



breach of the order. In considering whether or not to arrest a person, the member of the police must take the following matters into account:

- (a) The risk to the safety of the protected person if the arrest is not made.
- (b) The seriousness of the alleged breach of the protection order.
- (c) The length of time since the alleged breach occurred.
- (d) The restraining effect on the person liable to be arrested of other persons or circumstances.<sup>443</sup>

## *USA*

### *Minnesota*

6.2.9 A peace officer shall arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated an order restraining the person or excluding the person from the residence or the petitioner's place of employment, even if the violation of the order did not take place in the presence of the peace officer, if the existence of the order can be verified by the officer.<sup>444</sup>

### *Pennsylvania*

6.2.10 An arrest for violation of an order may be without warrant upon probable cause whether or not the violation is committed in the presence of the police officer.<sup>445</sup>

### *New Jersey*

6.2.11 Where a law enforcement officer finds probable cause to believe that domestic violence has occurred, the law enforcement officer shall effect an arrest if, inter alia, there is probable cause to believe that the alleged perpetrator has been served with the order alleged to have been violated. If the victim does not have a copy of the purported order, the officer may verify the existence of an order.<sup>446</sup>

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<sup>443</sup>Domestic Violence Act 86 of 1995, section 50.

<sup>444</sup>Minnesota Domestic Abuse Act (1992), section 14(b).

<sup>445</sup>Pennsylvania Protection From Abuse Act, section 6113(a).

<sup>446</sup>New Jersey Prevention of Domestic Violence Act of 1991 2C:25-21, 5. a.(3).

*Trinidad and Tobago*

6.2.12 Where a police officer believed on reasonable grounds that a persons has committed or is committing the offence of contravening a protection order, he shall make an arrest without a warrant.<sup>447</sup>

**C. Recommendation 16 in Discussion Paper 70**

6.2.13 In Discussion Paper 70 it is recommended<sup>448</sup> that the legislation provide that:

- (a) The applicant be issued with a duplicate warrant of arrest on conclusion of the prosecution of the respondent for the offence of contravening the conditions of the interdict.
- (b) A peace officer may execute a warrant of arrest if he or she has reasonable cause for suspecting that -
  - (i) an interdict is in force;
  - (ii) a warrant for the arrest of the respondent has been issued;
  - (iii) the respondent has breached any of the conditions regarding compliance with the interdict.
- (c) The peace officer who executed the warrant of arrest obtain an affidavit from the applicant as soon as possible after the execution of the warrant of arrest.

**D. Submissions on Recommendation 16 in Discussion Paper 70**

6.2.14 The *UWC Community Law Centre* states that there is room for a significant lapse of time between service of the interdict on the respondent and the receipt of the interdict and warrant of arrest by the applicant, and suggests that a duty should be placed on the clerk of the court to furnish the applicant with a copy of the interdict and the original warrant of arrest immediately

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<sup>447</sup>Trinidad and Tobago Domestic Violence Act, 1991, section 22.

<sup>448</sup>Discussion Paper 70 paragraph 4.2.21.

after an interdict is granted. The potential prejudice to the respondent will be obviated by the retention of the provision that the interdict shall have no effect until it is served on the respondent.

6.2.15 *Tshwaranang Legal Advocacy Centre* recommends that the warrant of arrest should be issued in quadruplicate - one copy to the respondent, one to the applicant, one to remain in the court docket, and one to be lodged at a police station of the applicant's choice. This is to ensure that when she comes to report a breach, she will not be sent away by police officers because she does not have a copy of the warrant with her.

6.2.16 *The Department of Justice Gender Unit* avers that the purpose of a suspended warrant is unclear, and that a police officer should have the power to arrest an offender without a warrant, if there are reasonable grounds for suspecting that a breach of an interdict has occurred.

6.2.17 *The Magistrate: Durban* argues that the court should have a discretion whether or not to grant a warrant for the arrest of the respondent and that a warrant of arrest should not be issued with interdicts as a matter of course, as a warrant can be abused by the applicant.

*Issuing of duplicate warrant on prosecution of respondent*

6.2.18 Whilst this recommendation is supported by *UNISA Health Psychology Unit*, *Tshwaranang Legal Advocacy Centre* and the *Department of Justice Gender Unit*, these respondents all recommend that a computerized system should be put in place so that all police officers can assess the existence of interdicts in the absence of the physical documentation being produced by the woman. *The Magistrate: Pietermaritzburg* suggests that the recommendation be expanded to provide for a duplicate warrant where the applicant has misplaced or lost the original warrant.

6.2.19 *The Magistrate: Wynberg* points out that to issue a duplicate warrant which has already been executed is futile. A new warrant of arrest ought to be issued.

6.2.20 Recommendation 16(a) is endorsed by the *UWC Community Law Centre*.

*Execution of warrant of arrest by police officer*

6.2.21 The *UWC Community Law Centre* points out that three situations can be distinguished:

- (a) Where the peace officer has the warrant and affidavit. In this instance it is recommended that no discretion be given to police officers, and that where a warrant of arrest exists coupled with an affidavit, the warrant shall be executed by the police officer. (*Tshwaranang Legal Advocacy Centre* endorses this recommendation.)
- (b) Where the peace officer has a warrant but no affidavit. This corresponds with recommendation 16(c), namely that the police officer must obtain an affidavit from the applicant as soon as possible after the execution of the warrant. The recommendation is endorsed by *UWC Community Law Centre*.
- (c) Duty to arrest without a warrant. This does not mean that no warrant has been issued, merely that the peace officer does not have the warrant in his or her possession. As long as the peace officer ensures that an interdict is in existence, arrest without a warrant does not constitute any greater intrusion on the liberty of the individual than arrest with a warrant.

6.2.22 *Tshwaranang Legal Advocacy Centre* points out that in the situation where a woman reports breach of an interdict, but is unable to produce a copy of the interdict or the warrant, the objective test of “reasonable grounds for suspecting that an interdict is in force” is not an appropriate test. Where the applicant lies about the existence of an interdict, she can be charged with perjury. This, it is argued, is sufficient a deterrent, and the police should be empowered to act on *her ipse dixit* without incurring penalties for unlawful arrests. *Tshwaranang* recommends the inclusion of sections in the Bill to the effect that a peace officer shall not refuse to execute a warrant of arrest solely on the basis that the applicant does not have a copy of the interdict; and further that no action shall be taken against a peace officer who executes a warrant of arrest unless such warrant has been executed *mala fide*. Finally, it suggests a section to the effect that a peace officer shall not be empowered to release a respondent arrested on warning.

6.2.23 The *Magistrate: Durban* does not support this recommendation and claims that it is highly undesirable, in the light of the Bill of Rights, to empower a police officer to arrest a respondent

merely on reasonable grounds for suspecting that an interdict or warrant of arrest has been granted.

*Affidavit from applicant after execution of warrant of arrest*

6.2.24 *The Department of Justice Gender Unit* states that a victim should not have to supply an affidavit before an arrest takes place. The *Magistrate: Pietermaritzburg* expresses concern over the situation where the applicant refuses to supply an affidavit to the arresting officer. He argues this would then constitute an illegal arrest and therefore a police officer should only execute the warrant once he has obtained evidence under oath of a contravention of an interdict, so that arresting officers can be indemnified from any allegations of unlawful arrest.

6.2.25 Recommendation 16 in Discussion Paper 70 is endorsed by:

*Cape Law Society*

*Magistrate: Pretoria North*

*Natal Law Society*

*NICRO, Western Cape*

*SA National Council for Child and Family Welfare*

## **E. Evaluation**

6.2.26 Where the applicant produces the original warrant of arrest or makes an affidavit to the effect that the warrant has been lost or destroyed, the SAPS should have limited discretion to arrest the respondent. It appears that too wide a discretion to arrest a respondent has, in the past, resulted in a derelict attitude by the SAPS in executing warrants of arrests. Police officers have preferred to warn respondents rather than arrest them, which has defeated the aims of the legislation.

6.2.27 Note is taken of the problems applicants experience where they are unable to produce the original warrant of arrest at police stations. Therefore, it is suggested that provision be made for a peace officer to arrest a respondent if he/she is satisfied upon receipt of an affidavit by the applicant that -

- (a) an interim protection order or a final protection order is in existence;
- (b) a warrant for the arrest of the respondent has been issued;
- (c) the warrant of arrest has been lost or destroyed; and
- (d) the respondent has breached any prohibition, condition, obligation or order imposed in terms of the protection order.

6.2.28 For applicants to enjoy perpetual protection, they should be provided with a duplicate warrant of arrest when the original warrant has been executed and the respondent has been arrested, and also where the original warrant of arrest has been lost or destroyed.

6.2.29 A proposal that magistrates and judges should be empowered to issue warrants of arrest for summary execution in appropriate cases and that they should not be obliged to suspend the execution of the warrant, cannot be supported. At the time of granting the protection order, such protection order has not yet been served on the respondent and the respondent would therefore not have known that an order of court has been issued against him.

### 6.3 Terms of the order

The issue of the definition of domestic violence ties in with the issue of the scope of interdicts and for the purpose of this analysis regard should be had to the relevant opinions and responses referred to in the discussion on the definition of domestic violence in Chapter 5, paragraph 5.10 et seq.

The following possible terms of protection orders are dealt with elsewhere:

- \* An order that the SAPS accompany the applicant to supervise the collection of personal property - Chapter 5, paragraph 5.8 et seq.
- \* Exclusion of the respondent from the shared household - Chapter 5, paragraph 5.13 et seq.
- \* Obligations as to the discharge of rent and mortgage payments - Chapter 5, paragraph 5.13 et seq.
- \* Temporary maintenance, custody and access orders - Chapter 6, paragraph 6.4 et seq.
- \* Seizure of arms and dangerous weapons - Chapter 7, paragraph 7.4 et seq.

#### A. **Problem analysis**

6.3.1 The only relief provided for in the Act is contained in section 2 in terms of which an interdict may be granted enjoining the respondent -

- (a) not to assault or threaten the applicant or a child living with the parties or with either of them;
- (b) not to enter the matrimonial home or other place where the applicant is resident, or a specified part of such home or place or a specified area in which such home or place is situated;
- (c) not to prevent the applicant or a child who ordinarily lives in the matrimonial home from entering and remaining in the matrimonial home or a specified part of the matrimonial home; or

- (d) not to commit any other act specified in the interdict.

6.3.2 In terms of section 2(2)(b) of the Act the execution of a warrant for the arrest of the respondent must be suspended subject to such conditions regarding compliance with the interdict as the judge or magistrate may seem fit.

## **B. Comparative survey of laws**

### *England*

6.3.3 Under existing English law the precise scope of a non-molestation injunction can be tailored to the requirements of the particular case. Traditionally, a common form of order restrains the respondent from assaulting, molesting, or otherwise interfering with the applicant.

A general prohibition can be followed by a more precise injunction against specific kinds of behaviour complained of.<sup>449</sup> The Law Commission<sup>450</sup> considers it important that orders should retain this dual capability. Where it is obvious that there should be a limitation on a particular sort of behaviour, the order should be specific so that the respondent is left in no doubt about what he must stop doing. However, the order also needs to be sufficiently general to cover any objectionable behaviour in which the respondent may subsequently decide to indulge. It is therefore recommended that the power to make non-molestation orders be so framed as to make it clear that the order is a flexible one, capable of being tailored to the requirements of the particular case, but the court should also be able to prohibit molestation in its general form if the case so demands.

### *Australia*

6.3.4 In most jurisdictions the court has flexible powers to tailor a protection order to meet not just violent conduct but harassing and pestering conduct which may not in itself be criminal.<sup>451</sup>

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<sup>449</sup>Law Com. No. 207 paragraph 3.2.

<sup>450</sup>Law Com. No. 207 paragraph 3.2.

<sup>451</sup>Laws of Australia paragraph [56].



*The Australian Capital Territory / Northern Territory*

6.3.5 It is possible to order that the respondent not approach within a certain distance of the person for whose protection the order is made.<sup>452</sup>

*New South Wales*

6.3.6 Unless otherwise ordered, every order is taken to prohibit stalking or intimidation.<sup>453</sup> Intimidation means conduct amounting to harassment or molestation, the making of repeated telephone calls or any conduct that causes a reasonable apprehension of injury to a person, or of violence or damage to any person or property.<sup>454</sup>

*Queensland*

6.3.7 The order must impose a condition that the respondent be of good behaviour and not commit violence against the aggrieved spouse. The order may also include a condition excluding the violent party from specified property or preventing him or her from approaching the aggrieved party or any relative or associate of the aggrieved party.<sup>455</sup>

*Victoria*

6.3.8 Conditions which may be imposed include restricting or prohibiting access to premises, keeping the defendant a specified distance from the victim, excluding the defendant from a specified locality, such as a suburb, prohibiting the defendant from making contact, for example, by telephone.<sup>456</sup>

*Canada**Alberta*

6.3.9 Referring to no-contact provisions, the Alberta Law Reform Institute<sup>457</sup> observes that the clearer and the more inflexible the primary no-contact provision is, the less difficulty both the

<sup>452</sup>Laws of Australia paragraph [62], [70].

<sup>453</sup>Laws of Australia paragraph [66].

<sup>454</sup>Laws of Australia paragraph [45].

<sup>455</sup>Laws of Australia paragraph [74].

<sup>456</sup>Laws of Australia paragraph [86].

<sup>457</sup>ALRI Report for Discussion No. 15 106.

police and the litigants have in understanding and complying with the terms of the order. It is recommended<sup>458</sup> that the legislation should empower the court to make an order prohibiting the respondent from making direct or indirect contact with the applicant. For further clarity and to assist in compliance with and enforcement of the order the meaning of “no-contact” should be explained. The order should give examples of the sorts of things that it includes in the meaning of contact. It should not, however, limit the meaning of “no-contact” to the examples set forth in the order. Things listed in the meaning of “no-contact” should include:

- (a) Telephoning the applicant at the applicant’s residence, place of employment or school.
- (b) Going to the applicant’s place of employment, school or residence.
- (c) Approaching the applicant if the respondent accidentally sees the applicant in a public place.
- (d) Watching the applicant or the applicant’s residence, place of employment or school from a distance.
- (e) Communicating with the applicant in any other way including but not limited to mail, fax, telegram, or any other form of written communication.
- (f) Communicating or attempting to communicate with the applicant in any of the above ways by enlisting the help of any other person.

