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2

The Prevention of Family Violence Act 1993

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PREFACE

This paper was first distributed in 1994, about nine months after the Prevention of Family Violence Act took effect. The paper discusses family violence, describes the Act, and raises both theoretical and practical questions about the Act and its implementation. Because of continuing controversy about the approach and ambit of the Act, and continuing difficulties with its implementation, the Law, Race and Gender Research Unit has decided to print the paper in this series. Although a great deal more experience in implementing the Act has been acquired in the two years since the paper was written, the problems that it raises remain. We hope that the paper will contribute to debate about the Act and, most importantly, to the development of a full legal response to family violence.

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INTRODUCTION

In December 1993, the Prevention of Family Violence Act 133 of 1993 (PFVA) introduced a system by which interdicts became available in the Magistrate's Courts. Some viewed the initial Domestic Violence Bill as a cynical election ploy,¹ a last minute and inadequate attempt to address the widespread phenomenon of family violence. Others welcomed the initiative as a long overdue endeavour to address issues of particular concern to women.²

Briefly, the Act allows for parties to a civil, customary or common law marriage, fearing violence from their partner, to seek an interdict in the Magistrate's Courts. Provision is made for the respondent to seek removal or modification of the interdict. At the time an interdict is granted a conditional warrant is issued for the respondent's arrest. Where the interdict has been breached, the applicant must file an affidavit at the police station, enabling the police to execute the warrant and arrest the respondent. The respondent may then be placed in custody and must be brought before the Magistrate for sentencing within 24 hours.

This paper sets out to do the following:

1. to introduce the phenomena of family violence;
2. to consider the ways in which the problem of family violence may be approached;
3. to investigate a variety of legal techniques which might be used to address family violence;
4. to evaluate the content of the PFVA in the light of foregoing discussion;
- (5) to outline procedural difficulties faced by magistrates, applicants and respondents, which provide barriers to adequate implementation of the Act; and finally

¹ It emerged as one in a trilogy of draft legislation, alongside bills concerning 'Abolition of Discrimination Against Women' and 'Promotion of Equal Opportunities'. Some writers, such as Fedler and Malifani (1994) consider that the legislation was a limited attempt to address problems related to family violence and is dangerous in that 'it closes the issue of violence against women by ostensibly addressing this issue'.

² Thamm (1994), p.75.

(5) to outline procedural difficulties faced by magistrates, applicants and respondents, which provide barriers to adequate implementation of the Act; and finally

(6) to suggest how the courts and the police might facilitate the effective operation of the interdicts system, and to propose further legislative developments.

THE PHENOMENA OF FAMILY VIOLENCE

2.1 Definition of Violence

Family violence has been defined as:

Any act or omission committed within the framework of the family by one of its members that undermines the life, the bodily or psychological integrity or liberty of another member of the same family or that seriously harms the development of his or her personality.³

Accordingly, violence within a family context may take a variety of forms.

Physical and sexual abuse are most commonly recognised. Physical abuse tends to extend beyond bruising, to kicking, choking, breaking limbs, burns from irons, cigarettes and scalding liquids, throwing as well as forced sexual assault.⁴ Family violence poses a significant danger of death or serious injury to its targets. A notable percentage of those who experience family violence suffer permanent damage to their organs (for example, liver and kidney damage), or have miscarriages.⁵ Those subjected to violence are more likely to suffer from depression, which may lead to suicide.⁶ Also, there remains the risk that those exposed to violent treatment over a lengthy period will retaliate, sometimes fatally injuring their past abuser.⁷

Also, verbal harassment and financial exploitation are among other means of victimisation. These form part of a continuum of abuse, and may have equally harmful repercussions in terms of psychological damage and infringement of personal liberty. Verbal harassment may take the form of constant threats, vicious criticism or demeaning insults either in private, or in the presence of family members or visitors. Financial exploitation commonly takes place where one member of a household insists on controlling all the household's finances, allocating others small and usually insufficient funds.

3 Council of Europe, Explanatory Memorandum to 'Violence in the Family' recommendation No. R (85) 4 adopted by the Committee of Ministers of the Council of Ministers of Europe, 26 March 1985.

4 Walker (1979), p.79.

5 Lessing (1994), p.260.

6 See United Nations, *Resource Manual*, p.9.

7 Kennedy (1992), pp.190 - 221.

Control of financial resources by an abuser can contribute to a 'hostage' situation. Not only is the target of the violence effectively prevented from leaving the house because of threats or being 'locked in', but her inability to escape is compounded by lack of money for transport, basic goods, services and alternative shelter.⁸ The 'hostage' situation may be contrasted with 'stalking', where an estranged husband, lover or family member may follow and harass a victim.⁹

Legislation has generally avoided addressing violence which takes forms other than physical and sexual abuse, and the latter remain the focus of this paper. Nevertheless, the extent to which other forms of violence should be recognised is an important issue. In fact, the broad drafting of the Prevention of Family Violence Act 1993, which fails to define 'violence', effectively provides magistrates with the discretion to recognise verbal harassment, financial exploitation, 'hostage' situations and stalking.

2.2 Victims and Survivors

Violence may arise in a variety of relationships, between brother and sister, parent and child, and within the extended family. Also, similar incidents could arise in homosexual and lesbian partnerships. Occasionally, a woman has been known to physically assault her spouse or de facto husband; but it is most common for the victim to be a woman, who is attacked by a present or past sexual partner.¹⁰ This is the paradigm case and this document will tend to centre, although not exclusively, upon the experience of women as survivors of family violence.

The term 'victim' has been the subject of substantial criticism. It is said that the word perpetuates a notion of powerlessness. The subject of family violence has been 'victimised', but ultimately should be regarded as having 'survived' these events. As a result, this document tends to refer to 'survivors' rather than 'victims' of family violence.

Another point too often overlooked is that the repercussions of family violence frequently extend beyond the person being beaten.¹¹ Research suggests that male children who witness family violence are significantly more likely to use physical violence against their own sexual partners.¹² As silent

8 Appendix 1, pp.5 - 7.

9 Bradburn (1992).

10 See Fedler and Malifani (1994), p.2; see also the Explanatory Memorandum on the Draft Bill on Prevention of Domestic Violence.

11 Cf. Voris (1991).

12 Finklehor, Gelles, Hotaling and Strauss (1983), p.52; Harvard Law Review Editors (1993), p.1610.

witnesses they apparently learn that violence is an acceptable means of resolving disputes or venting anger. Female children may model themselves on their mother's submissive behaviour and, as adults, tolerate physical, sexual and verbal abuse from a partner. Experience of family violence is also linked to higher rates of juvenile delinquency, violent crimes, suicide, drug and alcohol abuse.¹³

2.3 Incidence of Family Violence

Some statistical sources suggest that one in six women experience violence from a male partner.¹⁴ Others note that survivors of family violence are reluctant to make a report, either to the police or the courts, and that therefore the figure may be higher.¹⁵ In a recent survey by the Human Sciences Research Council, 43% of the women interviewed reported marital rape and assault.¹⁶

One popular prejudice should be overcome. This is the view that family violence is predominant in one racial group or culture; for example, that it is an 'African' or 'Muslim' problem. However, the evidence suggests that the phenomena of family violence transcends racial groupings and wage-earning brackets.¹⁷ It is more accurate to note that those from impoverished backgrounds are more likely to be trapped within a cycle of family violence, because fewer options are open to them, due to their limited financial means.

Others argue that, although family violence is unacceptable to the Afrikaner and the English, it must be tolerated in African, Coloured, and Muslim families, on the basis of cultural relativism. However, historical investigation reveals that chastisement of a wife was also considered acceptable in Afrikaner and English cultures.¹⁸ While cultural tolerance is an issue in many

13 Buel (1988), pp.222 - 223 citing the results of a report from the Commonwealth of Massachusetts, Dept of Youth Services, *Delinquent Youth and Family Violence: A Study of Abuse and Neglect in the Homes of Serious Juvenile Offenders* (1985), p.17 et seq. See also United Nations Resource Manual (1993), p.9.

14 Motsei (1993), p.99; Van Zyl (1992), p.514.

15 Angless (1992), p.52; Hansson, p.2; Irish (1993), p.7 report that this figure may be as high as one in four. See also discussion of the difficulty of gathering accurate statistics and the risk of underestimating the scale of the problem in United Nations, *Resource Manual* (1993), p.7.

16 See Cape Times 19/8/94.

17 Harvard Law Review Editors (1993), p.1501; United Nations, *Resource Manual*, p.4; UK Law Commission Report 91992), pp.3 - 4.

18 Ross, p.1 reports that under both Roman-Dutch and English law a husband maintained a 'right' to beat his wife. A similar point relating to both Roman-Dutch and African customary law is made by Van Zyl (1992), p.509. The right to discipline or chastise a wife appears to be linked to women's minority status in these societies. Where women are considered to possess the legal status of men, ideas of 'discipline' become inappropriate.

areas of legal reform, as regards family violence, and in particular, wife-battering, the issues do not differ substantially between cultural contexts. These issues include women's status and the toleration of different forms of violence within any society. It is patronising, rather than respectful, to consider any single culture peculiar in this regard, or to make special allowances for the racial or cultural background of the parties.

2.4 The Cycle of Violence

Over the past twenty years, academic and social research have identified a cycle of violence, common to most cases where a woman is battered by a past or present sexual partner.¹⁹

Contrary to popular belief, a survivor of domestic violence does not provoke violence.²⁰ In fact, she does everything to appease her abuser. Abuse occurs in three stages:

1. the 'tension building stage' during which minor violent incidents take place and the survivor attempts to placate the batterer;
2. the 'acute battering incident' where serious violence results; and
3. the 'contrition stage' during which the batterer's behaviour is loving and apologetic, accompanied by promises not to repeat the violence.

However, as the contrition fades the cycle begins over again.²¹

Accordingly, once victimised, a woman faces a high risk of being victimised again. It is a pattern of behaviour that, without intervention, escalates both in frequency and severity over time.²² Those who try to intervene, magistrates, lawyers and social workers, are often frustrated by a survivor's decision to return to her husband during the 'contrition stage' and her failure to break the cycle. An aspect of the desire for reconciliation may be a woman's 'learned helplessness', or a lack of self-esteem and self-motivation which stems from having been a target of violent abuse for an extended period.²³ Also, practical considerations such as financial dependence, lack of alternative housing, availability of jobs and problems of childcare may also play a role in persuading a woman that reconciliation is preferable to separation.²⁴

19 Walker (1979), p. iv; Ross, p. 4.

20 Cf. Scott-Macnab (1992), p. 290 who argues that 'violence is the result of a dispute and is not the dispute itself', suggesting that women in violent relationships are somehow responsible for their partner's behaviour.

21 Walker (1979), pp. 56 - 70.

22 Buel (1988), p. 216; Goolkasian (1987), pp. 279 - 280; Hansson, p. 14.

23 This view is expressed by Walker (1979), at p. 87 and Crump (1987), p. 237.

These factors may be exacerbated by economic background and, even with the official abolition of apartheid, racial origin. The reason is that women living away from the mainly white populated suburbs, in the townships, may have greater difficulty attracting police attention, have less access to support agencies, and face severe transport problems.

