SOUTH AFRICAN LAW COMMISSION

DISCUSSION PAPER 70

Project 100

DOMESTIC VIOLENCE

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INTRODUCTION

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

The members of the Commission are -

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PREFACE

This Discussion Paper has been prepared to elicit responses and to serve as a basis for the Commission's deliberations, taking into account any responses received. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views. The paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions relating to the reform of this particular branch of the law with sufficient background information to enable them to place focused submissions before the Commission.

For the convenience of the reader a summary of preliminary recommendations and requests for comment appears on the next page.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Constitution of the Republic of South Africa, Act 108 of 1996.

Respondents are requested to submit **written** comments, representations or requests to the Commission by **30 May 1997** at the address appearing on the previous page. The researcher will endeavour to assist you with particular difficulties you may have. Comment already forwarded to the Commission should not be repeated; in such event respondents should merely indicate that they abide by their previous comment, if this is the position.

The researcher allocated to this project, who may be contacted for further information, is Michael Palumbo. The project leader responsible for the project is Ms Zubeda Seedat.

SUMMARY OF RECOMMENDATIONS AND REQUESTS FOR COMMENT

<u>Recommendation 1</u> [Par 3.1.60]

It is recommended that the legislation provide:

(a) For the granting of interim interdicts *ex parte* and a rule *nisi* calling upon the respondent to show cause on the return day of the order why the provisional interdict granted against the respondent should not be made final.

(b) That the presiding officer shall grant an interim interdict unless he or she is convinced that a *prima facie* case has not been made out.

(c) That the fact that the respondent has not been given prior notice of the application shall not be a ground for refusing to grant an interim interdict.

<u>Recommendation 2</u> [Par 3.2.35]

It is recommended that the legislation:

(a) Provide that a person (the applicant) may apply for an interdict against another person (the respondent) if the applicant is or has been associated with the respondent in any of the following ways:

(i) They are or were married to each other (including marriage according to any law or custom).

(ii) They (whether the same or opposite gender) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other.

(iii) They are the parents of a child or are persons who have or

had parental responsibility for that child (whether or not at the same time).

(iv) They are family members related by consanguinity, affinity or adoption.

(v) They would be family members related by affinity if the persons referred to in (ii) above were, or were able to be, married to each other.

(vi) They are or were in an engagement or dating relationship.

(vii) They share or shared the same household.

(b) Retain the power to apply for an interdict "by any other person who has a material interest in the matter on behalf of the applicant" (section 2(1) of the Act).

<u>Recommendation 3</u> [Par 3.3.23]

It is recommended that the legislation:

(a) Afford the applicant a choice of jurisdictional factors as regards the conferment of jurisdiction in respect of the initial application for an interdict.

(b) Provide that the court in whose area of jurisdiction -

(i) the applicant resides (permanently or temporarily), carries on business or is employed; or

(ii) the respondent resides, carries on business or is employed; or

(ii) the cause of action arose;

shall have jurisdiction to entertain an application for an interdict.

(c) Provide that an interdict granted in terms of the legislation is enforceable throughout the Republic.

<u>Recommendation 4</u> [Par 3.4.21]

It is recommended that:

(a) No legislation in respect of legal representation be introduced.

(b) The Department of Justice investigate the matters of assistance by the Clerk of the Court or Registrar during the initial application phase and the issuing of uniform guidelines to promote effectiveness.

<u>Recommendation 5</u> [Par 3.5.25]

It is recommended that the legislation provide that:

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

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

<u>Recommendation 6</u> [Par 3.6.29]

It is recommended that:

(a) The Regulations specify under what circumstances and how one may apply for the Sheriff's fees for the service of the interdict to be borne by the State.

(b) The allegation that certain Sheriffs do not act until they receive the fee be investigated by the Department of Justice and be dealt with administratively.

(c) **The Regulations retain the prescribed manner of service which allows for delivery of the interdict at the respondent's place of residence, work or business, to some person apparently not less than 16 years of age and apparently residing or working there (Regulation 4(2)) or affixing a copy to the principal door (Regulation 4(3)).**

(d) **The Regulations provide for service on the respondent, together with the interdict, of copies of the initial application, supporting affidavit and, in the event of oral evidence having been heard, a note by the magistrate/ judge giving particulars of the supplementary facts which emerged from such oral evidence.**

<u>Recommendation 7</u> [Par 3.7.26]

It is recommended that the legislation:

(a) **Provide that the return day to show cause why the interim interdict granted against the respondent should not be made final shall not be less than 10 days after service has been effected upon the respondent.**

(b) **Set no time limit on the duration of a final interdict granted in terms of the legislation.**

(c) **Retain the respondent's power to apply for the amendment or setting aside of the interdict after 24 hours' notice to the applicant and the court concerned (section 2(2)(c) of the Act) in respect of the interim order and the final order.**

<u>Recommendation 8</u> [Par 3.8.37]

It is recommended that:

(a) The SAPS take cognisance of the criticism and guidelines for conduct expounded in 3.8 - Role of the South African Police Service.

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

<u>Recommendation 9</u> [Par 3.9.22]

It is recommended that the legislation provide that the provisions in respect of appeal and review contained in the Magistrates' Courts Act 32 of 1944, the Supreme Court Act 59 of 1959, and the Criminal Procedure Act 51 of 1977, shall apply to the interdict proceedings and the criminal investigation.

<u>Recommendation 10</u> [Par 3.10.41]

It is recommended that the legislation:

(a) Define domestic violence as including, but not limited to -
- **(i) physical abuse or threat of physical abuse;**
- **(ii) sexual abuse or threat of sexual abuse;**
- **(iii) intimidation;**
- **(iv) harassment; or**
- **(v) destruction of property.**

(b) Direct presiding officers to take account of the fact that -

(i) a single act may amount to domestic violence;

(ii) a number of acts that form part of a pattern of behaviour may amount to domestic violence, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.

<u>Recommendation 11</u> [Par 3.11.8]

It is recommended that:

(a) Proposals regarding the procedure to be followed after hours be kept in abeyance until clarity is obtained on the question of empowering the SAPS to apply for an interdict on behalf of the applicant.

(b) The Department of Justice take steps to promote the efficiency of the after hours system which has apparently been set up.

<u>Recommendation 12</u> [Par 3.12.6]

It is recommended that the legislation should not provide for state sponsored mandatory rehabilitation and counselling programmes for perpetrators of domestic violence.

<u>Recommendation 13</u> [Par 3.13.41]

It is recommended that the legislation:

(a) Empower the court to exclude the respondent from the shared residence. ["Shared residence is to be defined as the residence in which the applicant and respondent (whether the same or opposite gender) live or lived together in a marriage relationship or in a relationship in the nature of marriage, although they are not, or were

not, married to each other, or are not able to be married to each other, regardless of whether the parties are solely or jointly entitled to occupy the residence.]

(b) Provide that orders of this nature may only be made if it appears likely that the applicant or any relevant child [see recommendation 17(e)] will suffer significant harm if an order is not made and that such harm will be greater than the harm which the respondent will suffer if the order is made.

(c) Empower the court to impose on either party obligations regarding the discharge of rent or mortgage instalments.

(d) Provide that the discretionary power in (c) may only be exercised after taking into account the parties' financial resources and any financial obligations which they have or are likely to have in the foreseeable future, including any financial obligations to each other or to any child.

<u>Recommendation 14</u> [Par 3.14.12]

It is recommended that the legislation:

(a) Allow for the applicant to apply for the amendment of the interdict, but not for the setting aside of the interdict.

(b) Empower any other person who has a material interest in the matter to apply for the amendment of the interdict on behalf of the applicant.

<u>Recommendation 15</u> [Par 4.1.30]

It is recommended that the contravention of the conditions of an interdict

granted in terms of domestic violence legislation be an offence which is prosecuted in the criminal court.

<u>Recommendation 16</u> [Par 4.2.21]

It is recommended that the legislation provide that:

(a) The applicant be issued with a duplicate warrant of arrest on conclusion of the prosecution of the respondent for the offence of contravening the conditions of the interdict.

(b) A peace officer may execute a warrant of arrest if he or she has reasonable cause for suspecting that -

(i) an interdict is in force;

(ii) a warrant for the arrest of the respondent has been issued;

(iii) the respondent has breached any of the conditions regarding compliance with the interdict.

(c) The peace officer who executed the warrant of arrest obtain an affidavit from the applicant as soon as possible after the execution of the warrant of arrest.

<u>Recommendation 17</u> [Par 4.3.24]

It is recommended that the legislation:

(a) In addition to the power to exclude the respondent from the shared residence, empower the court to prohibit the respondent to -

(i) enter a specified part of the shared residence or a specified area in which the shared residence is situated; or

(ii) prevent the applicant or any relevant child [see recommendation 17(e)] who ordinarily lives or lived in the

shared residence from entering or remaining in the shared residence or a specified part of the shared residence.

(b) Provide that the court may grant an interdict against the respondent prohibiting the respondent to -

(i) physically or sexually abuse the applicant;[1]

(ii) threaten to physically or sexually abuse the applicant;

(iii) intimidate the applicant;

(vi) harass the applicant;

(v) damage property in which the applicant may have an interest;

(vi) threaten to damage property in which the applicant may have an interest;

(vii) enter, watch, loiter near, or prevent or hinder access to or from, the applicant's place of residence, business, employment, educational institution, or any other place that the applicant visits often;

(viii) follow the applicant or stop or approach the applicant in any place;

(ix) make any contact with the applicant by telephone or any form of written communication; or

(x) enlist the help of another person to act in any of the above ways.

(c) Retain the power (section 2(1)(d) of the Act) to prohibit any other act specified in the interdict.

(d) Empower the court to impose any special conditions that are reasonably necessary to protect and provide for the safety of the applicant or any relevant child [see recommendation 17(e)].

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1 "Applicant" includes a person on whose behalf an application for an interdict has been made. See recommendation 2 above.

(e) Empower the court to order that all or any of the prohibitions or conditions contained in the interdict apply for the benefit of any relevant child. ["Relevant child" is to be defined as any child whose interests the court considers relevant.]

<u>Recommendation 18</u> [Par 4.4.28]

It is recommended that the legislation:

(a) Empower the court to grant, together with the interdict, maintenance, custody and access orders.

(b) Provide that such orders shall subsist only until such time as a determination in respect thereof is made pursuant to any other applicable law.

(c) Provide that conditions imposed in terms of recommendation 17 (d) above, may also relate to the manner in which arrangements for access to a child are to be implemented.

<u>Recommendation 19</u> [Par 4.5.12]

It is recommended that the legislation should not provide for a costs order to be granted at any stage of the proceedings.

<u>Recommendation 20</u> [Par 4.6.7]

It is recommended that the legislation provide that proceedings shall, except in so far as the court may in special cases otherwise direct, be held *in camera*.

<u>Recommendation 21</u> [Par 4.8.11]

It is recommended that the legislation incorporate section 5 of the Act (Rape of wife by her husband) in its present form until such time as the law of rape is reviewed.

<u>Recommendation 22</u> [Par 4.9.5]

It is recommended that the Department of Justice investigate the need for consultation between the Magistrate/Judge and Family Advocate in domestic violence proceedings.

<u>Recommendation 23</u> [Par 4.10.10]

It is recommended that the legislation be called the "Domestic Violence Act".

<u>Recommendation 24</u> [Par 5.15

It is recommended that the Department of Justice and the Department of Safety and Security initiate programmes aimed at ensuring that -

(a) the criminality of domestic violence is recognised;

(b) the criminal justice system holds offenders accountable for the criminal behaviour; and

(c) procedures relating to police, prosecution and court practice take account of the special dynamics of domestic violence and the special vulnerability of the victim.

<u>Request for comment 1</u> [Par 3.6.30]

Specific comment is requested on the Commission's view that the SAPS should be involved in the service of interdicts issued in terms of domestic violence legislation.

<u>Request for comment 2</u> [Par 3.8.38]

Specific comment is requested on empowering:

(a) The SAPS to apply for an interdict on behalf of the applicant.

(b) The court to order a police officer to accompany the applicant to a specified residence to supervise the collection of specified personal property.

<u>Request for comment 3</u> [Par 4.7.11]

Specific comment is requested on the possible improvement of section 4 of the Act and/or its incorporation in section 42 of the Child Care Act 74 of 1983.

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1. INTRODUCTION

1.1 Origin of the investigation

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

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

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

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

1.2 Issue Paper 2 on Family Violence

In order to facilitate a focussed debate, Issue Paper 2 on Family Violence was published at the beginning of July 1996. The closing date for comments was 15 August 1996, but at the request of several role players the closing date was extended until 31 August 1996. Issue Paper 2 on Family Violence was the first issue paper on a matter in which people at all levels of society had a direct interest. There has been an excellent response from all role players, including NGO's. A list of respondents and other contributories appears in "Annexure B".

1.3 Scope of the investigation

1.3.1 The following introductory remarks by the National Council of Juvenile and Family Court Judges (USA)[2] are an accurate reflection of the effects of family violence on society:

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

1.3.2 Appropriate legislation to reduce and prevent family violence is therefore of critical importance. The rationale for legislation of this nature is affirmed in section 12(1)(c) of the Constitution, 1996,[3] which provides that everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources.

1.3.3 The Commission's investigation into family violence is primarily concerned with proposals for an expansion of the protection offered by the Act. It is clear that a revision of the Act cannot transform it into a panacea for the ills of a complex social

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2 National Council of Juvenile and Family Court Judges Model Code on Domestic and Family Violence Nevada: National Council of Juvenile and Family Court Judges 1994 v.

3 Constitution of the Republic of South Africa, 1996, as adopted by the Constitutional Assembly on 8 May 1996 and as amended on 11 October 1996.

phenomenon such as family violence. However, when victims of domestic abuse do turn to the law for protection, the law should be effective and efficient in its response. The objective is therefore to ensure that the substance and procedures of domestic or family violence legislation are well tailored to the needs of those suffering abuse in a domestic context. Proposed legislation is contained in "Annexure C".

2. A BRIEF OVERVIEW OF THE ACT

2.1 The Act and the Regulations made in terms of section 7 thereof ("the Regulations") came into operation on 1 December 1993. As stated by Thring J in **E M Rutenberg v The Magistrate, Wynberg and R Rutenberg**[4], one of the purposes sought to be achieved by the legislature ". . . was the laudable provision of a speedy, inexpensive, easily accessible and effective remedy for persons who find themselves threatened by violence within their family circle."

2.2 Section 2(1) of the Act provides that any party to a marriage[5] (the applicant) or any other party who has a material interest in the matter on behalf of the applicant, may apply to a judge or magistrate in chambers for an interdict against the other party to the marriage (the respondent) in which the latter is prohibited from -

(a) assaulting or threatening the applicant or a child living with the parties or with either of them [section 2(1)(a)];

(b) entering the matrimonial home or other place where the applicant is resident, or a specified part of such home or place or a specified area in which such home or place is situated [section 2(1)(b)];

(c) preventing the applicant or a child who ordinarily lives in the matrimonial home from entering and remaining in the matrimonial home or a specified part of the matrimonial home [section 2(1)(c)]; or

(d) committing any other act specified in the interdict.

2.3 "Party to a marriage" is defined in section 1(2) as including a man and a woman

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4 Unreported: Case No 912/95: Cape Provincial Division.

5 Although the Act is gender-neutral and family violence is sometimes perpetrated by women, the reality is

who are or were married to each other according to any law or custom and also a man and woman who ordinarily live or lived together as husband and wife, although not married to each other.

2.4 The application must be made by way of affidavit which must state the facts upon which the application is based and the nature of the order applied for [regulation 2(1)]. Supporting affidavits by persons who have knowledge of the matter may accompany the application [regulation 2(2)], which must be lodged with the registrar or clerk of the court, who must submit it to a judge or magistrate in chambers [regulation 2(3)].

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

(a) A warrant for the arrest of the must be authorised, but it must be suspended on such conditions regarding the compliance with the interdict as the judge or magistrate sees fit [section 2(2)(a), (b)].

(b) The respondent must be advised that he may, after 24 hours' notice to the applicant and the court concerned, apply for the amendment or setting aside of the interdict [section 2(2)(c)].

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

2.7 If the applicant requires the execution of the warrant he or she must present an affidavit to a peace officer in which it is stated that the respondent has breached one or more of the conditions of suspension of the warrant [section 3(1)]. After the respondent has been arrested, he may only be released if his or her release is ordered by a judge or a magistrate. The respondent must, however, be brought before a judge or magistrate as soon as possible but not later than 24 hours after his or her arrest [section 3(2)]. A summary inquiry is then held by a judge or magistrate into the alleged breach

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that women and children are most often the victims of abuse.

of the conditions of the order suspending the warrant [section 3(4)]. If the respondent contravened the interdict he could be sentenced to a fine (no maximum is specified) or up to 12 months' imprisonment or both [section 6].

2.8 Section 4 of the Act further provides for an obligation to report the ill-treatment of children. Any person who examines, treats, attends to, advises, instructs or cares for any child in circumstances which ought to give rise to a reasonable suspicion that such child has been ill-treated, or suffers from any injury the probable cause of which was deliberate, must immediately report such circumstances to a police official or a commissioner of child welfare or a social worker referred to in section 1 of the Child Care Act 74 of 1983.

2.9 For the sake of completeness the Act is duplicated in “Annexure A”.

3. PROBLEMS IDENTIFIED IN ISSUE PAPER 2 ON FAMILY VIOLENCE[6]

3.1 The *audi alteram partem* rule

A. Excerpt from Issue Paper[7]

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

B. Problem analysis

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

3.1.2 Dicker[8] contends that disregard for the *audi alteram partem* principle may be

6 This Chapter follows the sequence of headings in the Issue Paper.
7 Issue Paper at 5.

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

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

3.1.4 Dicker[9] concludes that the Act provides protection to the victims of violence within the family context "at an unacceptably high price", and that the procedure provided in the Act and Regulations is so deficient that it might be struck down "when measured against an enshrined right to due process under a new constitution".[10]

3.1.5 Fredericks & Davids[11] assert that it is clear that the Act violates the *audi* principle since the interdict is issued immediately but suspended. Temporary disregard of the *audi* principle may be warranted in suitable cases but the Act does not limit the right to *audi alteram partem* in accordance with section 33 (limitation clause) of the Constitution, 1993. The provisions are accordingly unconstitutional.

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8 L Dicker "The Prevention of Family Violence Act: Innovation or violation?" 1994 De Rebus 213.

9 Dicker 1994 De Rebus 215.

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

11 I N Fredericks & L C Davids "The privacy of wife abuse" 1995 TSAR 471 489.

3.1.6 Stewart[12] supports some of Dicker's arguments and discusses additional procedural and evidentiary difficulties experienced when attempting to have an interdict, issued in terms of the Act, set aside. She warns that[13], because the Act shows a "blatant disregard of the application of natural justice", it will be "struck down as unconstitutional in the near future" unless it is amended.