6.3.10 While it would seem preferable from an enforcement point of view to have a very comprehensive and inflexible no-contact provision, the Alberta Law Reform Institute<sup>459</sup> concedes that in some instances such an order would not be feasible. It is recommended<sup>460</sup> that where the circumstances of the case lead to the inference that a protection order is needed but where, as a matter of practical necessity or at the request of the applicant, the parties must, or could potentially desire to, have safe contact with one another, the order should be very specific structuring the terms of that contact to ensure that it does not -

- (a) provide an opportunity for continued abuse; or
- (b) make it impossible for the police to effectively enforce the order.

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<sup>458</sup>ALRI Report for Discussion No 15 108.

<sup>459</sup>ALRI Report for Discussion No 15 109.

<sup>460</sup>ALRI Report for Discussion No 15 110.

6.3.11 The Alberta Law Reform Institute's<sup>461</sup> final recommendation in regard to personal contact and communication are as follows:

The respondent may be restrained from contacting the claimant or associating in any way with the claimant and from subjecting the claimant to domestic abuse.

Examples of the type of conduct that may be restrained include the following:

- Attending at or near or entering any specified place that is attended regularly by the claimant, other family members, or other specified persons, including the residence . . .property, business, school, or place of employment of the claimant or of other family members or other specified persons.
- Making any communication, including personal, written or telephone contact, or contact by any other communication device, either directly or through the agency of another person, with the claimant , other family members, or other specified persons, or their employers, employees, or co-workers.
- Persons other than the claimant who are included in the order should be notified of the fact of their inclusion.

#### *Saskatchewan*

6.3.12 The Saskatchewan Victims of Domestic Violence Act<sup>462</sup> contains, inter alia, the following provisions restraining the respondent from -

- (a) communicating with or contacting the victim and other specified persons;
- (b) attending at or near or entering any specified place that is attended regularly by the victim or other family members, including the residence, property, business, school, or place of employment of the victim and other family members;
- (c) making any communication likely to cause annoyance or alarm to the victim, including personal, written or telephone contact with the victim and other family members or their employers, employees or co-workers or others with whom communication would likely cause annoyance or alarm to the victim;
- (d) taking, converting, damaging or otherwise dealing with property that the victim may have an interest in.

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<sup>461</sup>ALRI Report No 74 62 - 63.

<sup>462</sup>S.S. 1994, c. V-6.02, sections 3(3) and 7.

*Nova Scotia*

6.3.13 Proposed Nova Scotia legislation<sup>463</sup> provides for orders restraining the respondent from -

- (a) subjecting the victim to domestic violence;
- (b) harassing the victim;
- (c) entering the residence, property, school or place of employment of the victim or other family or household members of the victim and requiring the respondent to stay away from any specified place that is named in the order and is frequented regularly by the victim or other family or household members;
- (d) making any communication likely to cause annoyance or alarm including but not limited to personal, written or telephone contact with the victim or other family members or their employers, employees or fellow workers or others with whom communication would be likely to cause annoyance or alarm to the victim;
- (e) taking, converting or damaging property in which the victim may have an interest.

*British Columbia*

6.3.14 British Columbia legislation<sup>464</sup> has similar provisions.

*New Zealand*

6.3.15 It is a standard condition of every protection order that the respondent must not -

- (a) physically or sexually abuse the protected person;
- (b) threaten to physically or sexually abuse the protected person;
- (c) damage, or threaten to damage, property of the protected person;
- (d) engage, or threaten to engage, in other behaviour, including intimidation or harassment, which amounts to psychological abuse of the protected person; or
- (e) encourage any person to engage in behaviour against a protected person, where the behaviour, if engaged in by the respondent, would be prohibited by the order.<sup>465</sup>

<sup>463</sup>ALRI Report for Discussion No 15 195 - 200.

<sup>464</sup>ALRI Report for Discussion No 15 201 - 203.

<sup>465</sup>Domestic Violence Act 86 of 1995, section 19(1).

6.3.16 It is a condition of every protection order (referred to as the non-contact provision) that at any time other than when the protected person and the respondent are living in the same dwelling house, the respondent must not -

- (a) watch, loiter near, or prevent or hinder access to or from, the protected person's place of residence, business, employment, educational institution, or any other place that the protected person visits often;
- (b) follow the protected person about or stop or accost the protected person in any place;
- (c) without the protected person's express consent, enter or remain on any land or building occupied by the protected person;
- (d) where the protected person is present on any land or building, enter or remain on that land or building in circumstances that constitute a trespass; or
- (e) make any other contact with the protected person (whether by telephone, correspondence, or otherwise), except such contact -
  - (i) as is reasonably necessary in any emergency;
  - (ii) as is permitted under any order or written agreement relating to custody of, or access to, any minor; or
  - (iii) as is permitted under any special condition of the protection order.<sup>466</sup>

6.3.17 The court may in addition impose any special conditions that are reasonably necessary to protect the protected person from further domestic violence by the respondent.<sup>467</sup>

*USA*

*Model Code on Domestic and Family Violence*

6.3.18 The court may grant the following relief:

- (a) Enjoin the respondent from threatening to commit or committing acts of domestic or family violence against the petitioner.

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<sup>466</sup>Domestic Violence Act 86 of 1995, section 19(2).

<sup>467</sup>Domestic Violence Act 86 of 1995, section 27(1).

- (b) Prohibit the respondent from harassing, annoying, telephoning, contacting, or otherwise communicating with the petitioner, directly or indirectly.
- (c) Order the respondent to stay away from the residence, school, place of employment of the petitioner, or any specified place frequented by the petitioner.
- (d) Order such other relief as the court deems necessary to protect and provide for the safety of the petitioner.<sup>468</sup>

*General*

6.3.19 Women, Law & Development International<sup>469</sup> report that most protection orders generally consist of direct orders prohibiting a party from engaging in specified acts of violence. The orders may instruct the perpetrator to desist from abusing or contacting the victim, coming within their proximity, or interfering with the victim's property. In some of the legislation, the respondent may be ordered not to use an agent or third party to engage in any of the prohibited acts.

**C. Recommendation 17 in Discussion Paper 70**

6.3.20 In Discussion Paper 70 it was recommended<sup>470</sup> that the legislation:

- (a) In addition to the power to exclude the respondent from the shared residence, empower the court to prohibit the respondent to -
  - (i) enter a specified part of the shared residence or a specified area in which the shared residence is situated;<sup>471</sup> or
  - (ii) prevent the applicant or any relevant child who ordinarily lives or lived in the shared residence from entering or remaining in the shared residence or a specified part of the shared residence.<sup>472</sup>

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<sup>468</sup>Model Code, section 305, 306.

<sup>469</sup>State Responses 84 - 85.

<sup>470</sup>Discussion Paper 70 paragraph 4.3.24.

<sup>471</sup>Section 2(1)(b) of the Act.

<sup>472</sup>Section 2(1)(c) of the Act.

- (b) Provide that the court may grant an interdict against the respondent prohibiting the respondent to -
- (i) physically or sexually abuse the applicant;
  - (ii) threaten to physically or sexually abuse the applicant;
  - (iii) intimidate the applicant;
  - (vi) harass the applicant;
  - (v) damage property in which the applicant may have an interest;
  - (vi) threaten to damage property in which the applicant may have an interest;
  - (vii) enter, watch, loiter near, or prevent or hinder access to or from, the applicant's place of residence, business, employment, educational institution, or any other place that the applicant visits often;
  - (viii) follow the applicant or stop or approach the applicant in any place;
  - (ix) make any contact with the applicant by telephone or any form of written communication; or
  - (x) enlist the help of another person to act in any of the above ways.
- (c) Retain the power (section 2(1)(d) of the Act) to prohibit any other act specified in the interdict.
- (d) Empower the court to impose any special conditions that are reasonably necessary to protect and provide for the safety of the applicant or any relevant child. ["Relevant child" is to be defined as any child whose interests the court considers relevant.]
- (e) Empower the court to order that all or any of the prohibitions or conditions contained in the interdict apply for the benefit of any relevant child.

**D. Submissions on Recommendation 17 in Discussion Paper 70**

6.3.21 *M Horton* suggests that the terms of the interdict be framed generally with a list of specific prohibitions following. Merely having a list of specific prohibitions may result in the respondent moving on to other forms of harassment. A respondent may believe that because certain types of behaviour have been specifically prohibited, other types of equally unacceptable behaviour are still permissible.

6.3.22 *Tshwaranang Legal Advocacy Centre* recommends that the section that deals with terms of the order should be aligned with the definition of "domestic violence". In addition, it recommends that the terms "harassment and intimidation" be defined in the legislation, as they are nowhere defined in South African law.

6.3.23 The *SA National Council for Child and Family Welfare* makes the point that family members should also be prevented from harassing and intimidating the applicant, as they often take sides and are used by the respondent to exert pressure on the applicant.

6.3.24 *UWC Community Law Centre* recommends that the court must be empowered to prohibit additional acts that are currently not listed in the recommendation. In order to ensure that the judicial officer does not delineate the ambit of the prohibited conduct too narrowly, the exposition of prohibited acts should be more specific and the court should be empowered to prohibit any other conduct that constitutes controlling and abusive behaviour that harms the health, safety or well-being of the applicant.

6.3.25 Recommendation 17 in Discussion Paper 70 is endorsed by:

*Magistrate: Pietermaritzburg*

*Magistrate: Pretoria North*

*Natal Law Society*

*NICRO, Western Cape*

## **E. Evaluation**



6.3.26 The relief provided for in section 2(1)(a) - (c) of the Act is clearly inadequate and the extent to which section 2(1)(d) can be used to introduce innovative limitations on a particular sort of behaviour remains uncertain. The inclusion in the legislation of a comprehensive list of actions which the respondent may be prohibited from doing, would ensure that orders are specific so that the respondent is left in no doubt about what he must stop doing. The inclusion of a list of possible prohibitions would, in addition, provide clarity and promote consistency in determining what type of relief may be granted.

6.3.27 However, the inherent danger of an exhaustive list of prohibitions is that some kind of abusive behaviour might not be covered. With a view to ensuring that the legislation extends maximum protection to victims of domestic violence, the retention of a flexible power (section 2(1)(d) of the Act) to tailor the prohibitions to meet conduct which may not be included in the list, appears to be unavoidable. The New Zealand Domestic Violence Act<sup>473</sup> empowers the court to impose any special conditions that are reasonably necessary to protect the protected person from further domestic violence by the respondent. In terms of the Model Code on Domestic and Family Violence<sup>474</sup> the court may order such other relief as the court deems necessary to protect and provide for the safety of the petitioner.

6.3.28 The domestic sphere in which domestic violence takes place provides the basis for extending protection to persons other than the applicant. Children would obviously require such protection. The “paramount importance of a child’s best interests”<sup>475</sup> dictates that the court should of its own accord make orders for the protection of a child. It is clearly desirable for the court to have a discretion to make orders in relation to as wide a range of children as possible.

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<sup>473</sup>See paragraph 6.3.17 above.

<sup>474</sup>See paragraph 6.3.18 above.

<sup>475</sup>Constitution, 1996, section 28(2).

## 6.4 Temporary maintenance, custody and access orders

### A. **Problem analysis**

6.4.1 Fedler<sup>476</sup> asserts that women's lack of material resources permeates the abusive context. Aside from fear, economic dependence is the single most common reason why women remain with or return to their abusers. To offer substantive relief, available remedies must necessarily respond to this reality. While women can survive better without violence, they cannot survive at all without maintenance for themselves and their children. In the United States, a majority of states statutorily authorise the payment by the abuser of support to a spouse and maintenance for children as part of a civil protection order. It is submitted that magisterial discretion should be increased to include maintenance orders simultaneously with the issuing of the protection order.

6.4.2 It is further pointed out<sup>477</sup> that children often become the contact point through which a batterer can retain control over women, by asserting his rights to custody and reasonable access. Batterers often fight for child custody, refuse to pay maintenance for children and sometimes even resort to kidnapping children. Domestic violence, custody and maintenance, properly viewed, are facets of one predicament. Accordingly, eliminating parts of the predicament, while leaving others unaddressed, often fails to provide the woman with a sense of safety. Unless the custody issue is resolved in her favour, she is always potentially at risk that her abusive partner will gain physical access to her through an exercise of his legal rights as the father of her children. On issuing a protection order, magistrates are apprised of sufficient facts on the strength of which temporary orders of custody could be made. Such powers ought to be extended to them.

6.4.3 Le Roux<sup>478</sup> states that the reality is that the victim of domestic violence finds herself in a weak position of economic dependency and is therefore forced to remain in the violent home for her economic security. Before legislation can really come to the applicant's rescue, the available

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<sup>476</sup>Fedler 1995 SALJ 241.

<sup>477</sup>Fedler 1995 SALJ 241 - 242.

<sup>478</sup>Le Roux 1997 De Jure

remedies should respect this reality. A magisterial discretion to issue a maintenance order in conjunction with the interdict would be a sensible way of meeting this need of the applicant.

6.4.4 Clark<sup>479</sup> asserts that the lack of relief apart from an interdict is a problem: the Act does not deal with the issues of custody or maintenance. Magisterial powers could be conferred in the Act to grant, in addition to the interdict, a temporary custody, access order and/or maintenance order, where necessary. Obviously, if these orders are granted at this stage, then this should not prejudice a later final hearing. These orders should be temporary or they may delay the procedure for an interdict.

## **B. Comparative survey of laws**

### *Canada*

#### *Alberta*

6.4.5 The general approach of the Alberta Law Reform Institute<sup>480</sup> is that of providing the remedies required to protect claimants and children in their care from abuse, without encroaching unnecessarily on matters that are better resolved in another forum. It is thus proposed that the respondent may be restrained from contacting the claimant or children where this is necessary to protect them from harm, yet the question of custody (which requires determination of what is in the child's best interests, and thus considerable information, to enable the determination to be made properly), is left to be resolved in a forum in which such information can be made available to the adjudicator.

6.4.6 In an emergency situation, the safety of the claimant may be ensured first by an order that the respondent not contact the claimant. If there are children, the children may or may not themselves be at risk of harm. If they are, there should also be an order that the respondent not contact the children. However, even if there appears to be no risk of harm to children, contact between the respondent and children may compromise the safety of the claimant. If this is so, it may or may not be possible to structure the logistics of access to the children by the respondent

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<sup>479</sup>Clark 1996 SAJHR 597.