Yet a survivor's desire for reconciliation does not mean that intervention was meaningless. As one social worker in Cape Town noted, no one leaves a battered women's shelter unchanged.²⁵ Women take back with them a sense of the options open to them, and the knowledge that it is possible to leave again. Moreover, an abuser's behaviour may be affected by the realisation that his conduct was illegal and that avenues of escape are available to a survivor should he repeat past abusive behaviour. It may be more useful for the legislature, judiciary, police and community groups not to dwell upon frustrations caused by reconciliations, but to view their role in terms of providing survivors of violence with options and real alternatives to an abusive relationship.

24 See Strube in Hotaling et al (1988), pp. 93 - 96.

25 See Appendix 1, p. 2.

APPROACHES TO FAMILY VIOLENCE

There are three readily identifiable approaches to family violence which merit attention. These are:

- protecting the family unit;
- protecting privacy; and
- protecting the survivor.

Some argue that the family must be preserved at all cost, that 'a man's home is his castle', and that certain matters are not for the public gaze. These views are all familiar. However, my argument is that where there is at least one readily identifiable victim of violence, whose survival depends on legal mechanisms specifically aimed at her protection, her well-being must take priority. As the United Nations *Resource Manual* states, 'most importantly, policies need to take into account the needs and desires of the victim.'²⁶ It is a matter of giving priority to the right to life over other rights.

This is not to say that the survivor's needs should be viewed in isolation, without regard to her home context. She may require action sensitive to her desire for privacy, or to her desire to maintain certain family relationships. Nevertheless, she should remain the focus of any legal redress.

3.1 Family Unity

The British Association of Police Officers have stated that they wish to 'maintain the unity of the spouses' and consider that 'every effort should be made to re-unite the family'.²⁷

Although there is no accessible data, the suspicion of those working in this field is that this view may also be prevalent amongst South African police.²⁸

The view that 'family unity' is of primary importance is also reflected in the Explanatory Memorandum to the Draft Bill on Domestic Violence. The Memorandum stated it was passed 'to introduce a more effective system to

26 The United Nations, *Resource Manual* (1993), p.16

27 Freeman (1985), pp.169 - 170.

28 See, for example, Appendix 1, p.2.

deal with domestic violence outside the criminal courts in order to maintain family unity.'

Yet one is forced to wonder *why* should we value family unity.²⁹ Surely, where one person is subjected to violence, the so-called 'unity' of a family is considerably less desirable than a healthy individual living alone. The costs of 'unity' for a woman in a violent situation are immense, and, as noted above, the costs for children, even where they are not actual targets of violence may also be high.³⁰

It may be a trite point, but a woman who is a wife and mother remains a person in her own right, deserving of respect.³¹ Attempts to 'keep the family together' place pressure upon a woman to act as a wife and a mother, without taking account of her own needs. They also continue to make a woman feel guilty and responsible for the violence she experiences, rather than passing that responsibility on to the person to whom it belongs. Moreover, as the Council of Europe noted in a Recommendation on family violence, 'the defence of the family involves the protection of all its members against any form of violence which all too often occurs among them.'³²

This is not to say that a woman's ties to her family are irrelevant. Legal remedies must take account of a woman's situation, in its entirety. For example, where a husband provides the sole family income and is fined for his violent conduct, the woman and her children will suffer. Family context, rather than family unity, remains of vital concern.

3.2 Privacy

The notion that the family is an ultimate good to be preserved overlaps with a view of home life as private, a space which should not be subjected to state regulation. As Zimring writes:

If privacy has any physical locale in modern society, it is in the home, properly renowned as a haven in a heartless world. If privacy has any social focus, it is in the family, a set of intimate relationships that can only flourish when sufficiently protected from a public scrutiny.³³

29 Freeman (1985), p.171.

30 See *supra*, p.5.

31 See Appendix 1, p.4.

32 Council of Europe, 'Violence in the Family' Recommendation No. R (85) 4 adopted by the Committee of Ministers of the Council of Europe, 26 March 1985.

33 Zimring (1987), p.521.

However, privacy can be transformed into an 'arena where the strong prey on the weak and the weak on the weaker still.'³⁴ Some have challenged the artificial division between the private and the public, on the basis that it leads to the structural disadvantage of women.³⁵ However, a right to privacy is enshrined in Chapter 3 of the interim Constitution of the Republic of South Africa Act 200 of 1993 ('the Constitution'). This may have been due to the desire to guarantee that invasion of privacy by police during the apartheid era would not reoccur.

Section 13 of the Constitution provides that 'every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.' This provision might seem to indicate that any legislation or judicial action impinging upon domestic privacy would breach the Constitution, and that legislation relating to family violence would violate the section. However, no right is absolute. The right to privacy is subject to limitations set out in section 33 and, in addition, has to be counterbalanced against two other rights.

The first is the right to 'respect for and protection of ... dignity' contained in section 10. The second, contained in section 11, is freedom and security of the person. Section 11 also prohibits torture and cruel, inhuman and degrading treatment. Family violence is obviously a violation of the survivor's dignity, breaching her right to freedom and security of the person. As such violence often takes the form of cruel, inhuman and degrading treatment, section 11 provides an added reason for the legislature and judiciary to take measures which challenge the legality of acts in the domestic or 'private' sphere.

Section 33 allows the rights entrenched in Chapter 3 of the Constitution to be limited by law of general application provided that such limitation:

1. is reasonable and justifiable in an open and democratic society based on freedom and equality; and
2. does not negate the essential content of the right in question.

Any limitation on sections 10 and 11, but notably *not* section 13 must, in addition to being reasonable, be necessary.

The assumption made in this paper is that, given the other rights entrenched in the Constitution, the limitations on privacy involved in addressing

34 Zimring (1987), p.521.

35 Ross, pp.21 - 23.

issues of family violence by way of interdicts, civil proceedings, and criminal proceedings are imminently reasonable and justifiable in an open and democratic society. They do not negate the essential content of the right in question, for while they address acts committed in the private sphere, they can be sensitive to the privacy of the survivor, for example by means of closed court hearings and name suppression. As the United Nations *Resource Manual* (1993) states, 'the right to a private family life does not include the right to abuse family members'.³⁶

3.3 Survival and Focusing upon the Survivor

Where a person has experienced physical, sexual and other forms of abuse,³⁷ it seems reasonable to focus upon their protection and their needs rather than abstract ideals, such as the unity of the family or the preservation of privacy.

An immediate response might be that the survivor can solve these problems for herself, that is, she could leave.³⁸ However, on closer examination, the barriers to such action may seem insurmountable, at least to the survivor herself. These barriers include:

1. a sense of duty to remain for the sake of children or other family obligations;³⁹
2. economic dependence, compounded by lack of employment opportunities and available childcare;
3. a shortage of alternative housing; and
4. emotional ties to the abuser.⁴⁰

If these barriers are recognised, the need for financial aid, employment opportunities, housing, childcare, health care and counselling become readily apparent. These needs are not catered for in South Africa at present. For example, while the Salvation Army Shelter for Battered Women in Cape Town provides some of these resources, this shelter is the only free shelter in Cape Town. It houses only 17 women and its waiting list is long. The maximum

36 United Nations, *Resource Manual* (1993), p.11.

37 See supra, pp.3 - 4.

38 Although, it is interesting to note, as Freeman (1985) does at p.169, that this is one of the few violent crimes where it is generally accepted that the perpetrator should be left in peace and his victim removed to a place of safety.

39 See Appendix 1, p.6., where one woman reported that she returned to her husband to take care of her dying daughter. She said that she had taken the violence for so long that she could bear it for a little longer to be with her daughter.

40 Angless (1992), p.52.

period of residence is limited to three months, and residents express concern as to what they will do when that period has expired.⁴¹

Moreover, even if a survivor possesses the resources (both emotional and material) to leave, there is still the likelihood that the abuser will pursue her. In such cases, survivors also require immediate police protection, alongside the secure knowledge that courts will take steps to detain or rehabilitate the offender. They also require legal assistance to obtain a divorce, without which their husband can still make claims upon them.

The fear of focusing on the survivor's story has been that false accusations will be levelled to gain custody of children, or to evict a boyfriend from the family house and take in another.⁴²

While it is possible that a story may be fabricated, this is unlikely. Physical violence tends to leave evidence of injury on the body, family members often witness the events and, indeed, violence against the spouse will often take the form of humiliation in front of others. It may be difficult to get the woman or family to give evidence because they are scared or because emotional ties are strong, but affidavit evidence taken by police and admitted into court may evade this problem.⁴³

41 Appendix 1, pp.5 - 7.

42 Appendix 1, p.4.

43 Harvard Law Review Editors (1993), pp.1618 - 1619.

LEGAL REMEDIES

It should be obvious that, while legal remedies can assist survivors of family violence, such assistance may be limited. Firstly, family violence is a social and psychological problem which can be eliminated only by fundamental changes in society's attitudes to women and children.⁴⁴ Legal remedies can help a survivor and may assist in gradually changing attitudes, but cannot alone be guaranteed to stem the source of abuse.

Secondly, if legal remedies are to be accessible, a survivor will usually require supplementary assistance. Free legal assistance may be indispensable. Moreover, to survive in the meantime, a survivor (and her children) need housing and money for food, hospital care, transport, and clothing.

However, even acknowledging these limitations, it is possible to analyze potential legal remedies in the light of the foregoing discussion of the nature of family violence and the desirability of an approach which centres upon the victim's survival.

The following legal remedies have been suggested or implemented in other jurisdictions:

1. compulsory counselling for the offender (and sometimes joint family counselling);
2. mandatory arrest;
3. criminal charges;
4. civil proceedings for injury to the person; and
5. interdicts or injunctions.

I shall argue that it is unnecessary to select one sole legal remedy as the universal panacea to problems arising from family violence. Instead, a multi-faceted range of legal remedies should be available, in recognition of a survivor's multiplicity of needs, not all of which can be satisfied by any one legal process.

Counselling and mediation may meet a survivor's emotional needs; a mandatory arrest policy or an interdict may allow a survivor to feel physically

44 UK Law Commission Report 207 (1992), p.6.

safe and therefore confident; civil proceedings may, at least in part, compensate the survivor for injuries suffered, loss of earning potential, and long term disablement; while, on the other hand, criminal proceedings may provide for punishment and rehabilitation of the abuser.

4.1 Individual and Joint Family Counselling

Compulsory individual counselling has recently been used by local Cape Town magistrates as a sentencing option, where PFVA interdicts have been breached. This option has been welcomed by organisations such as NICRO, which supports alternative sentencing.⁴⁵

Encouraging an offender to attend counselling seems an excellent option, which has potential to preserve family unity and privacy. The difficulty is ensuring that counselling is effective and that the survivor is adequately protected against renewed attacks. The success rate of counselling programmes has been the subject of controversy.⁴⁶ Commentators in the United States have been sceptical as regards the effectiveness of counselling. Research indicates that 'programmes are more effective when conducted with volunteers, when participation does *not* serve to reduce sentences and when groups also include men who have not abused women.'⁴⁷

There has also been considerable debate as to whether joint family counselling or family mediation is appropriate in cases of family violence. Enthusiasm for family mediation has come from writers such as Professor Scott-Macnab who suggests that 'mediation with its propensity for dissipating conflict and exposing underlying problems which may be the root cause of the violence in the first place has a role to play in such cases.'⁴⁸ Yet he admits that mediation or joint counselling will be inappropriate in certain circumstances; at least where

- it is a case of 'incurable and repeated physical abuse',
- the survivor feels threatened or intimidated, and has difficulty in being in the presence of her spouse.⁴⁹

Discussion through informal structures may seem desirable, but informal structures usually do not address unwritten assumptions and institutional discrimination. For example, in Canada, women showed considerable reluc-

lance to contact tribal authorities in cases of family violence, or to use local community structures. They preferred to call for outside police assistance.⁵⁰ They doubted that people who knew their partners would assist them; but this was not the only cause of their hesitation. They added that, in an informal discussion, given the chance to 'talk themselves out of it', their husbands would not be deterred from violence. This fear also has to be recognised in the context of family counselling and mediation, and its limitations should therefore be acknowledged.