3.1.7 Stewart[14] argues that interim interdicts would be a more practical and just solution, especially in view of the fact that the legislature intended these remedies to be of a quick and interim nature. She points out[15] that a magistrate in deciding on whether to set aside an interdict, is obliged to accept the original applicant's version of any facts in dispute as correct. Only the respondent's (applicant for setting aside the interdict in terms of section 2(2)(c)) unopposed allegations should be accepted as correct by the magistrate. In order to convince the magistrate to set aside the interdict, the respondent is forced to deal with the allegations of fact on which the applicant originally relied. If the respondent placed the facts in the founding papers in dispute, his version would automatically be rejected, as those facts had already been accepted in the initial application for the interdict. Yet how would the respondent ever discharge the onus on him of proving that the interdict should be set aside without dealing with the allegations of fact originally set out in the applicant's founding affidavit?[16]

3.1.8 It is submitted[17] that applications to set aside interdicts should be treated on the same principles as interim interdicts; that is, the facts of the initial interdict are

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12 F Stewart "Family Violence Act causes 'Nightmarish' problems" 1994 De Rebus 721.

13 Stewart 1994 De Rebus 722.

14 Stewart 1994 De Rebus 722.

15 Stewart 1994 De Rebus 721.

16 This argument is in accordance with the **Rutenberg** case in which Thring J remarked as follows:

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

17 Stewart 1994 De Rebus 722.

disregarded and, once the respondent makes certain allegations of fact, these are accepted as correct unless conclusively placed in dispute by the applicant in her replying affidavit. The applicant then cannot rely simply on her initial affidavit (which might be exaggerated or blatantly incorrect). In addition it also forces her to raise disputes of fact, confirming that the respondent is a threat and therefore justifying the interdict order.

3.1.9 Novitz[18] suggests that the objection to the *ex parte* application could simply be overcome by including a notional return date. Either magistrates could impose such a date or legislative amendment could include a return date in the Act. She submits, however, that such an amendment while arguably desirable is not overly compelling as it is always open to the respondent to seek amendment or setting aside of the interdict on 24 hours' notice (section 2(2)(c) of the Act).

3.1.10 In reaction to Dicker[19], Coetzee[20] points out that the *audi alteram partem* rule is not always applied, or not always applied strictly. In exceptional circumstances natural justice does not require that the respondent be given an opportunity to be heard before the decision is taken. In **Administrator, Transvaal v Traub**[21] Corbett CJ held as follows:

> Generally speaking . . . the *audi* principle requires the hearing to be given before the decision is taken by the official or body concerned . . . Exceptionally however, the dictates of natural justice may be satisfied by affording the individual concerned a hearing after the prejudicial decision has been taken . . . This may be so, for instance, in cases where the party making the decision is necessarily required to act with expedition, or where for some other reason it is not feasible to give a hearing before the decision is taken.[22]

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18 T Novitz "Interdicts in the Magistrates' Courts: An analysis of the content and implementation of the Prevention of Family Violence Act", document produced for the Law, Race and Gender Project at the University of Cape Town, September 1994 at 51.

19 Paragraph 3.1.2 - 3.1.4 above.

20 M Coetzee "Die Wet op die Voorkoming van Gesinsgeweld, 1993: Noodsaaklik, tydig en vernuwend" 1994 De Rebus 623.

21 1989 4 SA 731 (A) 750.

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

3.1.11 Coetzee[23] submits that the unique relief which is sought in terms of the Act, as well as the urgent nature thereof, justifies a departure from the general *audi* rule. He submits that the Act does not negate the *audi* rule, but alters it to satisfy the needs of society. The respondent is given an opportunity to react to the allegations against him at a later stage. In **Visagie v State President**[24] it was held as follows:

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

3.1.12 Burman[25] argues that if the enormity of family violence, the deleterious effect on the victim and the harm to the community are taken into account, extraordinary, even revolutionary, measures are needed to prevent yet further violence on those so vulnerable. There are in any event very severe penalties for perjury, maliciously setting the law in motion and other common law crimes linked with abuse of the judicial system which should act as a deterrent.

3.1.13 In the **Rutenberg** case Thring J gave an incisive exposition of the granting of interdicts in our law and the application of the *audi alteram principle* to the Act. Since the case is not reported, it is deemed necessary to quote extensively from his judgment:

> First, our Courts do not, as a general rule, grant even interim or provisional interdicts *ex parte* unless a case of urgency is made out by the applicant concerned. Whilst it must immediately be conceded that in many applications for interdicts brought under the Act there will be genuine urgency present, this will not always be the case . . . a departure from the accepted requirement of notice could not normally be justified.
>
> Secondly, it is not the practice of our Courts to grant final interdicts *ex parte*, even where urgency is present: in such cases, the almost invariable practice is for a rule *nisi* to issue, which is then served on the respondent, and in which he or she is afforded an opportunity, on the return day, to show cause before the Court why the rule should not be made final. To protect the applicant's rights in the meantime, a provisional order is granted which operates as an interim interdict. On the return day, the respondent bears no onus: it is for the applicant to persuade the court that he or she should be granted final relief.

3.1.14 The judge continued by referring to the "potentially grossly inequitable results"

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23 Coetzee 1994 De Rebus 625.
24 1989 3 SA 859 (A) 865.
25 D Burman "Prevention of Family Violence Act: Criticism misses the point" 1994 De Rebus 317.

which could ensue if the Act were strictly applied:

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

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

3.1.16 Thring J concluded his judgment concerning the application of the *audi alteram*

partem rule to the Act as follows:

> It is only in exceptional cases, for example, where there is urgency, where the *audi alteram partem* rule will be departed from, and even then final relief will not usually be granted until parties who will be materially affected by the order sought have been afforded an opportunity to be heard . . . Thus the *ex parte* procedure for granting final relief which is apparently sanctioned in section 2(1) of the Act, read with regulation 2 and the relevant prescribed forms, constitutes a radical departure from the *audi alteram partem* rule, which is regarded in our law as a fundamental tenet of natural justice. This being so, it seems to me that the legislature must be taken to have intended that procedure to be used very sparingly, and only in those cases where a departure from the ordinary procedure is clearly justified in the circumstances of a particular case.
>
> There is nothing . . . in the Act or regulations to prevent a magistrate, in his discretion, when dealing with an application for an interdict under section 2(1) of the Act, from declining to grant the interdict *ex parte*, that is to say, refusing to grant it until the respondent concerned has been given what the magistrate regards as proper prior notice of the application. There is also . . . no reason why, in an appropriate case, the magistrate should not, again, at his discretion, in granting an *ex parte* application, follow the procedure laid down in Magistrate's Court Rule 56(5)(a) and issue a rule *nisi* calling upon the respondent to show cause on the return day of the order why the provisional interdict being granted against him should not be made final. In such a case the procedure provided in section 2(2)(c) of the Act for amending or setting the interdict aside would simply be an additional remedy open to the respondent. Nowhere in the Act or regulations am I able to find any prohibition against the following of this, the normal procedure expressly prescribed by the Magistrate's Court Rule 56(5)(a): the effect of the Act and regulations in this regard . . . is no more than to provide that a magistrate **may** depart from it if, in the circumstances, he sees fit to do so; not that he **must**. (Own underlining.)

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

3.1.18 The Magistrate, Cape Town reports that in the light of the **Rutenberg** case the procedure followed by courts in the Peninsula is that all applications are done by way of notice of motion. Only in exceptional circumstances is it done *ex parte*, but then only interim interdicts are granted.

3.1.19 In **Knox D'Arcy v Jamieson**[26] Grosskopf JA agreed entirely with the following comments by Stegmann J in the court *a quo*:[27]

> The making of an order which affects an intended defendant's rights, in secret, in haste, and without the intended defendant having had any opportunity of being heard, is grossly undesirable and contrary to fundamental principles of justice. It can lead to serious abuses and oppressive orders which may prejudice an intended defendant in various ways, including some ways that may not be foreseeable. The exercise of such a jurisdiction can therefore never be allowed to develop into a routine or standard practice. Nevertheless, when it is made to appear, as has happened in the present case, that the intended defendant is himself in the process of defeating, or preparing to defeat, the ends of justice, and that extraordinary measures must be adopted if he is to be prevented from getting away with his scheme, then it becomes necessary to exercise extraordinary powers. The exercise of such powers must be attended with due caution; with all practical safeguards against abuse; and with a careful attempt to visualise the ways in which the order may prove to be needlessly oppressive to the intended defendant. Consideration must also be given to the manner in which the order may interfere with the rights and obligations of third parties . . . Both the oppressiveness of the order to the intended defendant and its interference with the rights and obligations of third parties must be kept to the minimum that is necessary . . .

3.1.20 Grosskopf JA held that while it was probably not correct to say that an application should never be heard *in camera* and without notice to the respondent, this should happen only in very clear cases where justice could not be served otherwise than by depriving the respondent of his right to be heard.

C. Submissions in defence of the view that the Act and Regulations disregard the *audi alteram partem* principle

3.1.21 A number of respondents recommend that, in order to guard against possible injustice to respondents while at the same time affording applicants speedy relief, specific provision should be made for the issue of interim orders capable of confirmation on a return date:

KZN Network on Violence against Women

SA Association of Social Workers in Private Practice

26 1996 4 SA 348 (A) 379.

Northern Province Legal Services
Society of Advocates (TPD)
Cape Law Society
Transvaal Law Society
Magistrates: Randburg; Port Elizabeth; Pretoria North; Kempton Park; Bloemfontein; Durban; Welkom
Family Advocate: Bloemfontein

D. Submissions in defence of the view that the Act and Regulations <u>do not disregard</u> the *audi alteram partem* principle

The Black Sash

3.1.22 The Black Sash points out that the Supreme Court has in a number of instances granted an interdict without affording the person against whom an interdict is sought the opportunity of a hearing so long as the applicant can prove that it is urgent and there is no other option available to him or her. It is therefore of the opinion that the Act does not represent a radical and unjustified departure from the *audi* rule.

3.1.23 It is conceded that the rule is a fundamental principle of the South African law and should not be abandoned. However, the fact that it is a fundamental principle entrenched in Chapter 3 of the Constitution, 1993, does not render it absolute - it is a right which, like all other entrenched rights, is subject to limitation under section 33 of the Constitution which provides that a law of general application can limit rights entrenched in Chapter 3, provided such limitation is reasonable and justifiable in an open and democratic society. The Black Sash argues that it is reasonable to limit the *audi* rule considering the rights the limitation aims to protect, i.e. the enjoyment of human dignity, equality, freedom and security of the person. It is of the opinion that it is surely justifiable in an open and democratic society such as ours to protect these rights.

3.1.24 Domestic violence or violence against women infringes on a number of rights

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27 1994 3 SA 700 (W) 707-708.

entrenched under the Constitution and the Convention on the Elimination of Discrimination Against Women (CEDAW). South Africa ratified CEDAW in December 1995 without any reservations and also made commitments in Beijing concerning the protection of women and ensuring their equality. As a result South Africa has an obligation to uphold its commitments.

3.1.25 Section 8 of the Constitution, 1993, provides for equality before the law and section 8(3)(a) provides that: "This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms". Article 4 (1) of CEDAW provides as follows:

> Adoption by States Parties of temporary special measures aimed at accelerating **de facto** equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

3.1.26 The Black Sash contends that section 8(3)(a) of the Constitution,1993, and Article 4(1) of CEDAW are almost similar in that both realise that in order to promote equality it is necessary to realise that some people have been disadvantaged and special measures have to be applied to bring them to par with the rest. Women in South Africa have been disadvantaged previously by the law solely on the basis that they are women. The Act is an attempt to address the problem of violence against women by giving women (or victims of abuse, regardless of sex) a simple and inexpensive mechanism for the granting of interdicts with regard to family violence. The fact that it is extremely difficult for women to report cases of abuse or to apply for a normal interdict due to largely financial constraints and dependence on the abuser has been recognised.

3.1.27 The Black Sash also refers to sections 10 and 11 of the Constitution, 1993. Section 10 provides that: "Every person shall have the right to respect for and protection of his or her dignity". According to the Black Sash domestic violence infringes on the dignity of women and seriously inhibits women's ability to enjoy rights

and freedoms guaranteed under the Constitution. Section 11(2) provides that: “No person shall be subject to torture of any kind, whether physical ..., nor shall any person be subject to cruel, inhuman or degrading treatment or punishment”. Violence against women is a cruel and degrading treatment and South Africa has an obligation under Article 2(a) of CEDAW “to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise”.

3.1.28 Section 12 of the Constitution, 1996, goes even further by stating that: “Everyone has the right to freedom and security of the person, which includes the right ... to be free from all forms of violence from either public or private sources... ” and “Everyone has the right to bodily and psychological integrity ...”. This section directly supports Article 2(e) of CEDAW.

3.1.29 In conclusion, the Black Sash submits that section 2(1) of the Act should not be changed as it is the main section affording women the courage to come forward with their plight. In actual fact, section 2 does not disregard the *audi alteram partem* rule, it only affects it in the sense that it is not applied in its normal sense and the respondent is afforded the chance to apply for an amendment or setting aside of the interdict within 24 hours of service. The values our Constitution aims to uphold and our obligations under international law as espoused under section 35 of the Constitution, 1993, should be kept in mind in determining the matter.

Wits Law Clinic

3.1.30 The Wits Law Clinic submits that the violation of the respondent’s rights should be weighed up against the violation of the applicant’s rights to bodily integrity and to life. The law has previously recognised instances where it is necessary to deny a respondent his rights, or to delay a respondent in accessing his rights, in order to protect a more urgent interest. To insist on according the respondent his rights in an abuse situation is to possibly render nugatory the applicant’s right to bodily integrity. Policy should come out in favour of protection of the powerless such as abused women. Such a policy decision can easily be justified on the grounds that these situations always require urgent relief.

3.1.31 The Wits Law Clinic points out that a system of a rule *nisi* with a return date will have the effect of -

(a) involving already traumatised woman in protracted legal proceedings;

(b) involving her in more confrontation with the respondent; and

(c) giving the respondent the opportunity to intimidate or persuade her to drop the proceedings.

3.1.32 According to the Wits Law Clinic there are a number of reasons why women are often still living with their abusive spouses, eg. economic dependency, children and loss of self-esteem. Not to level the playing field in favour of women is to ignore the reality of the grossly unequal power relationship between the parties.

Human Rights Watch/Africa

3.1.33 Human Rights Watch/Africa believes that insistence that the respondent be notified and given opportunity to be heard before an interdict is granted may negate the purpose of the Act. Two competing interests are at stake - the right of a victim of violence to immediate relief and the right of the alleged perpetrator of violence to be heard. One should weigh carefully the competing interests and ultimately give recognition to the one that preserves most the physical integrity of an individual.

3.1.34 It is contended that even if the initial order is interim, with a return date for the parties to be heard before the order is made final, there is a risk that intimidation by the respondent may result in the applicant withdrawing the application. This is already the case in criminal charges, where women withdraw charges even in cases of serious assault, because further violence is threatened if they do not. Moreover, insistence on the *audi alteram partem* rule before a final interdict is given would make the procedure costly, inaccessible and time-consuming. The respondent's right to be heard is not entirely abrogated (section 2(2)(c) of the Act).

Professor J T R Jones

3.1.35 The comment of Professor James Jones, Professor of Law at The University of

Louisville School of Law, Kentucky, USA and currently visiting the School of Law at the University of Natal as part of an exchange programme, is supported by the School of Law, University of Natal.

3.1.36 Professor Jones believes that *ex parte* issuance of interdicts is essential in family violence situations. To argue to the contrary ignores the very essence of domestic violence. It is well known that the most dangerous time for any domestic violence victim is when she tries to separate herself from her abusive partner. Obtaining an interdict is exactly the type of action likely to trigger a violent response. To give the batterer advance notice of the victim's intended behaviour will prove catastrophic in many situations, and it will probably be impossible to predict when danger will arise. Family violence situations are extraordinary ones in all cases, justifying the temporary *ex parte* issuance of interdicts, notwithstanding the usual rule of *audi alteram partem*.

Natal Law Society / Magistrate: Kuilsrivier

3.1.37 Although, strictly speaking, the *audi alteram partem* rule may be infringed, the infringement does not last for long as the interdict may be anticipated upon 24 hours' notice.

Gauteng Regional Network on Violence against Women / Chief Family Advocate/ Lawyers for Human Rights / People Opposing Women Abuse (POWA) / FAMSA (National Directorate) / National Human Rights Trust

3.1.38 A proper balancing of the rights to dignity, freedom and security of the person, and fair administrative and judicial procedures should be made. Family violence should be seen as a situation requiring emergency intervention which warrants a departure from the strict application of the *audi alteram partem* rule. The Act would survive constitutional scrutiny on the basis of the test set out in section 33 of the Constitution, 1993 (the limitations clause).

E. Comparative survey of laws

United Nations framework for model legislation on domestic violence [28]

3.1.39 Emergency relief would include an *ex parte* temporary restraining order, to remain in effect until a court order is issued but for not more than 10 days after the *ex parte* temporary restraining order has been issued.[29] On 24 hours' notice to the plaintiff, the defendant may move for a dissolution or modification of the temporary restraining order.[30] Judges should be required to conduct hearings within 10 days of the complaint and application for a protection order.

England

3.1.40 The Law Commission (England)[31] emphasises that there are a number of inherent drawbacks to *ex parte* orders. The danger of misconceived or malicious application being granted or the risk of some other injustice being done to the respondent is inevitably greater where the court has only heard the applicant's side of the story and the respondent has had no opportunity to reply. Also, on *ex parte* applications, the judge has no opportunity to try and resolve the parties' differences by agreed undertakings or otherwise to reduce the tension of the dispute. Equally, there is no opportunity to bring home the seriousness of the situation to the respondent and to underline the importance of complying with the order.

3.1.41 The Law Commission (England), however, points out that despite the accepted need for caution, it is well recognised that there are occasions when *ex parte* orders are both necessary and desirable. In cases of imminent physical violence it is difficult to think of a more compelling justification, in a proper case, for permitting concern about the inherent dangers of *ex parte* orders to be outweighed. It accordingly recommends[32] that the court should retain a general discretion to grant orders without prior notice to the respondent where in all the circumstances it would be just and convenient. There should, however, be a requirement to take the following factors into account:

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28 United Nations Economic and Social Council (Commission on Human Rights) Report of the Special Rapporteur on violence against women, its causes and consequences - a framework for model legislation on domestic violence United Nations 1996 par 36.

29 UN Framework par 30.

30 UN Framework par 31(c).

31 The Law Commission (England) Report on family law, domestic violence, and occupation of the family home Law Com. No. 207 London: 1992 42.

