DOMESTIC VIOLENCE LEGISLATION IN NEW SOUTH WALES

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I. NEW SOUTH WALES LEGISLATION

In April 1983 a new domestic violence package of legislation and revised police instructions was proclaimed in New South Wales to the accompaniment of much fanfare. Domestic violence is a phenomenon so deeply rooted in our social and personal life that it can never be solved by legislation alone and many would argue that greater attention should be paid to education and improving services for women escaping from a violent relationship. Legislation can be a useful spearhead for broader social change, however, as well as providing remedies in individual cases. It is now two years since that legislation was introduced and in this article I look at the operation of the legislation both generally and in cases I and the other lawyers at Kingsford Legal Centre have handled for women victims.

Kingsford Legal Centre is the legal clinic attached to the University of New South Wales at which final year law students act for members of the local community under the supervision of the solicitors at the Legal Centre. Domestic violence work has been a particular area of specialisation for the Legal Centre because we saw it as an area of great social need which was not being adequately met by private practitioners. We were keen to evaluate the operation of the new legislation and associated reforms in practice and to this end have assisted every victim who sought our aid in relation to domestic violence. We would advise and or assist in at least five or

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six cases of domestic violence a week and the Chamber Magistrate at the Local Court at Waverley has a practice of referring to us all women who lay a complaint for apprehended domestic violence. We then advise these women and appear for them at court.

The amendments to the Crimes Act 1900 (N.S.W.) which changed the law in relation to domestic violence and the associated changes in police instructions, were the result of recommendations of the Domestic Violence Task Force first constituted by the Premier of New South Wales in March 1981. The Task Force presented its report to the Premier in July 1981.[1] The report contained 187 recommendations concerning not only legal reforms but also police, welfare, housing issues, the particular problems of Aboriginal and migrant women and the need for after hours crisis services. Perhaps typically, most attention was focused on the recommendations concerning legal and police reforms. Other recommendations such as those concerning the provision of Housing Commission accommodation for victims of domestic violence and better funding for refuges, which potentially would cost the Government considerable amounts of money, received less immediate attention although some progress has been made in these other areas by the Domestic Violence Monitoring Committee. This Committee was established by the Premier to monitor the implementation of the Government's domestic violence programme and the legislation.

Amendments to the Crimes Act were introduced to the New South Wales Parliament in November 1982. The Crimes Act and Police Instructions were amended in four ways. Firstly, police powers of entry were clarified and extended to provide that where a police officer suspects that "a domestic violence offence has recently been or is being committed, or is imminent, or is likely to be committed" in a dwelling house and entry is denied, the officer can radio a Magistrate for a telephone warrant in order to enter the premises to investigate the complaint (section 375G(3); see generally sections 357F-H).

Secondly, the Crimes Act was further amended to remove the privilege of a legal spouse who could formerly refuse to give evidence for the prosecution. Section 407AA was inserted which provides in sub-section (2) that except in circumstances where the spouse has been excused by the presiding Judge or Justice

> the husband or wife of an accused person in a criminal proceeding shall, where the offence charged is a domestic violence offence (other than an offence constituted by a negligent act or omission) committed upon that husband or wife, be compellable to give evidence in the proceeding in every Court, either for the prosecution or for the defence, and without the consent of the accused person.

"Domestic violence offence" was defined in section 4 of the Act to mean any offence of violence from common assault to murder

> committed upon a person at a time when the person who commits the offence and the person upon whom the offence is committed are married to each other or, although not married to each other, are living together as husband and wife on a bona fide domestic basis.

1 *Report of the New South Wales Task Force on Domestic Violence* (July 1981).

The definition also included the offence of attempting to commit any such offence. As will be discussed below, this definition was later extended to include former relationships – that is where the parties formerly were married although they are now divorced, or formerly lived together although now separated.

There were certain grounds set out in section 407AA on the basis of which the Judge or Magistrate could excuse the applicant party from giving evidence. The Judge or Magistrate must be satisfied that the application to be excused was made "freely and independently of threat or any other improper influence by any person" and that the applicant should be excused having regard to the availability of other evidence and the seriousness of the domestic violence offence in question (section 407AA(4)). It is significant that there was no specific reference made in the legislation to reconciliation between the parties as a ground for excusing a spouse from giving evidence although in the operation of the legislation it appears this is the ground most frequently adopted by Magistrates.

Thirdly, and in practice the most significant reform although the least contentious at the time the reforms were introduced, was the insertion in the Crimes Act of section 547AA. This section essentially established an injunctive procedure for a person in a domestic relationship of husband and wife or de facto husband and wife who apprehends upon him or herself the commission of a domestic violence offence by the other party to the relationship. Of course, in practice this is commonly the woman in the relationship who fears violence at the hands of her lawful or de facto spouse. The section allows the woman herself, or a police officer, to lay a complaint of apprehended domestic violence. Proceedings are then instituted by way of summons or, if the Chamber Magistrate considers the case sufficiently serious, by way of warrant which authorises arrest by any police officer. At the hearing of the proceedings, the court is empowered to impose conditions on the behaviour of the defendant which commonly require the defendant to stay away from the complainant and to stay away from her place of residence or employment.

In cases where the complainant wishes the relationship, but not the violence, to continue, the order may provide merely that the defendant is not to assault, molest or harass the complainant in the future (but by implication does not have to stay away from her). An order is effective for up to six months and provisions for enforcement of the order are included within the section. This was to overcome the difficulty with enforcement of the earlier section 547 of the Crimes Act (which was not repealed) which allows any person who apprehends violence at the hands of any other to invoke the protection of the court. That section had rightly been criticised because there was no procedure by which a person who breached a recognizance under section 547 could be brought back before the court for punishment except by laying new proceedings for assault or another section 547 order.

Section 547AA provides that once the defendant has been personally served with a copy of the order, if he knowingly breaches it, then he has

committed a criminal offence. No other provision in the Crimes Act which requires a defendant to enter a bond or promise to be of good behaviour in the future also provides that breach of the bond is an offence in itself for which the defendant can be arrested or dealt with by way of information and summons. This was a major breakthrough although, as will be seen, it is unclear to what extent the police are prepared to take action on breach of a domestic violence order.

Proceedings under section 547AA are not criminal proceedings. They are commenced by way of complaint, not information, and the onus of proof is on the balance of probabilities only. On the other hand, as we have seen, they have some quasi-criminal features. Section 547AA(14) provides that where a complaint has been made, a Justice may issue a summons or warrant ". . . as if the complaint alleged the commission of an offence" and that the Bail Act 1978 (N.S.W.) applies in respect of the defendant as if the proceedings "were proceedings in respect of an offence" and the defendant "were an accused person charged with an offence". Section 547AA(15) provides for appeal to the District Court as if the proceedings were criminal.