<sup>480</sup>ALRI Report No 74 77.

in such a way that contact does not compromise the safety of the claimant. If it is possible, this should be done. If it is not, the “no-contact” order should be made to apply to both the claimant and the children.<sup>481</sup>

6.4.7 Addressing the situation where there is an existing custody order in place, the Alberta Law Reform Institute<sup>482</sup> reasons that though it may be accurate to say that a lower court is not competent to vary an existing custody order, it is arguable that such court can still grant a protection order. The argument is based on the idea that protecting a child against harm by granting a “no-contact” order is a different issue than deciding which of two parents should have custody.

6.4.8 The two types of orders (custody/access and “no-contact”) do not conflict because they have different purposes. Protection orders do not conflict with custody orders because the two types of orders have different purposes. A protection order may temporarily suspend or qualify a respondent’s custody order, but it does not re-adjudicate the custody issue.<sup>483</sup>

6.4.9 The Alberta Law Reform Institute<sup>484</sup> recommends that it should be possible to make the following orders in respect of children:

- Where there is a risk of harm to a child, an order of “no-contact” with the child; if the risk is minimal, there may be an order of supervised contact.
- Where the respondent’s contact with the child would create a risk to a claimant, and order setting out the logistics of the respondent’s access to the child so that the claimant’s safety is not compromised; if this is not possible, there may be an order of “no-contact” with the child.

6.4.10 As regards financial relief, the Alberta Law Reform Institute<sup>485</sup> considers it important to distinguish between the type of financial relief that may be needed as a direct consequence of

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<sup>481</sup> ALRI Report No 74 77.

<sup>482</sup> ALRI Report No 74 80.

<sup>483</sup> ALRI Report No 74 82 - 83.

<sup>484</sup> ALRI Report No 74 82.

<sup>485</sup> ALRI Report No 74 73 - 74.

abuse and the resulting need for separation on the one hand, and an ongoing support obligation on the other. A respondent's abusive actions could give rise to a financial emergency for the claimant. For example, a claimant may have relied on the respondent for support (though there may have been no legal obligation) and, having left the home to escape further abuse, could become suddenly destitute or homeless. The abuse itself may have occasioned expenses such as medical, dental, or counselling costs. The separation may give rise to expenses such as legal costs, and the costs associated with moving. The separation may also place the claimant in a position of sudden financial need (for example, a temporary inability to work, or a sudden withdrawal of support). In such a case the respondent should be required to provide immediate financial relief regardless of whether an independent support obligation is owed. However, this relief should be limited to cover the emergency created by the abuse.

6.4.11 The relief discussed in the preceding paragraph is distinct from an ongoing support obligation and should be available regardless of whether the respondent has an obligation to support the claimant and children independently of the abuse issue. The Alberta Law Reform Institute<sup>486</sup> accordingly recommends that it should be possible to make an order that the respondent pay to the claimant financial relief made necessary by the abuse and resulting separation.

*Nova Scotia*

6.4.12 Proposed Nova Scotia legislation<sup>487</sup> provides that the court may make an order -

- (a) awarding temporary custody of a child and in making such an order the court shall presume that the best interests of the child are served by an award of custody to the nonviolent party;
- (b) providing for access to children provided that -
  - (i) the order shall protect the safety and well being of the victim and children and shall specify the place and frequency of visitation;

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<sup>486</sup> ALRI Report No 74 74.

<sup>487</sup> Quoted in ALRI Report for Discussion No 15 123.

- (ii) visitation arrangements shall not compromise any other remedy provided by the court by requiring or encouraging contact between the victim and the respondent;
- (iii) such order may include a designation of a place of visitation away from the victim's residence, the participation of a third party or supervised visitation;
- (iv) the court upon motion of the victim considers a request for an investigation or evaluation by an appropriate person or agency to assess the risk of harm to the child where the victim has a sound basis for making the request; and
- (v) the court orders that the cost of supervised access and any investigation or evaluation shall be borne by the respondent.

6.4.13 As regards financial provision for the applicant, the court may make an order requiring the respondent to pay emergency monetary relief to the victim and other dependants, if any, until such time as an obligation for support shall be determined pursuant to any other Act.<sup>488</sup>

#### *New Zealand*

6.4.14 The court may impose special conditions which may relate to the manner in which arrangements for access to a child are to be implemented.<sup>489</sup>

#### *USA*<sup>490</sup>

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<sup>488</sup>Proposed Nova Scotia legislation quoted in ALRI Report for Discussion No 15 196 - 197.

<sup>489</sup>Domestic Violence Act 86 of 1995, section 27(2)(a).

<sup>490</sup>The Alberta Law Reform Institute (ALRI Report for Discussion No 15 122, 145) notes that most American codes allow for the granting of an order for custody and access and spousal

*Model Code on Domestic and Family Violence*

6.4.15 The court may grant temporary custody of a minor child to the petitioner.<sup>491</sup> It may also specify arrangements for visitation of any minor child by the respondent and require supervision of that visitation if necessary to protect the safety of the petitioner or child.<sup>492</sup> The court may order the respondent to pay for the support of the petitioner and minor child if the respondent is found to have a duty to support the petitioner or minor child.<sup>493</sup>

*Minnesota*

6.4.16 The court may award temporary custody or establish temporary visitation with regard to minor children of the parties on a basis which gives primary consideration to the safety of the victim and the children. If the court finds that the safety of the victim or the children will be jeopardized by unsupervised or unrestricted visitation, the court shall condition or restrict visitation as to time, place, duration, or supervision, or deny visitation entirely, as needed to guard the safety of the victim and the children. The court may also establish temporary support for minor children or a spouse, and order the withholding of support from the income of the person obligated to pay the support.<sup>494</sup>

*New Jersey*

6.4.17 The court may grant an order providing for visitation. The order shall protect the safety and well being of the plaintiff and minor children and shall specify the place and frequency of visitation. Visitation arrangements shall not compromise any other remedy provided by the court by requiring or encouraging contact between the plaintiff and defendant. Orders for visitation may include a designation of a place of visitation away from the plaintiff, the participation of a third party or supervised visitation.<sup>495</sup> The court is also allowed to order the respondent to pay the victim monetary compensation for losses suffered as a direct result of the act of domestic violence. Compensatory losses include, inter alia, loss of earnings, out-of-pocket losses for injuries

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and child support along with the order for protection.

<sup>491</sup>Model Code, sections 305(3)(f), 306(2)(g).

<sup>492</sup>Model Code, section 306(3)(b).

<sup>493</sup>Model Code, section 306(3)(d).

<sup>494</sup>Minnesota Domestic Abuse Act (1992), section 6(3), (4).

<sup>495</sup>New Jersey Prevention of Domestic Violence Act of 1991, 2C:25-29b.(3).

sustained, cost of repair or replacement of property damaged or destroyed or taken by the respondent, cost of counselling or the victim, and moving or other travel expenses.<sup>496</sup>

### **C. Recommendation 18 in Discussion Paper 70**

6.4.18 In Discussion Paper 70 it was recommended<sup>497</sup> that the legislation:

- (a) Empower the court to grant, together with the interdict, maintenance, custody and access orders.
- (b) Provide that such orders shall subsist only until such time as a determination in respect thereof is made pursuant to any other applicable law.
- (c) Provide that conditions imposed by the court may also relate to the manner in which arrangements for access to a child are to be implemented.

### **D. Submissions on Recommendation 18 in Discussion Paper 70**

6.4.19 The majority of respondents support this recommendation. Most of the comments point to potential problems with implementation of the recommendation.

6.4.20 *The Department of Justice Gender Unit* endorses the view that any award of custody made under legislation should be seen as limited and subsisting only until such time as there is a review under other legislation dealing expressly with custody and access. The *Unit* recognizes that a provision in which courts are able to grant orders for custody and access may ultimately work against the interests of the abused woman in that it empowers a respondent to gain access not only to the children, but to her too. The *Unit* proposes that magistrates should be encouraged to endeavour to formulate interdicts which do not conflict with existing access orders

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<sup>496</sup>New Jersey Prevention of Domestic Violence Act of 1991, 2C:25-29b.(4).

<sup>497</sup>Discussion Paper 70 paragraph 4.4.28.



but which nevertheless maximize protection for the woman. It further suggests that the legislation should provide clear guidelines for the courts in respect of these orders:

- (a) The best interests of the child must be the paramount principle.
- (b) There should be a rebuttable presumption that where there has been domestic violence, it is in the best interests of the child to grant custody to the applicant.
- (c) Any access arrangements should be carefully defined and that copies of the custody and access orders should be given to both parties with the interdict.

6.4.21 *Gauteng Members of the ALS Family Law Standing Committee* and the *Laws and Administration Committee of the General Council of the Bar* endorse the notion of interim custody orders. *Gauteng Members of the Als Family Law Standing Committee* feel that maintenance should remain in the hands of existing forums. The *Magistrate: Paarl* cautions that a proper procedure for a full investigation of the issues should be established before the court grants maintenance, custody or access orders. The *Magistrate: Pietermaritzburg* expresses concern that in relation to custody and access orders, it may be that the magistrate will be usurping the authority of the High Court. He asks what would happen if the parties cannot reconcile but neither party sues for divorce: will the order remain in force indefinitely? He intimates that though he supports the recommendations in theory, there could be many practical difficulties with implementation. The *Magistrates: Pretoria* and *Johannesburg* strongly oppose this recommendation. They claim that to include access, custody and maintenance orders in the process will turn the quick procedures provided for by the Act into a lengthy undesirable process. Further, they are concerned that two courts may make contradictory orders on these issues which will lead to confusion. The *Cape Law Society* expresses strong reservations in relation to any provision permitting the granting or variation of maintenance, custody and access orders.

6.4.22 *Mpumalanga Provincial Government* proposes that the Maintenance Bill should form part of the Domestic Violence Bill. The *Natal Law Society* suggests that the Family Advocate should be part of the process of determining when these orders should be made.

6.4.23 *UWC Community Law Centre* suggests the inclusion of specific criteria to assist judicial officers to determine the best interests of the child. It also recommends that the legislation contain

a presumption that custody be granted to the non-violent parent and that unsupervised access by the abusive parent not be permitted. Provision should be made for a family member or friend to supervise access at no cost to the applicant, or supervised visitation centres should be established. The *Judge President: Northern Cape* claims that this recommendation does not take into account the existence of a current Maintenance Court order, and that the court granting the interim interdict will not have the power to vary such an order if it considers that changed circumstances necessitate a variation, unless it is specifically given the power to do so. He recommends that the legislation should expressly provide magistrates with the power to vary current Maintenance Court orders. The *Magistrate: Durban* recommends that maintenance should be defined in the legislation and that such an order should be restricted to a specified period of time only to ensure that it is temporary.

6.4.24 A number of respondents stress the need for magistrates to be properly trained to deal with these issues for this recommendation to operate effectively.

6.4.25 Recommendation 18 is Discussion Paper 70 is endorsed by:

*Magistrate: Pretoria North*

*M Horton*

*NICRO, Western Cape*

*SA National Council for Child and Family Welfare*

## **E. Evaluation**

6.4.26 It is recognized that many women remain in abusive relationships due to financial dependence upon a partner. When a woman therefore seeks legal protection, her circumstances are affected by economic factors. Separating from an abusive partner often imposes emergency financial expenses on the victim. In order for the legal protection offered by a court order to reflect the social context of victims of domestic violence, it is submitted that the court must be empowered, in its discretion, to make orders for emergency monetary relief to be paid to the applicant to cater for expenses that have already been incurred as a result of the domestic violence, such as loss of earnings, medical and dental expenses, moving and accommodation expenses.

6.4.27 The view of the Alberta Law Reform Institute<sup>498</sup> is that emergency monetary relief to cover the emergency created by the abuse is distinct from an ongoing support obligation and should be available regardless of whether the respondent has an obligation to support the victim and children independently of the abuse issue. Maintenance orders should be obtained separately from the protection order and in the appropriate forum so that issues of overlapping jurisdiction do not arise.

6.4.28 An order for educational expenses, where such expenses are incurred as a result of an act of domestic violence (although possibly a future expense), should also be catered for. The right to education is a fundamental human right enshrined in section 29 of the Constitution, 1996. This right should not be compromised by a domestic violence situation.

6.4.29 It seems that there is a need to deal with the link between contact with children and domestic violence in an effective way, failing which the safety of a victim of domestic violence may be seriously compromised. Children should not become the contact point through which the respondent can retain control by asserting his rights to custody and access.

6.4.30 Consultation suggests strong support for vesting presiding officers with a discretion to make an order for temporary custody and access in appropriate circumstances. The comparative survey of laws<sup>499</sup> also points in this direction. The forum for granting a protection order does not appear to be the appropriate forum for resolving issues relating to custody and access, due to the possible existence of such an order from a higher court. However, orders regulating contact between the abuser and his children may be necessary to protect the applicant and children. In the context of domestic violence the goals of such orders are to ensure that children who are at risk are protected from abuse and that the protection of the adult applicant is not compromised by the arrangements relating to the contact between the respondent and any children living with the applicant.

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<sup>498</sup>See paragraph 6.4.11 above.

<sup>499</sup>See paragraph 6.4.12 et seq above.

6.4.31 Section 28(2) of the Constitution, 1996, provides that a child's best interest is of paramount importance in every matter concerning the child. Hence, where children are at risk of harm from the respondent, the court should be empowered to refuse the respondent contact with any child if it is shown that contact is not in the best interests of such child. Even where there is no risk of safety to the children, the extent to which the respondent may use control over the children to gain physical access to the applicant, may also warrant a conclusion that the best interests of the child are served by refusing him contact or structuring such contact.

6.4.32 The reasoning of the Alberta Law Reform Institute<sup>500</sup> is that protecting a child against harm by granting a no-contact order is a different issue from deciding which of two parents should have custody. The two types of orders (custody/access and "no-contact") do not conflict because they have different purposes. A protection order may temporarily suspend or qualify a respondent's custody order, but it does not re-adjudicate the custody issue.

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<sup>500</sup>Paragraph 6.4.7 - 6.4.8 above.