32 Law Com. No. 207 44.

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

(b) Whether it is likely that the applicant will be deterred or prevented from pursuing the application if an order is not made immediately.

(c) Whether there is reason to believe that the respondent is aware of the proceedings but is deliberately evading service and the applicant or a child will be seriously prejudiced by the delay involved in effecting service or substituted service.

Australia

The Australian Capital Territory

3.1.42 An *ex parte* interim order may be obtained at short notice. The order is valid for 10 days.[33]

New South Wales

3.1.43 An *ex parte* interim order may be obtained quickly. The defendant is summoned to appear at a hearing as soon as possible, at which hearing the court may either confirm, vary or revoke the order.[34]

Northern territory

3.1.44 The court may grant an *ex parte* interim order. The defendant is summoned to show cause why the order should not be confirmed.[35]

Queensland

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

South Australia

3.1.46 An interim *ex parte* order may be made at short notice. After such an order is made the defendant is summoned to appear to show cause why the order should not be

33 J A Riordan (Editor in chief) The laws of Australia (Title 17 Family Law) Sydney: The law book company 1995 par [61].

34 Laws of Australia par [65].

35 Laws of Australia par [69].

continued. An interim order is binding once it is served on the defendant[36].

Tasmania

3.1.47 An interim *ex parte* order may be made by the court at short notice in emergency cases. The order, which is not binding until served, operates for a maximum of 60 days or until further order of the court.[37]

Victoria

3.1.48 An *ex parte* interim order may be made in emergencies. An interim order is binding on the defendant once it is served. The order operates for the time specified by the court or until a further order is made.[38]

Western Australia

3.1.49 An interim *ex parte* order may be made at short notice. The order is binding on the defendant once it has been served. The defendant is summoned to show cause why the order should not be confirmed.[39]

Canada

Alberta

3.1.50 To obtain a restraining order *ex parte*, the applicant must clearly demonstrate a situation of urgency. It must be established that taking the time to give notice would compromise the safety of the applicant or the applicant's children. The inference of an apprehension of immediate danger must be borne out by the information contained in the affidavit.[40] The Alberta Law Reform Institute[41] concludes that emergency conditions would obviously have to be present before an order would be given on an *ex parte* basis. The question of the duration of *ex parte* orders would have to be addressed.

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36 Laws of Australia par [77].
37 Laws of Australia par [81].
38 Laws of Australia par [85].
39 Laws of Australia par [89].
40 Alberta Law Reform Institute Domestic abuse: Toward an effective legal response Report for discussion No 15 Alberta: Alberta Law Reform Institute 1995 15 - 16.

New Zealand

3.1.51 A protection order may be made on an application without notice if the court is satisfied that the delay that would be caused by notice would or might entail a risk of harm or undue hardship to the applicant or a child of the applicant's family or both. A protection order made on application without notice is a temporary order that becomes final by operation of law three months after the date on which it is made. The respondent may notify the court that he wishes to be heard on whether a final order should be substituted for the temporary protection order.[42] A hearing date must then be assigned which must be as soon as is practicable but not later than 42 days after receipt of the respondent's notice.[43] The court may also of its own motion require a hearing before the order becomes final.[44]

USA

3.1.52 Professor J T R Jones,[45] Associate Professor of Law at the University of Louisville School of Law, maintains that family violence situations are extraordinary ones in all cases, justifying the temporary *ex parte* issuance of interdicts notwithstanding the usual rule of *audi alteram partem*. Jurisdictions in the USA long have recognised this fundamental fact, and as a result grant protective orders (the USA equivalent to family violence interdicts) on an *ex parte* basis despite the principles of USA due process law which are equivalent to *audi alteram partem*.

Kentucky

3.1.53 If the court determines that there is an immediate and present danger of domestic violence and abuse, an *ex parte* emergency protective order shall be issued. Such order shall be effective for a period of time fixed in the order, but not exceeding 14 days. A date for a full hearing shall be fixed not later than the expiration date of the emergency protective order.[46]

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41 ALRI Report for discussion No 15 53.
42 Domestic Violence Act 86 of 1995, section 13.
43 Domestic Violence Act 86 of 1995, section 76.
44 Domestic Violence Act 86 of 1995, section 78.
45 Submission to the Commission. See par 3.1.35 above.
46 Kentucky Revised Statutes, section 403.740.

Minnesota

3.1.54 Where there is an immediate and present danger of domestic abuse, the court may grant an *ex parte* temporary order of protection, pending a full hearing. The said order shall be effective for a fixed period not exceeding 14 days.[47]

F. Evaluation

3.1.55 It is obvious that in many applications for interdicts brought under the Act there will be genuine urgency present, thus justifying the granting of interdicts *ex parte*. As argued by the Law Commission (England),[48] in cases of imminent physical violence it is difficult to think of a more compelling justification, in a proper case, for permitting concern about the inherent dangers of *ex parte* orders to be outweighed. Other jurisdictions recognise the granting of orders made without notice provided that a situation of urgency is demonstrated.[49]

3.1.56 In the **Rutenberg** case[50] it was held that urgency would not always be present and that a departure from the accepted requirement of notice could not normally be justified. Thring J concluded[51] that there was nothing in the Act or regulations to prevent a magistrate, in his discretion, from declining to grant the interdict until the respondent concerned has been given what the magistrate regards as proper prior notice of the application.

3.1.57 The Commission is concerned that an unrestricted discretion to decide what circumstances would justify an *ex parte* order, might give rise to legal uncertainty and the consequent denial of relief to many victims of abuse who should qualify for emergency protection. Consideration could be given to the inclusion of a section indicating the factors that should be taken into account when exercising a discretion to grant an order without prior notice to the respondent.

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47 Minnesota Domestic Abuse Act, section 7.
48 See par 3.1.41 above.
49 See par 3.1.39 et seq above.
50 See par 3.1.13 above.

3.1.58 The Commission is, however, convinced that family violence situations are extraordinary ones in all cases, justifying the *ex parte* issuance of interdicts. As pointed out by Professor Jones,[52] it is well known that the most dangerous time for any domestic violence victim is when she tries to separate herself from the abuser. Obtaining an interdict is exactly the type of action likely to trigger a violent response. To give the batterer advance notice of the victim's intended behaviour will prove catastrophic in many situations, and it will probably be impossible to predict when danger will arise.

3.1.59 It is submitted that the inherent drawbacks to *ex parte* orders and criticism that the Act is an unjustified departure from the *audi alteram* principle, would be allayed by providing for the granting of interim interdicts *ex parte* and a rule *nisi* calling upon the respondent to show cause on the return day of the order why the provisional interdict being granted against him should not be made final. On the return day, the respondent bears no onus: it is for the applicant to persuade the court that he or she should be granted final relief. In all the jurisdictions considered[53] orders made on application without notice are temporary orders.

G. Recommendation 1

3.1.60 **It is recommended that the legislation provide:**

(a) For the granting of interim interdicts *ex parte* and a rule *nisi* calling upon the respondent to show cause on the return day of the order why the provisional interdict granted against the respondent should not be made final.

(b) That the presiding officer shall grant an interim interdict unless he or she is convinced that a *prima facie* case has not been made out.

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51 See par 3.1.16 above.
52 See par 3.1.36 above.

(c) That the fact that the respondent has not been given prior notice of the application shall not be a ground for refusing to grant an interim interdict.

3.2 Applicability of the act

A. Excerpt from Issue Paper[54]

It seems that the applicability of the Act should be broadened to enable parents to obtain interdicts against their children and vice versa. The question arises whether there is a need to provide for some form of relief for family members who are not "parties to a marriage" as defined in section 1(2) of the Act. The Act also appears to be unconstitutional in that, by omission, it denies relief to a party in a homosexual relationship[55].

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

B. Problem analysis

3.2.1 Fedler[56] points out that the Act excludes women who have never lived with their abusers in a "marital relationship". First, this affects domestic workers, who may be prohibited from living with men on their employers' property, and who may thus never have lived as "man and wife" with their partners; secondly, teenage girls who reside with their parents but are experiencing dating violence at the hands of boyfriends; thirdly, partners in a gay relationship; and fourthly, prostitutes who are being harassed by particular "clients".

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53 See par 3.1.39 et seq above.

54 Issue Paper at 5.

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

56 J Fedler "Lawyering domestic violence through the Prevention of Family Violence Act 1993 - An evaluation after a year in operation" 1995 SALJ 231 239.

3.2.2 According to Fedler[57] the Act does also not reflect international trends due to its omission of a number of other intra familial relationships from its protective ambit. Family violence occurs also between a variety of family members or people who live together. She suggests that it is not the particular relationship between the parties but rather the dangerous household environment that must be the unit of protection.

C. Submissions in support of the view that the applicability of the Act should be broadened

Human Rights Watch / Africa

3.2.3 The organisation points out that according to the U N Human Rights Committee, which monitors states' compliance with the International Covenant on Civil and Political Rights, the term "family" must be given a broad interpretation to include "all of those comprising the family as understood in the society of the state party concerned". Within South African society, as elsewhere in Africa, the notion of family goes beyond immediate parties to a marriage. Through the influence of economic and social factors, and the prevailing political, cultural or religious traditions, the family has been shaped in a diversity of ways. A narrow perspective of "family" that favours only parties to a marriage seems to be unjustified.

3.2.4 It is submitted that the term family be defined to include parents of the parties to a marriage, siblings, aunts, nieces, nephews, brothers- and sisters-in-law and other persons sharing a common residence or somewhat similar relationship. In addition, the Act should cover those having an intimate relationship who have always lived apart. Cohabitation or the act of physically living with the respondent should not be a prerequisite.

3.2.5 Human Rights Watch / Africa agrees that the limitation of the application of the Act to heterosexual relationships amounts to discrimination on grounds of sexual orientation which is prohibited under section 8(2) of the Constitution, 1993, and section 9(3) of the Constitution, 1996.

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57 Fedler 1995 SALJ 239 - 240.

Justice College

3.2.6 Justice College points out that magistrates are daily confronted with the frustration of applicants within extended families who cannot make use of the inexpensive and speedy remedy provided by the Act. Practice has shown that "family" must be broadened to include the extended family. The applicant will, as always, have to prove *locus standi* and a material interest in the application. As with any interdict, a satisfactory alternative remedy coupled with the discretion of the magistrate will alleviate an abuse of the process.

Other submissions

3.2.7 The majority of submissions received by the Commission argue that the Act is too narrow in scope and that many relations in which abuse often occurs do not fall within the ambit of the Act. Other respondents who support a broadening of the applicability of the Act are the following:

NICRO Women's Support Centre
Department of Social Work: Weskoppies Hospital
National Human Rights Trust
SA National Council for Child and Family Welfare
KZN Network on Violence against Women
Gauteng Regional Network on Violence against Women
Cape Law Society
Dr A Allan (Head: Psycholegal Unit, University of Stellenbosch)
Professor J Jones (University of Louisville School of Law)
Family Advocate: Bloemfontein
SA Association of Social Workers in Private Practice
Attorney Daryl Burman
SAPS - Divisional Chief: National Standards and Management Services
Lawyers for Human Rights
Society for Social Workers (Wits)
Mrs S J Mitchell
POWA

University of the Western Cape

C Smuts

Black Sash

FAMSA (National Directorate)

FAMSA (Pietermaritzburg)

Legal Resources Centre (PE)

Magistrates: Pretoria; Pretoria North; North End (PE); Simonstown; Kuilsrivier; Paarl; Goodwood; Wynberg; Cape Town

D. Submissions objecting to a general broadening of the applicability of the Act

Transvaal Law Society

3.2.8 The Society holds the view that the common law is still available for obtaining an interdict in respect of persons who do not fall within the scope of the traditional family. To extend the applicability of the Act to such other persons would have the result that interdicts in respect of persons which, strictly speaking, fall under the jurisdiction of the Supreme Court because they deal with the status of persons, are effectively placed under the jurisdiction of the Magistrate's Court. The Society submits that the level of legal competence required for affecting the status of a person is not readily encountered in the Magistrate's Court. The nature and frequency of family violence, however, are of such a nature that an exception must be made in order to expedite the prevention of violence.

Magistrate: Germiston

3.2.9 The Magistrate: Germiston argues that in respect of members other than the immediate family, the need is not more urgent and protection not more justified than in the case of other members of the community who have to resort to private law and criminal remedies.

SAPS: National Crime Investigation Service / Magistrates: Welkom; Pietermaritzburg / Chief Family Advocate

3.2.10 There is a need to provide relief to family members who are not "parties to a

marriage", such as children against parents and vice versa. An extension of the Act to family members that fall beyond the immediate family scope would, however, not be in line with the purpose of the Act, namely to provide a speedy remedy to family members who are subject to violence in a close and intimate relationship.

K R Makola / ACDP / Magistrates: Johannesburg; Port Elizabeth; Randburg

3.2.11 The respondents are opposed to the inclusion of parties to a homosexual relationship, mainly on the ground that the law should not recognise the legality of such relationships.

E. Comparative survey of laws

United Nations framework for model legislation on domestic violence

3.2.12 It is urged that States adopt the broadest possible definitions of acts of domestic violence and relationships within which domestic violence occurs, bearing in mind that such violations are not as culture-specific as initially observed, since increasing migration flows are blurring distinctive cultural practices, formally or informally. The broadest definitions should be adopted with a view to compatibility with international standards.[58] Domestic violence must be distinguished from intra-family violence and legislated for accordingly.[59] The relationships must include: wives, live-in partners, former wives or partners, girlfriends (including girlfriends not living in the same house), female relatives (including but not restricted to sisters, daughters, mothers and female household workers).[60]

England

3.2.13 The Law Commission (England)[61] asserts that there is no doubt that harassment and violence can occur in many types of relationship. Reference is made to an argument for having no limitations at all, on the basis that it is difficult to see why there should be any restrictions on the ground of relationship or residence if the main aim of

58 UN framework par 3.
59 UN Framework par 6.
60 UN Framework par 7.
61 Law Com. No. 207 par 3.8.

the legislation is to provide protection from violence for people who need it. However, the Law Commission (England)[62] thinks that this goes too far. Family relationships can be appropriately distinguished from other forms of association. In practice, many of the same considerations apply to them as to married or cohabitating couples. Thus the proximity of the parties often gives unique opportunities for abuse to continue; the heightened emotions of all concerned give rise to a particular need for sensitivity and flexibility in the law; there is frequently a possibility that their relationship will carry on for the foreseeable future; and there is in most cases the likelihood that they will share a common budget.

3.2.14 The Law Commission (England)[63] prefers a middle path whereby the range of applicants is widened to include anyone who is associated with the respondent by virtue of a family relationship or something closely akin to such a relationship and recommends that a non-molestation order should be capable of being made between people who are associated with one another in any of the following ways:

(a) They are or have been married to each other.

(b) They are cohabitants or former cohabitants.

(c) They live or have lived in the same household, otherwise than merely by reason of one of them being the other's employee, tenant, lodger, or boarder.

(d) They are within a defined group of close relatives.

(e) They have at any time agreed to marry each other (whether or not that agreement has been terminated).

(f) They have or have had a sexual relationship with each other (whether or not including sexual intercourse).

(g) They are the parents of a child or, in relation to any child, are persons who have or have had parental responsibility for that child (whether or not at the same time).

(h) They are parties to the same family proceedings.

62 Law Com. No. 207 par 3.19..
63 Law Com. No 207 par 3.26.

Australia

The Australian Capital Territory

3.2.15 A domestic violence protection order may be sought to protect a present or former *de jure* or *de facto* spouse of the violent party, a child of either party, a relative and a household member. "Relative" is defined to cover every kind of near relative. A "household member" means a person who normally resides, or who was normally resident, in the same household as the violent party (other than as a tenant or boarder).[64]

New South Wales

3.2.16 An apprehended violence order may be obtained to protect any person who fears violence or harassment. Protection is therefore not confined to a particular class. However, for some purposes, the legislation does distinguish between domestic violence and violence between non-intimates. Domestic violence is defined to be when the victim is a former or existing *de facto* or *de jure* spouse of the defendant; a person, not being a boarder or tenant, living, or who has lived, in the same household as the defendant; a relative which is broadly defined; or a person who has had an intimate relationship with the defendant.[65]

Northern Territory

3.2.17 A restraining order may be obtained to protect a limited class of people, namely an existing or former *de facto* or *de jure* spouse.[66]

Queensland

3.2.18 A domestic protection order may be obtained to protect a limited class of people. An existing or former *de facto* or *de jure* spouse or a person who, though not a spouse, is a biological parent of a child, may seek an order. A "relative" (includes a person whom the aggrieved spouse regards as a relative or who regards himself or herself as a relative of the spouse making the application) or "associate" (a person whom the

64 Laws of Australia par [59].
65 Laws of Australia par [63].
66 Laws of Australia par [67].

spouse who is making the application regards as an associate or vice versa, such as a person who works with, or resides in the same house as, the spouse) cannot make applications in their own right but can benefit from an application made by a spouse if specifically named in the order.[67]

South Australia

3.2.19 Domestic violence restraining orders may be obtained by a family member, which means an existing or former *de facto* or *de jure* spouse, a child of whom such a spouse has custody, or a child who normally resides with such a spouse.[68]

Tasmania

3.2.20 Any person who fears future violence or harassment may apply for a restraint order. The legislation is therefore not limited to the protection of a specified class of people.[69]

Victoria

3.2.21 "Family members" may seek an intervention order against future violence or harassment. This term covers a former or present *de facto* or *de jure* spouse, a relative (all close relatives and those who would be such relatives if a *de facto* couple were married), a child who normally or regularly resides with the violent person, a child of whom the violent person is a guardian and another person who is or has been ordinarily a member of the household of the violent person. The latter is not defined and probably does not cover a boarder, tenant or lodger.[70]

Western Australia

3.2.22 Any person in need of protection against future violence or harassment may seek a restraining order. The legislation is therefore not restricted to protecting a

67 Laws of Australia par [71].
68 Laws of Australia par [75].
69 Laws of Australia par [79].
70 Laws of Australia par [83].

particular class of people.[71]

Canada

Alberta

3.2.23 The Alberta Law Reform Institute[72] makes the following notable observation:

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

3.2.24 The reasons for seeking to deal specifically with domestic abuse and not with abuse in general are cited as the following:[73]

(a) Domestic abuse is a serious social problem which has drastic and devastating effects on its victims.

(b) There are numerous systemic barriers to victims of domestic abuse accessing the legal system.

(c) It is assumed that individuals experiencing abuse in non-domestic relationships will not experience the same kinds of barriers to escaping the perpetrator or accessing legal remedies and therefore that such individuals may have recourse to the criminal and civil remedies already in existence.