It may be anomalous then that section 407AA which makes the defendant's spouse a compellable witness does not apply to proceedings for an order under section 547AA though it does apply to proceedings for breach of such an order (section 407AA(1)(b)). It is unclear whether a spouse is otherwise compellable in proceedings for an order under section 547AA.[2]

Finally, police instructions were changed to exhort police to themselves lay charges of assault or other offences in domestic violence cases rather than requiring the woman to be the informant as was the historical practice. Requiring the woman to be the informant, even if the police had attended the house and perhaps removed the man or arrested him and taken him to the police station, meant that the woman herself had the conduct of the prosecution. The Police Prosecutor in court would not run the case – the woman herself or her lawyers would be responsible for calling evidence, cross-examining defence witnesses and making submissions on the law. This was a completely unfair and unrealistic burden to place on the woman informant, particularly as at this time the Legal Services Commission and other legal aid bodies had a policy of not providing aid for private informants in criminal proceedings. If the woman wished to continue the case, she had to do so herself or pay her own lawyer.

Police were also instructed to take a new and tougher approach to bail decisions on arrest for a domestic violence offence. The Bail Act itself was not amended but the police were directed to have regard to the possibility of withholding bail for fear of the commission of further offences and to the appropriateness of imposing conditions on bail if granted. A special bail form for domestic violence offences was provided which suggested

2 At common law a spouse was not competent to give evidence in either civil or criminal proceedings. It is uncertain whether s. 6 Evidence Act 1898 (N.S.W.) and s. 407 Crimes Act merely make a spouse in s. 547AA proceedings competent or compellable as well.

appropriate conditions such as that the defendant not assault or molest the alleged victim or not enter or go near her premises. Another suggested condition on the bail form was that the defendant not drink alcohol or visit licensed premises.

The proposals that excited the greatest controversy at the time were those relating to police powers of entry and compellability of the spouse. There were fears that the police would abuse their power to obtain telephone warrants. It was said by some that police powers of entry were quite adequate already and the clarification and extension of those powers in the legislation was a concession to the police for the other parts of the package which required them to take a more active role in domestic violence cases.

Similar comment could be made about the compellability provisions. Police commonly argue that the reason they have been reluctant to act as informant in domestic violence cases is that the woman who, of course, is their chief witness will often decline to give evidence or indicate that she does not wish to continue the proceedings. It is clear that in a very high proportion of assault cases instituted by the woman herself, the proceedings are discontinued by her[3] but it is hard to know whether this is as a result of intimidation at the hands of the defendant, exhaustion on the part of the woman faced with the burden of carrying a prosecution alone, a desire to reconcile or other factors. As will be discussed below, our own experience at the Legal Centre suggests that the woman informant may well wish to discontinue the proceedings even where legal assistance is available for a variety of reasons.

In our view, however, the reluctance of police to take an active role in domestic violence cases cannot be sufficiently explained by the possibility that the victim will not wish to proceed. Other factors such as the complexity of a crime committed within an ongoing relationship compared with a crime committed by a stranger, the pervasive notion that violence committed by a man on his wife is a private affair, and the trivialising of such violence are in our view more significant factors.

To the extent that the powers of entry and compellability provisions remove a convenient excuse for the police, then they may be useful. The telephone warrant provisions appear to have had very little impact in practice. Telephone warrants were issued in only six cases in 1984.[4] It is harder to estimate the impact of the compellability provisions, particularly whether, as was hoped, women are being saved from pressure not to give evidence, by saying they have no choice. In thirty-five cases across New South Wales spouses were excused from giving evidence in 1984.[5] Interestingly, the reconciliation of the parties was a factor cited by the Magistrate in 56.7% of these cases although not provided for in the legislation and of the nineteen courts which indicated that spouses had been

3 Department of the Attorney General and of Justice, New South Wales Bureau of Crime Statistics and Research, Statistical Report 5 Series 2, *Domestic Assaults* (September 1975) 23.
4 *Report of the New South Wales Domestic Violence Committee* (September 1985) 20.
5 *Id.*, 31.

excused from giving evidence, Tamworth court accounted for ten of the thirty-five cases.

It quite quickly became apparent that there were significant holes in the legislation as first proclaimed.[6] A major difficulty was that the apprehended domestic violence order and the other amendments to the legislation were only available to a woman who was still married or still living with the man who had assaulted her. Yet many cases of domestic violence occur between couples after they have ceased cohabiting or after the marriage is over. This is particularly the case where the couple have children as access may provide the occasion for continuing violence for many years. Accordingly, section 547AA and the definition of "domestic violence offence" was amended by a further amendment to the Crimes Act in November 1983 which came into force on 16 December 1983. That section and the other aspects of the original amendments are now available if the parties have ever been married or lived together even if they are not at the time of the apprehension.

That this was an enormously significant change is shown by the 1984 figures as collected by the New South Wales Bureau of Crime Statistics and Research. They found that in the majority of the 423 apprehended domestic violence orders handed down by courts during 1984, the offender and the complainant did not live at the same address (64.3%).[7] Even if some couples had separated as a result of the incident or incidents which prompted the order, it seems clear that in a very high proportion of cases, violence and harassment take place notwithstanding that the parties are separated. Homicide studies have also shown that there is a significant pattern of men killing their estranged wives, although the converse does not appear to be true – women kill the men they live with, and very often in response to violence from them.[8]

There were a number of other amendments at the same time as this significant extension of the legislation. The basis for seeking an order under section 547AA was extended to include apprehended harassment or molestation as well as violence. This was to cover cases of persistent and extreme harassment such as telephone calls, letters, damage to property and constant surveillance which, whilst not amounting to violence, may be even more distressing and debilitating for the victim. The court was also empowered to impose a fine on breach of a domestic violence order in addition to imprisonment and the legislation was amended to make it clear that on appeal from the domestic violence order, bail conditions could be imposed on the defendant. Prior to these amendments, the defendant could be placed on bail pending the hearing of the domestic violence complaint before the Magistrate, but if any order was made and he appealed, there was no provision for placing him on bail. This meant that until the appeal was

6 R. Lansdowne, "NSW Domestic Violence Legislation: Still Some Way to Go" (1983) 8 *LSB* 232.

7 Note 3 *supra*, 31.

8 T. Rodd, "Marital Murder" in J.A. Scutt (ed.), *Violence in the Family*, Australian Institute of Criminology (Canberra 1980).

heard, which in the congested lists of the Sydney District Court could take more than twelve months, the legislation gave the complainant no protection. The amended section 547AA is set out in the appendix to this article.

II. OTHER STATES

South Australia was the first State to take legislative action in relation to domestic violence. Legislation to amend the Justices Act 1921 (S.A.) was introduced into Parliament in February 1982 and came into force on 3 June 1982. The approach was similar to that subsequently taken in New South Wales in that existing "peace order" provisions in the Justices Act were strengthened to provide more effective enforcement and to allow for conditions to be attached to the bond. The legislation provides that where a court of summary jurisdiction is satisfied on the balance of probabilities that the defendant has done or threatened to do certain acts and is, unless restrained, likely to carry out those threats or repeat those acts then "the court may make an order imposing such restraints upon the defendant as are necessary or desirable to prevent him from acting in the apprehended manner" (section 99(1)). The prohibited acts consist of causing personal injury or damage to property or behaving in a provocative or offensive manner which is likely to lead to a breach of the peace.