It is questionable whether joint family counselling or mediation will serve any useful purpose if one party is well aware that the usual cost of disagreeing with the other is physical abuse. The extent to which a counsellor or mediator can compensate for this is difficult to judge. The obvious danger is that counselling or mediation will merely perpetuate the power of one party over the other. The factors which feed into this danger are:

- the passivity, or learned helplessness, 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.⁵¹

While compulsory individual, joint counselling, or family mediation may give the abused and survivor the opportunity to explore their emotions and resolve conflicts, the comments made above should inform a court's recourse to this option. It may be preferable to consider counselling and mediation as remedies which are unlikely to be effective alone, but which may supplement other legal remedies.

4.2 Compulsory Arrest and Criminal Proceedings

One response to family violence is a mandatory arrest policy, that is, a policy which requires police officers to arrest the batterer or abuser at the scene of an incident of family violence. Evidence suggests that immediate arrest substantially reduces the number of domestic assaults and murders.⁵²

The leading 'Minneapolis experiment' contrasted the procedure of arrest with mediation or temporary eviction orders. Within the restricted ambit of this study, it was found that arrested offenders were about half as likely to reoffend as non-arrested offenders over the six month follow-up period.⁵³

50 Antonowicz (1992), p.9.

51 Rowe (1985), p.864.

52 Buel (1988), p.215.

45 See Appendix 2, interview with Jane Keen, NICRO.

46 United Nations, *Resource Manual* (1993), p.67.

47 Hansson, p.15.

48 Scott-Macnab (1992), p.285.

49 Scott-Macnab (1992), p.288.

There have been criticisms of the study ranging from an inadequate sample size to the failure to extend the follow-up period. There are also suggestions that its effectiveness will depend upon a 'co-ordinated community response' providing counselling, housing, financial aid and legal aid.⁵⁴ However, the study received national attention in the United States and is credited with promoting the nationwide movement towards arrest as the preferred response in cases of family violence.⁵⁵

It would seem that a mandatory arrest policy is preferable to an optional arrest policy for a number of reasons. Firstly, a mandatory arrest policy clearly informs police of their role in a family violence situation.⁵⁶ Police the world over have tended to respond to domestic violence in a somewhat lack-lustre manner. They have tended to treat assault within the family differently from other complaints of assault, as a 'domestic affair' outside their jurisdiction.⁵⁷ They have also been hesitant to approach an abuser out of fear that they might also sustain injury. A mandatory arrest policy overcomes problems of allowing police to exercise their own discretion, forcing officers to take family violence seriously and act accordingly.

Secondly, a mandatory arrest policy has been said to have the advantage of not placing the burden of responsibility for the arrest upon the survivor. The abuser will be arrested without asking the survivor whether this is what she wants. A survivor of family violence may be hesitant to initiate an arrest for various reasons, not least of which is that she fears an escalation of violence on her abuser's return from detention. If her fears prove unfounded, (and police protection and community support are vital to see that they are), she may then acquire the courage to be more proactive in the future.⁵⁸ In other words, although the policy takes control from a woman, it does not necessarily disempower her.

However, commentators have suggested that the way in which a mandatory arrest policy is implemented will be vital to its success. Where an abuser has departed the scene prior to arrival of the police, the officer must assess the likelihood of his return and must act in order to protect the survivor,⁵⁹ such as temporarily assisting her and, if necessary, her children to spend the night

53 Buel (1988), p.215.

54 Hirschel and Hutchison (1989), p.14.

55 Hirschel and Hutchinson (1989), p.6.

56 Buel (1988), at p.220 describes it 'a clarification of the police role.'

57 Ferraro in Bart and Moran (1993), pp.166 - 170; Ross, p.11.

58 Buel (1988), p.222.

59 Policy on the Criminal Justice System Response to *Violence Against Women and Children: Part I*, Ministry of the Attorney-General (Canada), (1993), p.6.

with a friend. It is also vital that the police do not also arrest the person who was obviously the target of the violence. Dual arrest of abuser and abused can lead to added intimidation of the survivor.⁶⁰

Linked to the issue of arrest is the debate as to whether family violence should be viewed as a criminal offence. Is a target of violence in the home less deserving of protection than a person on the street? And, if not, why should a survivor of family violence not be able to seek the protection of the criminal law? Indeed, it might be argued that the personal nature of family violence should be taken more seriously, as it does more damage to the human psyche than physical harm done by a stranger.

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.⁶¹

There has been some difficulty persuading survivors to lay charges against a batterer or abuser, and some withdraw their charges during a reconciliation stage. A wife may have emotional ties to her husband or rely on her husband economically. Both these factors may effectively preclude her laying charges against him.⁶² However, if the responsibility has been placed on police to lay and pursue charges, this difficulty may be overcome.⁶³

Nevertheless, some have argued that family violence cannot be treated as a straightforward instance of assault.⁶⁴ Family violence remains, in their eyes, a family matter. Criminal trials and, in particular, standard criminal remedies are not sufficiently sensitive to the inter-personal relationships which family members may wish to preserve.⁶⁵ However, this view stemming from the 'family unity' approach,⁶⁶ does not provide coherent grounds for abandoning a criminal approach altogether. It seems preferable to modify criminal procedures and sentencing practices in cases of family violence. The United Nations *Resource Manual* suggests that special modifications are necessary to accommodate a crime which involves people 'who are emotionally and

60 See Ferraro in Bart and Moran (1993), p.169; and Ross (1993), pp.28 - 29.

61 Murray (1987), p.384.

62 Ferraro in Bart and Moran (1993), p. 172; Murray (1987), p.384.

63 Hansson, p.13; see also discussion of mandatory arrest supra at p.21.

64 See, for example, Middleton (1991), p.3.

65 Goolkasian (1987), p.282. This is also a view repeatedly expressed in the Explanatory Memorandum to the Council of Europe Recommendation No. R (85) 4 adopted by the Committee of Ministers of the Council of Europe on 26 March 1985.

66 Middleton (1991), p.3.

financially involved with each other.⁶⁷ For example, evidence could be given by affidavit rather than in person, or hearing could be in closed court. In addition, in terms of sentencing, judges or magistrates could impose community service, rather than fines or sentences which could have a negative repercussion upon the family finances.⁶⁸

It seems therefore that there may be scope for a criminal response to family violence, in conjunction with other sources of legal redress.

4.3 CIVIL ACTIONS

Civil action may be brought either against the abuser directly or, where the police have been negligent in providing protection or responding to a call,⁶⁹

Civil actions in delict have the advantage of providing a survivor of family violence with financial remuneration and support. In the absence of employment, the slow progress of divorce and maintenance proceedings leave many battered spouses without finances with which to set up an independent household. Nor will an interdict or a criminal conviction assist them. The situation is, if anything, worse for women without children, who have little or no chance of establishing a maintenance claim and are not entitled to legal aid for divorce proceedings.

Some critics have argued that civil remedies carry an implicit message to judges, the parties in the case, and the general public that the familial aspect of domestic violence outweighs its more serious criminal nature.⁷⁰ However, if a civil action is seen as one of a number of legal remedies to which a survivor may have access, not precluding a criminal trial, this objection may be overcome.

There are however practical problems which should not be overlooked. Firstly, it must be acknowledged that at the end of the day, the defendant may have no money, and the plaintiff will be left without compensation. Even where a civil action is feasible in terms of potential relief and the solvency of the defendant, few women possess the financial resources to fund the action, pay the lawyers' fees and court costs. Moreover, even with legal aid such proceedings take time, (sometimes up to two years), during which a survivor

67 United Nations, *Resource manual* (1993), p.15.

68 See *infra*, p.60.

69 Although of course this will depend on whether it can be established that the police have a duty to respond to a call or provide adequate protection. There is American authority to the effect that they do. See the discussion in Graycar and Morgan (1990), pp.277 - 298. C.f. Schauerman (1992) who writes on establishment of a tort duty for police failure to respond to domestic violence.

70 Goolkasian (1987), p.282.

of family violence may remain destitute. If civil remedies are to be made a real option for all survivors regardless of income, then these difficulties will have to be addressed.

4.4 Interdicts

Interdicts are orders which can anticipate family violence and constrain the movements and actions of a potential abuser accordingly. In other countries, interdicts are variously described as 'injunctions', 'non-molestation orders' and 'civil protection orders'. The consequences of breach of an interdict varies from jurisdiction to jurisdiction, but is usually punishable by community service, a fine or a maximum short term of imprisonment.

An interdict seems to have several advantages. A survivor of family violence is given some sense of security, knowing that a court order has been given, forbidding the abuser to approach her and that, should the order be breached, penalties will be imposed by the court. Another advantage would seem to be that the abuser himself benefits from being arrested and detained at an early stage, possibly before irreparable damage is done. Finally, an interdict places affirmative duty on police to act in the event of breach.⁷¹ However, upon closer examination the desirability of seeking an interdict may be questionable.

Firstly, while a court order may provide a survivor with peace of mind, the extent to which it provides her with actual protection is debatable. One study has suggested that one in ten women may be beaten simply because they have obtained the equivalent of an interdict.⁷² Secondly, as an abuser will be arrested only on further breach of the interdict, any survivor who cannot call for help at that time is in great danger. Accordingly, those women in rural areas and townships without ready access to a telephone and where police numbers are limited are most at risk under an interdicts system.

Moreover, while in theory arresting the offender at an early stage may break the cycle of violence, initiating a contrition stage and reconciliation, an arrest is unlikely to have significant impact where an abuser has previous convictions or has connections with the police.⁷³ Finally, there remains the danger that an interdicts procedure will deter police from making immediate arrests at the scene of an incident, requiring a survivor to seek an interdict which

71 Bradburn (1992), p.288.

72 Ferraro in Bart and Moran (1993), p.173.

73 Fedler and Malifani (1994), pp.5 - 8.

must be breached before they respond. There is little statistical data on these points and further investigative research is required.

Enthusiasm for this form of protection varies across jurisdictions in which it is employed. One writer in the United States suggests that over 80% of abusers obey a restraining order.⁷⁴ However, in a later American article, civil protection orders have been criticised on the basis that they are violated frequently, often fail to prevent further violence and seldom give rise to arrests or effective sanctions for violation.⁷⁵ The statistics seem difficult to verify.

One suggestion is that any protection orders should be complemented by substantial monitoring and enforcement efforts, as well as strict punishments for violations. Another suggestion is that where the allegations and evidence supporting an application for a protection order or interdict would be sufficient to support a criminal charge, parallel criminal proceedings should be encouraged, either by the police or by the judge hearing the application.⁷⁶

The equivalent 'non-molestation' orders in Britain have been criticised by the Law Commission Report *Domestic Violence and Occupation of the Matrimonial Home* (Law Commission No.207). However, the Law Commission recommends retaining but modifying the form and implementation of these orders. For example, the range of those eligible to apply for an order is to be extended. This issue is also relevant within the ambit of the Prevention of Family Violence Act and will be considered later in that context.