3.2.25 In circumscribing a sphere of the "domestic" to which the legislation will apply one should seek to identify relationships which contain the key factors which give rise to the systemic barriers to obtaining legal protection. The Alberta Law Reform Institute[74] identifies the following indicia of vulnerability that should be considered in assessing the advisability of including the type of relationship in the legislation:

(a) The intimate nature of the relationship.

(b) The potential in the relationship for emotional intensity.

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71 Laws of Australia par [87].
72 ALRI Report for discussion No 15 91.
73 ALRI Report for discussion No 15 93.

(c) The reasonableness of the inference that the relationship would be presumed by the parties to be one of trust.

(d) The reduced visibility of the relationship to others or the element of privacy which keeps the goings-on in the relationship unknown to others.

(e) Dependency or lack of ability of one or both of the parties to unilaterally leave the relationship.

(f) Ongoing physical proximity of the parties.

3.2.26 The Alberta Law Reform Institute[75] considers that the following relationships are characterised by the indicia of vulnerability:

(a) Individuals sharing the same living quarters:

(i) Married and unmarried heterosexual cohabiting relationships.

(ii) Relationships of cohabitation between homosexuals.

(iii) Members of an extended family occupying a single residence.

(iv) Individuals suffering from abuse by others occupying the same residence but with whom they do not share any sexual, intimate or family relationship. (For example, disabled and elderly individuals may live with other adults who are not sexual partners or family members. Live-in nannies.)

(b) Relationships beyond the shared residence:

(i) Former cohabitants.

(ii) Dating violence.

3.2.27 There may also be abuse in the following situations:[76]

(a) Individuals acting as agents for a primary abuser. (Extended family members or friends of an abuser engaging in abusive conduct toward a victim in an attempt to bring the victim back to the abuser or punish the victim for attempting to leave the abuser.)

(b) Abuse between individuals who neither share an intimate relationship nor

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74 ALRI Report for discussion No 15 94.
75 ALRI Report for discussion No 15 94 et seq.
76 ALRI Report for discussion No 15 101 - 102.

live in the same residence. (For example the situation of the abuser who threatens or harms the friends or relatives of a spouse, notably after an abused spouse has left the abuser.)

Alaska

3.2.28 The Alaska Code specifically includes dating relationships as well as the relation between household members whether they are sexual partners or not. It also expressly includes children. Protection orders are made available to victims who are a -

> spouse or former spouse of the respondent; a parent, grandparent, child, or grandchild of the respondent; a member of the social unit comprised of those living together in the same dwelling as the respondent; or a person who is not a spouse or former spouse of the respondent but who previously lived in a spousal relationship with the respondent or is in or has been in a dating, courtship, or engagement relationship with the respondent.[77]

New Zealand

3.2.29 The object of the New Zealand Domestic Violence Act 86 of 1995 is to reduce and prevent violence in domestic relationships.[78] For the purpose of the Act, a person is in a domestic relationship[79] with another person if the person -

(a) is a partner of the other person; ["partner", in relation to a person, means -

(i) any other person to whom the person is or has been legally married;

(ii) any other person (whether the same or opposite gender) with whom the person lives or has lived in a relationship in the nature of marriage (although those persons are not, or were not, or are not or were not able to be, legally married to each other);

(iii) any other person, in any case where those persons are the biological parents of the same person.]

(b) is a family member of the other person; ["family member", in relation to a person, means -

77 Alaska Stat., section 25.35.060 quoted in ALRI Report for discussion No 15 92.
78 Domestic Violence Act 86 of 1995, section 5(1).
79 Domestic Violence Act 86 of 1995, section 4.

(i) any other person who is or has been related to the person by blood, marriage or adoption;

(ii) any other person who is a member of the person's culturally recognised family group;

(iii) in the case of partners who are not legally married, any other person who would be a family member of that person pursuant to the preceding two paragraphs if the partners were, or were able to be, married to each other.]

(c) ordinarily shares a household with the other person; [A person is not regarded as sharing a household with another person by reason only of the fact that -

(i) the person has a landlord tenant relationship, an employer employee relationship or an employee employee relationship with that other person; and

(ii) they occupy a common dwelling house (whether or not other people also occupy that dwelling house.]

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

(i) an employer employee relationship; or

(ii) an employee employee relationship with that other person.

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

(i) the nature and intensity of the relationship;

(ii) the amount of time the persons spend together;

(iii) the place or places where that time is ordinarily spent;

(iv) the manner in which that time is ordinarily spent (it is not necessary for there to be a sexual relationship);

(v) the duration of the relationship.]

F. Evaluation

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

3.2.31 Although the United Nations framework for model legislation on domestic violence[80] urges States to adopt the broadest possible definitions of relationships within which domestic violence occurs, the obvious limitation is the realm of the domestic. The reasons cited by the Law Commission (England)[81] and the Alberta Law Reform Institute[82] for seeking to deal specifically with domestic abuse and not with abuse in general, are equally applicable to South Africa. However, as pointed out, the difficult task is to define the realm of the domestic in such a way as to include all individuals viewed as being in need of the protective provisions of the Act while at the same time ensuring that the scope of the Act does not become too broad.

3.2.32 The Law Commission (England)[83] submits that the range of applicants should include anyone who is associated with the respondent by virtue of a family relationship or something closely akin to such a relationship. The Alberta Law Reform Institute[84] identifies certain indicia of vulnerability that should be considered in assessing the advisability of including the type of relationship in the legislation. The New Zealand legislation[85] reflects a combination of these viewpoints.

3.2.33 The Commission is of the opinion that there should be comprehensive inclusion of all those exposed to risk of domestic or family violence. In this regard it is worthwhile to take note of the recommendations and enactments of the jurisdictions referred to in the preceding paragraph. It is conceded that a broad definition of the class of persons eligible to seek protection could be criticised for including relationships that fall outside

80 See par 3.2.12 above.
81 See par 3.2.13 above.
82 See par 3.2.24 above.
83 See par 3.2.14 above.
84 See par 3.2.25 above.
85 See par 3.2.29 above.

the “domestic” realm. However, since the aim of the legislation is to provide protection from violence, the Commission considers that a definition which is criticised for being too broad is preferable to a definition that is criticised for being too narrow. If a person who arguably falls outside the domestic realm is protected by invoking the provisions of domestic violence legislation, it would be a small price to pay, if any, for the assurance that victims who ought to qualify for the intended protection are entitled to apply for relief.

3.2.34 In terms of section 2(1) of the Act an application may also be made “by any other person who has a material interest in the matter on behalf of the applicant”. The question of the police’s standing to apply for an interdict on behalf of the victim is discussed in paragraph . . . below. It is submitted that the phrase is sufficiently wide to cover applications on behalf of persons lacking capacity (whether mental or physical) or persons who are unable, by reason of fear of harm or other sufficient cause, to make the application personally. Applications on behalf of children would also be covered by the phrase.

G. Recommendation 2

3.2.35 **It is recommended that the legislation:**

(a) Provide that a person (the applicant) may apply for an interdict against another person (the respondent) if the applicant is or has been associated with the respondent in any of the following ways:

(i) They are or were married to each other (including marriage according to any law or custom).

(ii) They (whether the same or opposite gender) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other.

(iii) They are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the

same time).

(iv) They are family members related by consanguinity, affinity or adoption.

(v) They would be family members related by affinity if the persons referred to in (ii) above were, or were able to be, married to each other.

(vi) They are or were in an engagement or dating relationship.

(vii) They share or shared the same household.

(b) Retain the power to apply for an interdict "by any other person who has a material interest in the matter on behalf of the applicant" (section 2(1) of the Act).

3.3 Jurisdiction

A. Excerpt from Issue Paper[86]

There appears to be some confusion as to precisely how jurisdiction is conferred on any particular court in terms of the Act as regards the initial application for an interdict. Under the normal rules of civil jurisdiction the applicant must apply to the court having jurisdiction over the respondent. Jurisdiction of the Magistrate's Court is governed by the Magistrate's Court Act, 32 of 1944, and the Magistrate's Court has jurisdiction only in respect of the persons as described in section 28 of the Magistrate's Court Act. It seems that under these circumstances section 28(1)(d)[87] is applicable since the whole cause of action arose in that court's jurisdiction. However, should this present problems in practice then jurisdiction should be spelt out explicitly in the legislation.

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

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86 Issue Paper at 6.

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

B. Problem analysis

3.3.1 Both the Act and Regulations are silent as to geographical jurisdiction. In the **Rutenberg** case it was held that if the powers and limitations of a magistrate who was called on to apply the provisions of the Act and Regulations could not be sought beyond the bounds of the Act and Regulations, it would follow that a magistrate would enjoy unlimited geographical jurisdiction, and the limits imposed thereon by the Magistrates' Courts Act would not apply. According to Thring J, that was an absurd result which could not have been intended by the legislature.[88]

3.3.2 The meaning of "cause of action" and the jurisdiction of the Magistrate's Court in terms of section 28(1)(d) of the Magistrates' Courts Act 32 of 1944 was described as follows in **Herholdt v Rand Debt Collecting Co**[89]:

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

Van Rensburg submits[90] that it is clear that a family violence issue which gives rise to an application for an interdict, falls within the meaning of the said description.

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

3.3.4 As regards jurisdiction to conduct an enquiry contemplated in section 3(4) of the Act, Van Rensburg[91] points out that in terms of section 90 of the Magistrates' Courts Act 32 of 1944 the court within whose district an offence has been committed, has jurisdiction in respect of that offence.

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

89 1965 3 SA 752 (T) 754.

90 Van Rensburg 1994 The Magistrate 98.

C. Comments on jurisdiction in respect of an initial application for an interdict

Magistrates

3.3.5 In spite of the ostensible clarity, magistrates of the Cape Peninsula argue that if normal civil law application rules are applied, the applicant would have to approach the court having jurisdiction over the respondent, which may leave an applicant with no remedy. They submit that the Act should be amended to specify exactly what the jurisdictional requirements are, or, preferably, to specify that any court may hear an application made to it.

3.3.6 The Magistrate: Pinetown points out that there are judicial officers who hold the view that a Magistrate's Court must, in terms of section 28 of the Magistrates' Court Act, have jurisdiction in respect of the respondent's person before an interdict can be granted against the respondent. This implies that a court will only have jurisdiction over the respondent if he or she resides, carries on business or is employed in the court district in question. In cases where an applicant has, for example, left the matrimonial home and temporarily stays in another district she will have to apply for an interdict in the district where the respondent resides. By the time the interdict is granted, harm could already have been inflicted. It is submitted that the Act never intended to limit the jurisdiction of a Magistrate's Court and the uncertainty in this regard should be cleared away.

3.3.7 According to the Magistrate: Pretoria the Act was designed to protect victims of family violence. The convenience of the respondent is therefore not paramount. The Magistrates: Germiston; Randburg; Port Elizabeth; and Johannesburg support a clarification of the jurisdiction of the courts in the granting of the interdicts.

Lawyers for Human Rights (National Directorate)

3.3.8 Lawyers for Human Rights maintain that currently an interdict must be obtained in the jurisdiction where the accused lives. It is submitted that there must be an

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91 Van Rensburg 1994 The Magistrate 104.

expansion of jurisdictional coverage so that victims may obtain protection no matter where the abuse occurs. They indicate that the restriction is problematic if a victim is threatened or abused elsewhere and cannot travel to the appropriate court for the application.

Human Rights Watch - Africa / Transvaal Law Society / Cape Law Society / KZN Network on Violence against Women

3.3.9 Human Rights Watch/Africa recommends that jurisdiction to hear an application for an interdict should be conferred on the court where either of the parties to the proceedings resides. The Transvaal Law Society and KZN Network on Violence against Women maintain that the only court which should have jurisdiction is the court where the applicant resides. The Cape Law Society agrees that, in order to be effective, the Act must be geared to assist the applicant at all times and that applicants should therefore be afforded a choice of jurisdictional factors, including the applicant's place of residence, place of employment and the place where the cause of action arises.

Other submissions

3.3.10 The following respondents agree that jurisdiction should be spelled out specifically in legislation:

Chief Family Advocate
Mrs S J Mitchell
Black Sash
Ms J Fedler
SAPS (National Crime Investigation Service)

D. Comments on applicability of interdict

Justice College

3.3.11 Justice College refers to regulations 3(2) and 4(7) of the Prevention of Family Violence Regulations, 1993, in terms of which the applicant is in possession of a certified copy of the interdict and the original warrant of arrest. These documents facilitate the opening of a new file in another jurisdiction.

Magistrate: Welkom

3.3.12 The Magistrate: Welkom confirms, however, that there have been instances where the applicant has left the jurisdiction where she obtained the interdict and has been advised to obtain a new interdict. An order of this nature should, for obvious reasons, be enforceable throughout the Republic.

Gauteng Regional Network on Violence against Women / POWA

3.3.13 It is submitted that an extension of the interdict granted be automatic. The violence is, after all, directed at the applicant's person - not her geographical location. It is suggested that a provision similar to section 6 of the Maintenance Act 23 of 1963[92] be adopted.

Other submissions

3.3.14 The following respondents argue that orders must be effective nationally so that, in the event of either the applicant or the respondent moving out of the area of jurisdiction of the court which granted the interdict, such interdict will remain effective, thereby obviating the need for any further application to court:

NICRO Women's Support Centre
KZN Network on Violence against Women
Cape Law Society
Dr A Allan
SA Association of Social Workers in Private Practice

E. Comments on jurisdiction in respect of an enquiry contemplated in section 3(4) of the Act

Magistrates: Cape Peninsula

3.3.15 Normal criminal jurisdiction would apply in the event of the breaking of the

92 In terms of section 6(2) of the Maintenance Act 23 of 1963, the maintenance officer may direct the clerk of a court which made a maintenance order, in writing to transmit such maintenance order, together with the prescribed records, to the clerk of the maintenance court within the area of jurisdiction of which the person in whose favour such maintenance order was made, or the person in whose care the said person is, resides.

conditions of the interdict. It is, however, submitted that the Act should specify which court has jurisdiction in regard to the breach of the interdict.

Magistrate: Germiston

3.3.16 It could transpire that the respondent is arrested in a district and brought before a magistrate where the breach did not occur. It is doubtful whether the said magistrate would be entitled to apply section 75 of the Criminal Procedure Act 51 of 1977[93] as, in the opinion of the Magistrate: Germiston, it is not a criminal enquiry.

Magistrate: Pretoria

3.3.17 The court that issued the interdict ought to be the court that has jurisdiction to conduct the enquiry referred to in section 3(4).

Magistrate: Pietermaritzburg

3.3.18 Criminal jurisdiction is provided for by the Magistrates' Courts Act 32 of 1944.

F. Comparative survey of laws

United Nations framework for model legislation

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

(a) the offender resides;

(b) the victim resides;

(c) where the violence took place; or

(d) where the victim is temporarily residing if she has left her residence to avoid further abuse.[94]

G. Evaluation

3.3.20 As regards the conferment of jurisdiction in respect of the initial application for an

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93 In terms section 75(2), if an accused appears in a court which does not have jurisdiction to try the case, the accused shall at the request of the prosecutor be referred to a court having jurisdiction.

94 UN Framework par 18.

interdict, the Commission is convinced that, in order to be effective, legislation must be geared to assist the applicant at all times and that applicants should therefore be afforded a choice of jurisdictional factors. This is in line with the United Nations framework for model legislation on domestic violence.[95]

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

3.3.22 The question of jurisdiction in respect of an enquiry contemplated in section 3(4) of the Act is connected with the question of whether a section 3(4) enquiry is regarded as a matter which should be accommodated in the criminal court. In paragraph 4.1.30 below it is recommended that the contravention of the conditions of an interdict granted in terms of domestic violence legislation should be an offence which is prosecuted in the criminal court. Normal criminal jurisdiction would therefore apply in the event of a contravention of the conditions of the interdict.

H. Recommendation 3

3.3.23 **It is recommended that the legislation:**

(a) Afford the applicant a choice of jurisdictional factors as regards the conferment of jurisdiction in respect of the initial application for an interdict.

(b) Provide that the court in whose area of jurisdiction -

(i) the applicant resides (permanently or temporarily), carries on business or is employed; or

95 See par 3.3.19 above.

(ii) the respondent resides, carries on business or is employed; or

(ii) the cause of action arose;

shall have jurisdiction to entertain an application for an interdict.

(c) Provide that an interdict granted in terms of the legislation is enforceable throughout the Republic.

3.4 Legal representation

A. Excerpt from Issue Paper[96]

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

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

B. Problem analysis

3.4.1 Although the Act does not expressly provide for legal representation, Coetzee[97] refers to the fact that the courts have on numerous occasions held that every person has the right to legal representation. This principle is confirmed in section 35 of the Constitution,1996.[98]

C. Submissions that do not support the exclusion of legal representation

96 Issue Paper at 6.
97 Coetzee 1994 De Rebus 623.
98 It should be noted that section 35 deals only with detained, arrested, and accused persons.

Magistrates

3.4.2 The Magistrate: Pretoria points out that the right to legal representation is not excluded by the Act and if a party requires such assistance there is nothing precluding the magistrate from allowing it. To introduce legislation in this regard is going to give rise to problems, such as requests for costs to be awarded to the successful party. The status quo ought therefore to be maintained.

3.4.3 According to the Magistrate: Welkom applications for an interdict do not give rise to problems, since the procedure is simple and sufficient assistance is rendered by the Clerk of the Court. Applications for the amendment or setting aside of the interdict usually entail legal representation. Legal representation for a person arrested in terms of section 3(1) of the Act is guaranteed under section 25 of the Constitution, 1993.

3.4.4 The Magistrate: Paarl argues that the procedure to be followed should be spelled out in the Act. Where one of the parties has legal representation, the other party may be prejudiced. In such cases it is difficult for the magistrate to assist the unrepresented party without detracting from the principle of impartiality.

Justice College

3.4.5 Justice College is of the opinion that if it is accepted that the Magistrates' Courts Act 32 of 1944 is applicable, then sections 20 and 21 authorising the appearances of practitioners in any proceedings in any court must be adhered to. It is submitted that denying either an applicant or a respondent legal representation at any stage could be unconstitutional.

Human Rights Watch / Africa

3.4.6 In the context of family violence, flexibility is essential and a rigid approach must be avoided so that the victim is not further victimised by the system. The issue of legal representation should therefore be left open, so that the parties may, but need not be, represented. There may be situations where a victim of violence may feel unable to obtain the interdict without assistance, for example, because she is illiterate. The magistrate or judge considering an application should be obliged to consider whether

the interests of justice require that the applicant be legally represented. If so, the applicant should be entitled to legal aid on the same terms as an accused in a criminal case and be informed of that right.

Cape Law Society

3.4.7 Both parties have a right to legal representation and any attempt to exclude representation would be constitutionally offensive. A respondent forced into proceedings under the Act, without cause, should be entitled to recover costs against the applicant. However, in general, recovery of the cost of legal representation should be disallowed save in the event of abuse of the judicial process.