As in the subsequent New South Wales legislation, a complaint may be made either by a member of the police force or by the victim of the prohibited acts. Where a person who has been served personally with an order made against him or her under the section contravenes or fails to comply with the order, he or she is guilty of an offence and can be arrested without warrant. Sub-section 4 of section 99 makes it explicit that an order may be made completely ex parte – that is, notwithstanding that the defendant was not summoned to appear at the hearing – provided that in that case he shall be summoned to appear before the court "to show cause why the order should not be confirmed". There has been debate in New South Wales as to whether the New South Wales legislation permits ex parte orders of this kind or only orders made in the absence of the defendant after he has been summonsed to appear.

The most significant difference between the South Australian and the New South Wales legislation is that the South Australian legislation is not confined to violence or threats between persons in any kind of domestic relationship let alone that of marriage or de facto marriage. The Women's Advisers Office in South Australia has collected figures on the use of the South Australian provision which show that in the year 1983 – 1984 orders between persons who are or have been in a marriage or de facto marriage (that is, conform to the New South Wales definition) comprised 51.5% of the total orders made.[9]

9 Quoted in note 3 *supra*, 24.

Western Australia followed the South Australian initiative in the Justices Amendment Act (No. 2) of 1982 which was assented to in December 1982 and commenced operation in May 1983. The new section 172 of the Justices Act is in similar terms to section 99 of the South Australian legislation and so is not limited to domestic relationships. The ex parte provisions of the legislation appear to be particularly frequently invoked in Western Australia.[10] Under this procedure a woman who apprehends violence can obtain an order quickly ex parte which is effective immediately on service subject to confirmation at a later date when the defendant is summonsed to appear before the Justices to show cause why the order should not be confirmed. This procedure can overcome the difficulties of delay which can be caused where the defendant must be summonsed to appear before an order can be made. In New South Wales it is usually three to four weeks between the date of the complaint and the first return date of the summons during which time the complainant has no legal protection against the defendant.

In Queensland, the Peace and Good Behaviour Act 1982 which was assented to on 14 December 1982 provides for the issue of a summons on complaint of a threatened assault or damage to property. The Magistrates Court may dismiss the complaint or order the defendant to keep the peace and be of good behaviour for a specified time and breach of such an order is an offence. It is clear from the second reading speech of the Minister for Justice and Attorney-General of Queensland that the Act is intended to have a wide operation not confined to domestic violence. A main purpose of the legislation the Minister said was

> that some protection should be given by statute to those whose rights or liberty have been threatened or violated by others daring to exert their will by force or threats of force.[11]

Despite the wide operation of the Bill it was supported by the Opposition on the basis that its main thrust was in relation to domestic disputes.[12]

This broader approach has also prevailed in Victoria where the Legal Remedies Sub-Committee of the Victorian Government Domestic Violence Committee recommended in November 1983 that legislation in similar terms to the South Australian and West Australian legislation be enacted. The Committee recommended that in addition to the power to place the defendant on specific conditions the Magistrate have the power to refer the parties to counselling.[13] The Committee also recommended that the Magistrate have the power to make an order in the absence of the defendant and before service of the application on the defendant but strictly defined the circumstances in which this might be possible to those where

10 Personal communication from Peter Waters, former researcher Australian Law Reform Commission. See also K. Rooney, "Dealing with Domestic Violence in WA" (1983) 8 *LSB* 205, 207.

11 *Parliamentary Debates*, 14 September 1982, 841 quoted in (1983) 7 *Crim L J* 172.

12 *Parliamentary Debates* 10 November 1982, 2135 quoted in (1983) 7 *Crim L J* 172.

13 Victorian Government Domestic Violence Committee, *Report of the Legal Remedies Sub-Committee* (November 1983) 26.

> the Magistrate is satisfied that there is just cause for the fear complained of and that the physical safety or property of an individual is in imminent danger and that it is not practicable to serve the defendant.[14]

No legislation has as yet been passed in Victoria.[15]

The narrower New South Wales approach to confine reform to marriage and de facto relationships was endorsed in a report prepared for the Northern Territory Government.[16] As yet no legislation has been passed in that Territory. The Australian Law Reform Commission has a reference to inquire into domestic violence in the Australian Capital Territory which is restricted to violence between adults; that is, does not include violence directed to children. The discussion paper produced as a result of that reference is concerned with domestic violence in the narrow view; that is, between parties who are or have been married or in a de facto relationship.[17]

III. THE NEW SOUTH WALES LEGISLATION IN PRACTICE

The legislation and changes in Police Instructions were accompanied by an extensive community education programme and intensive police re-training. The community education campaign had as its slogan "Domestic Violence – You Don't Have To Put Up With It" and ran from June to September 1983. The campaign was primarily directed at victims of domestic violence and comprised radio and television announcements, posters in public transport and a phone-in counselling service. Seminars were also conducted throughout the State for health and welfare workers, refuge workers and others who come into contact with domestic violence victims. A two month long community education campaign directed at migrant communities commenced in April 1985 using similar media.

A two day seminar was held prior to the proclamation the legislation for police education officers who in turn conducted workshops and lectures for police in their division. This was repeated twelve months later and continuing input is provided into police training by members of the Domestic Violence Monitoring Committee. There were high hopes that as a result of this publicity and training police attitudes would change and domestic violence would be regarded by them and the community as a crime which required State intervention and not a private matter between man and wife.

A longitudinal study which compared the remedies available to battered women before and after the changes would be necessary to give any clear indication as to whether these hopes have been realised. Some information should be provided by a study being conducted by the New South Wales Bureau of Crime Statistics and Research which compares the use of court

14 *Id.*, 27.
15 See R. Alexander, "Domestic Violence Bill in Victoria?" (1985) 10 *LSB* 37.
16 Dr P. D'Abbs, *Domestic Violence Between Adults in the Northern Territory: A Review of Current Services and a Strategy for the Future*, Institute of Family Studies (October 1983).
17 Australian Capital Territory Law Reform 4, *Domestic Violence*, Discussion Paper (1984).

remedies in 1982 and 1984. That study is to be completed in late 1985.

1. Police Complaints and Charges

423 apprehended domestic violence orders were made in 1984 – an average of 8.1 per week as compared with 4.6 during 1983.[18] This suggests that knowledge of the legislation may be widening in the community but the indications are that the impact on the police may be diminishing with time. The only measure currently available for the number of police charges of assault in domestic situations is the bail decision that must be noted and sent to the Bureau. In 1984, 470 bail returns were received from police recording charges laid for domestic violence offences which represents a reduction of 31.1% from the 1983 figures in the rate of returns per week.[19] If this is an accurate reflection of a fall in the number of arrests, then it presents an alarming picture for those who are keen to see the police take a greater role. The Bureau hopes in the further study to be able to establish whether the proportion of women victims laying the charge themselves in assault matters (presumably because the police have declined to charge) has diminished since the change in police instructions.