4.6 Conclusion

It seems that as no single legal solution emerges, 'the ideal approach to domestic violence involves co-ordinated and ready access for victims to all of the traditional mechanisms.'⁷⁷ It emerges that a realistic legal approach to problems arising from family violence would recognise the victim's various needs and cater to these going on and beyond the interdict system implemented by the Prevention of Family Violence Act.

In addition, supplementary measures are required.⁷⁸ These include modification of court procedures to facilitate effective representation of the survivor, but go beyond these to include exhaustive community education, improved access to shelters, hospitals, legal aid and related support services.

74 Bradburn (1992), p.278.

75 Harvard Law Review Editors (1993), pp.1509 - 1511.

76 Harvard Law Review Editors (1993), p.1514.

77 Harvard Law Review Editors (1993), p.1514.

78 As the United Nations *Resource Manual* states at p.48, 'an interdisciplinary approach is required.'

It should also be noted that divorce and maintenance proceedings, while not directly addressing the issue of family violence, may be vital in terms of securing a survivor's legal independence and securing sufficient financial support for any children.

THE CONTENT OF THE PREVENTION OF FAMILY VIOLENCE ACT

5.1 Existing Legal Remedies

The Prevention of Family Violence Act is the end result of debate over two draft bills, the Prevention of Domestic Violence Bill and the Prevention of Family Violence Bill. The Explanatory Memorandum to the Prevention of Domestic Violence Bill stated that the Act was intended to supplement existing legal remedies.

5.1.a Criminal Liability

Criminal liability for family violence has not been superseded by the Act.⁷⁹ Charges may still be laid in terms of the Criminal Procedure Act 51 of 1977, but the Explanatory Memorandum to the Prevention of Domestic Violence Bill noted that family members often were reluctant to testify or lay charges. No provision is made now or was then for requiring police to lay charges independently of women's consent or testimony.⁸⁰

The one major development in the criminal law, contained within the Prevention of Family Violence Act, is the introduction of provisions which criminalise rape within marriage.⁸¹ Initially, the first draft bill stated that where a man had assaulted his wife and, but for their marriage, could be considered to have raped her this could be treated as an aggravating factor. Also, if the marriage had broken down and the parties were living apart a man could be convicted of the rape of his wife. The second draft bill modified these provisions, and stated that 'a husband may be convicted of the rape of his wife', but could only be prosecuted with the written consent of an attorney-general.⁸² This latter requirement was dropped from the present Act.

79 See for example, Cape Times, 11/8/94, 'Wife-beating husband jailed'.

80 Moreover, a resident of the Salvation Army Battered Women's Shelter stated that she actually had difficulty gaining the assistance of police in laying a charge. See Appendix 1, p.5.

81 PFVA, section 5.

82 The Prevention of Family Violence Bill, clause 5.

However, the final Act failed to address the problem of substantiating the charge. Criminal law remains notorious for the way in which it treats rape survivors.⁸³ A complainant's testimony remains subject to the cautionary rule, which means that her credibility is treated with caution and her past sexual history is open to scrutiny (s.2 Criminal Law and Criminal Procedure Amendment Act 39 of 1989). It has always been difficult to establish rape in a relationship of past intimacy, and the PFVA does nothing to remedy this.

5.1.b Civil Liability, Interdicts and Peace Orders

Civil action for injury to the person remains available to a survivor of family violence, but it is an avenue of legal redress which seems to exist in theory rather than practice.⁸⁴ The Explanatory Memorandum to the first draft bill refers to existing 'civil procedures', but in fact seems to refer to interdicts previously available in the Supreme Court.

These were noted by the Memorandum to be 'cumbersome, unpractical (sic) and expensive'. An application cost at least R2000 and therefore was not accessible to the majority of survivors of family violence. Moreover, urgency was required if a Supreme Court interdict was to be granted. This caused problems. One senior Supreme Court Staff member was reported in 1992 as stating that, if a woman had been beaten for months, it was difficult to see the requisite urgency of an interdict application.⁸⁵

Peace orders, available in Magistrate's Courts, were more commonly sought. However, in the eyes of many, this legal remedy attempted to reduce family violence to the level of a petty disturbance, such as a dog barking. In line with this, penalties for breach of a peace order were initially minor.⁸⁶ However, in 1992, they were increased from a R50 maximum fine and one month's imprisonment to R2000 maximum fine and six months imprisonment.⁸⁷ The first draft bill on Prevention of Domestic Violence sought to retain these remedies for breach of an interdict,⁸⁸ but in later drafts penalties were raised to an unlimited fine and a period of imprisonment of up to 12 months.⁸⁹

83 Fedler and Malifani (1994), p.8.

84 Appendix 2, p.3.

85 Ross, p.13. Lee Anne De La Hunt of Legal Aid at University of Cape Town stated that the centre had started to seek interdicts in the Magistrate's Courts prior to the introduction of the Act precisely for those reasons. See Appendix 3, p.1.

86 Ross, p.12.

87 The Criminal Law Amendment Act 4 of 1992 amended s.384 of the Criminal Procedure Act 56 of 1955.

88 The Prevention of Domestic Violence Bill, clause 7.

89 PFVA, section 6.

5.1.c Divorce and Maintenance

Divorce and maintenance actions have, of course, always been possible. Past violence by one spouse may be relevant in a divorce case under the Divorce Act, clause 9(1) which allows the court to make an order that the patrimonial benefits of the marriage be forfeited in favour of the other, where there has been 'substantial' misconduct. However, this provision has little relevance where the parties lack significant marital assets. For the most part, divorce merely secures a survivor's legal and economic independence. Maintenance actions can ensure financial support for children.

Neither divorce or maintenance actions are mentioned by the Prevention of Family Violence Act, so that there is no co-ordination of judicial jurisdiction where a divorce or maintenance claim has a background involving family violence.

In fact, this could be said of all other extant legal remedies. It remains unclear how criminal and civil actions are to be co-ordinated with the interdicts procedure and the availability of the once commonly granted peace order also remains uncertain.

The introduction of the bills and rapid passage of the Act through Parliament was criticised for its speed and the government's lack of consultation in introducing this politically expedient measure.⁹⁰ There were certain changes to the draft bills in response to submissions on, for example, the term 'domestic violence' and provisions dealing with marital rape.⁹¹ However, the government of the day overlooked the call of various community organisations and academic groups for an overall legislative and social programme which would address comprehensively issues of domestic violence. For this reason, the limitations of the Act as it came into force in December 1993 are readily apparent.

5.2 The Interdict Procedure

The Act makes provision for the offence of marital rape⁹² and ill-treatment of children,⁹³ but its focus and the focus of this paper is the availability of interdicts in the Magistrate's Courts.

90 See, for example, Representations from the University of Cape Town Caucus on Law and Gender (COLAG) on the Prevention of Domestic Violence Draft Bill (1993).

91 It was suggested in certain submissions that the term 'domestic violence' suggested that violence against women in the home was somehow less serious than other forms of violence and that the term reinforced the standard legal divide between the public and the private to the detriment of women.

Briefly, to repeat what has been set out in the introduction to this paper, the Act makes it possible for a party in a marriage (be that marriage civil, customary or de facto), to seek an interdict in the Magistrates' Courts.⁹⁴ Any one authorised by the applicant also may make an application upon the applicant's behalf.

At the time an interdict is granted, a conditional warrant is issued for the respondent's arrest.⁹⁵ The interdict is of no effect until it is served upon the respondent, with the order stating the conditions upon which the respondent will be subject to arrest.⁹⁶ Provision is made for the respondent to apply for the amendment or setting aside of the interdict.⁹⁷

When the interdict has been breached the applicant must file an affidavit at the police station, enabling the police to execute the warrant and arrest the respondent. The respondent may then be placed in custody and is to be brought before the magistrate for sentencing within 24 hours.⁹⁸

A person who contravenes an interdict (or fails to report the ill-treatment of children) is guilty of an offence and liable on conviction to a fine or sentence of imprisonment or both. Contravention of an interdict is punishable by a fine (not limited by the Act) and a period of imprisonment not exceeding 12 months.⁹⁹ However, in practice certain magistrates have been more innovative in their sentencing practices.¹⁰⁰

5.3 Limitations of the Act

The brief summary given above might suggest that the Act is straightforward, easily understood and comprehensive. However, the Act has certain limitations, some more severe than others.¹⁰¹

93 PFVA, section 4.

94 PFVA, Section 2.

95 PFVA, section 2(2).

96 PFVA, section 2(3).

97 PFVA, section 2(2)(c).

98 PFVA, section 3.

99 PFVA, section 6.

100 Such as counselling. See Appendix 2, interview with Jane Keen, pp.4 - 5.

101 The points made below were extracted over a series of meetings with women in Cape Town at Lawyer's for Human Rights, University of Cape Town Legal Aid Clinic, Rape Crisis, NICRO, and the Salvation Army Battered Women's Shelter. See Appendices attached. See also submissions on the draft Bills, such as those provided by the Cape Attorneys Association, University of Cape Town Caucus on Law and Gender (COLAG) and Desiree Hansson of the Cape Town Institute of Criminology.

5.3.a Ambit of the Act

Only 'parties to a marriage' may bring an application for an interdict under the Act. Section 1 of the Act restricts this class to 'a man and a woman' either married according to law or custom or who have lived in a de facto relationship.

Same-sex couples, couples who have been intimately involved but have never lived together, parents and, to some extent, children, are excluded from the ambit of this piece of legislation. Violence within the domestic context, the family and close personal relationships therefore is not addressed comprehensively by this Act.¹⁰²

5.3.b Definition of Violence

There is no definition of 'violence' in the Act, nor is there any reference to the grounds upon which an interdict should be granted.¹⁰³ One problem identified in the United States has been that a survivor must prove that a substantial degree of violence has been used against them before she becomes eligible for a restraining order. Some judges are suspicious of women's 'ulterior motives' in seeking such an order.¹⁰⁴ One important issue is whether in practice, the lack of clarity in the PFVA will lead to similar burdens of proof being placed upon South African women.

Magistrate's Courts in the Cape have tended not to require that applicants prove that they have experienced severe violence. They do not require photographs, police reports, or doctors' records, appreciating the urgency of the application makes securing these difficult. But affidavits set out a history of family violence, without which it appears that an application will not be granted.¹⁰⁵ A worker at the NICRO Battered Women's Programme in Cape Town had recently carried out a series of interviews with local magistrates, one of whom suggested that the openness of the Act was actually desirable, as it gave each magistrate the opportunity to exercise their discretion in dealing with the individual case.¹⁰⁶

However, there have been suggestions that the interdict system is not working as well as in other regions. 'Lawyers for Human Rights' has sent out

a list of questions to its branch offices to investigate the relative success of applications in other areas.¹⁰⁷

5.3.c Content of Interdicts Granted

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.