## 6.5 Costs

### A. Problem analysis

6.5.1 The Act makes no provision for a costs order to be granted at any stage of the proceedings. One view is that the lack of authority to apply for a costs order means that applicants who are in a position to afford to apply for other remedies are discouraged from making use of the interdict procedure, leaving more time for applicants in need. Another view is that it is a matter for the court to decide and that discretionary powers should be granted to the courts.<sup>501</sup>

### B. Comparative survey of laws

#### *Australia*

##### *New South Wales / Northern Territory / Queensland*

6.5.2 Costs may be awarded but not against the person seeking protection unless the application for an order was frivolous or vexatious.<sup>502</sup> Northern Territory refers to an application which was in bad faith and was unreasonable.<sup>503</sup>

##### *Tasmania*

6.5.3 Costs may be awarded against either party.<sup>504</sup>

##### *Victoria*

6.5.4 Each party bears his or her own costs unless the court considers there are exceptional reasons for making an order for costs.<sup>505</sup>

##### *Australian Capital Territory*

<sup>501</sup>Submission to the Commission by magistrates of the Cape Peninsula.

<sup>502</sup>Laws of Australia paragraph [66], [74].

<sup>503</sup>Laws of Australia paragraph [70].

<sup>504</sup>Laws of Australia paragraph [82].

<sup>505</sup>Laws of Australia paragraph [86].

6.5.5 The Community Law Reform Committee<sup>506</sup> recommends that a provision that each party to proceedings shall bear their own costs unless the court otherwise orders should be inserted in domestic violence legislation.

*Canada*

*Alberta*

6.5.6 The Alberta Law Reform Institute<sup>507</sup> maintains that it would seem reasonable to allow the court to award costs to the applicant.

*Nova Scotia*

6.5.7 Proposed legislation<sup>508</sup> provides for an order requiring the respondent to pay the reasonable legal and other costs or expenses of the application necessarily incurred by the victim.

*Saskatchewan*

6.5.8 A victim's assistance order may contain a provision requiring the respondent to pay the victim compensation for monetary losses suffered as a direct result of the domestic violence, including legal expenses and costs of an application pursuant to the relevant Act.<sup>509</sup>

**C. Recommendation 19 in Discussion Paper 70**

6.5.9 In Discussion Paper 70 it was recommended<sup>510</sup> that the legislation should not provide for a costs order to be granted at any stage of the proceedings.

**D. Submissions on Recommendation 19 in Discussion Paper 70**

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<sup>506</sup>CLRC Report 11 (Internet reference).

<sup>507</sup>ALRI Report for Discussion No 15 150.

<sup>508</sup>Quoted in ALRI Report for Discussion No 15 199.

<sup>509</sup>Victims of Domestic Violence Act S.S. 1994, c. V-6.02, section 7(1)(f).

<sup>510</sup>Discussion Paper 70 paragraph 4.5.12.

6.5.10 Many of the respondents seem to assume that this recommendation is a bar to a magistrate's discretion to make a costs order, and for this reason, many oppose the recommendation and suggest that the court should have a discretion to make a costs order.

6.5.11 The *Department of Justice Gender Unit* seems to be in favour of a provision that prohibits a magistrate from making a costs order altogether in these proceedings.

6.5.12 *UWC Community Law Centre* supports the recommendation to the extent that it affirms that the court should be given a discretion to award costs (including the applicant's legal costs) in favour of the applicant.

6.5.13 Recommendation 19 is endorsed by the *SA National Council for Child and Family Welfare*.

## **E. Evaluation**

6.5.14 A general provision for costs orders may result in complicated applications making an intended simple and swift procedure once again expensive and time-consuming. The inclusion of a prohibition on an order of costs save in circumstances where the court is satisfied that a party has acted frivolously, vexatiously or unreasonably, ensures that an innocent party will not be saddled with the legal costs of the other party.

## 6.6 Open court or behind closed doors?

### A. Problem Analysis

6.6.1 In the **Rutenberg** case<sup>511</sup> the use of the phrase “in chambers” in section 2(1) of the Act was scrutinised. Thring J came to the following conclusion:

. . . it does not necessarily follow that, merely because a Judge or magistrate sits in his chambers, members of the public are excluded from attending the proceedings . . . Nowhere in the Act or regulations is it stipulated that applications for interdicts under section 2(1) thereof are to be held *in camera* or, to use the language of section 5(2) of the Magistrates’ Courts Act, “with closed doors”. . . Of course, in particular circumstances the judge or magistrate concerned may, in the exercise of his discretion under section 16 of the Supreme Court Act<sup>512</sup> or section 5(2) of the Magistrates’ Courts Act<sup>513</sup> . . . direct that particular proceedings, including an application for an interdict under the Act, be conducted *in camera* . . . In other words, it is not the place where the judicial officer sits which governs whether or not the session is to be open to the public, but the application or non-application of the provisions of section 16 of the Supreme Court Act or section 5 of the Magistrates’ Courts Act . . .

It seems to me that the phrase “in chambers” was introduced into the Act as a purely permissive measure, because it was envisaged that many applications for interdicts under section 2(1) would be made outside normal court hours, when a courtroom and court staff would not be readily available. To read more into it than that is . . . simply not warranted.

6.6.2 Referring to the enquiry in section 3(4) of the Act, Thring J held<sup>514</sup> that the conviction and sentence of persons for criminal offences was a purely judicial function and that section 25(3)(a)

<sup>511</sup>**Rutenberg v Magistrate, Wynberg** 1997 4 SA 735 (C) 748 - 749.

<sup>512</sup>“Save as is otherwise provided in any law, all proceedings in any court of a division shall, except in so far as any such court may in special cases otherwise direct, be carried on in open court.”

<sup>513</sup>“The court may in any case, in the interests of good order or public morals, direct that a civil trial shall be held with closed doors, or that (with such exceptions as the court may direct) minors or the public generally shall not be permitted to be present thereat.”

<sup>514</sup>**Rutenberg v Magistrate, Wynberg** 1997 4 SA 735 (C) 744.



of the Constitution, 1993 (every accused person shall have the right to a fair trial, which shall include the right to a public trial before an ordinary court of law) was applicable.<sup>515</sup>

## **B. Comparative survey of laws**

### *New Zealand*

6.6.3 The court has the power to hear proceedings in private or to exclude any person from the court.<sup>516</sup>

### *Canada*

#### *Saskatchewan*

6.6.4 The court may order that the hearing of an application or any part of the hearing be held in private.<sup>517</sup>

## **C. Recommendation 20 in Discussion Paper 70**

6.6.4 In Discussion Paper 70 it was recommended<sup>518</sup> that the legislation provide that proceedings shall, except in so far as the court may in special cases otherwise direct, be held *in camera*.

## **D. Submissions on Recommendation 20 in Discussion Paper 70**

6.6.5 *NICRO, Western Cape* suggests that an applicant should also be allowed to be accompanied in court by a person of her choice in a supportive capacity. *Tshwaranang Legal Advocacy Centre* supports this recommendation in principle, but warns that the legislation should not bind courts to a procedure if the system does not have the capacity to implement it.

<sup>515</sup>Section 35(3)(c) of the Constitution, 1996, provides that every accused has a right to a fair trial, which includes the right to a public trial in an ordinary court.

<sup>516</sup>Domestic Violence Act 86 of 1995, section 83.

<sup>517</sup>Saskatchewan Victims of Domestic Violence Act S.S. 1994,c. V-6.02, section 9(2).

<sup>518</sup>Discussion Paper 70 paragraph 4.6.7.

6.6.6 Recommendation 20 in Discussion Paper 70 is endorsed by:

*Cape Law Society*

*Department of Justice Gender Unit*

*Magistrate: Pietermaritzburg*

*Magistrate: Pretoria North*

*M Horton*

*Mpumalanga Provincial Government*

*Natal Law Society*

*SA National Council for Child and Family Welfare*

*UWC Community Law Centre*

## **E. Evaluation**

6.6.7 With a view to protecting the interests of victims of domestic violence, proceedings in terms of domestic violence legislation should be held behind closed doors, save in circumstances where the court on good cause shown directs otherwise. Because of the nature of domestic violence, such a provision will probably survive constitutional scrutiny.

## **6.7 Obligation to report ill-treatment of children**

### **A. Problem analysis**

6.7.1 Section 4 of the Act reads as follows:

Any person who examines, treats, attends to, advises, instructs or cares for any child in circumstances which ought to give rise to the reasonable suspicion that such child has been ill-treated, or suffers from any injury the probable cause of which was deliberate, shall immediately report such circumstances -

- (a) to a police official; or
- (b) to a commissioner of child welfare or a social worker referred to in section 1 of the Child Care Act, 1983 (Act 74 of 1983).

6.7.2 Failure to comply with the provisions of section 4 constitutes an offence for which a penalty of a fine or imprisonment for three months or both such fine and such imprisonment may be imposed (section 6 of the Act).

6.7.3 According to Sinclair<sup>519</sup> section 4 ties in well with section 30(1)(d) of the Constitution, 1993, which entrenches the right of children not to be neglected or abused.<sup>520</sup>

6.7.4 Section 4 of the Act is a very broad section which to some extent appears to overlap with section 42 of the Child Care Act 74 of 1983. Sections 42(1), (5) and (6) of the latter Act have been substituted by section 15(a) and (b) of the Child Care Amendment Act 96 of 1996, provisions which will be put into operation by proclamation:

Notwithstanding the provisions of any other law every dentist, medical practitioner, nurse, social worker or teacher, or any person employed by or managing a children's home, place of care or shelter, who examines, attends or deals with any child in circumstances giving rise to the suspicion that child has been ill-treated, or suffers from any injury, single or multiple, the cause of which probably might have been deliberate, or suffers from a nutritional deficiency disease, shall immediately notify the Director-General or any officer designated by him or her for the purposes of this section, of those circumstances.

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<sup>519</sup>Sinclair 137 fn 366.

<sup>520</sup>In terms of section 28(1)(d) of the Constitution, 1996 every child has the right to be protected from maltreatment, neglect, abuse, or degradation.

Any dentist, medical practitioner, nurse, social worker or teacher, or any person employed by or managing a children's home, place of care or shelter, who contravenes any provision of this section shall be guilty of an offence.

No legal proceedings shall lie against any dentist, medical practitioner, nurse, social worker or teacher, or any person employed by or managing of a children's home, place of care or shelter, in respect of any notification given in good faith in accordance with this section.

6.7.5 Section 4 of the Act does not contain a "good faith" clause. Van Dokkum<sup>521</sup> argues that the one redeeming feature of section 42 of the Child Care Act is that it protects the reporter from legal proceedings (for example, a defamation action by the parent or guardian of the victim) if the report is made in good faith. As an incentive to overcome public reluctance to report possible offenders, the "good faith" clause provides that all persons should be permitted to report in good faith their reasonable suspicions of child abuse to appropriate authorities and agencies, with protection against criminal and civil liability for non-malicious, even if erroneous, reporting. Van Dokkum<sup>522</sup> points out that the most obvious practical implication of the absence of a good faith clause is that it affects the question of proof. Under the Act, where the facts seem to indicate something less than good faith, the burden of proof to dispel this impression would be on the reporter. The legislature has, unfortunately, seen fit to remove the safety net that would encourage reporting, not maliciously, but in good faith.<sup>523</sup>

6.7.6 Criticising section 42 of the Child Care Act, Van Dokkum<sup>524</sup> questions the limitation of reporters to specified health professionals. What of mental-health professionals? Further afield, what of teachers, creche supervisors and day care providers? There are many categories of professional who are more likely to come into frequent contact with children.

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<sup>521</sup>N van Dokkum "The Statutory Obligation to Report Child Abuse and Neglect" 1996 Acta Juridica 163 173.

<sup>522</sup>Van Dokkum 1996 Acta Juridica 173.

<sup>523</sup>Van Dokkum 1996 Acta Juridica 174.

<sup>524</sup>Van Dokkum 1996 Acta Juridica 171.

## **B. Comparative survey of laws**

### *USA*

6.7.7 Each of the 50 state jurisdictions identifies who must report and there is some variation across the states. For example, every jurisdiction requires health practitioners and teachers to report. Social workers must report in 40 states; clergy in five states; and attorneys in three states. Twenty- two states mandate "any person" to report.<sup>525</sup>

### *New York State*

6.7.8 A substantial number of professionals are mandated to report: physician, medical examiner, dentist, optometrist, podiatrist, intern, registered nurse, psychiatrist, social worker, peace officer, police officer, surgeon, coroner, osteopath, chiropractor, resident psychologist, dental hygienist, school official, day care centre worker, mental health professional, christian scientist practitioner, hospital personnel engaged in the admission, examination, care or treatment of persons, employee or volunteer in a residential care facility, providers of family or group family day care, any other child care or foster care worker, district attorney or assistant district attorney, investigator employed in the office of the district attorney or other law enforcement official.<sup>526</sup>

## **C. Request for Comment 3 in Discussion Paper 70**

6.7.9 In Discussion Paper 70 specific comment was requested<sup>527</sup> on the possible improvement of section 4 of the Act and/or its incorporation in section 42 of the Child Care Act 74 of 1983.

## **D. Submissions on Request for Comment 3 in Discussion Paper 70**

<sup>525</sup>Van Dokkum 1996 *Acta Juridica* 172 fn 39.

<sup>526</sup>Van Dokkum 1996 *Acta Juridica* 172 fn 39.

<sup>527</sup>*Discussion Paper 70* paragraph 4.7.11.

*Section 4 should not be subsumed by the Child Care Act*

6.7.10 The *Laws and Administration Committee of the General Council of the Bar* points out that child abuse may form part of domestic violence. Child abuse warrant such extreme measures that any overlapping with the Child Care Act is of lesser importance. The fact that mandatory reporting in terms of section 4 of the Act is not confined to the domestic sphere is more of an advantage than a disadvantage. The *National Human Rights Trust* also holds the view that abuse of children is part of the domestic violence syndrome. The *Gauteng Members of the ALS Family Law Standing Committee* and the *Centre for Criminal Justice, Pietermaritzburg* agree that section 4 of the Act should not be subsumed by the Child Care Act.

*Section 4 should be subsumed by the Child Care Act*

6.7.11 The *Magistrate, Pietermaritzburg* stresses that the Child Care Act deals specifically with the care of children. The *Democratic Party* desires the inclusion of penalties in the event of non-reporting of ill-treatment. The *Cape Law Society, Natal Law Society, Dr A Allan: Head of Psycholegal Unit, University of Stellenbosch, NICRO - Western Cape* and the *SA National Council for Child and Family Welfare* endorse the incorporation of section 4 of the Act in the Child Care Act.