Whatever the situation with respect to criminal charges, it is quite clear that the police do not lay complaints for apprehended domestic violence orders although this is envisaged in the legislation. Only 5.2% of domestic violence orders made in 1984 were sought by police, a fall from 7.6% in 1983.[20] This contrasts dramatically with the situation in South Australia where the converse is true. A recent evaluation of the South Australian legislation has shown that in the most recent period for which figures are available police laid the complaint for a peace order in over 97% of cases.[21] Interestingly, the percentage of peace order complaints laid by police rather than private complainants has increased over time, the converse of the situation in New South Wales. In the first three months of the operation of the South Australian legislation, peace orders were sought privately in 23% of matters, declining to 3% of orders by the second half of that year.[22]

Police we have spoken to have given different explanations for the practice in New South Wales. Some say it is because most assaults take place at night and the police officer who attends that call will not be on duty the next morning, the first time when he or she could contact a Chamber Magistrate to lay a complaint. Other police have blamed inadequate police numbers. These explanations hardly seem adequate. One measure of relative police activity in relation to domestic violence in the two States is to compare numbers of police informations for domestic violence offences and police complaints seeking 547AA orders in New South Wales with police complaints under section 99 of the South Australian legislation. Even

18 Note 4 *supra*, 28.
19 *Id.*, 13.
20 *Id.*, 21.
21 *Id.*, 24.
22 *Ibid.*

without figures on police charges for criminal offences in South Australia it is clear the police play a much greater role in that State. There were approximately 470 police charges in New South Wales together with twenty-two cases of police seeking apprehended domestic violence orders in 1984, compared with 878 orders in relation to domestic situations conforming to the New South Wales definition in South Australia in 1983 – 1984, 97% of which were police initiated. As the New South Wales Domestic Violence Monitoring Committee notes, the data reflect even more adversely on the degree of police intervention in New South Wales when one considers that the population of New South Wales is approximately four times that of South Australia.[23]

The unwillingness of police to institute proceedings for a domestic violence order means that the onus is still cast heavily on the woman to get to the Chamber Magistrate to lay a complaint and then prosecute it. Legal aid is now available through the Legal Services Commission for domestic violence complaints but the most easily accessible lawyers, the Duty Solicitors at the court, have been directed by the Commission that they are to appear for defendants only. The woman has to find her own lawyer and one who is sympathetic to the particular demands of domestic violence cases and who cannot take any steps in the proceedings with a guarantee of payment until the legal aid application has been lodged and approved. This means in many cases substantial delay and the opportunity for quick intervention is lost.

The figures also show it is entirely legitimate to speak of the complainant in a domestic violence case as female and her attacker as male – only 2 out of 423 orders in 1984 were made against women and there were two cases where the sex of the defendant could not be ascertained from the court papers.[24]

2. Family Law Injunctions

At the Legal Centre we see both women who have not yet been to see the Chamber Magistrate and those who have been and laid a complaint under section 547AA and been referred to us by the Chamber Magistrate for assistance in the case. In the former case, the woman may sometimes only want advice of the options and perhaps a letter to the person she fears. Apart from action under section 547AA or assault proceedings, the other alternative, if the woman and assaulter are or have been married, is proceedings for an injunction under section 114 of the Family Law Act 1975 (Cth). Non-molestation injunctions have been the subject of enormous criticism, many women describing them as not being worth the paper on which they are written.[25] Until amendments to the Act in November 1983, there was no way to enforce a family law injunction except by proceedings

23 *Id.*, 25.
24 *Id.*, 28.
25 Note 1 *supra*, 58 and Australian Law Reform Commission, Reference on Contempt of Courts, Tribunals and Commissions. Research Paper No. 6A, *Contempt and Family Law* 36.

for contempt or proceedings analogous to contempt pursuant to section 114(4) which emphasised the discourtesy of the man to the court rather than the criminal nature of his conduct to his wife.[26] These proceedings had to be instituted at the earliest the next day by way of application and supporting affidavit and there was no provision for police intervention at the time the incident which constituted the breach of the injunction took place.

A woman who had a family law injunction against her husband who called the police on breach was likely to be told that the police could not do anything because the breach of the injunction was not itself an offence and anyway the injunction was a matter of Federal law and they were State police.[27]

The Family Law Act was amended extensively in November 1983 and as part of those amendments it was provided that the court could attach a power of arrest in certain circumstances to a family law injunction (section 114AA).

There are no statistics available on the use by the Family Court or Courts of Petty Sessions exercising family jurisdiction of this ability to attach a power of arrest. The Family Court in Sydney does not keep a record, but the Registrar of that Court has indicated to the Domestic Violence Monitoring Committee that the practice of the Court is to attach a power of arrest in very rare circumstances only, usually only after there has been a serious breach of an existing injunction involving serious violence. By this stage the woman has been assaulted at least twice – on one occasion to justify the granting of the injunction and the second on breach of it. It may be that Magistrates in Courts of Petty Sessions are more ready in the family law jurisdiction to draw on the use of arrest they see in the criminal cases before them and attach a power of arrest. Generally, however, we would take the view that there is little to be gained by seeking a family law injunction unless a permanent order for exclusion from the matrimonial home is sought.

3. Punishment or Protection?

The rhetoric of the legislative reforms in New South Wales and in other States has very much been that domestic violence is a crime and should be treated as such notwithstanding that the persons involved may live or have lived together. For example, the two year report of the Domestic Violence Monitoring Committee states that

> [t]he New South Wales reforms establish that an offence of assault committed within the confines of the family should be regarded as seriously as an assault between strangers in a public place. The reforms are thus located within the criminal law, encouraging criminal charges to be laid by police where offences have been committed and consequently carrying criminal sanctions when convictions result.[28]

The reality is, of course, that the main legislative change introduced was a

26 *Contempt and Family Law*, *id.*, 37.
27 *Id.*, 41.
28 Note 4 *supra*, 6.

new form of protective order to be obtained in civil proceedings and which carries no criminal stigma except on breach. Although the order would most commonly be sought where an assault has already been committed, it does not purport to punish that assault but merely to limit the circumstances in which a further assault may occur – that is by requiring the defendant to stay away from the complainant.

Some people who work with domestic violence cases have realised the hollowness of the official rhetoric. A refuge worker in South Australia, for example, has pointed out that protection orders are not sought against bank robbers and so why should they be sought against men who commit the criminal offence of assault.[29] We would argue, however, that it is not appropriate to treat domestic violence for all purposes as a criminal offence like any other criminal offence. The fact that the parties had an intimate relationship and may have an ongoing relationship of some sort, particularly if there are children involved, quite simply makes the situation significantly different from that where the crime is committed by a stranger. This does not mean that the offence is any the less an offence, but simply the punishment for an action in the past is not the only consideration. Protection for the victim for the future when there is every likelihood that there will be future contact between the parties, must be a major concern and this is the intent of the protection order or peace order such as that embodied in section 547AA.