However, the greatest problem, identified by magistrates, is that they are unclear as to their authority to either make an order modifying existing access orders or to make an order evicting a respondent from property which he owns (whether it be solely or jointly).¹⁰⁸ Eviction orders were also problematic when interdicts were granted solely by the Supreme Court.¹⁰⁹ The Supreme Court was reluctant to grant such orders and this reluctance has not abated in the past year.¹¹⁰ Moreover, granting an application affecting an existing access order may, strictly speaking, impinge upon Supreme Court jurisdiction, by which such orders were originally made.

However, in the interests of common sense, it seems vital that a magistrate, convinced of past violence and recent threats, can take action to protect the survivor and her children. Arguably, where there is a serious risk to life, protection of the applicant and children should take priority over property rights, that is, an eviction order should be granted. Moreover, where an access order is in issue, a magistrate hearing the application for an interdict may have access to information unavailable to the judge who heard the initial application for access. With superior information at their disposal, magistrates must act to prevent serious physical harm to either the survivor or her children.¹¹¹

These issues need to be resolved directly, possibly by Magistrate's Courts agreeing on uniform practice, although legislative reform is preferable. Most preferable would be the establishment of a forum where interdicts, divorce and custody issues could be heard together, such as a Family Court.¹¹² This

¹⁰⁷ See questionnaire attached as Appendix 4.

¹⁰⁸ Delcarme (1994), pp.6 - 7; Appendix 2, pp.1 - 2.

¹⁰⁹ Pillay (1993), p.62.

¹¹⁰ Delcarme (1994), pp.6 - 7.

¹¹¹ See Appendix 2, p.2; see also Graycar and Morgan (1990) who report, at pp.293 - 294, horrifying consequences of continuing access where there was a history of violence and recent threats against mother and child.

¹¹² *Infra*, p.58.

¹⁰² Delcarme (1994), pp.3 - 4. *C.f.* Legislation in New South Wales, South Australia, Western Australia and Tasmania where the range of applicants is unlimited and any one may apply for an 'apprehended order'.

¹⁰³ See PFV Act, section 2.

¹⁰⁴ Bradburn (1992), p.274.

¹⁰⁵ Appendix 2, p.1.

¹⁰⁶ Appendix 2, p.2.

would avoid problems of 'treading on the toes' of another court's jurisdiction and simplify matters considerably.

5.3.d *Recourse to Appeal*

There is nothing in the legislation which states whether or how an appeal may be brought, when a magistrate refuses to grant an interdict or refuses the respondent's application to set aside or modify the affidavit. Some such provision should be made either by legislative amendment or by magistrates' practice and the public advised of their rights.

5.3.e *Civil Orientation of Act*

It has been suggested that the civil, rather than criminal orientation of the Act should be of concern, as it detracts from recognition of family violence as criminal conduct.¹¹³ However, interdicts or injunctions are civil orders with criminal penalties for breach. Usually, these criminal penalties arise because breach of a court order constitutes contempt of court, but the PFVA provides statutory penalties. In this sense, the Act traverses the civil and the criminal.

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. The problem with the PFVA is that 'it is only *after* an interdict has been granted and the person is about to or again commits this type of breach, that an arrest can be made and sanctions can be imposed by the courts.'¹¹⁴ It has been argued that 'the Court should have the power to punish an individual the very first time violence is perpetrated.'¹¹⁵ Indeed, one magistrate has been known to take the initiative and suggest to an applicant that the facts in the interdict suggested that criminal charges should be brought.¹¹⁶

However, the Act is curious in that it places no duty upon police to respond to a domestic incident, unless an affidavit in the proper form has been signed and delivered to them, stating that the interdict has been breached.¹¹⁷ Even then section 3(1) PFVA only states that, upon receipt of the affidavit, the police officer *may* execute the conditional warrant of arrest, leaving the officer with discretion as to actual execution.

Indeed, it would be interesting to investigate current police attitudes to cases of family violence.¹¹⁸ Reluctance to intervene in family disputes may be compounded by the current spate of police killings and the physical danger involved in intervention where family violence takes place in township areas or squatter camps. Moreover, it must be noted that targets of violence in such areas may have difficulty contacting police, in any case.

In London, the Metropolitan Police have established 62 domestic violence units staffed by trained officers whose primary function is to offer protection for the victim.¹¹⁹ There has been talk in South Africa of setting up 'Family Violence Units', comparable to the present 'Child Protection Unit', but nothing has yet been confirmed. On-going education programmes are also underway.¹²⁰ Nevertheless, it seems that police duties in relation to family violence must be clarified, either by an internal policy document or legislative amendment.

It should be added that one solitary piece of legislation relating to interdicts cannot address the multiplicity of problems faced by survivors of family violence. As noted earlier, a co-ordinated response is required, one which provides a range of options for legal redress and also meets the material needs of the women concerned in terms of food, shelter, transport, hospital care and other necessities.

To this extent the PFVA cannot adequately address problems of family violence. In this sense its content is inevitably flawed. Yet, as it is the only legislation relating to family violence in South Africa at present, it is important to investigate how it operates in practice.

113 See *supra*, p.19 *et seq.*

114 Sarkin (1993), p.288.

115 Sarkin (1993), p.289.

116 Appendix 2, p.2.

117 Hansson, p.13.

118 Police attitudes have been criticised by social workers and organisers in this field. See Appendix 1, pp.2 - 3 and p.5; Appendix 2, p.4; Appendix 3, pp.1 - 2.

119 Edwards and Halpern (1992), p.798.

120 Appendix 2, p.4.

PRACTICAL AND PROCEDURAL PROBLEMS WITH IMPLEMENTATION OF THE ACT

Superficially, it might seem that the Prevention of Family Violence Act has been a successful initiative. An issue of *Femina*, in April 1994 recorded that, between 1 December and 25 January, 300 women in Cape Town had gained injunctions. Nevertheless, the success of the Act is, in part, illusory and merits further examination.

6.1 Access to the Courts

It has been said that 'the arrogance of the legislation lies in its assumption that people trust it and people will use it.'¹²¹ Barriers to utilising the legislation are not addressed by the PFVA. In particular, it seems that if survivors of family violence are to have real access to the courts and the interdicts system, the issues of education, cost and urgency must be addressed.

6.1.a Education

If survivors of family violence are to have access to the interdicts system provided by the Magistrate's Courts, they must at least be made aware of its existence. This entails a comprehensive community and school education programme, for which state funding will ultimately be required. It is also vital to educate the police about the availability of interdicts, so that they can inform a potential applicant of her options in a time of crisis. Social workers at one battered women's shelter in Cape Town were adamant that this study should stress that 'training helps'.¹²²

6.1.b Costs

The costs of making an application must not be prohibitive. Many applicants without an independent income will require free legal assistance if they are to make a potentially successful application. Either court staff should be made

¹²¹ Fedler and Malifani (1994), p.1.

¹²² Appendix 1, p.3.

available to assist them, or legal aid clinics should be equipped to provide this assistance. To some extent this is already happening,¹²³ but some consistent overall system of providing adequate assistance and advice should be agreed upon and made known to applicants. Moreover, the financial costs faced by those living in rural areas, for example, the cost of transport to an urban centre where Magistrate's Courts are situated, need to be examined.

The chief problem encountered by many applicants is the sheriff's fee for service. This fee varies according to the difficulty of service. Apparently, magistrates can order that the court shall pay these fees, but many survivors are left in ignorance of this option.¹²⁴ Also, some police have been co-operative in service of interdicts, but this seems to be an anomaly rather than the rule.¹²⁵ Again, a uniform solution should be agreed upon and applicants made aware of the options open to them.

6.1.c Urgency

Finally, there remains the problem of urgency. Most violent family incidents take place during the weekend or in the evening when courts are not in session.¹²⁶ 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.¹²⁷ However, in practice, it seems that this system is seldom put into operation. 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. Again, it seems that if urgent applications are to be heard police need to be educated about the interdicts system and how to assist with an urgent application.¹²⁸

6.2 Alleged Procedural Unfairness - Hearing of Applications Ex Parte

It has been argued that granting a final interdict by ex parte application, accompanied by evidence in the form of an affidavit, constitutes a breach of the *audi alteram partem* rule.¹²⁹

¹²³ Delcarme (1994), pp.5 - 6.

¹²⁴ See Appendix 1, p.5; Appendix 2, p.3.

¹²⁵ Delcarme (1994), p.11.

¹²⁶ Bradburn (1992), p.273.

¹²⁷ Appendix 3, p.1.

¹²⁸ Appendix 2, p.2.

¹²⁹ Dicker (1994).

The issue of ex parte applications has been considered by courts in the United States, albeit in relation to interim injunctions which contain return dates. A series of decisions have established that an important public interest or a special need for protection can sustain such an application.¹³⁰ Obviously, a survivor of family violence has special need of immediate protection and it is arguably in the public interest that such protection be provided.

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. However, this 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.¹³¹

The lack of oral evidence and focus upon affidavit, which has been identified as a problem, is common in making any ex parte application before a judge. Moreover, it is vital in the context of family violence, where the sheer volume of applications is such that to have a full oral hearing would preclude magistrates hearing the bulk of cases. Moreover, although Leon Dicker suggests that lack of legal representation creates a further barrier to procedural justice, this is only true in one sense. Lack of legal obfuscation and the absence of lawyers' fees can, where court procedures are simple, facilitate access to the courts rather than preclude it. What is needed here is not legal representation in court with all the costs that this will entail, but capable assistance in drafting an affidavit. It may be also helpful, if a magistrate requires more information, to invite the parties in separately and informally so that they may explain the statements made.

¹³⁰ *Fuentes v Shevin* 407 US 67 (1972); *Mitchell v WT Grant Co* 416 US 600 (1974); *Matthews v Eldridge* 424 US 319 (1976).

¹³¹ PFVA, section 2(2)(c). Moreover, as the UK Law Commission Report 207 (1992) commented at p.27, '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 non-molestation orders should continue to be capable of enduring beyond the end of a relationship...'

PENALTIES UNDER THE ACT

Section 6 of the Prevention of Family Violence Act provides, inter alia, that contravention of an interdict constitutes an offence, punishable by a fine or imprisonment for a period not exceeding 12 months. The degree to which these penalties are imposed is left to a magistrate's discretion. The problem remains as to how such discretion should be exercised.

A recent educative talk at the University of Cape Town suggested that this was not a punitive statute. Its purpose was to place the respondent under arrest to 'cool off' before any harm was done and to assist in a switch to a 'contrition' stage.¹³² Others suggest that where the breach involved violence of a criminal nature, such as physical assault, the full penal force of the Act should be brought to bear.¹³³

7.1 Fines

Where the abuser is the sole supporter of the household, imposing a fine will have an impact on family finances, affecting the survivor and, possibly any children involved. It therefore seems vital that a fine is imposed only with caution. Moreover, it may not be desirable for a fine is paid to the state when the survivor of family violence is herself struggling on subsistence level. It may accordingly be desirable to order some form of restitution rather than a straightforward fine.

7.2 Imprisonment

Again, the effect of imprisonment on the family where the abuser is the sole carner must be considered. The difficulty lies in weighing the likelihood that violence will reoccur against the family's loss of financial support. Further information from the survivor and other family members may be useful in this regard.

¹³² Lawyers for Human Rights, Ilze Olckers speaking at UCT 17/8/94.

¹³³ Policy on the Criminal Justice System Response to *Violence Against Women and Children: Part 1*, Ministry of the Attorney General (Canada) (1993).