*Suggestions for improvement*

6.7.12 *M Horton* suggests that the provisions in the Act and in the Child Care Act be rationalised into a single provision. *Mpumalanga Department of Health, Welfare and Gender Affairs* argues that professionals not at present included in the Act and in the Child Care Act should be included. Various submissions under the *SA National Council for Child and Family Welfare* propose the following: ensure protection of person giving a bona fide but erroneous report; include "other" people in obligatory reporting; anybody suspecting child abuse should be made responsible to report; include psychologists and psychiatrists; reporting by any person who has knowledge of such aspects; include teachers; specific persons/professionals should not be stipulated; define "ill-treatment".

**E. Evaluation**

6.7.13 Mandatory reporting of ill-treatment of children is an effective step in the direction of preventing, identifying and dealing with child abuse. Both section 4 of the Act and section 42 of the Child Care Act 74 of 1983 provide for mandatory reporting. The argument that child abuse warrants such extreme measures that any overlapping with the Child Care Act is of lesser importance, is convincing.

6.7.14 The wording of the Child Care Amendment Act (paragraph 6.7.4 above) is endorsed, although psychologists could be included in the list of persons obliged to report ill-treatment of children. Having regard to the context of the legislation, specific reference should be made to a child who has been subjected to acts of domestic violence.

6.7.15 Inclusion of “the good faith clause” will encourage reporting.<sup>528</sup>

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<sup>528</sup>See paragraph 6.7.5 above.

## 6.8 Marital rape

### A. Problem analysis

6.8.1 Section 5 of the Act reads as follows:

Notwithstanding anything to the contrary contained in any law or in the common law, a husband may be convicted of the rape of his wife.

6.8.2 “Husband” and “wife” should be interpreted with reference to section 1(2) of the Act.<sup>529</sup>

6.8.3 Marital rape is an issue of importance in several jurisdictions. An exemption from prosecution for rape enjoyed by a husband in respect of his wife is widely seen as discriminatory against (married) women.<sup>530</sup>

6.8.4 Fredericks & Davids<sup>531</sup> affirm that marital rape has been directly linked to family violence, since it often occurs in circumstances where women are being physically abused. The exclusion of wife rape from the definition of family violence, as has been the case prior to the Act, ignored one of the most serious violations of a woman’s bodily integrity. However, according to the authors, section 5 of the Act is clearly a legislative afterthought as the procedure laid down in the Act is inappropriate in the case of marital rape. The provision belongs in the Criminal Procedure Act 51 of 1977 since the proper forum for such a crime is the ordinary criminal courts.

6.8.5 Fedler<sup>532</sup> laments that no real changes which would encourage women to lay charges of marital rape have been made by the mere abolition of the common law marital rape exemption by the Act. The private locus of domestic violence means that proof of sexual assault or rape by a partner is very difficult to obtain. Given the fact that our criminal law has been criticised for its

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<sup>529</sup>M Jansen “Verkragting Binne Huweliksverband: Die Laaste Spykers in die Doodkis” 1994 SACJ 78 91.

<sup>530</sup>Sinclair 133.

<sup>531</sup>Fredericks & Davids 487.

<sup>532</sup>Fedler 1995 SALJ 245.



treatment of rape survivors who have been raped by strangers, women who have been raped by their husbands are in an invidious position.

6.8.6 Sinclair<sup>533</sup> maintains that two concerns about marital rape remain, namely sentencing and the definition of rape itself. On sentencing, the abolition of the marital rape exemption could be rendered virtually nugatory if the judiciary fails to respond appropriately to the legislative acknowledgement of the seriousness of this offence. On the definition, she states that there are feminists who contend that the focus should be shifted away from the issue of lack of consent on the part of the victim to the coercion employed by the assailant. Other points of criticism against the traditional definition of rape are that the definition -

- (a) is too narrow because it relates only to one form of sexual intercourse;
- (b) demonstrates a male bias in that it constructs rape as a sexual act while the available evidence suggests that rape victims do not view rape as a sexual act but as a form of violence; and
- (c) reflects the ideology of male proprietary interests in female sexuality.

6.8.7 Human Rights Watch<sup>534</sup> recognises the marital rape provision as an important reform, but claims that the difference that it will make in practice to women in abusive marriages is probably limited. Because marital rape is most likely to occur in the home, proof of rape by a husband is difficult to obtain.

## **B. Recommendation 21 in Discussion Paper 70**

6.8.8 In Discussion Paper 70 it was recommended<sup>535</sup> that the legislation incorporate section 5 of the Act (rape of wife by her husband) in its present form until such time as the law of rape is reviewed.

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<sup>533</sup>Sinclair 436.

<sup>534</sup>Human Rights Watch 107.

<sup>535</sup>Discussion Paper 70 paragraph 4.8.11.

### C. Submissions on Recommendation 21 in Discussion Paper 70

6.8.9 *The Department of Justice Gender Unit* states that it is aware of high levels of dissatisfaction with the laws and procedures relating to sexual assault in South Africa and recommends that these issues be investigated properly so that informed public debate can ensue. *S Kottler* recommends that the definition of rape be extended beyond penile-vaginal penetration to include forced sodomy, fellatio and penetration of the vagina or anus with fists and/or other foreign objects. She also recommends that the police improve their data collection methods with computer systems to provide up-to-date statistics on marital rape and to protect the victims of marital rape who may not have a copy of the interdict with them when reporting a breach of the interdict. *Tshwaranang Legal Advocacy Centre* suggests that the recommendation does not go far enough, and that the law of rape needs to be substantively reviewed. The recommendation needs to ensure that when women do lay charges of rape against their husbands, they will not be hampered in getting a conviction by the “consent” defence. It is suggested that the recommendation include provisions to the effect that evidence of past sexual history between husband and wife be considered irrelevant for the purposes of conviction and that a history of domestic violence between husband and wife be considered relevant for the purposes of a conviction.

6.8.10 Recommendation 21 is endorsed by:

*Cape Law Society*

*Magistrate: Pietermaritzburg*

*Magistrate: Pretoria North*

*M Horton*

*NICRO, Western Cape*

*SA National Council for Child and Family Welfare*

**D. Evaluation**

6.8.11 Cognisance is taken of the concerns about marital rape. It is to be noted, however, that many of the points of criticism apply not only to marital rape, but also to rape and sexual offences in general.

6.8.12 The judgement of **S v J**<sup>536</sup> in which the cautionary rule was addressed by the Supreme Court of Appeal is to be commended. Problematic areas relating to the sexual offences are investigated separately by the Law Commission (Project 107: Sexual offences).

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<sup>536</sup>1998 (2) SA 984 (SCA).

## **6.9 Consultation between Magistrate / Judge and Family Advocate**

### **A. Problem analysis**

6.9.1 The Act contains no provision directing a presiding officer to consult with the Family Advocate prior to granting an interdict in cases which have a bearing on the interests of minor children.

### **B. Recommendation 22 in Discussion Paper 70**

6.9.2 In Discussion Paper 70 it was recommended<sup>537</sup> that the Department of Justice investigate the need for consultation between the Magistrate/Judge and Family Advocate in domestic violence proceedings.

### **C. Submissions on Recommendation 22 in Discussion Paper 70**

6.9.3 The *Magistrate: Pietermaritzburg* points out that though it would be helpful for magistrates and family advocates to consult in these matters, this recommendation is wholly impractical, since family advocates have only been appointed in the bigger centres such as Durban, Cape Town, Johannesburg and Pretoria. He holds the view that current initiatives to set up Victim Support Units will suffice to protect the interests of the applicant and any children involved. The *Natal Law Society* suggests that inter-sectoral co-operation with NGO's would also be beneficial. Various social workers from the *SA National Council for Child and Family Welfare* comment that family advocates are not available to rural communities. Local child welfare societies should also be involved, especially if they have a long-term history with the children. Some social workers express reservations that this recommendation will lead to delays in the granting of interdicts.

6.9.4 Recommendation 22 is endorsed by:

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<sup>537</sup>Discussion Paper 70 paragraph 4.9.5.

*Cape Law Society*

*Magistrate: Pretoria North*

*NICRO, Western Cape*

*Women's Lobby*

#### **D. Evaluation**

6.9.5 There appears to be a need for interaction between the court and the Family Advocate where children are involved in domestic violence proceedings. However, a proviso that the court first confer with the Family Advocate before granting a protection order, might cause delays that will thwart the granting of urgent relief. The Department of Justice should therefore address this problem on an administrative level.

## 6.10 Renaming the Act

### A. Comparative survey of laws

#### *England*

6.10.1 The Law Commission (England)<sup>538</sup> proposes a “Family Homes and Domestic Violence Bill”.

#### *Australia*

##### *The Australian Capital Territory / Northern Territory / South Australia*

6.10.2 “Domestic Violence Act”.

##### *Queensland*

6.10.3 “Domestic Violence (Family Protection) Act”.

#### *Canada*

##### *Saskatchewan*

6.10.4 “Victims of Domestic Violence Act”.

#### *New Zealand*

6.10.5 “Domestic Violence Act”.

#### *USA*

6.10.6 The National Council of Juvenile and Family Court Judges drafted a “Model Code on Domestic and Family Violence”.

##### *Minnesota*

6.10.7 “Domestic Abuse Act”.

##### *Pennsylvania*

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<sup>538</sup>Law Com. No. 207 62.

6.10.8 “Protection from Abuse Act”.

*New Jersey*

6.10.9 “Prevention of Domestic Violence Act”.

**B. Recommendation 23 in Discussion Paper 70**

6.10.8 In Discussion Paper 70 it was recommended<sup>539</sup> that the legislation be called the "Domestic Violence Act".

**C. Submissions on Recommendation 23 in Discussion Paper 70**

6.10.9 *UNISA Family Law Lecturers* point out that the title of the Afrikaans version of the Act should be carefully selected as the current Afrikaans title “Wet op Voorkoming van Gesinsweld”, limits the ambit of the Act.

6.10.10 Other suggestions are:

*Centre for Criminal Justice, Pietermaritzburg*: “The Gender Relations and Domestic Violence Act”.

*Natal Law Society*: “The Prevention of Domestic Violence Act”.

*SA National Council for Child and Family Welfare*: “Violence Against Family or Significant Other Act”; “Interpersonal Violence Act”; “Spousal Abuse Act”.

*UNISA Health Psychology Unit*: “The Domestic Violence Criminal and Public Health Act”.

6.10.11 Recommendation 23 in Discussion Paper 70 is endorsed by:

*Cape Law Society*

*Magistrate: Pietermaritzburg*

*Magistrate: Pretoria North*

*M Horton*

*NICRO, Western Cape*

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<sup>539</sup>Discussion Paper 70 paragraph 4.10.10.

**D. Evaluation**

6.10.12 In paragraph 5.2.39 above it is argued that the protective ambit of the legislation be extended to a broad range of persons that does not fit into a narrow perspective of “family”. The endeavour is to limit the scope of the legislation to the domestic realm. “Domestic Violence Act” appears to be an encompassing title.



## 6.11 Criminal justice response to domestic violence

### A. Problem analysis

6.11.1 Murray & Kaganas<sup>540</sup> draw attention to the view that the Act's approach and underlying philosophy (of dealing with family violence outside criminal courts) are considered by some to undermine its overall value. Commentators have argued that the emphasis on civil remedies in the Act, and its reference to "family violence", underscores the impression held by many people, that violence in the home or between family members is less serious than assaults that take place in other circumstances.

6.11.2 Fredericks & Davids<sup>541</sup> observe that a critical issue in obtaining an interdict in terms of the Act is that the burden to initiate the process lies with the victim. The procedure places too much reliance on the initiative of the complainant in reporting and monitoring the abuse - it treats the victim as an equal when the reality is that the abuse is the result of a lack of equality. Where the interdict causes the husband to retaliate and reassert his challenged "authority", it can hardly be seen as an effective tool to prevent future violence.

6.11.3 They claim<sup>542</sup> that empirical evidence in the United States has shown that arrest was the most effective mechanism to prevent further abuse. Research done in the United Kingdom indicates that the enforcement of restraining orders was not effective since only a small percentage of women believed that they offered meaningful protection. In view of this and the practical problems experienced, Fredericks & Davids question whether an interdict granted in terms of the Act is an appropriate mechanism to counter abuse. Where there are no protective provisions which allow for crisis intervention, such as providing for physical refuge or shelter from the

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<sup>540</sup>C Murray & F Kaganas "Law and Women's Rights in South Africa: An Overview" in Murray Et Al Gender and the New South African Legal Order Kenwyn: Juta 1994 125.

<sup>541</sup>Fredericks & Davids 1995 TSAR 488.

<sup>542</sup>Fredericks & Davids 1995 TSAR 488.

violent situation, counselling and rights informational services, an interdict may leave little comfort for abused women.<sup>543</sup>

6.11.4 It is further pointed out<sup>544</sup> that even if the abuser is arrested during the second stage of the procedure, it is not for the criminal offence (that is the abuse), but for violating the authority of the court that granted the order. Arrests should relate to crimes against women, not to the flouting of the authority of the courts.

6.11.5 Novitz<sup>545</sup> observes that one obvious concern is that the Act may have effectively diverted attention away from arrest of abusers at the scene of a violent domestic incident, or the laying of criminal charges. She asserts<sup>546</sup> that the criminal law probably remains one of the most effective ways of addressing cases of family violence. A criminal charge has certain advantages, such as few financial costs for the complainant, the deterrent effect of a criminal conviction and the fact that sentences can be precisely tailored to the particular case.

6.11.6 Clark<sup>547</sup> refers to the argument that criminal prosecution is the only effective approach to domestic abuse, particularly that perpetrated against women, and that protection orders, now matter how well-intentioned, only serve to decriminalise the problem. The main basis for this argument is that the matter should be taken out of the hands of the victim so as to destroy the sacred public/private divide which has constituted a major barrier to the prosecution of such cases. However, according to Clark, despite these arguments, there are advantages to be secured by a specific protection order for those suffering family violence, although one remedy cannot be a panacea to these problems.

6.11.7 Sinclair<sup>548</sup> notes that the effectiveness and appropriateness of any criminal sanction in the context of matrimonial violence has been questioned, inter alia because victims are loath to report

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<sup>543</sup>Fredericks & Davids 1995 TSAR 489.

<sup>544</sup>Fredericks & Davids 1995 TSAR 489.

<sup>545</sup>Novitz 44.

<sup>546</sup>Novitz 26.

<sup>547</sup>Clark 1996 SAJHR 592.