In our experience at the Legal Centre, many women who are the victims of domestic violence do not want the perpetrator, their former or current husband or de facto, punished. They just want the violence to stop. This is so whether they want the relationship to end or want the relationship to continue but on re-negotiated terms; that is, without the violence. These clients are concerned to obtain ongoing protection not punishment of the offender.

There are also tactical reasons why we may advise a woman to institute proceedings for a section 547AA order rather than proceedings for assault (where the police have declined to charge). Proceedings under section 547AA are civil proceedings only and so the complainant need only establish her case on the balance of probabilities. In many domestic assaults there is no witness to the assault and no corroborating evidence such as medical evidence. If the man denies the assault, it will be one person's word against the other. In criminal proceedings, if both witnesses are equally plausible, the Magistrate has no alternative but to dismiss the information which could reinforce the man's belief that he is immune from the legal process. A woman in that situation is much more likely to be able to succeed in a 547AA complaint.

The defendant, in our experience, is also more likely to admit a 547AA complaint on the first occasion than he is to plead guilty to a criminal offence of assault. This has enormous psychological and forensic advantages

29 N. Seddon, "Domestic Violence in the A.C.T : No Easy Solution" (1985) 10 *LSB* 7, 9.

for the woman. If the proceedings are defended it may be many months before she obtains a result whereas if the man admits the complaint on the first occasion, and why would he not when all he is asked to do is stay away from her and not commit any further assaults, then she has a quick result from the court and a clear indication that the State is concerned to see that the man's conduct not be repeated.

Finally, the penalty for conviction of a domestic assault, apart from the fact of a conviction itself, is usually quite minimal. The defendant is most likely to receive a bond under section 556A of the Crimes Act (pursuant to which the offence is found proved but no conviction entered) or under section 558 (a conviction entered and sentence deferred on the defendant entering a recognizance to be of good behaviour). At worst he will receive a fine. The bond will normally provide that the defendant be of good behaviour towards the informant, but breach of the bond is not an offence in itself for which the defendant can be arrested and brought back before the court. Fresh proceedings for assault or other relief must generally be instituted and the breach of the bond mentioned in relation to sentencing on this second occasion. A magistrate can issue a warrant for the apprehension of the defendant if satisfied he has breached a bond where sentence was deferred (section 556B Crimes Act) but this procedure can be difficult to invoke for a private informant. Section 547AA has the major advantage that breach of an order made under that section is a criminal offence. It still will be difficult to persuade the police to arrest for that offence but at least the possibility is there.

4. Initiating Proceedings By Arrest

As indicated, the New South Wales legislation provides that proceedings for a domestic violence order may be commenced either by summons or by warrant. A warrant is an authority to every police officer in the State to arrest the defendant. Commencing proceedings by way of warrant rather than by way of summons has significant advantages for the complainant. The practice of New South Wales courts when proceedings are commenced by summons is to stipulate a date, normally at least three weeks hence, as the first time the defendant must attend court. Since the December 1983 amendments to the legislation it is now clear that the court can, on that return date, impose bail conditions on the defendant where proceedings are commenced by way of summons just as it could in proceedings commenced by arrest. This, however, does not give the victim any protection in the three weeks before the matter comes to court and in particular, in the period after the man has been served with the summons. The woman has not received immediate protection and the man has not been given the impression that assistance is quickly available to her.

The advantage of proceeding by way of warrant is that generally the warrant will be handed to the police closest to the defendant's address that same day or the next day and executed as soon as possible. If the defendant is arrested outside court hours he will normally be bailed by the police but

on conditions that he not approach the victim and for a relatively short period before the matter comes back to court. If the defendant is arrested during court hours, the police will bring him immediately to the court and the victim has the opportunity, either herself or through her lawyers, to indicate to the court the need for any special bail conditions.

The legislation does not specify the circumstances in which the Chamber Magistrate may issue a warrant and the 1984 statistics suggest that warrants are not issued very often. There were only thirty-four bail returns indicating an arrest on a first instance warrant for apprehended violence in 1984[30] and the police determination of bail in these cases suggests that the Chamber Magistrates are reserving the issue of warrants for extremly serious complaints. In fourteen of those thirty-four cases where proceedings were commenced by way of warrant, bail was refused by the police – that is, in 41% of cases. Bail was refused in only 13% of cases where men were charged by the police with assault female or common assault.[31]

It is startling that the refusal of bail should be so much higher in cases of the essentially civil complaint of apprehended domestic violence than in cases where the police consider there is adequate evidence to charge that an assault has taken place. The answer may be in part that Chamber Magistrates are reserving the issue of warrants for extremely serious cases where serious assaults have occurred but one must wonder, if the matter is so serious, why the police have not taken action themselves. It may also be that defendants in apprehended domestic violence proceedings tend to be arrested in the day during court hours and so the police refusal of bail is merely an indication that the defendant has been brought immediately before the court. Most charges of assault, on the other hand, would be laid after court hours because that is when most assaults occur.

The warrant procedure is so much quicker and more effective than the summons procedure from the point of view of the complainant that at the Legal Centre in all cases where the assault is a serious one or likely to be repeated on the complainant's return home, we urge the Chamber Magistrate to issue a warrant. Not only does this bring the defendant more quickly to court and allow a quicker resolution of the proceedings, it also brings the defendant into contact with the police although the woman herself is the complainant. It is a clear message to the defendant that his conduct is not acceptable to the community and that quick assistance is available to his wife or de facto when she needs it. In our view, the advantage of the legislation, particularly where proceedings are commenced by warrant, is that it can alter the power balance between victim and aggressor, giving the victim of domestic violence a strength and so, confidence that she may not previously have had. This is so whether she wants the relationship to end or continue, but without the violence.

Police involvement inevitably makes the proceedings appear more serious

30 Note 4 *supra*, 15.
31 *Id.*, 17.

to the defendant and to the Magistrate, indeed in some cases the defendant has not appreciated that it is not the police actually bringing the "charge". It is our impressionistic view that commencing proceedings by way of warrant which entails police arrest and all the associated procedures at the police station has a significant effect on the mind of the defendant. This impression is supported by research from America which suggests that the use of arrest punitively, even without proceeding to charge, can have a considerable deterrent effect on future assaults.[32]

There are of course significant civil liberties issues that arise in relation to the use of arrest. These have been highlighted most starkly in the Australian Capital Territory where police are required not to arrest routinely in criminal matters but to proceed by way of summons if at all possible.[33] The influence of this principle is such that in the A.C.T. it is proposed that applications for protection orders be commenced only way of summons; that is, it is not envisaged that the proceedings be commenced by way of warrant and the debate in the discussion paper issued by the Australian Law Reform Commission has focused on whether arrest should be available on breach of the order.[34] In New South Wales the dilemma is less stark because the police practice here is to commence most criminal proceedings, other than relatively minor traffic matters, by way of arrest, but the dilemma does remain. Is it too great an encroachment on the civil liberties of the defendant to provide that he may be arrested in consequence of the commencement of essentially civil proceedings against him?