There is one school of thought which says that imprisonment has the effect of shock value. An offender will realise that violence within the family is in fact a crime and not reoffend. Others think this view is naive. Those who are already hardened offenders are unlikely to change and rehabilitation is unlikely within prison walls.

Fedler and Malifani suggest that offenders in cases of family violence tend to fall into three classifications. Type A who has never been in jail and will back down if confronted, Type B who has had brushes with the law, is unpredictable by nature and might lose his temper if confronted and Type C abusers who have no fear of the law and who can in no way be stopped. Fedler and Malifani recommend different courses of action to survivors of family violence on the basis of the classification of the offender.¹³⁴ I do not think the law should reflect these classifications, at least in sentencing practice.¹³⁵ The human psyche has a tendency to defy precise classification. To make a faulty classification could be to risk someone's life. For this reason, sentencing patterns should be uniform; in particular, reoffending and the actual degree of violence used should be recognised.

There are three possible alternatives to imposing standard prison sentences. One is community service, which has some punitive value without disrupting the family. However, it may be seen as a very mild penalty and has minimal value as a deterrent.

A second and possibly preferable alternative is periodic detention, i.e. imprisonment over weekends only. This may be desirable in that it keeps the offender away from the survivor over the very time when research suggests that violence is most likely to erupt. Moreover, it allows for the possibility of rehabilitative counselling and even the possibility of eventual reconciliation.

A final alternative, to which magistrates in the Cape seem to have been attracted, is the suspended sentence.¹³⁶ However, such a sentence may have disastrous repercussions. Interestingly, a suspended sentence featured in one recent case, reported in the Cape Times.¹³⁷

A husband had indecently assaulted his wife, knocked her head against a wall, hit her with a spade and threatened to hang her. He had also put his wife on a lead, made her crawl on all fours and bark like a dog in front of their three children after sodomising her on the kitchen table. These offences were

committed while serving a suspended sentence for beating her with a sjambok in August 1993, and awaiting trial on two charges of indecent assault. Although the husband was eventually sentenced to eleven years' imprisonment, one wonders whether earlier preventative action could not have been taken by the courts. The survivor's initial complaints do not appear to have been treated seriously, leading to renewed and vicious abuse.

It is submitted that magistrates can and should explore sentencing options other than a straightforward term of imprisonment, but that a suspended sentence may not be the preferable alternative. Periodic detention and community service should also be considered.

7.3 Rehabilitation and Counselling

Anger-management counselling may be another option. For example, Dr Anshu Padayachee of Durban's Advice Desk for Abused Women agrees that abusers should be encouraged to undergo some form of treatment or counselling.¹³⁸ However, it remains questionable whether counselling should be the sole remedial action taken.¹³⁹ It may be most effective as part of a sentence which, for example, includes community service, periodic detention and a suspended sentence.¹⁴⁰

¹³⁴ Fedler and Malifani (1994), pp.5 - 7.

¹³⁵ Nor indeed do Fedler and Malifani, who merely use these as an illustration of the limited extent to which the interdict impacts upon certain cases of family violence.

¹³⁶ Delcarme (1994), pp. 12 - 13.

¹³⁷ Cape Times, 11/8/94, 'Wife-beating husband jailed'.

¹³⁸ Thamm (1994), p.75.

¹³⁹ See supra, pp.18 - 21.

¹⁴⁰ See Jane Keen's comments in a NICRO interview recorded in Appendix 2, p.4.

PROPOSALS

On the basis of the comments made above, it seems appropriate to make the following proposals:

8.1 Monitoring the Operation of the Act and Further Research

It is necessary to continue to monitor the operation of the Prevention of Family Violence Act. This paper merely provides an introduction to the issues. Further empirical research should be co-ordinated across the country, to assess its impact. It may be worthwhile lobbying government to provide funds to assist such a project.

8.2 Legislative Changes

The scope of the PFVA needs to be widened to include persons in a wider range of family and inter-personal relationships.

Other possible amendments include:

- clarification of the violence the Act is intended to address and the grounds upon which a Magistrate may grant an interdict;
- specific provision for modification of orders concerning access to children in cases of imminent danger to mother or child;
- modification of the penalties listed in the Act so as to include compulsory counselling and periodic detention;
- detailed provisions, either in the Act or Regulations, stating how one may apply for sheriffs' fees to be waived;
- provision for police to arrest a violent abuser without a second affidavit being sworn where the circumstances clearly warrant the action;
- clarification of the appropriate appeal process; and
- providing for a return date for interdicts, if this will assist in persuading magistrates and the rest of the legal profession of the procedural fairness of the interdict process.

8.3 Introduction of a Family Court

This paper has outlined a variety of means by which survivors of family violence might wish to seek legal redress. It is submitted that to do so in one single court would ease the potential clash between different judgments and different jurisdictions. Co-ordination of divorce, maintenance, access, civil and criminal proceedings as well as applications for interdicts might lead to a fuller understanding of the survivor's circumstances and the family context. In addition, staff and judges (or magistrates) could receive specialised training in family issues. This is not an entirely novel idea, one example of such a system being the Family Court in New Zealand.¹⁴¹

8.4 Operation of the Act

Magistrates themselves may need to take initiatives, so as to ensure that the Act operates effectively in practice, rather than in theory. Such initiatives may include:

- providing uniform guidelines to applicants and legal aid clinics as to the grounds upon which interdicts will be granted;
- granting eviction orders as provided for by PFVA, section 2(1)(b);
- issuing interdicts which have the effect of modifying orders relating to access to children where there is a likelihood of significant harm to parent or child if such access arrangements continue;
- suggesting to applicants that they bring criminal charges when the facts stated in their affidavit suggest that a crime has been committed;
- participating in community and other education programmes which will promote awareness of the availability of interdicts;
- ensuring that impoverished applicants will not be required to pay a sheriff's fee for service of the interdict;
- responding to urgent applications for interdicts;
- hearing oral evidence from the applicant or respondent when this will clarify the content of affidavits or applications;
- imposing penalties for breach of interdict which are sensitive to the needs of the survivor of family violence and other members of the family.

¹⁴¹ See the Family Proceedings Act 1980 (NZ).

8.5 Clarification of the Police's Role

The United Nations *Resource Manual* calls for clarification of the police's role so as to overcome their reluctance to respond to domestic violence.¹⁴² On the basis of the discussion contained in this paper, it is suggested that:

- the police respond to all calls to incidents of family violence;
- where a crime has taken place, the police arrest the perpetrator, regardless of the family context of the acts in question;
- the police actively assist a woman and, if necessary, her children to leave the scene of a violent incident if the abuser is not present, but is likely to return;
- the police provide an escort for women to return to the family home to collect their belongings;
- there be a clear policy statement providing grounds upon which police will exercise the discretion to execute a warrant of arrest upon receipt of an affidavit;
- police training be put in place to ensure that officers can respond effectively to family violence and advise a woman of the options open to her;
- a 'Family Violence Unit' be set up to specialise in cases of family violence and assist survivors; and
- special measures are taken to ensure effective police support for survivors of family violence in townships and rural areas.

8.6 Supplementary Services

In addition, state action will be required to address the following issues:

8.6.a The Cost of Legal Proceedings in Family Violence Cases

This might be tackled by making legal aid readily available to survivors of family violence. It would also involve modifying the present Legal Aid rule, so that past withdrawal of divorce proceedings would not prevent a survivor from seeking legal aid. State funding of volunteer legal assistance centres would also be effective in ensuring that affordable legal advice was available.

142 United Nations, *Resource Manual* (1993), pp.26 - 29.

8.6.b Funds for Survivors

Survivors of family violence need money in order to subsist. They will need to feed themselves, as well as any children. They may also require money for transport, for hospital services, for housing, to look for employment, or even to pay for childcare while they look for employment. It may be months before they receive a maintenance payment, if indeed they ever do, so that an emergency fund may be their only means of support.

8.6.c Housing

Short term shelters must be provided to assist survivors leaving a violent family situation. There is a marked lack of available shelters. For example, in Cape Town there is only one free shelter.¹⁴³ Also, survivors who leave the shelters will require long term housing.¹⁴⁴ In the face of a severe housing shortage, not to mention the lack of money to pay rent, they may be forced to return to an abusive relationship.¹⁴⁵ Serious consideration should be given to the means by which this problem may be tackled. One option may be to utilise the resources of local councils, but this requires further discussion.

8.6.d Health Care

Survivors of family violence often require urgent hospital care. They may also have long-term health problems which involve consulting a doctor regularly. This is prohibitively expensive for most survivors and it seems crucial that they receive free, or even subsidised, health care.

8.6.e Education

Access to legal redress is dependent on the knowledge that it is available. School and community education programmes could be implemented to ensure that every one is aware of action that may be taken in response to family violence. Special care should be taken to assist economically disadvantaged groups, as well as people in townships and rural areas.

In addition, training is required for all those working in the field of family violence, including court staff, lawyers, social workers, judges and magistrates.¹⁴⁶ Not only should they be aware of all avenues of legal redress, but

143 Appendix 1, p.1.

144 See United Nations, *Resource Manual* (1993), p.63.

145 Appendix 1, pp.6 - 7.

146 See Appendix 1, p.3; and Appendix 4, pp.1 - 2.

also have an understanding of the social aspects of problems faced by survivors.

8.7 Conclusion

This paper does not make any startling or novel observations. Instead, a variety of material on family violence has been collated with the hope that this may be presented in a readable form.

There are difficulties with the Prevention of Family Violence Act as it stands, and the amendments suggested above may go some way towards making the interdicts system more effective. However, the crucial point to take from this discussion is that a narrow, legalistic approach to the phenomena of family violence is unlikely to provide effective assistance to survivors. Instead, an 'overall, comprehensive long-term plan of action',¹⁴⁷ is required. The interdicts system implemented by the Prevention of Family Violence Act may play a part in such a plan of action, but cannot play the sole or even central role.

¹⁴⁷ Hansson, (1993); see also the co-ordinated police, judicial and social services response advocated by Gamache, Edleson and Schock in Hotaling et al 91988), pp.193 - 209.

Appendix 1

INTERVIEW 16/8/94: 'CAREHAVEN'

Salvation Army Shelter for Battered Women

Synnov Skorge

Veronica Libbie

ph: 633 5287

Organisation of shelter

The shelter makes provision for 17 women and 30 - 40 children. It is funded entirely by the Salvation Army. The shelter provides the only entirely free shelter in Cape Town. Women are asked to contribute their own food and R50 - R150 housing costs. However, if they cannot make this contribution, food and housing is provided in any case. This makes the project expensive, because they provide for the most needy.

Women are accepted into the shelter after an 'assessment interview' in which they provide their history of abuse. Sometimes after an episode of domestic abuse, the police will drop off a woman on their doorstep (and sometimes children with them!). However, although they will admit women in an emergency, they prefer not to do so. The preliminary assessment interviews allow them to make practical arrangements for women to move into the shelter, concerning schooling, jobs and what they will need to take with them.

There is a waiting list to enter the shelter. Women can stay for up to three months and are then supposed to find alternative accommodation. They never force a woman to leave until she is ready, so this period is sometimes extended, but they stress that exceptions are rare. They are now introducing a monthly review period to assist women in readying themselves for departure i.e. making plans for finding a job (or income) and housing upon leaving.