<sup>548</sup>Sinclair 424 fn 31.

the matter or press charges. The emotional strain which prosecution will put on the victim, the financial loss which would be suffered if the offender were to be incarcerated and/or were to lose his job, the fear of reprisals if the offender were released on bail pending trial, the fact that imposition of prison sentence would, usually, offer only temporary respite, and the unhelpful attitude and ineffective approach of the police have, inter alia, been cited as reasons for the widespread reluctance to press charges. The criminal law is further considered to be an inappropriate and inadequate tool for the resolution of the problem of matrimonial violence because it places the emphasis on the offender, not on the victim. It merely punishes the offender without seeking to solve the underlying problem. The punishment imposed may also be too lenient to serve any real purpose.

6.11.8 Bonthuys<sup>549</sup> affirms the recognition that domestic violence affects various areas of the law. A legal system may respond directly to violence against women in different ways, using the criminal law, and special protective measures such as interdicts. Violence may also be an important, although indirect, factor in other areas of law such as the law of delict, evidence, and family law.

## **B. Comparative survey of laws**

### *England*

6.11.9 The Law Commission (England)<sup>550</sup> points out that criminal law is primarily intended to punish the offender. However, most victims of domestic violence are not primarily interested in punishment. They want the violence to stop and they want protection. It is argued<sup>551</sup> that civil remedies are prospective and positive: their main is to regulate and improve matters for the future, rather than to make judgments upon or punish past behaviour. Unlike criminal proceedings, they can also provide an immediate means of evicting the perpetrator from the home. This is often the only effective method of stopping abuse. If the perpetrator is arrested and charged with a criminal offence, he will usually be released on bail, albeit with conditions

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<sup>549</sup>Bonthuys 1997 SALJ 384.

<sup>550</sup>Law Com. No. 207 paragraph 2.9.

<sup>551</sup>Law Com. No. 207 paragraph 2.11.

regulating his conduct, until the trial. Unless there are serious injuries, he is likely to receive a fairly short sentence and be released, whereupon he is free to return home. The consequences of criminal sanctions in domestic cases bear no relation to the future needs of the victim.

6.11.10 Because civil remedies are not in general designed to handle violence and other forms of extreme behaviour normally dealt with under the criminal law, it has been found necessary to develop certain specialised quasi-criminal machinery to make the remedies properly effective for the purposes they are intended to serve.

### *Australia*

#### *The Australian Capital Territory*

6.11.11 The Community Law Reform Committee<sup>552</sup> contends that although breach of a protection order is a criminal offence this means that generally two criminal acts will have been committed before the offender is held criminally accountable. Civil processes are primarily remedial and preventative and consequently, civil processes are not a substitute in law or effect for criminal charges.

6.11.12 The basic thrust of revising the criminal justice response to domestic violence is to work to ensure that domestic violence cases are not screened out of the criminal justice system and that the system holds offenders of criminal behaviour committed in the context of domestic violence, accountable to the same extent as offenders of other similar criminal offences.<sup>553</sup> According to the Community Law Reform Committee,<sup>554</sup> research indicates that bringing domestic violence cases, which involve breach of the criminal law, into the criminal justice system generally results in a substantial reduction in the violence. It is recognised that to effectively deal with domestic violence in a criminal justice context, the special dynamics of the violence and the special

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<sup>552</sup>The Community Law Reform Committee of the Australian Capital Territory Report on Domestic Violence Report No 9 Canberra 1995 paragraph 119.

<sup>553</sup>CLRC No 9 paragraph 189.

<sup>554</sup>CLRC No 9 paragraph 191.

vulnerability of the victim have to be understood and taken into account in procedures relating to police, prosecution and court practice.<sup>555</sup>

### **C. Recommendation 24 in Discussion Paper 70**

6.11.13 In Discussion Paper 70 it was recommended that the Department of Justice and the Department of Safety and Security initiate programmes aimed at ensuring that -

- (a) the criminality of domestic violence is recognised;
- (b) the criminal justice system holds offenders accountable for the criminal behaviour; and
- (c) procedures relating to police, prosecution and court practice take account of the special dynamics of domestic violence and the special vulnerability of the victim.

### **D. Submissions on Recommendation 24 in Discussion Paper 70**

6.11.14 *UWC Community Law Centre* recommends that when the court hears the contravention of an interdict, it must transfer allegations of conduct that constitute a contravention to the criminal division for possible prosecution on a charge of a domestic violence offence. It is argued that experience has shown that criminal prosecutions for domestic violence are not often instituted in South Africa, and that the existing substantive offences do not cover all the manifestations of such violence. Because the complainant in criminal proceedings is subject to considerable gender disadvantage and the focus on the proceedings is for the state to secure a conviction, the substance and procedure of the criminal law that regulate domestic violence ought to be reformulated to eliminate this gender disadvantage.

6.11.15 One suggestion is the enactment of a Domestic Violence Offences Act. In this Act, offences such as assault, intimidation, harassment and stalking would all be defined as substantive

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<sup>555</sup>CLRC No 9 paragraph 194.

offences. A further submission is that the prosecuting authority has a constitutional duty to consider the broad interests of justice in making decisions concerning the institution of criminal proceedings in domestic violence cases. In addition, there ought to be a duty on the prosecuting authority to provide reasons for a refusal to institute criminal proceedings and a survivor of domestic violence should not be compelled to testify against the accused if she does not wish the criminal proceedings to proceed. The *Centre* also argues that South Africa should adopt the German **Nebenklagerin** procedure in terms of which the complainant is empowered as an ancillary prosecutor. In this way she is given the right to -

- (a) inspect records with the assistance of her legal representative;
- (b) request the recusal of a judge;
- (c) to object to expert witnesses;
- (d) give a statement;
- (e) ask questions; and
- (f) apply to have evidence adduced.

It is argued that the cumulative effect of the **Nebenklagerin** procedure is the elimination of gender inequality and secondary victimization of the complainant.

6.11.16 The *Centre* states that in order to ensure the criminality of domestic violence, the respondent who contravenes an interdict must be charged with contempt of court and a domestic violence offence. This has implications for arrest proceedings, bail, decisions to prosecute, the procedure, sentencing and appeal.

6.11.17 Recommendation 24 in Discussion Paper 70 is endorsed by:

*Cape Law Society*

*Magistrate: Pietermaritzburg*

*Magistrate: Pretoria North*

*Natal Law Society*

*National Human Rights Trust*

*NICRO, Western Cape*

*SA National Council for Child and Family Welfare*

*UNISA Health Psychology Unit*

## **E. Evaluation**

6.11.18 An effective legal response to domestic violence involves both a civil remedy (protection order procedure) and a criminal law response. Civil processes should not be seen as a substitute for criminal charges and vice versa. As can be inferred from the literature and comparative survey of laws discussed above, both approaches have certain advantages and victims of domestic violence should have the benefit of both.

6.11.19 Since the Law Commission's investigation focussed primarily on reviewing the present Prevention of Family Violence Act, 1993, and not the criminal justice response to domestic violence, the formulation of a new offence of domestic violence has not been considered. The Research Paper does, however, contain provisions that will assist the victim of domestic violence in terms of the criminal law response.

6.11.20 In paragraph 6.1.22 above it is therefore suggested that the contravention of the conditions of a protection order granted in terms of domestic violence legislation be an offence which is prosecuted in the criminal court. The respondent accordingly becomes an accused who is held criminally accountable. Although the criminal accountability is not in consequence of the criminal act or acts that induced the applicant to apply for a protection order, the procedure does bring the domestic violence case within the criminal justice system, thus no longer making it a safe haven for offenders shielding them from real prosecution and the full extent of criminal procedure. It is also argued that the penalties for breach of the protection order be increased (paragraph 5.12.20 above).

6.11.21 Further proposals relate to the placing of certain duties on the SAPS at the scene of domestic violence (paragraph 7.2.7 below) and arrest of the perpetrator of domestic violence without a warrant (paragraph 7.3.6 below).

6.11.22 Consideration has also been given to the arguments in favour of mandatory prosecution for offences committed in the context of domestic violence. Since the applicant is a crucial witness whose autonomy ought to be preserved, all criminal proceedings should be

initiated by the applicant. However, the legislation should encourage the applicant to lay charges at all stages of the protection order proceedings.



## 6.12 Victim support

### A. Problem analysis

6.12.1 Fedler<sup>556</sup> concludes as follows:

. . . legislative tinkering by lawmakers unexposed to the brutal mundaneness of abused people's lives can produce little more than a law to appease the conscience that recoils from the horror of cruelty to women and children. It is not sympathy that battered women seek. Nor is it their goal to become the symbol of the extent to which a particular government cares for the disempowered. They need safety. They need maintenance. They need a roof over their heads. They need work. They need legal advice that is responsive to the unique circumstances in which they find themselves. A commitment to ending violence in the home must deliver to women the means of survival. Only then will legislative improvements to the Prevention of Family Violence Act be a measure of the extent to which women's lives are valued.

6.12.2 To Fredericks & Davids<sup>557</sup> it appears to be imperative that the state proffers a measure of assistance to complainants, particularly when a return to the common home is fraught with danger or when they are left homeless when a relationship has been terminated. They contend that an effective measure of supporting victims of wife abuse is the provision of shelters<sup>558</sup> that are integrated with other programmes involving counselling and legal services. Shelters may therefore, in addition to providing temporary housing, serve as a mechanism to inform abused women of the options of criminal prosecutions, restraining orders or other alternatives. This will not only heighten abused women's awareness of services and facilities but also facilitate their access to legal and related support systems. Without any other form of intervention, an interdict order granted on its own will not achieve the desired result.<sup>559</sup>

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<sup>556</sup>Fedler 1995 SALJ 251.

<sup>557</sup>Fredericks & Davids 1995 TSAR 489 - 490.

<sup>558</sup>The authors point out that there are no state-funded shelters for abused women in South Africa.

<sup>559</sup>The need for more shelters is also emphasised by Clark 1996 SAJHR 600 - 601 who points out that these services are critically important to domestic violence survivors.

6.12.3 Human Rights Watch<sup>560</sup> emphasises that government assistance to battered women can only succeed through a concerted and coordinated effort on the part of a number of different departments. There is a need for agreed strategies for response and referral at national level, coupled with direct funding to provide shelters, welfare payments, health services, legal assistance, counselling services and education for survivors of abuse.

6.12.4 Bonthuys<sup>561</sup> argues for due acknowledgement to the fact that changing the law is but one aspect of solving the problem of domestic violence. If we treat individual victims of domestic violence as if they have the same economic and social power as the perpetrators, we fail to respond to the greater part of their needs. Women who are the victims of domestic violence often also lack resources such as money to maintain themselves and their children, housing, education to enable them to find employment, and the self-confidence to enable them to escape from abusive relationships. Changing the law will never be enough as long as women cannot in practice afford to leave abusive situations.

## **B. Submission on victim support**

6.12.5 *UWC Community Law Centre* suggests that the National Network on Violence Against Women should be responsible for monitoring victim support programmes.

## **C. Evaluation**

6.12.6 There is a clear need for support services offered to victims of domestic violence. Domestic violence legislation should be fortified by the provision of shelters and advice and referral services linking victims of domestic violence with appropriate support systems. In this regard it is encouraging to note that a victim support movement is gaining momentum in South Africa. A national programme on victim empowerment and support is an integral part of the National Crime Prevention Strategy. The Commission is also a stakeholder in the national victim empowerment programme since the Project Committee on Sentencing has identified the need to

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<sup>560</sup>Human Rights Watch 88.

<sup>561</sup>Bonthuys 1997 *SALJ* 385.

review legislation pertaining to victims of crime as part of its investigation into all aspects related to sentencing.<sup>562</sup>

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<sup>562</sup>Issue Paper 7 on Restorative Justice (compensation for victims of crime and victim empowerment) was published.

## 7. CONCERNS NOT DEALT WITH IN DISCUSSION PAPER 70 ON DOMESTIC VIOLENCE

### 7.1 Preamble in domestic violence legislation

#### A. Problem analysis

7.1.1 Clark<sup>563</sup> argues that a valuable ideological function could be served by a section stating the objects of the legislation clearly and comprehensively: objects such as the reduction and prevention of violence in abusive relationships, the recognition that domestic violence is unacceptable behaviour and the need for adequate legal protection for its victims. This section could also set out how the legislation aims to achieve its object, for example, by empowering the court to make orders to protect victims, by ensuring that access to court is speedy and inexpensive as possible and by providing more effective sanctions.

#### B. Comparative survey of laws

##### *USA*

##### *New Jersey*

7.1.2 The New Jersey Prevention of Domestic Violence Act of 1991<sup>564</sup> contains a comprehensive “findings and declarations” section which reads as follows:

The Legislature finds and declares that domestic violence is a serious crime against society; that there are thousands of persons in this State who are regularly beaten, tortured and in some cases even killed by their spouses or cohabitants; that a significant number of women who are assaulted are pregnant; that victims of domestic violence come from all social and economic backgrounds and ethnic groups; that there is a positive correlation between spousal abuse and child abuse; and that children, even when they are not themselves physically assaulted, suffer deep and lasting emotional effects from exposure to domestic violence. It is therefore, the intent of the Legislature to assure the victims of domestic violence the maximum protection from abuse the law can provide.

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<sup>563</sup>Clark 1996 SAJHR 598.

<sup>564</sup>2C:25-18, 2.

The Legislature further finds and declares that the health and welfare of some of its most vulnerable citizens, the elderly and disabled, are at risk because of incidents of reported and unreported domestic violence, abuse and neglect which are known to include acts which victimize the elderly and disabled emotionally, psychologically, physically and financially; because of age, disabilities or infirmities, this group of citizens frequently must rely on the aid and support of others; while the institutionalized elderly are protected under P.L.1977, c.239 (C.52:27G-1 et seq.), elderly and disabled adults in noninstitutionalized or community settings may find themselves victimized by family members or others upon whom they feel compelled to depend.

The Legislature further finds and declares that violence against the elderly and disabled, including criminal neglect of the elderly and disabled under section 1 of P.L.1989, c.23 (C.2C:24-8), must be recognized and addressed on an equal basis as violence against spouses and children in order to fulfill our responsibility as a society to protect those who are less able to protect themselves.