The New South Wales figures certainly suggest that Chamber Magistrates are issuing warrants with caution, indeed we would suggest in too few cases. In most cases where a woman seeks the protection of a domestic violence order, she does so because she has recently been assaulted, that is an offence has indeed been committed. It is in the Chamber Magistrate's discretion as to whether to issue a warrant and the woman herself cannot require it. A more contentious encroachment on the civil liberties of the defendant had been proposed in the Task Force Report in the suggestion that following an arrest for a domestic violence offence the defendant be compulsorily detained for twelve hours without the possibility of bail.[35] This was to give a "12 hour peace period" to the victim to enable her to leave the matrimonial home if she wished, to decide what she wished to do and generally gather her resources. That compulsory detention would only have applied on breach of an apprehended domestic violence order or on the institution of criminal proceedings but after opposition from civil liberties groups it was not included in the legislation.

An alternative to the commencement of proceedings by warrant which

32 L. Sherman and R. Berk, "The Specific Deterrent Effects of Arrest for Domestic Assault" (1984) 49 *Am Soc Rev* 261.

33 See s. 8A Crimes Act 1914 (Cth) as interpreted in *McIntosh* v. *Webster* (1980) 30 ACTR 19; *Donaldson* v. *Broomby* (1982) 40 ALR 525.

34 Note 17 *supra*, 22, 26, 44, 47.

35 Note 1 *supra*, 48-50.

would overcome some of the problems of delay associated with summons proceedings would be to issue orders ex parte in the first instance, returnable after service in two or three weeks. The order would be effective in this interval and thereafter if confirmed. This is, in broad terms, the procedure in Western Australia but the New South Wales legislation (section 547AA(6)) may only permit orders to be made in the absence of the defendant once he has been served.

5. The Victim as Informant

Most of the current thinking in relation to domestic violence is informed by the feminist argument that it should be the police, as the agents of the State, who bring proceedings for domestic violence whether they be criminal proceedings or proceedings for a protection order. This is seen as the clearest indication that the conduct in question is not acceptable to the community and is criminal and to be treated like any other crime. Expecting the woman herself to bring the proceedings is seen as a statement that violence in a relationship is a private matter, a view which trivialises the violence and may trap the woman in the situation. It is an indication to the perpetrator of the violence that essentially he can get away with it because there is no effective assistance available to the woman.

On the other hand, when the woman, rather than a police officer, is the complainant or informant in the proceedings she does at least retain control of them. If she wants to discontinue she can. As we see below, there are reasons for fearing that many private informants discontinue proceedings because of practical obstacles, not out of any real desire to do so. But our experience at the Legal Centre is that many women will want to discontinue the proceedings even when these obstacles do not exist. This is a decision that may sometimes be exasperating to outsiders but the woman's right to make that decision must, in my view, be respected.

It was the desire to encourage the police to lay charges that led to the abolition of the spousal privileges against giving evidence in domestic violence cases so that the spouse could be compelled to give evidence in a police prosecution. In an offence against the State, the victim is merely a witness with no control over the proceedings. As well, the former privilege of a legal spouse not to give evidence was seen as exposing the woman to a real risk of intimidation and possible further violence at the hands of the defendant in an attempt to force her not to give evidence.[36]

Intimidation at the hands of the defendant was seen as a major reason for the high rate of discontinuance in private informations laid by victims. Other factors such as lack of support in bringing the proceedings, lack of legal assistance and the sheer delay and procedural hurdles of the court process were also identified as being reasons why women did not continue, and clearly these were all significant.[37]

36 *Id.*, 55.
37 Note 3 *supra.*

There are no statistics available to show the "drop out rate" in private informations under section 547AA. The Bureau figures show only the number of orders made, not the number of applications lodged. Most of the practical hurdles that have always made it difficult for private informants to continue proceedings in this area still exist. Legal aid is now theoretically available for private prosecutions for domestic violence or apprehended domestic violence orders but only seventy grants of legal aid for this purpose were made by the New South Wales Legal Services Commission (now Legal Aid Commission) from April 1983 when the legislation was introduced to May 1985.[38] In that period, 595 domestic violence orders had been granted together with an unknown number of private proceedings for assault. As earlier indicated, in the vast majority of section 547AA proceedings, the complainant was the woman herself and not the police and so unless one assumes that most of the women complainants were sufficiently well off to afford their own lawyers, it seems quite clear that the vast majority of private complainants were not represented. The Women's Legal Resources Centre based at Lidcombe has suggested to the writer that many women who contact them have been unable to continue proceedings for domestic violence because of difficulties in obtaining legal aid or otherwise negotiating the system.

But apart from these practical obstacles, there may be other reasons why a woman complainant or informant does not wish to continue the proceedings. Our experience at the Legal Centre suggests that this will often be so even where legal assistance is available in, what we hope is, a supportive environment. It may be, for example, that the woman wants the relationship to continue although without the violence. If it seems that the proceedings may fracture the relationship, she may be prepared to sacrifice the sanction of a court order. The woman complainant may still be subject to harassment to stop her continuing proceedings, or more subtlely, emotional pressure. The man may promise that things will improve and appear to have learnt his lesson by the mere institution of the proceedings or he may succeed in making the woman feel so guilty about bringing them that she discontinues. Women who have been assaulted, particularly over a period of years, are particularly susceptible to this kind of emotional blackmail because their own self esteem is so low and the relationship may have isolated them from any other source of support or self esteem.[39]

A decision to discontinue proceedings for these reasons may appear to outsiders, including the woman's lawyers, as short-sighted. Even with a considerable amount of sympathy for the dilemma facing women in this situation, it is easy as the lawyer for a woman victim to become exasperated if she does not wish to continue the proceedings, particularly if it seems

38 Note 4 *supra*, 37. It is unclear whether these grants were for criminal or s. 547AA proceedings, or both. The Australian Legal Aid Office may also have made some grants of aid to women informants and/or complainants.

39 W. Bacon and R. Lansdowne, "Women Who Kill Husbands: The Battered Wife on Trial" in C. O'Donnell and J. Craney (eds), *Family Violence in Australia* (1982) 77, 80.

obvious to an outsider that the violence will continue. It is possible that one factor behind the call for tougher action against the perpetrators of domestic violence, whether the victim herself wishes that action or not, is a view that a battered woman should leave the battering relationship and should be given a push in that direction whether she wants to or not. This is unacceptable paternalism in my view which assumes that the woman is not in a fit state to make appropriate decisions, and so the decisions should be made for her. For all its disadvantages, being the complainant has the significant advantage of retaining control of the proceedings. Some of the decisions to discontinue may seem wrong to outsiders but the complainant's right not to continue must be respected. She, after all, is the person with the greatest knowledge of the relationship and the person who will bear the consequences of any court action or a lack of court action.