3.4.8 The Cape Law Society recommends further that applicants be afforded assistance in making complaints of violence in a manner similar to that in which complainants are assisted in the maintenance courts by maintenance officers.

Lawyers for Human Rights

3.4.9 While legal representation may not always be necessary, expressly excluding representation is unconstitutional. Although victims of violence are not accused persons, they are equally in need of representation. Legal representation should be provided for victims who cannot afford legal representation.

Chief Family Advocate

3.4.10 In terms of the common law and the Constitution, 1993, there can be little doubt that the parties will always and at any stage have the right to have legal representation. The Act was however designed to make it possible for the applicant to approach the court without legal representation and it is suggested that the applicant would not have a right to legal representation provided by the state.

Other submissions

3.4.11 The following respondents also support the view that legal presentation should be allowed at all stages of the interdict proceedings:

Magistrates of the Cape Peninsula; *Johannesburg; Randburg; Germiston*

Society for Social Workers (Wits)

Northern Province Legal Services

Family Advocate: Bloemfontein

SA Association of Social Workers in Private Practice

SA National Council for Child and Family Welfare

D. Submissions supporting the exclusion of legal representation

KZN Network on Violence Against Women

3.4.12 The Act should expressly exclude legal representation for the purposes of obtaining an interdict. The Small Claims Court is an example of where legal representation in civil procedures is disallowed.

Gauteng Regional Network on Violence against Women / POWA

3.4.13 It is emphasised that legal representation could cause possible legal delays that might seriously endanger the applicant's life.

FAMSA - Pietermaritzburg

3.4.14 FAMSA strongly feels that, except for review and appeal procedures, legal representation should be expressly excluded. The victims of abuse often lack financial resources or have been denied access to those resources. Since the abuser tends to control the finances, he has greater ability to secure legal representation. This could lead to the victim feeling further abused by the legal process.

SAPS - National Crime Investigation Service / Magistrate: Pietermaritzburg

3.4.15 If the purpose of the Act is to provide expedient remedies to an applicant, legal representation should rather be excluded, except with regard to review and appeal procedures.

Dr A Allan

3.4.16 A possible solution is to restrict the use of legal representation to the return date of the rule *nisi* and later. This, however, still leaves the problem that an applicant may feel obliged to appoint a legal representative if the respondent appoints one. Many applicants can ill afford this.

E. Evaluation

3.4.17 Consultation suggests that there is strong support for the view that parties have the right to legal representation at all stages of the interdict proceedings and that denying either an applicant or a respondent legal representation at any stage could be unconstitutional. There have also been suggestions that applicants should be entitled to legal aid on the same terms as an accused in a criminal case and that they should be informed of that right.[99]

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

3.4.18 Although the Constitution, 1996, does not explicitly entrench the right to legal representation in civil proceedings, the Commission agrees that any attempt to expressly exclude legal representation would be constitutionally offensive. It is submitted that the democratic values of equality and freedom dictate that legal representation should be allowed at all stages of the process. It is clear that the status quo allows for such legal representation and there appears to be no need to introduce legislation in this regard.

3.4.19 Considering the question of having a legal practitioner assigned to an applicant by the state and at state expense, regard should be had to the fact that the Constitution, 1996, grants such a right to arrested, detained and accused persons only.[100] It is submitted that extending the right to applicants in domestic violence civil proceedings, would pave the way for public demand that similar rights be afforded to other civil litigants, and an already overburdened fiscus having to foot the bill. Moreover, granting such a right to the applicant would probably encroach upon the respondent's right to equal benefit of the law.[101] The object of the Legal Aid Board, established in terms of the Legal Aid Act 22 of 1969, is to render or make available legal aid to indigent persons and to that end the services of legal practitioners can be obtained.[102] Indigent applicants would therefore be able to apply for legal aid.

3.4.20 The Commission has the impression that sufficient assistance is rendered by the Clerk of the Court or Registrar during the initial application phase. There has been a suggestion that applicants be afforded assistance in making complaints in a manner similar to that in which complainants are assisted in the maintenance courts by maintenance officers. The Commission considers it important that the Department of Justice look into the matter with a view to ensuring that uniform guidelines to promote effectiveness are issued. Applicants should not be denied the opportunity to apply for an interdict because of factors such as an intimidating legal environment or illiteracy.

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100 Constitution, 1996, section 35.
101 Constitution, 1996, section 9(1).
102 Legal Aid Act 22 of 1969, section 3(a).

F. Recommendation 4

3.4.21 **It is recommended that:**

(a) No legislation in respect of legal representation be introduced.

(b) The Department of Justice investigate the matters of assistance by the Clerk of the Court or Registrar during the initial application phase and the issuing of uniform guidelines to promote effectiveness.

3.5 Hearing of oral evidence

A. Excerpt from Issue Paper[103]

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

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

B. Problem analysis

3.5.1 In the **Rutenberg** case Thring J found that the procedure to be followed by a magistrate in terms of the Act was governed by the Magistrates' Courts Act and the Magistrates's Court Rules in so far as these were not inconsistent with the Act and Regulations. Reference was made to Magistrate's Court Rule 55(2)(a)[104] and it was held that this rule was not in any way inconsistent with any provision of the Act or Regulations.

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103 Issue Paper at 7.

104 "(2) Except where otherwise provided, an application need not be supported by affidavit but in the event of any dispute arising as to the facts, the court may-
(a) receive evidence either viva voce or by affidavit and try the issues in dispute in a summary manner;"

3.5.2 Referring to Rule 56(3) of the Magistrates' Courts Rules,[105] Van Rensburg[106] argues that before the magistrate grants the interdict he may, in his discretion, require further oral evidence or evidence by way of affidavit. This is a power of the magistrate and not a right of the applicant to supplement the affidavit.

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

3.5.4 Dicker[107], on the other hand, submits that because neither the Act nor the Regulations allow for the oral examination of witnesses, there is no question in a Regulation 5 application (amendment or setting aside of interdict) of the applicant (original respondent) being able to avail himself of "his right to apply for the deponents concerned to be called for cross-examination". The magistrate should therefore decide the application on the unopposed allegations of fact in the applicant's (original respondent's) affidavit and where there is a dispute of fact, the allegations of fact in the respondent's (former applicant's) affidavits must be accepted as being correct. In addition the original respondent is saddled with the burden of proof. If - on a conspectus of the facts that are common cause or cannot be disputed by the original applicant, and the version of the original applicant, in the case of any conflicts of fact - the original respondent cannot establish a case for the setting aside or amendment of the interdict, on a balance of probabilities, the application is doomed to failure.

C. Submissions objecting to the hearing of oral evidence before granting an

105 "56. Arrests tanquam suspectus de fuga, interdicts, attachments to secure claims and mandamenten van spolie
(3) The court may, before granting an order upon such an application, require the applicant to give security for any damages which may be caused by such order and may require such additional evidence as it may think fit."

106 Van Rensburg 1994 The Magistrate 98.

interdict (section 2(1) of the Act)

Magistrates

3.5.5 The Magistrate: Germiston is of the opinion that if the affidavit is sufficiently particularised to justify an interdict, the obtaining of further evidence is an unnecessary delay which defeats the whole object of expedition in granting an interdict and affording protection. In Germiston district interdicts have been issued on the sole application of the applicant without any oral evidence in 250 cases of which only six have been set aside in terms of section 2(2)(b) of the Act. In only six cases were the warrants of arrest executed.

3.5.6 The Magistrate: Johannesburg contends that the hearing of oral evidence should not be necessary. An applicant should be assisted in the drafting of the affidavit. This would be more practicable than placing the burden of rectifying the shortcomings in the application on the presiding officer by allowing the hearing of oral evidence.

3.5.7 The Magistrate: Pietermaritzburg agrees that the hearing of oral evidence would negate the spirit of the Act.

Justice College

3.5.8 At the initial application stage the hearing of oral evidence would be unnecessary. If the affidavit is scant, then the clerk of the court, or registrar, must advise the applicant sufficiently to supplement the affidavit to negate the leading of oral evidence. At the courses presented at Justice College for registrars and clerks they are fully instructed in this regard.

KZN Network on Violence against Women / Dr A Allan / FAMSA Pietermaritzburg

3.5.9 The granting of an interim order with a return date provides the applicant and respondent with an opportunity to present oral evidence.

D. Submissions in support of the hearing of oral evidence before granting an

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107 Dicker 1994 De Rebus 215.

interdict

Society of Advocates of South Africa:Transvaal Provincial Division

3.5.10 The Society contends that the majority of women in South Africa are not literate or legally literate or close to courts or police stations where there are people who are able to handle the situation of family violence. This is especially so in the rural community. Affidavits are poorly compiled and do not set out the main issues. It is submitted that there should rather be a mechanism through which applicants can come to court and apply orally. A magistrate should be able to ask questions and identify the problems and then make a finding as to what the real issues are.

3.5.11 The problem is that the court only has the affidavit to apply its mind to in a case where a drastic remedy must be granted. There is no replying affidavit or anything else involved. Although the court has the discretion to require oral evidence from the applicant, in practice this would seldom happen, bearing in mind the work load of magistrates. The applicant has no right to give oral evidence before a magistrate - it depends entirely on the magistrate's discretion. The Society emphasises the fact that the purpose of the Act is to give people access to an inexpensive remedy in cases of family violence. However, dealing with the problem by way of affidavit makes the remedy less accessible for the very people it has been created for.

Cape Law Society

3.5.12 The Cape Law Society agrees that, for the purpose of assisting applicants, provision should be made in the Act or the Regulations for the amplification of the original written application for an interdict by the hearing of oral evidence. Concern is, however, expressed that respondents should not be prejudiced in consequence of any such provision. It is accordingly recommended that magistrates be obliged in terms of the Act or Regulations to note in the court file the substance of oral evidence heard by them for the purpose of enabling respondents to reply thereto.

3.5.13 It is emphasised that, if provision of relief against violence is to be taken seriously, in line with constitutional guarantees of equality, dignity and security of person

and bodily and psychological integrity, practical steps must be taken to achieve effective implementation of the Act and proper enforcement of the relief provided therein.

NICRO Women's Support Centre / Human Rights Watch - Africa / SA National Council for Child and Family Welfare / Family Advocate: Bloemfontein / SA Association of Social Workers in Private Practice / Ms J Fedler / Mrs S J Mitchell / Black Sash / Transvaal Law Society I Lawyers for Human Rights / K R Makola I Magistrates of the Cape Peninsula

3.5.14 The presiding officer should be given a discretion to hear oral evidence to elicit more information where there is unclarity.

E. Submissions in support of the hearing of oral evidence on application for the amendment or setting aside of an interdict (section 2(2)(c) of the Act)

Magistrates: Welkom; Johannesburg

3.5.15 The Magistrate: Welkom argues that an interpretation which excludes oral evidence from an application for the amendment or setting aside of an interdict, will make it almost impossible for the applicant (original respondent) to discharge his burden of proof in cases where a dispute of facts arises, and the court cannot make a final order based on common or proved facts.

3.5.16 The Magistrate: Johannesburg suggests that oral evidence will be necessary only where a dispute of fact should arise on the affidavits before a judge or magistrate. The hearing of oral evidence in all instances could amount to an enquiry or trial which the current legislation does not account for procedurally.

F. Comparative survey of laws

Australia

The Australian Capital Territory

3.5.17 The applicant must give oral evidence on oath to support the application for an

interim order.[108]

New South Wales

3.5.18 A complaint for an order may be made orally or in writing and must be substantiated on oath.[109]

South Australia

3.5.19 An interim *ex parte* order can be obtained on affidavit evidence. The applicant must be prepared to give oral evidence at the proceedings for confirmation of the order.[110]

Victoria

3.5.20 The applicant must be prepared to provide oral evidence of the urgency which justifies an *ex parte* interim order.[111]

New Zealand

3.5.21 In any proceedings under the New Zealand Domestic Violence Act 86 of 1995 the Court may, of its own motion, call as a witness any person whose evidence may, in its opinion, be of assistance to the Court.[112] The court may receive any evidence that it thinks fit, whether or not it is otherwise admissible in a court of law.[113]

G. Evaluation

3.5.22 The Commission surmises that the argument for allowing the hearing of oral evidence before granting an interdict is convincing. This view is also supported by the majority of respondents. The judicial process cannot permit that relief against domestic violence be refused for want of compliance by the applicant with requirements of the Act or Regulations, where such lack of compliance may be cured by the hearing of oral

108 Laws of Australia par [61].
109 Laws of Australia par [64].
110 Laws of Australia par [77].
111 Laws of Australia par [85].
112 Domestic Violence Act 86 of 1995, section 82.
113 Domestic Violence Act 86 of 1995, section 84.

evidence. The Commission has noted that at the courses presented at Justice College for Registrars and Clerks of the Court they are fully instructed to advise the applicant sufficiently to supplement the affidavit to obviate the leading of oral evidence. However, this should not preclude a presiding officer to hear oral evidence to elicit more information where there is unclarity. This is also the position in Australia and New Zealand.[114]

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

3.5.24 In paragraph 3.1.60 above it is recommended that provision be made for the granting of interim interdicts *ex parte* and a rule *nisi* calling upon the respondent to show cause on the return day of the order why the provisional interdict granted against the respondent should not be made final. On the return day the applicant and the respondent have the opportunity to present oral evidence.[115]

H. Recommendation 5

3.5.25 **It is recommended that the legislation provide that:**

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

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

114 See par 3.5.17 et seq above.
115 H N Pretorius Burgerlike prosesreg in die landdroshowe Vol II Durban: Butterworth 1986 744.

3.6 Service of interdicts

A. Excerpt from Issue Paper[116]

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

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

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

B. Problem analysis

3.6.1 In terms of section 2(3) of the Act the interdict shall have no force and effect until served on the respondent in the prescribed manner. The manner of service is prescribed in Regulations 3 and 4.[117]

3.6.2 The applicant is responsible for the payment of sheriff's fees for the service of the interdict effected by the sheriff. The Magistrate may, however, after assessing the relevant circumstances, such as the financial position of the applicant, order that the State will be responsible for such fees.[118] Apparently this is done by way of the applicant making an affidavit stating her circumstances and why she cannot afford to pay the sheriff.[119]

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116 Issue Paper at 7.

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

118 Van Rensburg 1994 The Magistrate 99; Justice Circular 50 of 1993 par 4.3.

119 M Daniels & L Muntingh NICRO Occasional Paper No 3: Report on a survey of women who applied for interdicts through the NICRO Women's Support Centre in terms of the Prevention of Family Violence Act 133 of 1993 Cape Town: NICRO 1995 8.

3.6.3 Fedler[120] points out that financial abuse and the withholding of funds are a common feature of battering relationships and that many women do not have enough money for transport, let alone an interdict. Sheriff's fees are an unnecessary obstacle to the women' safety. She suggests an amendment to the Act to provide explicitly for the costs of service of the interdict to be borne by the State. Alternatively, the police should be legislatively mandated to serve the interdict.

3.6.4 According to Novitz[121] the chief problem encountered by many applicants is the sheriff's fee for service. This fee varies according to the difficulty of the service. Applicants are left in ignorance of the option that the costs may be borne by the State. She argues for detailed provisions, either in the Act or Regulations, stating how one may apply for sheriff's fees to be waived.[122]

3.6.5 Human Rights Watch / Africa[123] reports that long delays are experienced as a consequence of an order that the fee for the interdict to be served be paid by the State. In cases where the applicant has been exempted from paying the fee, it appears that some sheriffs do not act until they receive the fee from the Department of Justice. Cases have been reported where women who had been granted an interdict had waited up to six weeks for the sheriff to deliver service, instead of the usual one to two days. For a woman at risk of violence, the delay may be life-threatening. Service of the interdict by the police has the advantage both of saving costs and of ensuring that the police are aware of the interdict at the exact moment that it comes into force.

3.6.6 Daniels & Muntingh[124] report that the time taken to serve the interdict is an issue of some concern as during this time the applicant will be unprotected, as she will not yet have received her copy of the interdict and the warrant of arrest. A survey in the greater Cape Town area revealed that the average time taken to serve the interdict after being

120 Fedler 1995 SALJ 243.
121 Novitz 49.
122 Novitz 58.
123 Human Rights Watch/Africa Violence against women in South Africa - State response to domestic violence and rape New York: Human Rights Watch 1995 71.
124 Daniels & Muntingh 8.

granted was 8 days.[125] The average time taken to serve the interdict is too long considering the urgency of the matter. Also, the time lapse between the interdict being served and the applicant receiving a copy of the interdict and the warrant of arrest is too lengthy and in this period applicants are often left feeling vulnerable and powerless.[126]

3.6.7 Daniels & Muntingh[127] recommend that service of the interdict occur on an urgent basis, and should always be same-day service where possible. In this way the sheriff would furnish the court sooner with a return of service and an applicant would accordingly be in possession of the interdict and warrant sooner. Applicants should always be encouraged to obtain the interdict documents personally from the courts. Where postal service is necessary, court personnel should ensure that all the necessary documents are sent, and that they are sent immediately upon the court receiving the sheriff's return of service.

C. Submissions in respect of service by the South African Police Service

South African Police Service: Divisional Chief, National Standards and Management Services

3.6.8 The Divisional Chief: National Standards and Management Services points out that section 13 of the Police Service Act 68 of 1995 is very clear as regards the duties and functions of police officials. The Family Violence Act however, does not confer a duty or power upon police officials by law. Instead or further burdening the police with the service of documents it is important to look at the real problem, i.e the lack of sheriffs. It is proposed that an urgent petition be made to appoint more sheriffs. They should have a 24-hour number where a sheriff is available to serve the documents.

South African Police Service: National Crime Investigation Service

3.6.9 The National Crime Investigation Service do not support the proposal that provision should be made for service by the South African Police Service. According to

125 It is, however, important to note that the interdict is not necessarily served in the same area of jurisdiction where an application is made, but that this will usually be the case.
126 Daniels & Muntingh 16.
127 Daniels & Muntingh 16.

them this is purely a matter of civil litigation which should not form part of the police's functions. Such a proposal will also have serious personnel implications for the SAPS.

Lawyers for Human Rights

3.6.10 There is scepticism about the SAPS's ability to effect service timeously and efficient. The SAPS is currently suffering from a serious shortage of manpower and lacks the capacity to serve the numerous interdicts. Interdicts should be served on a uniform tariff that is substantially lower than the tariff in the magistrate's court. A service fee of R10 per service is recommended and service fees should be dispensed with in deserving cases.

Black Sash

3.6.11 It is argued that the SAPS is already involved in this process in that they effect the suspended warrant of arrest in case of an interdict breach. This change would marginally increase their role, while greatly expanding protection.