The Legislature further finds and declares that even though many of the existing criminal statutes are applicable to acts of domestic violence, previous societal attitudes concerning domestic violence have affected the response of our law enforcement and judicial systems, resulting in these acts receiving different treatment from similar crimes when they occur in a domestic context. The Legislature finds that battered adults presently experience substantial difficulty in gaining access to protection from the judicial system, particularly due to that system's inability to generate a prompt response in an emergency situation.

It is the intent of the Legislature to stress that the primary duty of a law enforcement officer when responding to a domestic violence call is to enforce the laws allegedly violated and to protect the victim. Further, it is the responsibility of the courts to protect victims of violence that occurs in a family or family-like setting by providing access to both emergent and long-term civil and criminal remedies and sanctions, and by ordering those remedies and sanctions that are available to assure the safety of the victims and the public. To that end, the Legislature encourages the training of all police and judicial personnel in the procedures and enforcement of this act, and about the social and psychological context in which domestic violence occurs; and it further encourages the broad application of the remedies available under this act in the civil and criminal courts of this State. It is further intended that the official response to domestic violence shall communicate the attitude that violent behaviour will not be excused or tolerated, and shall make clear the fact that the existing criminal laws and civil remedies created under this act will be enforced without regard to the fact that the violence grows out of a domestic situation.

## **C. Evaluation**

7.1.3 The gendered dimensions of domestic violence cannot adequately be captured in the gender neutral text of legislation. The preamble could serve as a framing device to contextualize domestic violence legislation and to declare the attitude of the legislature that domestic violence will not be tolerated in a society based on freedom, equality and dignity.

## 7.2 Duty to inform victim of rights

### D. Problem analysis

7.2. Clark<sup>565</sup> asserts that it is vital that the police are instructed about the availability of interdicts so that they can inform a victim of her rights in a time of crisis.

### E. Comparative survey of laws

#### USA

##### *Model Code on Domestic and Family Violence*

7.2.2 The law enforcement officer shall give a written notice to the adult victim in his or her native language substantially as follows:<sup>566</sup>

If you are the victim of domestic or family violence and you believe that law enforcement protection is needed for your physical safety, you have the right to request that the officer assist in providing for your safety, including asking for an emergency order for protection. You may also request that the officer assist you in obtaining your essential personal effects and locating and taking you to a safe place, including but not limited to a designated meeting place for a shelter, a family member's or a friend's residence, or a similar place of safety. If you are in need of medical treatment, you have the right to request that the officer assist you in obtaining medical treatment. You may request a copy of the report at no cost from the law enforcement department.

You may ask the prosecuting attorney to file a criminal complaint. You also have the right to file a petition in insert name of court requesting an order for protection from domestic or family violence which could include any of the following orders:

- (a) An order enjoining your abuser from threatening to commit or committing further acts of domestic or family violence;
- (b) An order prohibiting your abuser from harassing, annoying, telephoning, contacting or otherwise communicating with you, directly or indirectly;
- (c) An order removing your abuser from your residence;
- (d) An order directing your abuser to stay away from your residence, school, place of employment, or any other specified place frequented by you and another family or household member;
- (e) An order prohibiting your abuser from using or possessing any firearm or other weapon specified by the court;

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<sup>565</sup>Clark 1996 SAJHR 599.

<sup>566</sup>Model Code, section 204(2).

- (f) An order granting you possession and use of the automobile and other essential personal effects;
- (g) An order granting you custody of your child or children;
- (h) An order denying your abuser visitation;
- (i) An order specifying arrangements for visitation, including requiring supervised visitation;
- (j) An order requiring your abuser to pay certain costs and fees, such as rent or mortgage payments, child support payments, medical expenses, expenses for shelter, court costs, and attorney's fees.

The forms you need to obtain an order for protection are available from the insert clerk of the court or other appropriate person. The resources available in this community for information relating to domestic and family violence, treatment of injuries, and places of safety and shelters are: insert list and hotline numbers. You also have the right to seek reimbursement for losses suffered as a result of the abuse, including medical and moving expenses, loss of earnings or support, and other expenses for injuries sustained and damage to your property . . .

7.2.3 In most jurisdictions, law enforcement officials are responsible for reading key terms of the order to the defendant. Reading the order out loud precludes the defendant from stating that he could not read and understand it.<sup>567</sup>

#### *New Jersey*

7.2.4 A law enforcement officer shall disseminate and explain to the victim the following notice:<sup>568</sup>

You have the right to go to court to get an order called a temporary restraining order, also called a TRO, which may protect you from more abuse by your attacker. The officer who handed you this card can tell you how to get a TRO.

The kinds of things a judge can order in a TRO may include:

- (1) That your attacker is temporarily forbidden from entering the home you live in;
- (2) That your attacker is temporarily forbidden from having contact with you or your relatives;
- (3) That your attacker is temporarily forbidden from bothering you at work;
- (4) That your attacker has to pay temporary child support or support for you;
- (5) That you be given temporary custody of you children;
- (6) That your attacker pay you back any money you have to spend for medical treatment or repairs because of the violence. There are other things the court can

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<sup>567</sup>State Responses 86.

<sup>568</sup>New Jersey Prevention of Domestic Violence Act of 1991, 2C:25-23 7.



order, and the court clerk will explain the procedure to you and will help you to fill out the papers for a TRO.

You also have the right to file a criminal complaint against your attacker. The police officer who gave you this paper will tell you how to file a criminal complaint.

On weekends, holidays and other times when the courts are closed, you still have a right to get a TRO. The police officer who gave you this paper can help you get in touch with a judge who can get you a TRO.

### *Pennsylvania*

7.2.5 Each law enforcement agency shall provide the abused person with an oral and written notice.<sup>569</sup> The statements to be included in the written notice are similar to the statements required by New Jersey law.

### *Missouri*

7.2.6 The officer at a scene of an alleged incident of abuse shall inform the abused party of available judicial remedies for relief from adult abuse.<sup>570</sup> Clerks shall explain to litigants not represented by counsel the procedures for filing all forms and pleadings necessary for the presentation of their petition to the court. The performance of these duties shall not constitute the practice of law.<sup>571</sup>

## **F. Evaluation**

7.2.7 Most victims are ignorant as to their rights. At certain key moments in the domestic violence situation, the victim will encounter law enforcement agents, such as a police officer, or the clerk of the court. These law enforcement agents should have a duty to inform the victim of her rights to obtain a protection order as well as to lay criminal charges. This obligation will fortify the relationship between the public and the criminal justice system, in that the law enforcement agents will be regarded with less suspicion.

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<sup>569</sup>Pennsylvania Protection from Abuse Act, section 6105(b).

<sup>570</sup>Missouri Revised Statutes Chapter 455, section 455.080.4.

<sup>571</sup>Missouri Revised Statutes Chapter 455, section 455.025.

### **7.3 Arrest without warrant**

#### **A. Problem analysis**

7.3.1 The situation where a victim of domestic violence seeks urgent assistance from the police in the absence of a protection order needs to be addressed.

7.3.2 In terms of section 40(1)(a) and (b) of the Criminal Procedure Act 51 of 1977 a peace officer may without warrant arrest any person who commits or attempts to commit any offence in his presence; or whom he reasonably suspects of having committed an offence referred to in Schedule 1. Schedule 1 refers to, inter alia, assault, when a dangerous wound is inflicted. The offence of common assault is not a First Schedule offence. This creates the dilemma that when the SAPS attend to a common assault in a domestic violence situation they can, apart from taking a statement, do nothing to protect the victim. The victim is therefore left to the mercy of the abuser.

7.3.3 Workshops have highlighted the need experienced by SAPS officers called out to scenes of domestic violence to safeguard victims by arresting abusers suspected of committing common assault. It appears that most domestic assaults are classified as common assaults.

#### **B. Comparative survey of laws**

*USA*

*Missouri*

7.3.4 When a law enforcement officer has probable cause to believe a party has committed a violation of law amounting to abuse or assault against a family or household member, the officer may arrest the offending party whether or not the violation occurred in the presence of the arresting officer.<sup>572</sup>

*New Jersey*

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<sup>572</sup>Missouri Revised Statutes Chapter 455, section 455.085.1.

7.3.5 A law enforcement officer may arrest a person where there is probable cause to believe that an act of domestic violence has been committed.<sup>573</sup>

### **C. Evaluation**

7.3.6 Apart from the situation where the applicant reports a breach of the protection order, the SAPS should be empowered to arrest an abuser without a warrant where the circumstances justify such arrest. It is submitted that the SAPS should be empowered to arrest the abuser when they arrive at the scene of an incident of domestic violence after an attack on the victim and reasonably suspect that an offence containing an element of physical violence has been committed by the abuser.

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<sup>573</sup>New Jersey Prevention of Domestic Violence Act of 1991, 2C:25-21 5b.

## **7.4 Confidentiality of applicant's address**

### **A. Problem analysis**

7.4.1 The Act contains no provisions in respect of confidentiality. This implies that the respondent will always be able to ascertain where the applicant is staying, thus compromising the applicant's safety.

### **B. Comparative survey of laws**

#### *Canada*

##### *Saskatchewan*

7.4.2 The victim's address shall be kept confidential at the request of the victim or a person acting on the victim's behalf.<sup>574</sup>

##### *Alberta*

7.4.3 The Alberta Law Reform Institute<sup>575</sup> recommends that the claimant's address be kept confidential unless the claimant consents to the giving of the address.

#### *USA*

##### *Missouri*

7.4.4 A petitioner shall not be required to reveal any current address or place of residence except to the court *in camera* for the purpose of determining jurisdiction. The petitioner may be required to provide a mailing address unless the petitioner alleges that he or she would be endangered by such disclosure.<sup>576</sup>

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<sup>574</sup>Saskatchewan Victims of Domestic Violence Act S.S. 1994, c. V-6.02, section 9(1).

<sup>575</sup>ALRI Report No 74 89.

<sup>576</sup>Missouri Revised Statutes Chapter 455, section 455.030 3.

*Pennsylvania*

7.4.5 The court may consider whether the plaintiff is endangered by disclosure of the permanent or temporary address of the plaintiff or minor children.<sup>577</sup>

*Kentucky*

7.4.6 The court, when issuing an emergency protective order, shall order the omission or deletion of the petitioner's address, and the address of any minor children from any documents to be made available to the public, or to the person who engaged in the acts of domestic violence.<sup>578</sup>

**C. Evaluation**

7.4.7 Confidentiality of the applicant's address may be very important to the applicant's safety since the abuser may follow her from destination to destination, making her life intolerable. Many women fleeing abusive relationships go into hiding, either at the home of a friend, family member or shelter. It is imperative that an applicant be able to retain the confidentiality of her address in this period when her life may be in danger. However, in exercising this choice to retain the confidentiality of her address, the applicant will not be able to request the court to make an order preventing the respondent from entering the residence, as a physical address will need to be provided for this order to be effective.

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<sup>577</sup>Pennsylvania Protection from Abuse Act, section 6112.

<sup>578</sup>Kentucky Revised Statutes, section 403.770(1).

## 7.5 Seizure of arms and dangerous weapons

### A. Problem analysis

7.5.1 The Act contains no provisions regarding the seizure of arms and dangerous weapons used or used to threaten in a domestic violence situation. Many view the need for removal of dangerous weapons from situations of domestic violence to be self-evident.<sup>579</sup>

7.5.2 Section 11 of the Arms and Ammunition Act 75 of 1969 provides, inter alia, as follows:

#### 11 Declaration of persons by Commissioner to be unfit to possess arms

(1) If the Commissioner is of the opinion that on the ground of information contained in a statement made under oath, other than such a statement made by the person against whom action in terms of this section is contemplated, there is reason to believe that any person is a person-

(b) who has threatened or expressed the intention to kill or injure himself or any other person by means of an arm; or

...

(c) whose possession of an arm is not in the interest of that person or any other person as a result of his mental condition, his inclination to violence, whether an arm was used in the violence or not, or his dependence on intoxicating liquor or a drug which has a narcotic effect; or

(d) who, while in lawful possession of an arm, failed to take reasonable steps for the safekeeping of such arm,

he may, by notice in writing delivered or tendered to such person by a policeman, call upon such person to appear before the Commissioner at such time and place as may be specified in the notice, in order to advance reasons why such person shall not be declared unfit to possess any arm on any ground aforesaid so specified.

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<sup>579</sup>Submissions to the Commission.

## B. Comparative survey of laws

### *Australia*

#### *The Australian Capital Territory*

7.5.3 The Community Reform Committee<sup>580</sup> recommends that the domestic violence legislation should provide that the court may, in addition to the making of an interim protection order, order the seizure and detention for the period during which the order is in force, of any dangerous weapon or restricted weapon in the respondent's possession.

### *New Zealand*

7.5.4 It is a standard condition of every protection order that the respondent must -

- (a) not possess, or have under his or her control, any weapon;
- (b) not hold a firearm licence; and
- (c) surrender to a member of the Police any weapon and any firearms licence.<sup>581</sup>

### *Canada*

#### *Alberta*

7.5.5 The need for removal of dangerous weapons is seen as arising out of the emotional volatility and intensity of a domestic violence situation. Further, the need for removal of weapons at the time of granting the protection order is seen to be demonstrated by evidence showing the point of separation as the most dangerous time for a victim of abuse.<sup>582</sup> The Alberta Law Reform Institute<sup>583</sup> recommends that there should be a provision that allows for seizure and storage of firearms, where the firearms have been used, or their use has been threatened, in the abusive activity.

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<sup>580</sup>CLRC Report 11.

<sup>581</sup>Domestic Violence Act 86 of 1995, section 21.

<sup>582</sup>ALRI Report for Discussion No 15 136.

<sup>583</sup>ALRI Report 74 84.

*USA**Pennsylvania*

7.5.6 The protection order may include ordering the defendant to temporarily relinquish weapons which may have been used or been threatened to be used in an incident of abuse against the plaintiff or the minor children. Subsequent to an arrest for violation of an order the police officer shall seize all such weapons.<sup>584</sup>

*New Jersey*

7.5.7 A law enforcement officer who has probable cause to believe that an act of domestic violence has been committed may seize any weapon that the officer reasonably believes would expose the victim to a risk of serious bodily injury.<sup>585</sup>

*Model Code on Domestic and Family Violence*

7.5.8 A law enforcement officer shall seize all weapons that are alleged to have been involved or threatened to be used in the commission of a crime involving domestic violence.<sup>586</sup>

**C. Evaluation**

7.5.9 In many cases of domestic violence, dangerous weapons are used to intimidate and physically harm the victim. Since some victims may choose to remain with the abuser, it is important to provide a mechanism through which arms and dangerous weapons may be seized to remove the immediate source of danger from the victim's environment and to make it more difficult for the abuser to access these weapons. Most foreign jurisdictions surveyed, contain provisions to this effect.