It seems, however, that some Magistrates feel constrained by the legislation to view the situation in another light. Some Magistrates have interpreted the provisions of section 407AA which compel a spouse to give evidence *as a witness* as taking away the privilege of a complainant in section 547AA proceedings or private informant to refuse to offer any evidence if he or she so wishes. These Magistrates require a woman complainant or informant who does not wish to proceed to explain her actions and have an adequate reason before allowing the complaint or information to be dismissed. In my view this is misconstruing section 407AA. It is clear from the terms of sub-section 2 of that section that it only applies to criminal proceedings where a domestic violence offence is charged and so not proceedings under section 547AA. In addition the section states that the spouse is compellable to give evidence "for the prosecution or for the defence". It is still, in my view, up to the prosecution, in this case the woman herself, to determine which witnesses she wishes to call and if she chooses to call none then that remains her prerogative.

A recent case at the Legal Centre illustrates how a woman who is not used to exercising any power in her marriage may find it difficult to continue proceedings against her husband. In this case the woman concerned, Mrs L, had been living in a de facto relationship with her attacker for eight years. In that time her sense of self had become quite eroded leaving her a timid and anxious person, quite dependent on the man who abused her. The first time she came to the Legal Centre he drove her there in his car. Her request at this time was merely for help in obtaining Housing Commission accommodation but she returned to us after yet another assault and instructed us to institute domestic violence proceedings. Over the years she had learnt to anticipate when her husband would be violent and the increased tension this caused would lead her to take massive amounts of Valium. Before the incident that drove her to see us again, she had taken a number of Valium tablets because she knew that he was going to return home in a violent mood. This over-use of Valium, which is a clear indicator of stress and frequently of battering, had apparently been overlooked by her local doctor who had, on one occasion in the past, after another assault

prescribed her injections of Valium to cope with her anxiety.

Mrs L did not come to court as arranged on the first return date of the summons. As it happened, the summons had not been served and so no harm was done. When we contacted her she explained that she had been overwhelmed by other things. Her son had become ill and she herself had had to go to hospital. She was uncertain about proceeding particularly as her husband had moved out of the matrimonial home. She was optimistic that this meant he would not return although he had moved out many times in the past and in fact had returned after she discontinued earlier proceedings against him the year before. She felt very guilty about bringing the case at all and needed constant support to reassure her that she was doing the right thing.

On the next occasion when the summons had been served, we rang her the evening before the court case to check that she wished to go ahead. After much embarrassment and hedging she said that no, she did not wish to because she was certain that her husband would not return. Her decision not to go ahead was perhaps influenced by the fact that the solicitor and student who had been involved with her case could not go to court and had proposed that another lawyer from the Centre mention the case for her. Mrs L had become close to the student particularly, and was worried that this support would not be there. We don't know what has happened with Mrs L's case. It may be that there has been no repetition of the violence or it may be that her husband has returned and assaulted her again. When we last spoke, she seemed so embarrassed at having put us to the trouble of bringing the case that she asked if she would have to get another solicitor next time. It may be that this embarrassment has stopped her contacting us again although the violence has continued.

IV. EVALUATION

Mrs L's case can seem dispiriting but it is not necessarily typical. It shows the complex emotional factors that may impinge on domestic violence proceedings but in the majority of cases we have seen at the Legal Centre, the woman does wish to continue the proceedings and an order is made. In most of these cases the order will be made either on the first day the woman is in court or perhaps on the second, after the man has sought some legal representation. Usually all that is asked of the man is that he not break the law in the future and that he stay away from the complainant and when this is explained most defendants will agree to enter an order by consent.

The only issue that commonly arises is the question of access to the children who usually live with the complainant and so are most easily visited by approaching her premises. Of all orders made in 1984, 13.7% referred in the terms of the order to a defendant's right of access.[40] For example, the

40 Note 4 *supra*, 28.

defendant may be ordered not to approach the complainant's premises at a specified address except for the purposes of access or except between the hours of – say – 10.00 a.m. and 5.00 p.m. on Saturdays for the purpose of access. Unless the order is defined with a degree of particularity in relation to access rights, there is a danger that it will be difficult to enforce. If the defendant is allowed to visit the complainant's premises at any unspecified time for the purposes of access then she will have difficulty persuading the police to arrest him merely for approaching the premises as he could be doing so for the purposes of access.

There may be a more serious conflict between this State law in respect of domestic violence and the Federal Family Law Act. The Family Law Act includes provisions that deal with domestic violence between married persons (section 114 and section 114AA). On 21 March 1983 in an unreported decision (*Tape* v. *Pioro*) the Supreme Court of South Australia held that where the complainant is a member of the police force, the proceedings are not a matrimonial cause under the Family Law Act 1975 (Cth) and the Court of Summary Jurisdiction had jurisdictions to make an order under section 99 Justices Act 1921 (S.A.). Mitchell J. was of the view that a person cannot bring proceedings under section 99 of the Act against his or her spouse, alleging personal injury, because such proceedings would be a "matrimonial cause" within the meaning of the Family Law Act 1975 (Cth) and must be taken under section 114 of that Act. Section 114AB of the Family Law Act was inserted later in 1983 in an attempt to preserve the option of a married person of proceeding under the State or Federal law. It is unclear whether this provision would be effective.[41]

It is difficult to say how effective the orders are in practice. The section provides that a police officer may arrest without warrant on suspicion of breach of the order but our experience at the Legal Centre suggests that police are fairly reluctant to do so. It may take repeated breaches and repeated calls to the police by the woman or her lawyers before the police will locate the copy of the order filed at the police station and act on its breach. Although arrest without warrant is specifically provided for in section 547AA, that section is not a code as far as enforcement of the order is concerned. As it provides that breach of the order is a criminal offence, proceedings for breach may be commenced as with any other criminal offence by way of information and summons or warrant.[42] Police action in the form of arrest is entirely a matter of police discretion. Bail returns to the Bureau of Crime Statistics for 1984 disclose only five occasions when a man was arrested for breach of a domestic violence order or other recognizance or bail condition.[43] There are no figures on prosecutions for breach of an apprehended domestic violence order instituted by summons and no information as to whether the police are taking such action rather than arrest

41 *University of Wollongong* v. *Metwally* (No. 1) (1984) 56 ALR 1.
42 Justices Act 1902 (N.S.W.) ss 59, 60.
43 Note 4 *supra*, 15.

on breach, or requiring the woman herself to enforce the order. There is of course no way of estimating the number of breaches of domestic violence orders that occur which the woman does not prosecute, perhaps out of a sense of futility.

Although at the Legal Centre we have not been able to evaluate the long term effectiveness of domestic violence orders, we have observed the immediate ramifications when the order is made. In our view, use of the procedure can give the victim a significant sense that there is court and police help available and in that way give her a power and equality in the relationship that she did not otherwise have. This is particularly the case when proceedings are commenced by way of warrant and so are resolved quickly before an intervening period has altered the situation between the parties. The warrant procedure is a show of strength that seems to have a significant effect on the mind of the defendant. Nevertheless it is probably the case that a section 547AA order gives most protection where it orders the man to stay away from the woman altogether (because she wants the relationship to end). Where the woman is prepared to continue the relationship and the order merely bars further assaults these may recur when the parties are in contact.