Other submissions

3.6.12 The following respondents submit that provision should be made for service by the SAPS:

SA National Council for Child and Family Welfare

Gauteng Regional Network on Violence against Women

Cape Law Society (Provision for service by sheriffs or by the SAPS)

Transvaal Law Society (In so far that sheriffs do not normally work after office hours)

Family Advocate: Bloemfontein

Attorney D Burman (Judicial officer should have discretion to order service by either the SAPS, a sheriff or, in isolated cases only, the clerk of the court)

Mrs S J Mitchell

POWA

Ms J Fedler (A special sheriff should be assigned or the SAPS must be mandated)

Magistrate: Welkom (Service by the SAPS will create practical possibilities to

expedite service, especially after-hours)

Magistrate: Pretoria North (Service by the SAPS in cases where the applicant cannot afford to pay or where sheriff or clerk of court is not able to serve the interdict)

D. Submissions in support of the view that personal service of interdicts should be required

Magistrates

3.6.13 The following magistrates hold the view that personal service of the interdict on the respondent should be required:

Magistrates of the Cape Peninsula

Magistrate: Welkom (Because of the far-reaching and personal nature of the interdict, as well as the penalty provided for in section 6 of the Act, personal service is a necessary requirement)

Magistrate: Pretoria

Magistrate: Pietermaritzburg (If the option of an interim order is accepted, personal service would not defeat the main objective of the Act, as the interim order would already be in force)

Magistrate: Johannesburg

Lawyers for Human Rights

3.6.14 There must be personal service on respondents, both to ensure due process and to ensure that the respondent has actually received notice.

E. Submissions opposed to the view that personal service of interdicts should be required

Magistrate: Germiston

3.6.15 The Magistrate: Germiston points out that it is only when the respondent cannot be found that alternative service is acceptable. Respondents are known to evade personal service. The warrant of arrest is any event issued after the interdict has been served. If any doubt should exist as to whether the interdict has come to the notice of

the respondent, re-service could be called for. In terms of section 3(1) peace officers may execute warrants. This clearly implies the exercise of a discretion as to whether it is necessary to arrest the respondent and this discretion has been specifically made subject to the provisions of section2(3) (service on respondent).

Other submissions

3.6.16 The following respondents hold the view that a requirement of personal service would be used as a method of avoidance and defeat the main objective of the Act, namely to prevent violence:

Chief Family Advocate
Human Rights Watch / Africa
Gauteng Regional Network on Violence against Women
Cape Law Society (If provision is made for the service of interim orders)
Dr A Allan
POWA
FAMSA - Pietermaritzburg

F. Submission by the Cape Law Society

3.6.17 In order to address any possible prejudice to respondents, the Cape Law Society submits that provision be made in the Regulations for service on the respondent, together with the interdict, of copies of the initial application, supporting affidavit and, in the event of oral evidence having been heard, a note by the magistrate/ judge giving particulars of the supplementary facts which emerged from such oral evidence.

G. Comparative survey of laws

Australia

The Australian Capital Territory

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

on the respondent.[128]

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

3.6.19 Once the interim order is served on the defendant it is effective to protect the victim.[129] The defendant must have been served with the order before he or she can be guilty of a breach.[130]

Queensland

3.6.20 It is not necessary, as it is in other jurisdictions, that the respondent should have been served with a copy of the order. It is sufficient that he or she was aware of the order to the extent that it can be said that he or she "knowingly" breached the conditions.[131]

USA

Kentucky

3.6.21 The adverse party shall be personally served with a copy of the emergency protective order, a copy of the notice setting the full hearing, and a copy of the petition.[132] An emergency protective order shall be reissued for a period not to exceed 14 days if service has not been made on the adverse party by the fixed court date and time.[133]

Minnesota

3.6.22 A temporary order shall be personally served upon the respondent.[134]

H. Evaluation

128 Laws of Australia par [61] - [62].
129 Laws of Australia par [65], [69], [77], [81], [85], [89].
130 Laws of Australia par [66] [70], [78], [82], [86], [90].
131 Laws of Australia par [74].
132 Kentucky Revised Statutes, section 403.740(4).
133 Kentucky Revised Statutes, section 403. 740(3).

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

3.6.24 Suggestions are that the costs of service of an interdict should in all instances be borne by the State, that the police should be mandated to serve the interdict, or that there should be detailed provisions stating how one may apply for Sheriff's fees to be waived. A recommendation that the costs should in all instances be borne by the State will obviously have major cost implications and seems to be unjustified in respect of those applicants who are in a position to pay the Sheriff's fees. A viable solution would be for the Regulations to specify under what circumstances and how one may apply for the Sheriff's fees for the service of the interdict to be borne by the State. The allegation that certain Sheriffs do not act until they receive the fee should be investigated by the Department of Justice and dealt with administratively.

3.6.25 There appears to be strong support for the view that provision should be made for service by the SAPS, either as a rule or as an alternative to service by the Sheriff. It is argued that service by the SAPS would obviate the need for service fees and ensure that the police are aware of the interdict at the exact moment that it comes into force. There is concern that the average time taken to serve the interdict is too long considering the urgency of the matter. The involvement of the SAPS will expedite service, especially after-hours.

3.6.26 The Commission considers that there are compelling arguments for involving the SAPS in the service of interdicts. Practical experience of legal practitioners and of frustrated applicants indicate that serious efforts should be undertaken to involve the

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134 Minnesota Domestic Abuse Act, 1992, section 8.

SAPS in the service of interdicts. However, note should be taken of the fact that the SAPS is, at this stage, opposed to the idea, mainly on the ground of cost and personnel implications.[135]

3.6.27 As regards the view that warrants should be issued only where there has been personal service on the respondent, the Commission recognises that a requirement of personal service would defeat the main objective of the Act, namely to prevent violence. Respondents are known to evade personal service. It is submitted that the recommendation that provision be made for the granting of interim interdicts with a return date,[136] will to a great extent limit the risk of a respondent being arrested without the interdict having coming to his notice. There appears to be no reason to depart from the prescribed manner of service[137] which allows for delivery of the interdict at the respondent's place of residence, work or business, to some person apparently not less than 16 years of age and apparently residing or working there, or affixing a copy to the principal door.

3.6.28 The Commission is persuaded by the submission[138] that, in order to address any possible prejudice to respondents, provision be made in the Regulations for service on the respondent, together with the interdict, of copies of the initial application, supporting affidavit and, in the event of oral evidence having been heard, a note by the magistrate/ judge giving particulars of the supplementary facts which emerged from such oral evidence. This is in line with Rule 56(7) of the Magistrates' Courts Rules which provides that a copy of an order made *ex parte* and of the affidavit on which it was made shall be served on the respondent and will ensure that the respondent is in the best possible position to show cause on the return day of the order why the provisional interdict granted against him should not be made final.

I. Recommendation 6

135 See par 3.6.8 - 3.6.9 above.
136 See par 3.1.60 above.
137 See footnote 116 above.
138 See par 3.6.17 above.

3.6.29 **It is recommended that:**

(a) **The Regulations specify under what circumstances and how one may apply for the Sheriff's fees for the service of the interdict to be borne by the State.**

(b) **The allegation that certain Sheriffs do not act until they receive the fee be investigated by the Department of Justice and be dealt with administratively.**

(c) **The Regulations retain the prescribed manner of service which allows for delivery of the interdict at the respondent's place of residence, work or business, to some person apparently not less than 16 years of age and apparently residing or working there (Regulation 4(2)) or affixing a copy to the principal door (Regulation 4(3)).**

(d) **The Regulations provide for service on the respondent, together with the interdict, of copies of the initial application, supporting affidavit and, in the event of oral evidence having been heard, a note by the magistrate/ judge giving particulars of the supplementary facts which emerged from such oral evidence.**

J. Request for comment 1

3.6.30 **Specific comment is requested on the Commission's view that the SAPS should be involved in the service of interdicts issued in terms of domestic violence legislation.**

3.7 Duration of interdicts

A. Excerpt from Issue Paper[139]

> The Act makes no provision for the automatic cancellation of interdicts after a certain period of time. The opinion was expressed that some sort of limit should be set on the duration of interdicts. Although this proposal is not without merit, it will, if implemented, cause a variety of administrative problems, for example giving notice to the applicant will be essential and in many cases the applicant will no longer be traceable on account of a change of address.
>
> The question also arises whether the warrant for arrest would also lapse? A respondent who is arrested on a warrant issued in terms of an interdict that has lapsed would be in a position to sue for unlawful arrest.

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

B. Submissions in support of the view that a limit should be set on the duration of interdicts

3.7.2 The following respondents support the idea of having limits on the duration of interdicts:

SA Association of Social Workers in Private Practice (Provided that the applicant can apply for extension.)

SA National Council for Child and Family Welfare (Proper reviews need to take place three months prior to the expiry of the interdict and interdicts should be extended without incurring further costs to the applicants.)

Human Rights Watch / Africa (The interdict should be made final on first application for a period of one year or more if justified to the magistrate by the applicant. The respondent could still apply for the interdict to be set aside before it lapsed.)

SAPS - National Crime Investigation Service (It might, however, complicate the matter for the SAPS if they act upon an interdict which has lapsed.)

K R Makola (State in the order that in will remain in force for a period, say, of 12 months. This fact can also be reflected on the warrant of arrest.)

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139 At 8.

Mrs S J Mitchell

Ms J Fedler (A time-limit such as two or five years, renewable at the request of the applicant.)

Magistrates: Kempton Park; *Randburg*

Magistrate: Port Elizabeth (10 years or until the death of either party.)

Magistrate: Johannesburg (Period of three years and an endorsement on the warrant that it expires after the said period.)

Magistrate: Pretoria (Period of two years and the court that granted the interdict should be empowered, on application, to extend the interdict for the same period from time to time. The respondent must be given notice of the application and extension.)

Magistrate: Germiston (In practice interdicts are to be retained indefinitely by the office where they were issued. The presiding officer should be granted a discretion to grant an interdict subject to a time limit.)

Magistrates of the Cape Peninsula (A time limit would have practical benefits for the various magistrates' offices that have to store the interdict files. Automatic cancellation of interdicts after, say, two years should be prescribed. A letter could be sent to applicants placing them in a position to renew the interdict if necessary.)

Magistrate: Pretoria North (If respondent does not apply for setting aside or amendment of provisional interdict within one week of receipt of service the order automatically becomes a final order.)

C. Submissions in support of the view that no limit should be set on the duration of interdicts

Cape Law Society

3.7.3 Taking into consideration the potential abuse by applicants of an interdict of extended duration, it is submitted by the Cape Law Society that a warrant of arrest issued together with an interdict should endure for a period of one year only and then lapse automatically. The underlying interdict should, however, remain in force until set aside by a competent court. Provision should be made in the Act for applicants to

apply, at any time prior to the expiry of the one year period, for an extension of the duration of the warrant of arrest beyond one year. Further provision should be made for applicants to apply, after the lapse of the warrant of arrest, for the warrant to be "reactivated", provided that the underlying interdict is still in force. In the event of the interdict being set aside, any warrant issued in terms thereof would lapse. Clear provision should be made in the Act for a warrant to lapse in such circumstances.

Gauteng Regional Network on Violence against Women

3.7.4 The Network does not support a proposal allowing for automatic expiry of an interdict. All other interdicts - with the exception of a temporary interdict pending the outcome of court case - are final. On this basis there seems no sound reason to make an exception of this particular interdict. Attention is drawn to the fact that violent incidents cannot be predicted and peaceful interludes, in of themselves, are no guarantee that violence has ceased for good. Unless the applicant has requested that the interdict be set aside, there is no reason to allow for its expiry.

Justice College

3.7.5 Justice College points out that in general the object of interdicts is the protection of alleged existing rights, the immediate objective being to preserve or restore the *status quo* pending the final determination of the rights of the parties. The interdict provided for in the Act deviates from the general principle in that a final interdict is granted without determination of the final rights of the parties. If compliance with *audi alteram partem* could be built into the Act the indefinite duration of the interdict would not be problematic as final rights had been determined and would need perpetual protection. The obvious way for the Act to provide for this would be the granting of an interim interdict. This would not defeat the main objective of the Act as a warrant of arrest, though suspended, should preserve or restore the *status quo*.

Magistrates: Pietermaritzburg; Welkom / Chief Family Advocate

3.7.6 No other Act provides for a time limit on any interdict. To make it incumbent upon courts to send out notices of renewal contradicts an argument in respect of a lack of manpower. A time limit is impractical and a variety of administrative problems are

anticipated.

Other submissions

3.7.7 The following respondents also feel that no time limit should be set on the duration of the interdict:

FAMSA Pietermaritzburg

POWA

KZN Network on Violence against Women

NICRO Women's Support Centre

Transvaal Law Society

D. Comparative survey of laws

England

3.7.8 The Law Commission (England)[140] asserts that fixed time limits are inevitably arbitrary and can restrict the courts' ability to react flexibly to problems arising within the family. In particular, it is important that orders should continue to be capable of enduring beyond the end of a relationship, although in some cases, short-term relief will be all that is necessary or desirable. The Law Commission does not think that a formal distinction between short and long term remedies is necessary and recommends that orders should be capable of being made for any specified period or until further order.

Australia

The Australian Capital Territory

3.7.9 An interim order is valid for 10 days. The order lasts for 12 months unless the court specifies a shorter time.[141]

New South Wales

3.7.10 If an interim order is made, the defendant is summoned to appear at a hearing as soon as possible. The order may last for any period, but if the court does not specify a

140 Law Com. No. 207 27.

141 Laws of Australia par [61] - [62].

period then it lasts for six months.[142]

Northern Territory

3.7.11 The order may be made for any period which must be specified in the order.[143]

Queensland

3.7.12 An interim order usually lasts for 30 days but may be extended. The order remains in operation for two years or for a specified longer period if the court considers that there are special reasons why it should be for a longer period. The order may be renewed to take effect immediately upon the expiration of the original order.[144]

South Australia

3.7.13 After an interim order is made, the defendant is summoned to appear to show cause why the order should not be continued. No time limit is imposed on the duration of an order and the court is not required to specify how long the order will last.[145]

Tasmania

3.7.14 An interim order operates for a maximum of 60 days or until further order of the court. The order lasts for such time as the court considers it necessary to protect the person who applied for the order.[146]

Victoria

3.7.15 An interim order operates for the time specified by the court or until a further order is made. The order lasts for 12 months or a lesser period as the court specifies.[147]

Western Australia

3.7.16 If an interim order is made, the defendant is summoned to show cause why the

142 Laws of Australia par [65] - [66].
143 Laws of Australia par [70].
144 Laws of Australia par [73] - [74].
145 Laws of Australia par [77] - [78].
146 Laws of Australia par [81] - [82].
147 Laws of Australia par [85] - [86].

order should not be confirmed. The order lasts for 12 months or for such other period (including longer than 12 months) as the court specifies.[148]

Canada

Alberta

3.7.17 The Alberta Law Reform Institute[149] notes that there may be concerns about limiting the duration of *ex parte* orders. However, such considerations might not apply in the case of final orders. In some instances a very long-term or permanent order might be fair and desirable. Consideration should be given to the circumstances in which the duration of orders should be limited. The issue of what should be required for an applicant to obtain a renewal of an order should also be addressed. A low threshold of proof should be considered here.

New Zealand

3.7.18 A final protection order continues in force until it is discharged by the court on the application of the applicant or the respondent.[150]

USA

Kentucky

3.7.19 An emergency protective order shall be effective for a period of time fixed in the order, but not to exceed 14 days. Upon the issuance of an emergency protective order, a date for a full hearing shall be fixed not later than the expiration date of the emergency protective order.[151]

Model Code on Domestic and Family Violence

3.7.20 An emergency order for protection expires 72 hours after issuance.[152] An order of protection is effective until further order of the court.[153]

148 Laws of Australia par [89] - [90].
149 ALRI Report for discussion No 15 54.
150 Domestic Violence Act 86 of 1995, section 45(2).
151 Kentucky Revised Statutes, section 403.740(3).
152 Model Code, section 305(5).
153 Model Code, section 306(5).

E. Evaluation

3.7.21 In paragraph 3.1.60 above it is recommended that provision be made for the granting of an interim interdict *ex parte* with a return date. In terms of the Magistrates' Courts Rules,[154] an order made *ex parte* shall call upon the respondent to show cause against it at a time stated in the order, which shall not, unless the court shall give leave for a shorter time, be a less time after service than the time stated in the following Rule: where service of an *ex parte* order calling upon the respondent to show cause at a time stated in the order is to be effected upon any party, service of such *ex parte* order shall be effected at least 10 days before the time specified in such *ex parte* order for the appearance of such party.[155]

3.7.22 As appears from the comparative survey of laws,[156] the span of time for interim orders varies between 3 and 60 days. In a number of jurisdictions an interim order operates for the time specified by the court. The Commission is of the opinion that the position as set out in the Magistrates' Courts Rules provides sufficient flexibility in respect of the duration of interim orders.

3.7.23 A final interdict is one which is granted without (as a rule) any limitation as to time. It is granted in order to secure a permanent cessation of an unlawful course of conduct or state of affairs.[157] The Commission takes cognisance of the fact that violent incidents cannot be predicted and that peaceful interludes, in of themselves, are no guarantee that violence has ceased for good. As asserted by the Law Commission (England),[158] it is important that orders should continue to be capable of enduring beyond the end of a relationship.

3.7.24 If the court determines on the return day that the interim interdict granted against the respondent should be made final, it implies that final rights have been determined. Such rights require perpetual protection. The Commission considers that a time limit on

154 Rule 56(5)(a).
155 Rule 9(13)(b).
156 See par 3.7.8 et seq above.
157 H J Erasmus & A M Breitenbach Superior Court Practice Kenwyn: Juta 1994 E8-3.

a final interdict in respect of domestic violence is impractical and a variety of administrative problems are anticipated.[159]

3.7.25 In terms of Magistrates' Courts Rule 56(6) the return day of an order made *ex parte* may be anticipated by the respondent upon 12 hours' notice to the applicant. In terms of section 2(2)(c) of the Act the respondent has the power to apply for the amendment or setting aside of the interdict after 24 hours' notice to the applicant and the court concerned. The procedure provided for in section 2(2)(c) of the Act for amending or setting the interdict aside could be retained as an additional remedy open to the respondent, both in respect of the interim order and the final order.

F. Recommendation 7

3.7.26 **It is recommended that the legislation:**

(a) Provide that the return day to show cause why the interim interdict granted against the respondent should not be made final shall not be less than 10 days after service has been effected upon the respondent.

(b) Set no time limit on the duration of a final interdict granted in terms of the legislation.

(c) Retain the respondent's power to apply for the amendment or setting aside of the interdict after 24 hours' notice to the applicant and the court concerned (section 2(2)(c) of the Act) in respect of the interim order and the final order.