There is a 'big room' with a television, which is also where women receive counselling. Melanie Thomas and I met with some of the women living in the shelter in that room. It is not large.

There have been a couple of violent incidents at the shelter, but generally the location of the shelter and its occupants is secret. Recently, the police gave that information to a violent husband. The results are reported below.

There is also a school nearby which children living in the shelter can attend on a temporary basis. The headmistress is apparently sympathetic and allows the children living in the shelter to attend without being placed on the formal 'roll'.

About 50% of women who stay at the shelter return to their husbands or partners. However, Synnov stressed that none of the women who have lived at the shelter return unchanged. They have learnt about the options that are out there, that it is possible to live in a shelter, how they might get a divorce, interdict, how they might lay a criminal charge, they have also learnt about how they might make changes to their lives. Their view is that no one should judge what a woman should be doing and that it would be wrong to judge the success of the shelter on the basis of numbers of women who return to their husbands or partners or divorce rate.

They contrast their approach with that of the old Rape Crisis shelter where women, in their view, essentially had to undertake not to return to their husbands and apply for permanent separation or divorce. This was on the premise that batterers do not change. (They were also critical of Rape Crisis handling of admission interviews which were only given at a Thursday afternoon clinic without provision for flexibility).

Police response

Police often refer women to the shelter. The assessment interview records whether women have ever called the police and what the police's response was. If any researcher ever has a month to spare, they are welcome to analyse them. However, the view of Veronica and Synnov was that police responses varied.

One key problem is that there is no actual legal duty on police to intervene in cases of domestic violence. The police were uncertain what rights of immediate arrest they had in such cases. They were not pressing charges as the police could be liable for illegal detention. Legal changes were needed in this regard to make it clear what police responsibilities were. An internal policy document (if any such document exists) is not enough. Some did not even know what an interdict was.

Some police saw their job as protecting the children and keeping the family together rather than assisting the woman injured. Veronica and Synnov were once lectured by a policeman who criticised them for 'breaking up families' by allowing women refuge. On another occasion they were aware of, a woman had been badly injured by her husband, but the police refused to take

her away to lay a complaint. She was told to stay to take care of the children. They also report instances of police allowing the batterer to escape, rather than giving chase and making an arrest.

Another incident which caused considerable concern arose where a husband had reported his wife missing to the police. This does sometimes happen. In this case, the police found her at the shelter and tried to force her to leave and go back with them. She refused. The police then proceeded to tell the man where his wife was. He has since been harassing her at the shelter. Melanic and I spoke with her afterwards. She says she would like to be 'safe', that she lies awake at night afraid, that she is afraid to step outside the shelter because he is 'around outside'. She knows he has a job in the area. The police effectively destroyed her peace of mind and sense of safety in the one place she had, up until then been able to feel safe.

Women also often need police escorts to a hospital or to pick up belongings at home. Different levels of police co-operation made it difficult to predict when such support would be provided.

They asked me to stress in any report I made that training helps. The Mannenburg police received special training from, they think, NICRO. The results have been impressive. Mannenburg police have shown enthusiasm in assisting women in serving interdicts and tend to be more sensitive to complaints.

Interdicts and other legal responses

Very few women come with an interdict. The shelter makes arrangements for women to speak to a lawyer and provides the necessary letter of referral. The lawyer is Mr Carew (ph: 697 1241). The problem with referral to Legal Aid clinics is that they tend to refer to other clinics or lawyers or not take responsibility for cases. They attribute this to a lack of knowledge or disorganisation.

One particular problem is that few residents of the shelter have any money. Legal aid is available so long as a woman has children, but not otherwise. This is a new policy as of last year. The other problem is that women who initiate a Legal Aid funded divorce and then withdraw proceedings are then liable for their past legal costs and cannot claim legal aid again. The cycle of domestic violence is such that temporary reconciliation often takes place, the result being withdrawal of proceedings that is later regretted. Emotional and economic dependence often means that withdrawal by means of a phone call is due to coercion rather than the woman's choice.

There is a quick process for divorce available in the Supreme Court for women with no children, no assets, no job and no money. Childless women are encouraged to utilise this process as far as possible. (in forma pauperis)

Legal steps taken are left up to the women involved. Application for divorce seemed to be standard. Criminal charges and civil actions were less likely. Several women had applied for interdicts under the new PFV Act which had been granted, problems were in the cost of service, and the difficulty in finding the respondent. Breaches of interdicts were too often frequent and judges' sentencing response tended to be counselling with FAMSA (not always constructive).

The shelter assisted people in applying for affidavits and noted, in particular, that a clerk at Mitchell's Plain, Mr Davids was helpful. The only problem was that women were using interdicts to get rid of their boyfriends - a little hesitancy is now coming through.

The problem with interdicts as far as they are concerned is that a court order is not going to stop a boyfriend who is a gangster. The interdict cannot really provide safety. The most it can do is serve a woman as a psychological prop, to make her feel safe. Overall, Synnov was not impressed. Veronica was more supportive of the process, the intervention an interdict makes may prompt reconciliation. She cited a case of a man who was evicted via interdict, who by a longwinded route ended up seeking reconciliation.

Women are *not* aware of the possibility of waiver of the sheriffs' fees. They expect to have to pay at least R25.

Interestingly, while women may be misinformed of the procedure, they feel that men are too. Husbands seldom oppose interdict applications or try to vary an application, perhaps because they know their past conduct speaks for itself, but also because they do not know that they can do so, or how to go about it.

Counselling was offered to women if they wished. Joint family counselling was also an option. The counsellor would first meet the man and women separately, then if he considered it reasonable, the two of them together. The counsellor keeps in touch with the shelter to inform them of the progress. It was interesting to them that men's complaints about their wife's absence centred on performance of household chores. They had no clean trousers or had burnt the toast. They seldom said that they loved or needed their wives.

The main problem as far as the legal process is concerned is that women are still not seen as individuals with full rights. They are seen as adjuncts to their children and husbands, mothers and wives. Childcare is seen as the primary role of women. This is reflected in the approach of the Legal Aid

Board who do not provide legal aid to battered women unless they have children, and the interventions of the Family Advocates who try to keep 'families together' and protect the children at the expense of the woman's safety.

Financial problems

This is the biggest problem for women at the shelter. Even if they apply for maintenance and get it immediately, this takes three weeks. If maintenance is opposed it may take two to three months to get a court date, and even then the husband may refuse to pay. In fact, neither Synnov nor Veronica were aware of one successful maintenance case within the three months that women stayed with them.

There used to be a relief fund available to provide women with emergency cash, but now no money is available. Veronica stressed that this was very important for the women at the shelter.

MEETING WITH WOMEN RESIDENTS

There were six women and two social workers in the 'big room' where we met.

One woman, A, who remained standing, because of her injuries and the fact that sitting was painful, was the only woman in the room who had applied for an interdict. A was told to do so by a 'cop' at the police station after she had been badly beaten by her husband. She was taken to the court at Mannenburg where she spoke to Mr Davids, who told her to go to Legal Aid to get an affidavit, and then to return with an affidavit. She did so and filed for an interdict, the application was granted.

The police kept A waiting at the police station for two hours before taking her to a friend's house. She told them that she wanted to lay a charge, but no one helped her until she kicked up a fuss. She then laid a charge. The driver of the police car on the way home was sarcastic about being a taxi service, but helped her pick up her daughter (aged 5) from a neighbour's house and took her to a friend's home.

She has still not handed the interdict to the sheriff for service as she cannot afford transport or the sheriff's service fee.

Another woman, B, told her story relating to her husband having filed a missing person's report and her struggle with a police officer not to take her home. This story is noted above and an account had already been given to us by Synnov and Veronica.

We asked the women in the group whether there were any other matters they wanted raised in any policy document that would be forthcoming. They gave a list of the following:

(a) Hospital care

This is free to women at 'Carehaven' but not battered women generally. Also, medicines can be expensive. They want protection when they attend the hospital for fear that their husbands or partners will approach and hurt them and their friends. They also need transport to hospitals as they have no cars, and using public transport makes it more likely that they will see their abuser unprotected or a friend of the abuser.

(b) Transport

Women in a battered women's shelter need transport to buy food, to go to the doctor, to find work and keep working, to visit the sheriff, to go to court, etc.

(c) Money

Women need money to pay for food and housing (even though in exceptional cases the shelter will provide these). Money would also assist in the area of transport.

(d) Sympathy from police

They want help, not sarcasm or disbelief. They also think that the standard police line is that 'they don't want to get involved in something between husband and wife', but in fact they are scared of the husband, too.

(e) Legal aid

All women apply for a divorce upon entering the shelter which is funded by legal aid BUT not if they have at some time withdrawn an application for divorce funded by legal aid. A had done so, under physical coercion from her husband, and now wanted to recommence. They want access to easy, cheap (if not free) divorces.

(f) Somewhere to go

Women are only allowed to stay at the shelter for three months. They are afraid as to what will happen to them when they have to leave. Trying to find a job will be, for some of the older women, near impossible. One woman, C,

pointed out that special provision is made for the disabled in society, but not for us. 'What happens to us old ones.'

Some have children, but those children are not supportive of their decision to leave their father. B recalled an instance when one of her children had arranged to fetch her from a safe place, but her husband had turned up instead. (She had returned home to take care of her 26 year old daughter who was dying of cancer. She had thought that she would stay with her in any case, even if it meant being exposed to her husband's violence again, because she had taken it for so long in any case.)

Many of the men will not be able to provide maintenance, even in the long term, as they are unemployed. Without jobs or money, the women's hope of finding accommodation away from abusive partners is virtually nil. Without somewhere to go, they may be forced by economic necessity to return to violent domestic situations or live on the streets.

Appendix 2

NICRO INTERVIEWS

17 August 1994
Deolinda Delcarme
Jane Keen
ph: 221 690

INTERVIEW WITH DEOLINDA DELCARME

(1) *Background to Organisation and Programme*

Deolinda was brought in by NICRO to work on a pilot programme which involved providing legal advice to battered women. She is still doing articles, having just received her law degree. This has been operating only since 14/2/94. In that time over 160 women have been assisted by the programme.

The programme assists women who have been the targets of violence from partners or loved ones who wish to:

- obtain interdicts under the Prevention of Family Violence Act 1993
- obtain interdicts under the Supreme Court Rules
- obtain divorces
- obtain maintenance or custody orders

Deolinda and volunteers provide legal representation under the supervision of Legal Aid at UCT.

They also provide workshops to people working with abused women, including police social workers.

They do not liaise with shelters. It is strictly a legal assistance service, to enable them to cope with the bulk of cases.

(2) *Interdicts*

(a) *level of proof required/ affidavits*

Deolinda provided me with a standard form of interdict affidavit which is attached here. These affidavits have been used as precedents by students at UWC legal aid clinic and are used as examples of how to write an affidavit

by the Magistrate's Court at Mitchell's Plain. They always contain the history of abuse and the most recent incident.

She seldom provides medical records, photographs or police evidence because most interdicts are urgent and obtaining these things takes time. However, where they are available she appends them to the affidavit. Magistrates will readily grant an interdict without such evidence.

(b) *content of interdict granted*

Applications seldom contain a stalking clause unless there is good reason to make this additional application. The reason is that Magistrates are generally hesitant to grant them. In terms of section 2, Magistrates tend to grant interdicts enjoining the respondent not to assault or threaten the applicant (section 2(1)(a), and enjoining the respondent not to prevent the applicant or a child who ordinarily lives in the family home from entering or remaining in the family home or a specified part of the family home (section 2(1)(c)). They are more hesitant to evict the respondent from the family home under section 2(1)(b).