What we cannot know is whether women using section 547AA would have made equal use of the court remedies that were available before the 1983 legislation and with equal success or lack of success. Only a long term study which examined the lives of a number of women who had been subject to violence could tell us this. On the one hand, it could be said that the publicity which surrounded the legislation and change in police instructions has made more people aware of the availability of some legal redress. On the other hand, the emphasis in that publicity was very much that the police would now take action and for some women this has continued not to be the case.

There has been a steady stream of complaints to the Women's Co-ordination Unit monitoring the domestic violence legislation that police are still not charging in cases of domestic violence. In some cases of course there will not have been sufficient evidence for the police to charge but it may be that the publicity surrounding the legislation gave rise to false expectations as to what the police could, let alone should, do. Women whose expectations have been raised falsely may experience an even greater disillusionment and sense of hopelessness when the promised assistance is not available. Certainly I would argue that in the publicity and community education programme there was too much emphasis on the legislation as being a solution in itself irrespective of broad social change and other concrete solutions the woman could aim for, such as separation and if necessary temporary accommodation in a women's refuge.

It must be said, however, that legislation is a useful focus for community education because of the widespread belief that the law can change human relations. In this view the legislation was a useful spearhead to broader social change which flowed on from the community discussion and awareness

created. Some women who have contacted the Legal Centre since the emphasis in the media that domestic violence is unacceptable have said that the publicity and greater community awareness of the problem had encouraged them to seek assistance for the first time. Having done so they would find that some police are more prepared to take an active role and some Magistrates feel constrained to treat domestic violence more seriously than in the past. Ultimately, it is only this change in behaviour and ideally attitudes on the part of the police, Magistrates and the community generally which will provide sufficient support for a battered woman who wishes to end the violence.

APPENDIX

SECTION 547AA CRIMES ACT

Apprehended domestic violence orders.

547AA.(1) Where, upon complaint made in accordance with subsection (2), a court of summary jurisdiction is satisfied on the balance of probabilities that a person apprehends-

(a) the commission by another person of a domestic violence offence upon the person; or

(b) the commission by –

(i) another person who is or has been married to the person; or

(ii) another person who is living with or has lived with the person as his wife or her husband, as the case may be, on a bona fide domestic basis although not married to him or her, as the case may be,

of conduct consisting of harassment or molestation of the person, being conduct which falls short of actual or threatened violence but which, in the opinion of the court, is sufficient to warrant the making of an order under this section,

and is satisfied on the balance of probabilities that the apprehension is reasonable, the court may make an order imposing, for a period not exceeding 6 months, such restrictions or prohibitions on the behaviour of the defendant as appear necessary or desirable.

(1A) In this section, "aggrieved spouse of the defendant", in relation to a complaint under this section or an order made upon such a complaint, means the person whose apprehension concerning the commission of a domestic violence offence or conduct referred to in subsection (1)(b) is the subject of the complaint.

(2) A complaint under this section shall be made in the manner prescribed by regulations made under subsection (16) and may be made by –

(a) the aggrieved spouse of the defendant; or

(b) a member of the police force.

(3) Without limiting the generality of subsection (1), an order made under this section may do all or any of the following things:-

(a) prohibit or restrict approaches by the defendant to the aggrieved spouse of the defendant;

(b) prohibit or restrict access by the defendant to any specified premises occupied by, any specified place of work of, or any other specified premises or place frequented by, the aggrieved spouse of the defendant, whether or not the defendant has a legal or equitable interest in the premises or place;

(c) prohibit or restrict specified behaviour by the defendant which might affect the aggrieved spouse of the defendant.

(4) Before making an order under this section which prohibits or restricts access by a person to premises or a place in which the defendant resides, the

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

(5) Where a person stands charged before a court of summary jurisdiction with an offence which appears to the court to be a domestic violence offence, the court shall enquire whether a complaint under this section has been made or is to be made either by a member of the police force or the person upon whom the domestic violence offence is alleged to have been committed and, where such a complaint has been made or is made, the court may deal with complaint forthwith.

(6) An order under this section may, if in all the circumstances it appears to the court to be necessary or appropriate, be made in the absence of the defendant.

(7) A person against whom an order has been made under this section and who –

(a) has been served personally with a copy of a record of the order made in the form and in the manner prescribed by regulations made under subsection (16); and

(b) after having been so served, knowingly fails to comply with a restriction or prohibition specified in the order so served,

shall be guilty of an offence and liable on conviction before a stipendiary magistrate to imprisonment for 6 months, or to a fine of $2,000, or both.

(8) Where a member of the police force believes on reasonable grounds that a person has committed an offence under subsection (7), the member of the police force may, without warrant, arrest and detain the person.

(9) A person arrested and detained as referred to in subsection (8) shall be brought as soon as practicable before a stipendiary magistrate to be dealt with for the offence.

(10) Where an order has been made under this section –

(a) the complainant;

(b) where the complainant was a member of the police force – the aggrieved spouse of the defendant; or

(c) the defendant,

may at any time apply to a court of summary jurisdiction for variation or revocation of the order and the court may, if satisfied that in all the circumstances it is proper to do so, vary or revoke the order by a further order.

(11) Where a complaint or order is made under this section or an order so made is varied or revoked, the clerk of the court at which the complaint is made or by which the order is made, varied or revoked shall forward a copy of the complaint, order, variation or revocation, as the case may be, to the Commissioner of Police and, where the complaint is made by a member of the police force, to the aggrieved spouse of the defendant.

(12) Upon a complaint under this section, the court may award costs to the complainant or the defendant, to be recovered as costs in summary jurisdiction cases are recoverable.

(13) Nothing in this section prevents or restricts the application of section 547 in relation to cases to which this section may apply.

(14) Where a complaint has been made under this section –

(a) a Justice may issue a summons for the appearance of the defendant or (except in the case of a complaint relating exclusively to the apprehension by a person of conduct referred to in subsection (1)(b)) a warrant for the arrest of the defendant as if the complaint alleged the commission of an offence; and

(b) the Bail Act, 1978, applies to and in respect of the defendant as if –

(i) where the defendant is arrested pursuant to a warrant issued upon the complaint or first appears before a court in answer to a summons so issued, the defendant were an accused person charged with an offence; and

(ii) proceedings in respect of the complaint or an order made under this section upon the complaint were proceedings in respect of an offence.

(15) Where an order has been made under this section –

(a) the order shall be deemed to be an order whereby the defendant is punished within the meaning of section 122 of the Justices Act, 1902; and

(b) in the application of section 123 of that Act and the Bail Act, 1978, to and in respect of the defendant, the defendant shall be deemed to be an accused person who, by reason of the restrictions or prohibitions imposed by the order on the behaviour of the defendant, is in custody.

(16) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that is required or permitted to be prescribed under this section or that is necessary or convenient to be prescribed for carrying out or giving effect to this section.