3.8 Role of the South African Police Service

158 See par 3.7.8 above.
159 See excerpt from Issue Paper above.

A. Excerpt from Issue Paper[160]

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

B. Problem analysis

3.8.1 Human Rights Watch / Africa[161] maintains that in practice, the greatest problem with implementation of the Act appears to lie with the police. Ignorance about the law within the police continues to be prevalent. In addition, police response to domestic violence is often unsympathetic or hostile.[162] Resources must be devoted to ensuring that police understand that domestic violence in a home is a community issue of priority that must not be condoned by the police in any way.[163]

3.8.2 Fedler[164] emphasises that the co-operation of police officers in arresting the abuser for breach of the interdict is pivotal to the efficacy of the Act. According to her experience has shown that it is not the magistrates, but the police, who are the weakest link in the interdict structure:

(a) The police still do not treat domestic violence as a crime.

(b) There is a lack of prompt response by the police when called upon to assist.

(c) There is a reluctance on the part of the police to accept a charge of assault against a husband or boyfriend, an insensitive approach and a lack of commitment and vigour when it comes to investigating such a charge.

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160 At 8.
161 Human Rights Watch 74.
162 Human Rights Watch 76 *et seq*.
163 Human Rights Watch 83.
164 Fedler 1995 SALJ 246.

3.8.3 Novitz[165] points out that the United Nations Resource Manual calls for clarification of the police's role so as to overcome their reluctance to respond to domestic violence. She suggests that -

(a) the police respond to all calls to incidents of family violence;

(b) where a crime has taken place, the police arrest the perpetrator, regardless of the family context of the acts in question;

(c) 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;

(d) the police provide an escort for women to return to the family home to collect their belongings;

(e) 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;

(f) 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;[166]

(g) a "Family Violence Unit" be set up to specialise in cases of family violence and assist survivors; and

(h) special measures are taken to ensure effective police support for survivors of family violence in townships and rural areas.

3.8.4 The Commission is aware of the fact that the SAPS has a Victim Support Programme as one of five interlinking programmes identified to support the transformation process within the SAPS and to contribute to effective policing in South Africa.[167] The aim is to have at least one victim support centre per province in traditionally underresourced areas. The SAPS counter staff will all be specially trained to take statements sensitively. Similarly training of all police officials in the appropriate and skilful handling and referral of victims will take place. This entails the following:

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165 Novitz 60.

166 If urgent applications are to be heard the SAPS needs to be educated about the interdict system and how to assist with an urgent application (Novitz 50). See paragraph 3.11.1 - 3.11.2 below.

167 Snr Supt J A Nel (National Coordinator: Victim Support Programme) The role of the South African Police

(a) Training in interpersonal and communication skills.

(b) That all police officials are to be informed and able to provide basic psychological first aid at the scene of the crime.

(c) That police officials can serve as referral agent to these services.

3.8.5 The following milestones for the SAPS Victim Support Programme have been identified:

(a) The establishment of sustainable and effective crisis centres and support mechanisms by and within communities to aid service delivery by the SAPS.

(b) The implementation of an integrated training curriculum for police officials.

(c) The establishment of effective support mechanisms for police officials within the SAPS as victims of crime and violence.

(d) Community participation in victim support and in addressing the root-causes.

(e) Customer satisfaction.

3.8.6 The SAPS acknowledges that South Africa can no longer afford to neglect the needs and rights of victims. The SAPS Victim Support Programme represents a vision (of a victim centred restorative justice system); processes (such as policy, consultation, etc.); structures (such as a coordination body for service renderers); programmes and projects (such as new training curricula for police officials).

C. Submissions expressing concern about the role of the SAPS

Magistrate: Welkom

3.8.7 The Magistrate: Welkom reports that the problems referred to in the Issue Paper are often encountered in practice. In addition there are a number of other problems, for example, the omission of endorsing the warrant of arrest when executed, which makes it difficult to ascertain whether section 3(2)(b) of the Act has been complied with. Respondents have been detained for more than 48 hours before being brought before a

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Service in victim support and prevention Unpublished paper.

magistrate. The SAPS often do not execute the warrant of arrest, because the respondent indicates that he will go to court himself. This creates the danger of an irate respondent harming his family before he can be brought before a court.

Dr A Allan: Head of Psycholegal Unit, University of Stellenbosch

3.8.8 Dr Allan has found that the perceived reluctance of the police to intervene in family violence cases is to a large extent because the SAPS feel that they are being abused. They complain that certain people repeatedly lay assault charges against family members, and then withdraw them at a later stage. The classical example is where Mrs X lays an assault charge Friday evening, but withdraws it Sunday evening. Dr Allan is of the opinion that the reason for this can be found to some extent in the circumstances and personalities of the complainants.

3.8.9 This phenomenon is well known in psychological literature and some of the reasons why women do this are the following:

(a) They often lack a support system because their male partners have isolated them from family and friends, and even the medical and psychological systems, and consequently they feel hopeless and powerless.
(b) They fear for their own, and their children's, safety once the perpetrator is released on bail or discharged from prison.
(c) Religious beliefs.
(d) Financial reasons. Many such women do not have financial independence, have not worked for years and lack skills which make them freely employable. They therefore feel that they must maintain the relationship with the perpetrator to provide for themselves and their children.
(e) The lack of community support systems.
(f) As regards personality, battered women are often dependent and non-assertive people and they believe that they need their male partners to survive.

3.8.10 Dr Allan indicates that when the violence takes place, or immediately afterwards, these women may be driven by their fear to lay a charge. However, when the crisis has abated and they realize that they will have to face the new week without money, a support system and so forth, they withdraw the charge. This not only reinforces the aggressive behaviour of male partners, but also perpetuates a vicious circle of increasing violence. This is a well-known pattern and even for a therapist this is an extremely difficult situation to manage and one must have sympathy with members of the SAPS who are not trained to deal with such cases. There is no simple solution to this problem and he can think of no amendment of the Act that will solve it. Possible solutions include the empowerment of women, improving community support systems and starting support groups for such women. It is also important that members of the SAPS are trained to understand the dynamics which underpin this type of behaviour.

Ms J Fedler

3.8.11 Ms Fedler emphasises that before the SAPS is designated functions and duties in terms of any legislation, it is essential that extensive consultation with the SAPS takes place to ensure that the mechanisms that have been put in place will be able to be implemented.

Other submissions

3.8.12 The following respondents are also concerned about the role of the SAPS:

Human Rights Watch / Africa (There should be proper training, specialised police units to deal with family violence and clear policy guidelines issued to the police.)

Transvaal Law Society (Members of the SAPS should be properly informed as regards the operation of the Act.)

KZN Network on Violence against Women (It must be made clear that the SAPS have no discretion to release a respondent on warning and that they cannot refuse to institute a criminal charge when an interdict exists.)

Gauteng Regional Network on Violence against Women (Act should clearly spell out the role of the SAPS. A comprehensive training programme on the use of the Act should be embarked upon.)

Cape Law Society (A quick response family violence unit, clarification of police duties and a clear policy statement describing the circumstances in, and grounds upon which, the discretion under section 3(1) of the Act should be exercised.)
Professor J Jones (The SAPS must take the Act, and the heightened national concern over domestic violence, far more seriously.)
Society for Social Workers - Wits
Mrs S J Mitchell
Justice College (Continued education, training and informative sessions to the SAPS.)
POWA
Legal Resources Centre (PE) (Mandatory educational and training workshops on the Act and the appointment of a task team to monitor the efficacy of the Police in responding to its duties.)
Magistrates of the Cape Peninsula (As stated in the excerpt from the Issue Paper above.)
Magistrate: Pretoria (The Commissioner should be requested to issue a suitable directive to the members of the SAPS.)
Magistrate: Pietermaritzburg (The lodging of criminal charges and the application for an interdict are clearly not dependant on each other.)

D. Submissions by the SAPS

South African Police Service: National Crime Investigation Service

3.8.13 The National Crime Investigation Service states that the contention that the police are refusing to accept criminal charges until an interdict has been granted is somewhat generalised and needs some deliberation. It is conceded that some members of the police would be reluctant to accept criminal charges as far as family violence is concerned. It happens more often than not that family members withdraw charges within a few hours after lodging them. The “unwillingness” of the police to accept criminal charges is, however, not always the case and is, to a large extent, dependant on the specific circumstances of a case.

3.8.14 The fact that persons are being released with a warning after their arrest, is attributed to the ignorance or lack of knowledge of individual police officers who, despite undergoing continuous training, are not aware of the provisions of the specific Act. This serious concern will, however, again be brought to the attention of police officials by means of a circular.

3.8.15 The National Crime Investigation Service concedes that the contention is not without merit that the police tend to regard family violence as a civil matter and are reluctant to intervene. This is, however, also a matter which should be guided by the specific circumstances of a particular case. Family violence in itself should not exclude the intervention of the police. If offences such as assault and indecent assault are being committed within the context of the family sphere, there exists no reason for the police to fold their arms.

South African Police Service: Divisional Chief, National Standards and Management Services

3.8.16 In response to the problem that police tend to regard family violence as a civil matter and are reluctant to intervene, the Divisional Chief: National Standards and Management Services refers to a message by the National Commissioner of the South African Police Service which was circulated at the National Conference on Women Abuse and Domestic Violence (1995). The following excerpt is quoted:

> This perception is totally incorrect because the police must intervene in any situation where crime is being or has been committed.
>
> Women are also encouraged to report, to higher authorities, any police official who refuses to attend to such complaints, makes fun of the victim or humiliates the latter in any way, so that necessary disciplinary action can be taken against the responsible member.

3.8.17 In the light of the above it is concluded that it is clear that the police are committed to the prevention of domestic violence and the apprehension of perpetrators of these crimes. The police may not refuse to accept criminal charges and obtaining an

interdict is not a prerequisite for laying a charge. A cause for frustration is the fact that most cases of domestic violence reported to the police are withdrawn by the complainants.

E. Comparative survey of laws

Australia

3.8.18 In all jurisdictions, the police have standing to apply for civil remedies under the domestic violence legislation.[168]

New South Wales

3.8.19 Police are obliged to apply for an order on behalf of a victim of domestic violence unless they are satisfied that the applicant is applying for an order or there is some other good reason for the police not to apply for an order. The police must record the reasons for not applying for an order on behalf of a domestic violence victim. If the victim is a child, the police must apply for an order.[169]

Queensland

3.8.20 Police may apply for an order on behalf of the victim where the officer reasonably suspects that the spouse has been subjected to violence. Police must apply for a protection order where the officer has arrested someone for violence against a spouse or property. In addition, police may represent a person seeking an order.[170]

South Australia

3.8.21 It is a notable feature of the South Australian practice that in virtually all cases the police apply for an order on behalf of the victim.[171]

England

168 Laws of Australia Chapter 5.
169 Laws of Australia par [63].
170 Laws of Australia par [71].
171 Laws of Australia par [75].

3.8.22 Commenting on the position in Australia, the Law Commission (England)[172] points out that the power of the police to apply for civil remedies is seen as having a number of advantages. In many cases, the victim is in a state of helplessness because of the violence and is unable to take any initiative herself. Giving the power to the police removes the burden of taking action from her, reduces the scope for further intimidation by the perpetrator and leads to far fewer cases being withdrawn. In addition, it is seen to be in the police's interests to take steps to stop further violence because this will eventually lighten their workload. The fact that the police are initiating the proceedings also has the beneficial effect of bringing home to the respondent the seriousness of the matter and giving civil proceedings the "weight" they can lack in the eyes of some of the less law abiding members of society. There is also an argument that having the power to bring civil proceedings encourages the police to upgrade the importance of domestic violence and become more aware and sensitive in relation to it. They may also be more prepared to arrest for breach if they themselves have initiated the proceedings and obtained the order.

3.8.23 The following reservations are expressed on giving such powers to the police:[173]

(a) The intrusion of the police into the civil law.

(b) The manner in which they might exercise their powers.

(c) The degree of attention which would be paid to the wishes and interests of the woman involved.

(d) Indiscriminate and insensitive use of such powers could place many women in a worse position.

(e) Reluctance of the police to become involved.

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

3.8.24 The Law Commission[174] notes that the provision of support and assistance is rather different to actually taking legal proceedings on behalf of someone else and it is difficult to think of an alternative body which could fulfil the latter role. Often, the police

172 Law Com. No. 207 par 5.18.
173 Law Com. No. 207 par 5.19.
174 Law Com. No. 207 par 5.20.

will already be involved and will have witnessed the aftermath of incidents of domestic violence, if not the incident itself. They are accustomed to handling these problems and to participating in court proceedings. The police also represent the role of society in protecting individuals from violence and abuse. Extending standing to the police would give them greater flexibility in the way they respond to domestic crises without putting them under any obligation to apply for civil remedies or deterring criminal proceedings if these are more appropriate.

3.8.25 The Law Commission (England)[175] therefore recommends that where the police have been involved in an incident of molestation or actual or threatened violence, or its aftermath, they should have the power to apply for civil remedies on behalf of the victim. It is envisaged that the police would have power to apply for a civil order where they had attended at or following an incident of molestation or violence, and had reasonable cause to believe that such abuse had occurred. They could then apply for an order against the aggressor, provided that the people concerned fell within the relevant categories, and provided that the police consider this would be an appropriate course of action for them to take. There would be no obligation on the police to take civil proceedings, but the option would be available either as an alternative to or in addition to criminal proceedings.

3.8.26 The question of whether the victim's consent should be necessary before the police bring civil proceedings is also considered by the Law Commission (England).[176] On one view of the matter, it can be said that for an order to be effective, the active cooperation of the victim is required. On the other hand, requiring the victim's consent could be seen as undermining many of the reasons suggested for giving the police power to bring the proceedings. A third alternative is to require the police to consult the woman concerned and take account of her views. This should give the victim a significant degree of influence over the conduct of proceedings by the police, but does not make her consent or approval the decisive factor in determining whether or not civil proceedings are issued. The police could then take action where the victim asks them

175 Law Com . No. 207 par 5.20 - 5.21.
176 Law Com. No. 207 par 5.22 - 5.23.

to and would be in a better position to obtain the necessary information to enable them to distinguish cases where the woman genuinely does not want civil proceedings issued, from cases in which she does want some action taken against her assailant but does not dare to initiate or authorise it directly. The police could also properly emphasise to the assailant that the decision to issue civil proceedings is out of the victim's hands. As an additional safeguard it could be provided that when proceedings are taken by the police, the court should take account of the wishes of the victim before making any order.

3.8.27 The Law Commission (England)[177] accordingly recommends that the police should be under a duty to consult the victim and to take account of her views in deciding whether to issue and how to conduct any civil proceedings. In cases where proceedings are brought by the police, the court should have a duty to take the victim's views into account before making any order.

Canada

Alberta

3.8.28 The Alberta Law Reform Institute[178] refers to significant difficulties involving possession of personal property by victims of domestic abuse. It is often the case that they leave the residence in an emergency situation, going to a shelter or to the home of a friend, and they then face the difficulty of having left their personal possessions behind in the residence and have no way of returning to the residence in safety to collect them. The difficulty of setting up a new home without access to one's clothes and other personal effects in a situation of financial stress is a problem for many. Personal items like cots and highchairs are often essential to the victims's ability to take proper care of children that they have taken with them when fleeing the residence.

3.8.29 It is recommended[179] that the legislation should empower the court to order a police officer to accompany the applicant to a specified residence to collect specified personal property. Since the assailant might intimidate the victim out of the sight of the

177 Law Com. No. 207 par 5.23.
178 ALRI Report for discussion No 15 142 - 143.
179 ALRI Report for discussion No 15 144.

police officer, such orders, if ultimately granted, should be clear that the police officer must remain with the applicant at all times.

Nova Scotia

3.8.30 The Nova Scotia proposed legislation[180] empowers the court to grant an order, which shall be restricted in duration, requiring that a police officer accompany either party to a residence or supervise the removal of personal belongings in order to ensure the personal safety of the victim.

Saskatchewan / British Columbia

3.8.31 Saskatchewan[181] and British Columbia[182] have similar provisions directing a peace officer to accompany, within a specified time, a specified person to the residence to supervise the removal of personal belongings in order to ensure the protection of the victim.

F. Evaluation

3.8.32 The Commission takes cognisance of the fact that there is extensive criticism of the role of the SAPS in the combatting of domestic violence. However, it is clear that little can be done by way of legislative intervention to remedy the situation. Continued education and training to clarify the SAPS's role are required to ensure effective policing in domestic violence cases. In this regard the SAPS's Victim Support Programme[183] is encouraging evidence of sensitisation to the needs and rights of victims.

3.8.33 In all jurisdictions in Australia the police have standing to apply for civil remedies under the domestic violence legislation.[184] The Law Commission (England)[185] has made a careful analysis of the advantages of empowering the police to apply for civil remedies on behalf of the victim in domestic violence cases. The conclusion is that

180 Quoted in ALRI Report for discussion No 15 143.
181 Victims of Domestic Violence Act S.S 1994, c. V-6.02, section 3(3)(c), 7(1)(e).
182 Quted in ALRI Report for discussion No 15 201 - 203.
183 See par 3.8.4 et seq above.
184 See par 3.8.18 et seq above.
185 See par 3.8.22 et seq above.

such a power should be an option available to the police either as an alternative to or in addition to criminal proceedings. The Commission is persuaded that there is a strong argument in favour of empowering the SAPS to apply for an interdict on behalf of a victim of domestic violence.

3.8.34 In paragraph 3.2.35 above it is recommended that the power to apply for an interdict "by any other person who has a material interest in the matter on behalf of the applicant" (section 2(1) of the Act) be retained. Although one could probably argue that the police would have a material interest in the matter on behalf of the applicant, there should be no uncertainty as to the role of the SAPS in this regard and a power of this nature should be explicitly provided for in respect of the SAPS. However, as argued in paragraph 3.6.26 above, it would be inappropriate to intrude upon the line function of another department without proper consultation.

3.8.35 The difficulties referred to by the Alberta Law Reform Institute[186] involving possession of personal property by victims of domestic abuse are equally applicable to the situation in South Africa. Consultation suggests that victims often have to leave the residence in an emergency situation without having access to essential personal possessions. The Commission holds the view that the legislation should empower the court to order a police officer to accompany the applicant to a specified residence to supervise the collection of specified personal property. Jurisdictions in Canada[187] have provisions to this effect. However, this is also a matter that requires further consultation.

3.8.36 The Commission has been referred to the problem of access to the courts in the townships and rural villages. This problem might be alleviated by furnishing police stations with the necessary application for interdict forms and requiring the SAPS to assist applicants with the affidavits. It would be appropriate for the Department of Justice to investigate this possibility in consultation with the SAPS.

G. Recommendation 8

186 See par 3.8.28 above.
187 See par 3.8.29 - 3.8.31 above.

3.8.37 **It is recommended that:**

(a) The SAPS take cognisance of the criticism and guidelines for conduct expounded in 3.8 - Role of the South African Police Service.