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<sup>584</sup>Pennsylvania Protection from Abuse Act, sections 6108.(a)(7), 6113.(b).

<sup>585</sup>New Jersey Prevention of Domestic Violence Act of 1991, 2C:25-21 5.d.

<sup>586</sup>Model Code, section 207(1).



## **7.6 Notification of police station**

### **A. Problem analysis**

7.6.1 When applicants report breach of a protection order, they are often not able to produce the original warrant of arrest, either because it has been lost or destroyed. Because the applicant may be unknown to the police, she may encounter unwarranted obstacles in securing her safety.

7.6.2 Bonthuys<sup>587</sup> argues for a requirement that, when a protection order is issued, local police should be informed of the existence of such an order.

### **B. Comparative survey of laws**

#### *New Zealand*

7.6.3 A copy of the order must be made available, without delay, to the officer in charge of the police station nearest to where the protected person resides.<sup>588</sup>

#### *USA*

##### *Pennsylvania*

7.6.4 The Pennsylvania State Police shall establish a Statewide registry of protection orders and shall maintain a complete and systematic record and index of all valid temporary and final court orders of protection.<sup>589</sup>

##### *Missouri*

7.6.5 A copy of any protection order shall be issued to the local law enforcement agency.<sup>590</sup>

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<sup>587</sup>Bonthuys 1997 SALJ 386.

<sup>588</sup>Domestic Violence Act 86 of 1995, section 88(2).

<sup>589</sup>Pennsylvania Protection from Abuse Act, section 6105(e)(1).

<sup>590</sup>Missouri Revised Statutes, section 455.040.3.

*New Jersey*

7.6.6 Notice of orders issued shall be sent to the appropriate chiefs of police, members of the State Police and any other appropriate law enforcement agency.<sup>591</sup>

**C. Evaluation**

7.6.7 In order to facilitate the operation of the protection order procedure and to ensure that the SAPS are informed of members of the public within their community who are likely to be subject to domestic violence, it is deemed necessary to direct the clerk of the court to forward a copy of the final order and of the warrant of arrest to a police station of the applicant's choice. It is anticipated that this will encourage the police to participate more fully in the victim's protection.

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<sup>591</sup>New Jersey Prevention of Domestic Violence Act of 1991, 2C:25-28 12. n.

## **7.7 Penalties against law enforcement agents**

### **A. Problem analysis**

7.7.1 It is argued<sup>592</sup> that any legislation seeking to improve the position of victims of domestic violence would be rendered toothless without the support of law enforcement agents who are to provide information and effect prompt service of the order and arrest of an abuser who breaches the order. Even though law enforcement agents have duties to serve the interdict and may arrest abusers in terms of the Act, in practice, many communities have found that these duties are being carried out with no sense of urgency or sometimes not at all. Duties imposed, without a sanction for dereliction of those duties, has often resulted in careless attitudes by law enforcement agents in taking the issue of domestic violence seriously.

### **B. Comparative survey of laws**

#### *General*

7.7.2 Women, Law & Development International<sup>593</sup> surveyed 146 respondents from different countries. In addition to adopting gender-specific, comprehensive domestic violence legislation, respondents felt<sup>594</sup> that greater enforcement of existing laws would improve the situation of domestic violence in their countries. Respondents noted that a lack of faith in the legal system and pressure from legal officials were major factors influencing women not to file domestic violence complaints. Too often women who try to access the courts are impeded by the ignorance and hostility of the very officials to whom they must complain. Survey responses advocated for strong penalties for officials who do not enforce existing laws regarding domestic violence or do not follow proper procedures and protocols for the enforcement of these laws.

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<sup>592</sup>Submissions by members of the Law Commission Project Committee on Domestic Violence.

<sup>593</sup>State Responses 91.

<sup>594</sup>State Responses 98-99.

7.7.3 It is recommended<sup>595</sup> that governments develop and enforce penalties against officials who do not follow proper procedures and protocols for the enforcement of laws in cases of domestic violence or for actions contrary to the provisions and principles in domestic violence legislation.

### C. Evaluation

7.7.4 Three crucial stages in the applicant's encounter with the legal system which are integral to the victim's safety are embodied in previous discussions:

- \* *A duty on the SAPS to inform the victim of her rights.* The legislation cannot operate effectively unless applicants are made aware, by those who represent the justice system, that there are procedures in place which they can utilize to protect their rights.
- \* *The service of documents by the clerk, sheriff and peace officers.* Once again, without these law enforcement agents acting promptly, applicants cannot rely upon the protection of the order.
- \* *A duty upon the SAPS to execute warrants of arrest and to arrest respondents.*

7.7.5 The failure of law enforcement agents to carry out their duties in the crucial stages in the applicant's encounter with the legal system should constitute misconduct or even an offence. This is an attempt to ensure that law enforcement agents have a stake in ensuring that the legislation works to promote the safety of victims caught in domestic violence situations. In effect, it sends out the message that domestic violence is not only the problem of the applicant, but that of the entire justice system. Law enforcement agents have something to lose by not carrying out their duties to promote the spirit of the legislation.

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<sup>595</sup>State Responses 99.

7.7.6 A duty on certain individuals to report the ill-treatment of children is contained in the Act and failure to comply therewith is an offence.<sup>596</sup>

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<sup>596</sup>Section 6 of the Act.

## 8. CONCLUSION

8.1 The Community Law Reform Committee of the Australian Capital Territory<sup>597</sup> makes the following notable observation:

Over the past 10 years every major report dealing with domestic violence at an international, national, and state level has stressed the need for a co-ordinated and comprehensive approach to the problem. It has become apparent that there is little hope of effectively stopping the violence unless players in the system work co-operatively. The players include the courts, the police, the prosecution, lawyers, correctional services, health, housing, crisis and victim support workers, refuges, and the legislature.

8.2 The view that domestic violence is a social problem that must be dealt with holistically, also commanded substantial support on consultation. It is clear that the law does not hold an exclusive position in either the response to, or the prevention of, domestic violence. The law cannot play its part in a meaningful way in isolation from the larger community of services. The whole society must be involved in helping to reduce the problem, because directly or indirectly it affects the quality of life of the whole society.

8.3 The successful implementation of domestic violence legislation is contingent upon, firstly, the development of appropriate training programmes for all state role players and, secondly, the allocation of adequate financial and other resources. Some of the major points of criticism against the Act rest on the fact that it was enacted without adequate government funding to ensure the practical realisation of the legislative measures.<sup>598</sup>

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<sup>597</sup>CLRC No 9 paragraph 120.

<sup>598</sup>Fedler 1995 SALJ 234.

**PREVENTION OF FAMILY VIOLENCE ACT 133 OF 1993**

[ASSENTED TO 24 SEPTEMBER 1993] [DATE OF COMMENCEMENT: 1 DECEMBER 1993]

(English text signed by the Acting State President)

**ACT**

To provide for the granting of interdicts with regard to family violence; for an obligation to report cases of suspected ill-treatment of children; that a husband can be convicted of the rape of his wife; and for matters connected therewith.

**1 Definitions**

(1) In this Act, unless the context indicates otherwise-

'magistrate' includes a family magistrate appointed under section 9 (1) (a) (v) of the Lower Courts Act, 1944 (Act 32 of 1944);

'matrimonial home' means the house, flat, room or other structure in which the parties to a marriage ordinarily live or lived together;

'prescribed' means prescribed by or under this Act.

(2) Any reference in this Act to the parties to a marriage shall be construed as including a man and a woman who are or were married to each other according to any law or custom and also a man and a woman who ordinarily live or lived together as husband and wife, although not married to each other.

## 2 Interdict with regard to family violence

(1) A judge or magistrate in chambers may, on application in the prescribed manner by a party to a marriage (hereinafter called the applicant) or by any other person who has a material interest in the matter on behalf of the applicant, grant an interdict against the other party to the marriage (hereinafter called the respondent) enjoining the respondent-

(a) not to assault or threaten the applicant or a child living with the parties or with either of them;

(b) not to enter the matrimonial home or other place where the applicant is resident, or a specified part of such home or place or a specified area in which such home or place is situated;

(c) not to prevent the applicant or a child who ordinarily lives in the matrimonial home from entering and remaining in the matrimonial home or a specified part of the matrimonial home; or

(d) not to commit any other act specified in the interdict.

(2) In granting an interdict contemplated in subsection (1) the judge or magistrate, as the case may be, shall make an order-

(a) authorizing the issue of a warrant for the arrest of the respondent;

(b) suspending the execution of such warrant subject to such conditions regarding compliance with the interdict as he may deem fit; and

(c) advising the respondent that he may, after 24 hours' notice to the applicant and the court concerned, apply for the amendment or setting aside of the interdict contemplated in subsection (1).



(3) The interdict contemplated in subsection (1) and the order contemplated in subsection (2) shall have no force and effect until served on the respondent in the prescribed manner.

### 3 Execution of warrant of arrest

(1) Subject to the provisions of section 2 (3) a warrant of arrest issued and suspended in terms of section 2 (2) may be executed by a peace officer as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977), upon receipt of an affidavit in which it is stated that the respondent has breached any of the conditions contained in the order contemplated in section 2 (2).

(2) A respondent arrested in terms of subsection (1)-

(a) shall not be released unless a judge or magistrate orders his release; and

(b) shall as soon as possible but not later than 24 hours after his arrest be brought before a judge or magistrate by a peace officer contemplated in subsection (1).

(3) Subject to the provisions of this section, all the provisions of the Criminal Procedure Act, 1977 (Act 51 of 1977), relating to the form and manner of execution of warrants of arrest, the arrest, detention, searching and other treatment necessary for the control of persons named in warrants of arrest, shall *mutatis mutandis* apply in respect of warrants of arrest issued under section 2 (2).

(4) The judge or magistrate before whom a respondent is brought in terms of subsection (2) shall enquire into the respondent's alleged breach of the conditions of the order made in terms of section 2 (2) and may at the conclusion of such enquiry-

(a) order the release of the respondent from custody; or

(b) convict the respondent of the offence contemplated in section 6.

(5) The provisions of the Criminal Procedure Act, 1977 (Act 51 of 1977), relating to the procedure which shall be followed in respect of an enquiry referred to in section 170 of that Act, shall apply mutatis mutandis in respect of an enquiry under subsection (4).

#### 4 Obligation to report ill-treatment of children

Any person who examines, treats, attends to, advises, instructs or cares for any child in circumstances which ought to give rise to the reasonable suspicion that such child has been ill-treated, or suffers from any injury the probable cause of which was deliberate, shall immediately report such circumstances-

(a) to a police official; or

(b) to a commissioner of child welfare or a social worker referred to in section 1 of the Child Care Act, 1983 (Act 74 of 1983).

#### 5 Rape of wife by her husband

Notwithstanding anything to the contrary contained in any law or in the common law, a husband may be convicted of the rape of his wife.

#### 6 Offences and penalties

A person who-

(a) contravenes an interdict or other order granted by a judge or magistrate under section 2 (1) or (2); or

(b) fails to comply with the provisions of section 4,

shall be guilty of an offence and liable on conviction in the case of an offence referred to in paragraph (a) to a fine or imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment and in the case of an offence referred to in paragraph (b) to a fine or imprisonment for a period not exceeding three months or to both such fine and such imprisonment.

## 7 Regulations

The Minister of Justice may make regulations-

(a) prescribing the manner in which an application contemplated in section 2 is to be made;

(b) prescribing the manner in which the interdict and order shall be served on the respondent in terms of section 2 (3); and

(c) in general, as to any matter which he may consider necessary or expedient to prescribe or regulate in order to achieve the objects of this Act.

## 8 Repeal of section 1 of Act 39 of 1989

Section 1 of the Criminal Law and the Criminal Procedure Act Amendment Act, 1989 (Act 39 of 1989), is hereby repealed.

## 9 Short title and commencement

This Act shall be called the Prevention of Family Violence Act, 1993, and shall come into operation on a date fixed by the State President by proclamation in the Gazette.

**PERSONS WHO AND INSTITUTIONS WHICH REACTED TO DISCUSSION PAPER  
70 ON DOMESTIC VIOLENCE**

- \* Association of Law Societies Standing Committee on Family Law Matters
- \* Black Sash
- \* Cape Law Society
- \* Centre for Criminal Justice, Pietermaritzburg
- \* Concerned Friends of the Frail and Aged
- \* Democratic Party
- \* Department of Justice Gender Unit
- \* Dr A Allan (Head: Psycholegal Unit, University of Stellenbosch)
- \* Durban City Police
- \* Family Advocate: Durban
- \* Gauteng Members of the ALS Family Law Standing Committee
- \* Gender Advocacy Programme
- \* Judge President: Free State
- \* Judge President: Northern Cape
- \* Laws and Administration Committee of the General Council of the Bar
- \* Magistrate: Bloemfontein
- \* Magistrate: Durban
- \* Magistrate: Greytown
- \* Magistrate: Johannesburg
- \* Magistrate: Mitchells Plain
- \* Magistrate: Paarl
- \* Magistrate: Pietermaritzburg
- \* Magistrate: Pretoria
- \* Magistrate: Pretoria North
- \* Magistrate: Verulam
- \* Magistrate: Wynberg

- \* M Horton (Research Advisor in the Deputy Ministry of Justice)
- \* M L Kennedy (Defence Secretariat)
- \* Mpumalanga Provincial Government (Department of Health, Welfare and Gender Affairs)
- \* N Van Dokkum (Department of Private Law, University of Durban)
- \* Natal Law Society
- \* National Human Rights
- \* NICRO Western Cape
- \* P Thwala (University of Swaziland Library)
- \* S Kottler (Intern Psychologist at Broadcast Research Unit at Sabc)
- \* SA National Council for Child and Family Welfare
- \* The Women's Lobby
- \* Tshwaranang Legal Advocacy Centre to End Violence Against Women
- \* UCT Law, Race and Gender Research Unit
- \* UNISA Health Psychology Unit and Centre for Peace Action
- \* UNISA Family Law Lecturers
- \* UWC Community Law Centre (Women & Human Rights Project), Rape Crisis (Cape Town) & ANC Parliamentary Women's Caucus
- \* Van Niekerk & Vennote