The other difficulty is the broad ambit of section 2(1)(d) which allows the Magistrate to enjoin the respondent 'not to commit any other act specified in the interdict'. Deolinda tends to use this provision for marital rape (c.f. section 5 of the Act)

Whether an interdict can suspend existing access orders remains a matter of controversy. Some Magistrates refuse to trespass on what they see as Supreme Court jurisdiction. Other Magistrates consider that the PFVA is there for a reason, and that they must balance the element of danger to the child against the safe route, (continuation of existing access orders). For example, the respondent may be using threats to the children to control the mother or may vent his frustration on the children. (Deolinda did not seem to contemplate that mere danger to the mother need be an issue).

Some court staff liaise with other courts to check how they respond to certain kinds or forms of applications. Some Magistrates stick by what they see as 'the letter of the law', others go with 'the spirit of the law' and are more innovative. One Magistrate (at Mitchell's Plain) told Deolinda in confidence that the vague quality of the Act is intentional and useful. The present form of the Act allows Magistrates to respond with sensitivity to the particular problem before them. Mitchell's Plain was most responsive to the Act because it was handling the largest no. of applications (over 800 c.f. 100 in Simonstown). E.g. Mitchell's Plain's arrangement with the Legal Aid office across the road which will help a woman draw up an affidavit free of charge. This

Magistrate's Court has also been innovative in terms of allowing oral evidence where an affidavit is unclear.

(c) urgency procedures

She is aware that in theory urgency procedures are up and running (after duty public prosecutors and magistrates are available). But in practice, police tend not to possess the necessary forms or are not aware of the procedures. Moreover, a lack of specialised staff on duty tends to lead the police to advise a woman to come back for an interdict first thing in the morning.

(d) criminal charges

Deolinda does know of one incident at Mitchell's Plain where the Magistrate recommended to the woman involved that she lay criminal charges, where she was having difficulty serving the interdict. She believes that when an interdict is given there is usually an assault charge pending.

Deolinda has also considered the problem of being punished twice for the same offence. Where a husband breaches the interdict by assaulting the wife and a wife lays a charge of assault, a dilemma might seem to come up whereby a sentence is given under PFVA proceedings and again on the assault charge. However, we agreed that there were two separate offences in such cases. The first was breach of the interdict (analogous to contempt of court) and the second was the actual assault itself. The same conduct can give rise to liability on more than one criminal count.

(e) sheriffs' costs

Deolinda was not clear on how sheriffs' service costs might be waived. Sometimes the court might pay the woman's service costs or the court staff might arrange for free police service. Even NICRO sometimes pays the costs of women's applications. But to avoid 'being taken advantage of', every one keeps the potential for avoiding sheriffs' costs quiet.

(3) Alternatives:

While NICRO assists women in laying criminal charges it will not help them to commence a civil action.

In fact, Deolinda did not seem aware of a delict which was available as this was not negligence or nuisance. She was not aware that an action could lie on the basis of injury to the person which was intentional. This seemed anomalous and, upon checking, it emerged that Deolinda's understanding of the law was flawed in this respect.

Her other reasons for not taking civil claims were more persuasive. The women she sees are most concerned about their immediate safety and emotional well-being. A protracted civil trial would not, in her view, be in their interests. She also made the practical point that where a husband has no money, there is no point commencing a civil suit.

INTERVIEW WITH JANE KEEN

(1) NICRO

NICRO is a national organisation with branches in most of the main centres. It has three branches in Cape Town. It attempts to tackle issues arising in three areas:

- offenders
- victims
- youth/justice

Work with offenders centres on alternative sentencing (e.g. diversion, community service etc.) NICRO also assists families where a person is in prison and assists people coming out of prison in terms of finding employment etc.

Their youth scheme concentrates on keeping children out of prison. They hold a juvenile school which is either voluntary or an alternative sentence.

Their only work with victims at the moment focuses upon battered women, because the issue was receiving so little attention 2 - 5 years ago. There is a phone in 'victim line' in some branches of NICRO.

50% of NICRO's funding is provided by government subsidy. The remainder comes from Community Chest and other minor sources.

The whole of the Cape Town project on battered women is new. They have been working on the issue of battered women since 1989, running training courses and workshops, but this particular project only commenced in February. The expansion into provision of legal services was funded by their existing funding; they are still looking for additional funding.

(2) Police Training

One worker at NICRO who has recently left, (Christopher Ferndale) had with community co-operation been involved in training the police at Mannenberg and Athlone about the Prevention of Family Violence Act. She was less positive about its success than Synnov at the Salvation Army Shelter. Her

impression was that the attitude of police officers varied considerably within any police station.

It has been agreed in principle that police in the Western Cape will receive training through the Police's Social Work Dept. They have recently had one initial meeting and will have more. Small local initiatives have also involved police, NICRO and the Red Cross.

NICRO has been pushing for special police units, but despite reports in the Cape Times suggesting that these will come into operation, Jane has heard nothing about them. This may be happening in Jo'burg, but she is not sure. The Child Protection Units are one aspect of the police force that have, in her view, been successful and a Family Violence Unit could be appropriate.

(3) Counselling

Jane was aware that certain magistrates had sent men to FAMSA counselling, to a Group for Abusers.

The person to speak to about this is apparently Charles Mazie at Catholic Welfare and Development (252 095 or 97).

In terms of sentencing options Jane is also aware of a recent example of an innovative sentence from a magistrate. He gave a combination of:

- a suspended sentence
- community sentence
- house arrest and
- counselling

Not aware of problems with mediation between battered women and their husbands, but are sure that it happens.

Appendix 3

INTERVIEW - LEE ANNE DE LA HUNT

15 August 1994

ph: 650 3551 (w)

fax: 650 2521

Interestingly, the Legal Aid Clinic at UCT started seeking interdicts last year under the MC Rules. Did, however, have problems with enforcement as police had never seen such orders before and doubted their validity. But much, much cheaper.

(1) Procedure for Interdict Applications

In terms of orders sought, Legal Aid varies its requests acc. to ostensible need.

Legal Aid has sought a 'stalking' order as part of the interdict procedure, where a man was pursuing a woman at work as well as at home. However, this was the exception rather than the rule.

The procedure for urgent applications was read to me by Lee Anne, translating from Afrikaans. She acquired the internal police memo at a NICRO liaison meeting with police last week. She herself has never handled an after hours application other than last year, through the Supreme Court.

The police memo basically stated the following:

- (a) The person making the application must fill in the application for the interdict and bring it to the attention of the policeman on duty at the police station. (Not clear whether police would in these circumstances assist in drawing up the application).
- (b) The policeman must then telephone the on-duty prosecutor, who in turn will telephone the magistrate on duty and arrange a hearing.
- (c) If the application is successful, the Magistrate will issue the interdict and conditional warrant for arrest as per the Prevention of Family Violence Act No.133 1993 (PFVA).
- (d) This emergency procedure is to be available weekends and public holidays.

The problem with the urgent interdict process therefore lies with the efficiency of sheriffs' service rather than the initial process.

Problem is their tariffs which can rise over and above the staple R 21 where respondent difficult to track down. Applicants have to make an application to waive the fee, but in her opinion tended not to know about it. We even had difficulty finding what provision of MC Rules covered such an application (R 53 does not apply to disbursements).

As to how the police deal with the actual process of executing the conditional warrant, LA has no idea how that works in practice. E.g. whether women are assisted by police in drafting their affidavits.

If a woman wishes to lay a criminal charge a docket must be opened and all std procedures followed. No apparent encouragement from magistrates on the basis of affidavit before her/him to issue a criminal complaint.

(2) Court hearings and their workings

Lee Anne has come across male applicants. The Clinic is actually representing women resisting these applications. Legal Aid workers handling these cases are: Heidi Stegman and Soraya. She can see no problem enforcing interdicts across magistrate's jurisdictions. If this is a problem in Natal, as rumoured, she cannot think why (at least in terms of the Act).

Worth checking with clinic run by two women at Durban-Westville relating to PFVA. (Anshu Padayachee)

(3) Follow up?

Lee Anne has no idea as to no.s who come back asking for execution of arrest. Does consider that a lack of pamphlet information means that women leave the court without the interdict and conditional warrant as required, or simply do not know what the next step is.

Also have been suggestions that the wealthy are still using the Supreme Court as a method of seeking interdicts. No follow through on those as far as arrest is concerned? Question of legal aid? Lee Anne suggests it is worth checking with Alison Tilley (Black Sash).

The conditional arrest idea also seems a good idea, but has meant police remain reluctant to answer domestic violence call-outs or arrest on the spot. The interdict procedure has become the focus. (However, police explain their response in terms of lack of resources rather than the ideal response).

Nevertheless, the Legal Aid clinic has tended to gear its response to legislation in terms of ye olde 'multi-pronged' approach. Will use a combi-

nation of the interdict process, with civil claims and criminal charges also playing a role - IF client consents. Notes frustration with battered women's syndrome and tendency to withdraw complaints.

Lee Anne noted the problem of arranging shelter - usually a friend or a relative rather than an official shelter. (Problem is that the former is less safe - more likely to be uncovered by a spouse). Another problem is that support and maintenance are available to women only where children are involved or the woman herself has suffered severe disability.

Appendix 4

TELEPHONE INTERVIEW 31/8/94: GAYNOR VASSER

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Police Training

I spoke to Gaynor to find out more about the police training initiatives she had been involved in. She was able to tell me something about the ways in which the Mannenberg Police had been trained in relation to the Prevention of Family Violence Act.

The training took place in two separate venues; the first outside the police station in a local church and the second at the police station itself. They covered the same ground, namely:

- definition of battery;
- coping methods and survival
- interviewing skills
- networking and alternatives and
- policy on battery and family violence

The first programme was attended by 17 police officers and 11 'community persons' (Christopher Ferndale from NICRO was also involved). The second was attended by 11 - 15 police officers and 15 'community persons'.

Her view of the impact of the programme is as follows:

1. Women no longer need to approach the Heideveld Advice Office before going to the police. They have confidence to go directly to the police station. The police have been made more aware and sensitive. Previously, without training, they would say that family violence was a domestic matter and would not interfere, after training they encouraged women to pursue interdicts and lay charges.

2. Mannenberg has provided a special room in which women who complain of sexual assault or family violence can be interviewed. Female officers are always present at interviews.
3. The problem of costs of service have been addressed by the Mannenberg police. Normally sheriffs' fees for serving an interdict will be R30 - 35. However, if the police are not too busy on any single day, they will accompany the woman to the Wynberg Court and deliver the interdict to the respondent themselves. Even if they are too busy on a particular day, if service is not urgent, they will ask the woman to come back the next day and deliver it then.

Gaynor was not aware of any immediate plans to implement similar training programmes across the Western Cape. This was a one-off community-based training initiative, prompted by the introduction of the Act and the urgent need to educate local police. She will not be co-ordinating any others, although she will stay in touch with Mannenberg police station.

She does know that the Women's Support Programme and NICRO have been inundated with requests for similar programmes. The person to speak to about this is apparently Tammy van der Stan at NICRO ph: 474 000.

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