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

H. Request for comment 2

3.8.38 **Specific comment is requested on empowering:**

(a) The SAPS to apply for an interdict on behalf of the applicant.

(b) The court to order a police officer to accompany the applicant to a specified residence to supervise the collection of specified personal property.

3.9 Review and appeal

A. Excerpt from Issue Paper[1]

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

B. Problem analysis

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

3.9.2 Dicker[2] argues that because the Act contains no provision for a right of appeal, the only recourse of an aggrieved party is by means of the procedure of common law review of an administrative act. This course of action would be available only in the limited circumstances that give rise to a right to have an administrative act reviewed by the Supreme Court. An application for review would have to be brought under Rule 53 of the Uniform Rules of Court.[3]

3.9.3 In the **Rutenburg** case it was held that a magistrate, in granting, setting aside or amending an interdict under the Act, acted in his judicial capacity as the officer presiding over his court. The jurisdiction, powers and procedure of that court were to be found, then, in the first instance, not in the provisions of the Act and Regulations, but in those of the Magistrates' Courts Act 32 of 1944 and the Magistrates' Courts Rules. The latter

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1 At 8.

2 Dicker 1994 De Rebus 215.

3 Rule 53(1) of the Uniform Rules of Court provides as follows:

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

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

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

provisions did not cease to apply to a magistrate simply because, in a particular case, he was applying the Act and Regulations: he was basically governed by the relevant provisions of the Magistrates' Courts Act 32 of 1944 and the Magistrate's Court Rules which applied to and regulated the proceedings in his court. It was only where those were expressly or by clear implication extended or departed from in the Act and Regulations that they would not apply.

3.9.4 According to Coetzee[4], section 83[5] of the Magistrates' Courts Act 32 of 1944 accords the respondent the right to appeal if his application for the amendment or setting aside of the interdict does not succeed.

3.9.5 Van Rensburg[6] states that the provisions of the Magistrates' Courts Act 32 of 1944[7] and the Criminal Procedure Act 51 of 1977[8] in respect of appeal and review are, with the necessary amendments, applicable to the interdict proceedings and the criminal investigation in terms of the Act.

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

3.9.7 It is clear to Van Rensburg[9] that a respondent arrested in terms of section 3(1) of the Act may at any time make an after hours application for bail. He refers to section 60 of the Criminal Procedure Act 51 of 1977[10] and to the Appellate Division's[11] interpretation of the section. The provision that a respondent shall as soon as possible be brought before a judge or magistrate (section 3(2)(b) of the Act) will be interpreted

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4 Coetzee 1994 De Rebus 625.

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

6 Van Rensburg 1994 The Magistrate 106.

7 Chapter XI.

8 Chapter 30.

9 Van Rensburg 1994 The Magistrate 103.

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

strictly and accordingly it can be argued that the respondent is, in essence, in the same position as an accused who applies for bail.

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

C. Submissions in respect of appeal and review

Magistrate: Germiston

3.9.9 The parties to an interdict or the amendment or setting aside of an interdict would have a right of appeal as submitted by Coetzee.[12] The respondent would also be able to take an enquiry with its criminal consequences for noncompliance with an interdict on appeal in terms of the Criminal Procedure Act 51 of 1977. A sentence would also be reviewable in terms of section 302[13] of the said Act.

Cape Law Society

3.9.10 The Cape Law Society prefers that for the sake of clarity, the Act should be amended to include detailed grounds for review and the procedure on review. On the question of appeal procedures, it is recommended that detailed provision for appeal and cross procedures be incorporated into the Act subject to the proviso that an interdict granted stand until the hearing of the appeal and not be suspended by such noting of an appeal. Unless the aforementioned proviso is included, an appeal procedure will effectively defeat the remedies provided under the Act.

Ms J Fedler (Gender Policy Consultant)

3.9.11 It is unnecessary for the Act to go any further than allowing a respondent to apply for the amendment or setting aside of the interdict.

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11 **Minister van Wet en Orde v Dipper** 1993 3 SA 591 (A).
12 See paragraph 3.9.4 above.
13 Sentences subject to review in the ordinary course.

Other submissions

3.9.12 The following respondents agree that provision should be made for appeal and review:

Magistrates: Pietermaritzburg; Port Elizabeth; Magistrates of the Cape Peninsula

Magistrate: Randburg (Rule 51 of the Magistrates' Courts Rules[14] should be followed for appeals.)

Chief Family Advocate

Human Rights Watch / Africa

Transvaal Law Society

KZN Network on Violence against Women

Gauteng Regional Network on Violence against Women

Dr A Allan

Family Advocate: Bloemfontein

SA Association of Social Workers in Private Practice

SAPS - National Crime Investigation Service

Society for Social Workers (Wits)

Mrs S J Mitchell

Justice College (If the Magistrates' Courts Act is the governing Act, then sections 83 - 88 read with rule 51 would be applicable. If not, the Act should spell out appeal and review.)

POWA

FAMSA - Pietermaritzburg

D. Submissions in respect of the postponement of the enquiry proceedings and bail

Magistrate: Durban

3.9.13 The Magistrate: Durban points out that respondents are arrested over weekends with a view to the holding of an enquiry in terms of section 3(4) read with section 3(5) of the Act. The affidavits lodged in support of the execution of the warrants of arrest (section 3(1) of the Act) are not submitted to the magistrates for purposes of the

14 Appeals in civil cases.

enquiry, nor are the deponents available at the time. Some magistrates grant bail whereas others are of the view that the Act does not permit it.

3.9.14 It is argued that the Act itself, neither expressly nor by implication, provides for the granting of bail. Even section 3(3) cannot be construed as permitting the granting of bail, since the provision itself limits the application of the provisions of the Criminal Procedure Act 51 of 1977 only to provisions relating "to the form and manner of execution of warrants of arrest, the arrest, detention, searching and other treatment necessary for the control of persons named in warrants of arrest". The respondent is furthermore not "an accused who is in custody in respect of any offence" as contemplated in section 60(1) of the Criminal Procedure Act 51 of 1977 and therefore would not qualify for bail under this section on the basis that the magistrate is entitled to order his release in terms of section 3(2)(a) of the Act. On the face of it, section 25(2)(d) of the Constitution, 1993, does not apply either. The section applies only to a person "arrested for the alleged commission of an offence" and it does not provide for bail outside section 60 of the Criminal Procedure Act 51of 1977.

3.9.15 There is no express provision in the Act which permits the enquiry proceedings to be postponed or adjourned by the magistrate. Section 3(2)(b) read with section 3(4) and (5) presupposes that within a reasonable time after arrest the whole affair should be over, with the respondent either having been released from custody or convicted and sentenced. In given instances, where the supporting affidavit is produced, the enquiry can be finalised on the papers. However, even where it is produced, there may be a dispute of fact, or the respondent may wish to call witnesses in his defence. Such events may warrant a postponement.

3.9.16 The Magistrate: Durban submits that the provisions of the Criminal Procedure Act 51 of 1977 (excluding section 59[15] but including section 72[16]) relating to bail ought to be rendered applicable to proceedings in terms of the Act. For the sake of uniformity of practice, provision should also be made in the Regulations for the supporting affidavit

15 Bail before first appearance of accused in lower court.

16 Accused may be released on warning in lieu of bail.

contemplated in section 3(1) of the Act to be submitted together with the executed warrant of arrest to the judge or magistrate before whom the respondent is brought in terms of section 3(2)(b) of the Act.

Gauteng Regional Network on Violence against Women / *POWA*

3.9.17 The Criminal Procedure Second Amendment Act 75 of 1995 should be amended to include breach of the Act as an offence in which the onus is placed on the respondent to prove why he should be released on bail.[17] In the event of bail being granted, the following conditions should be added:

The respondent -

(a) may not threaten or abuse the applicant;

(b) should surrender any firearms;

(c) may not enter the applicant's property nor come within a 200-metre radius of the applicant; and

(d) may not enlist the services of a third party to harass, intimidate or abuse the applicant.

Other submissions

3.9.18 The following respondents hold the view that provision should be made for the granting of bail:

Magistrate: Port Elizabeth (Right to postpone and grant bail should be spelled out. At present it seems that all that can be done at the enquiry is to order the respondent's release or find him guilty and sentence him.)

Magistrate: Verulam; Magistrates of the Cape Peninsula

Human Rights Watch / Africa (The exclusion of police bail is appropriate.)

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17 Section 60(11) of the Criminal Procedure Act 51 of 1977 now provides as follows:

" Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-

(a) in Schedule 5;

(b) in Schedule 1, which was allegedly committed whilst he or she was released on bail in respect of a Schedule 1 offence,

the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, satisfies the court that the interests of justice do not require his or her detention in custody."

Dr A Allan
SAPS - National Crime Investigation Service
Society for Social Workers (Wits)

E. Comparative survey of laws

Australia

New South Wales / Tasmania / Victoria

3.9.19 A respondent to an application for a protection order is treated for bail purposes as if he or she is facing criminal proceedings. This means that, if proceedings are adjourned or an order is not made immediately, the court may impose bail conditions to protect the victim.[18]

New Zealand

3.9.20 Where a person is arrested for breach of a protection order and charged with an offence of contravening a protection order, the person must not be released on bail during the 24 hours immediately following the arrest.[19]

F. Evaluation

3.9.21 It is clear that the absence of explicit provision for appeal and review in the Act gives cause for considerable confusion and that the legislation should provide for this. The Supreme Court Act 59 of 1959 and the Uniform Rules of Court; the Magistrates' Courts Act 32 of 1944 and the Magistrates' Courts Rules; and the Criminal Procedure Act 51 of 1977[20] contain detailed provisions for appeal and review in civil and criminal proceedings. For this reason the Commission does not deem it necessary to encumber the domestic violence legislation with detailed provisions in this regard. It need merely be provided that the parties to the proceedings have a right to appeal or to bring proceedings under review in accordance with the provisions of the aforementioned Acts.

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18 Laws of Australia par [23], [27], [28].
19 Domestic Violence Act 86 of 1995, section 51.
20 In paragraph 4.1.30 below it is recommended that the contravention of an interdict granted in terms of domestic violence legislation should be an offence which is prosecuted in the criminal court.

(As regards the granting of bail, see paragraph 4.1.30 below.)

G. Recommendation 9

3.9.22 **It is recommended that the legislation provide that the provisions in respect of appeal and review contained in the Magistrates' Courts Act 32 of 1944, the Supreme Court Act 59 of 1959, and the Criminal Procedure Act 51 of 1977, shall apply to the interdict proceedings and the criminal investigation (see the recommendation in paragraph 4.1.30).**

3.10 Definition of family violence

A. Excerpt from Issue Paper[21]

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

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

B. Problem analysis

3.10.1 Human Rights Watch / Africa[22] points out that it is left to the individual magistrate to determine whether the abuse qualifies for an interdict. Section 2(1)(a) and (d) of the Act refers to "assault or threaten" and "any other act". These sweeping provisions allow magistrates overly broad discretion to determine what constitutes abuse. This has resulted in a lack of consistency between various jurisdictions. It is also unclear whether most magistrates would view emotional or psychological harassment, not coupled with physical violence or threats of violence, as abuse.

3.10.2 According to Fredericks & Davids[23] the prevention of violence within the family is central to the Act, yet there is no definition of violence contained in section 1. The reference to "assault" or a "threat" in section 2(1)(a) of the Act is clearly inadequate as violence consists not only of the infliction of injury by way of physical force or a threat to harm or injure, but also the infliction of emotional, verbal and psychological abuse. According to the authors it is clear, however, that the Act is aimed only at physical violence and a threat is relevant only to the extent that it is ancillary to the violence.

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21 At 9.
22 Human Rights Watch 70.
23 Fredericks & Davids 1995 TSAR 487.

3.10.3 Novitz[24] refers to a problem identified in the United States, namely that a survivor must prove that a substantial degree of violence has been used against her before she becomes eligible for a restraining order. One important issue is whether in practice, the lack of clarity in the Act will lead to similar burdens of proof being placed upon South African women. There needs to be clarification of the violence the Act is intended to address and the grounds upon which a magistrate may grant an interdict.[25] 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.[26]

3.10.4 Fedler[27] points out that, because the interdict is granted on the word of just one party, certain magistrates require proof of ongoing abuse in the form of doctors' reports, police documentation or disregarded peace orders. Many women are unable to produce the required proof. The requirement by some magistrates that women produce evidence of ongoing abuse is acutely at odds with the reality of the lives abused women lead. To ensure fairness there must be uniformity in the qualifying requirements for the interdict among the various magistrates' courts.[28]

C. Submissions in respect of the definition of family violence

National Human Rights Trust

3.10.5 It is suggested that most courts refuse to grant an interdict in the event of threats to assault since it is viewed as purely emotional abuse which is difficult to prove. Some courts do not view stalking as threatening or abusive behaviour for fear of violating a person's right of freedom of movement.

Ms J Fedler

3.10.6 The broad categories in the Act of "assault" and "threat" give no indication of

24 Novitz 40 - 41.
25 Novitz 58.
26 Novitz 42.
27 Fedler 1995 SALJ 244.

whether emotional abuse, psychological abuse, verbal abuse, threat with a weapon, stalking, harassment or financial abuse is sufficient to satisfy the requirements of the Act. It is therefore difficult for magistrates to decide whether or not an interdict is warranted in cases where the violence is potential and only in the form of threats. Ms Fedler suggests an amendment to the Act which includes a detailed but not exhaustive list of abusive behaviour that warrants an interdict.

3.10.7 She points out that stalking is recognised in certain countries as an offence, often associated with domestic violence. A separate Act, creating a statutory offence of "stalking", would be the best response to the problem.

Dr A Allan - Head: Psycholegal Unit, University of Stellenbosch

3.10.8 Dr Allan maintains that stalking is a problem which is much broader than the domestic sphere. There should be a general anti-stalking Act which also incorporates the recommendations of the Booysen Commission.[29]

Legal Resources Centre (PE)

3.10.9 The lack of specificity and vagueness of the Act insofar as what form of abuse entitles a survivor to relief, is identified as a major flaw. This renders a challenge against a refusal difficult in that specific grounds for obtaining an interdict are not mentioned.

Justice College

3.10.10 Justice College submits that in general definitions are dangerous due to imperfections. If there is a need for a definition of family violence, then the definition must be one of noninclusiveness. Magistrates are aware that violence includes physical, mental and sexual abuse.

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28 Fedler 1995 SALJ 244 fn 59.

29 Commission of inquiry into the continued inclusion of psychopathy as a certifiable mental illness and the handling of psychopathic and other violent offenders Interim Report Pretoria: Department of Justice 1992 (Report is not available in English). The following statutory offence is recommended (par 8.1.5):

> "Iemand wat opsetlik en wederregtelik op enige wyse dreig om iemand anders dood te maak of aan te rand of om sodanige dood of aanranding te veroorsaak, is aan 'n misdryf skuldig en by skuldigbevinding deur 'n hof strafbaar met die straf of strawwe wat die hof kan oplê vir aanranding."

Other submissions

3.10.11 The following respondents support the inclusion of a broad definition of family violence in the Act:

Transvaal Law Society

SA National Council for Child and Family Welfare

KZN Network on Violence against Women (Physical, sexual and emotional violence. Stalking should be included as an offence.)

Gauteng Regional Network on Violence against Women (Physical, psychological and sexual violence. Stalking.)

Cape Law Society (All forms of violence, including physical, sexual and mental abuse and damage to property. Stalking constitutes a serious family violence - interdicts defined in terms of radius are largely ineffective.)

SA Association of Social Workers in Private Practice

SAPS - Divisional Chief: National Standards and Management Services (Activities which instill fear but are not physically violent should be addressed eg. stalking, harassing, monitoring.)

Lawyers for Human Rights (Magistrates have enormous discretion and victims are often left with no recourse. Immediate violence or threats of violence, physical injury, threat of sexual abuse or sexual abuse should be included.)

Mrs S J Mitchell

POWA (Emotional abuse, stalking, harassment, verbal abuse, threat of abuse, psychological abuse, physical abuse and sexual abuse. A definition will provide uniformity in the granting of interdicts.)

FAMSA - National (A comprehensive definition which includes physical, mental and sexual abuse.)

Magistrate: Welkom (Physical, mental and sexual abuse. Stalking.)

D. Comparative survey of laws

United Nations framework for model legislation

3.10.12 It is urged that states adopt the broadest possible definition of acts of

domestic violence with a view to compatibility with international standards.[30]

England

3.10.13 The Law Commission (England)[31] refers to three possible approaches to the issue of the definition of the criteria for non-molestation orders:

(a) To define the criteria quite precisely, perhaps singling out the use or threat of violence.

(b) To leave them undefined.

(c) To adopt a broad statutory criterion, protecting the health, safety or well-being of the applicant or any child concerned.

3.10.14 It is recommended[32] that there should be no statutory definition of molestation. An acceptable degree of flexibility is provided by a model that empowers the court to grant an order where this is just and reasonable having regard to all the circumstances including the need to secure the health, safety or well-being of the applicant or a relevant child.[33]

Australia

The Australian Capital Territory

3.10.15 The applicant must establish that the respondent has engaged in violent conduct and is likely to do so again, or has threatened such conduct and is likely to carry out the threat.[34]

New South Wales

3.10.16 The applicant must establish that he or she has reasonable grounds to fear, and in fact fears, either violence or harassment. Unless otherwise ordered, every order is taken to prohibit stalking or intimidation.[35]

3.10.17 In New South Wales stalking, as defined, is a criminal offence. Stalking

30 UN Framework par 3.
31 Law Com. No. 207 par 3.3.
32 Law Com. No 207 par 3.1.
33 Law Com. No. 207 par 3.7.
34 Laws of Australia par [60].
35 Laws of Australia par [66].

means the following of a person about, watching, frequenting of the vicinity of, or an approach to, a person's place of residence, business or work or any place that a person frequents for the purpose of any social or leisure activity.[36]

Northern Territory

3.10.18 It must be established that the defendant has caused, or threatened to cause, personal injury to the victim or damage to the victim's property, or has engaged in provocative or offensive conduct and is likely to repeat that conduct or carry out the treat.[37]

3.10.19 Stalking, as defined, is a criminal offence. It includes following, loitering outside where the other person is, interfering with property of the other person, keeping the other person under surveillance or acting in any other way that could reasonably be expected to arouse the other person's apprehension or fear.[38]

Queensland

3.10.20 It must be established that violence or intimidation has occurred or been threatened, and violence and intimidation are likely to happen again or the threat is likely to be carried out.[39]

3.10.21 Stalking, as defined, is a criminal offence. It includes following, loitering near, watching or approaching another person or their place of work, residence or where they visit, telephoning, interfering with property, giving or leaving offensive material, harassing, intimidating, or threatening another person.[40]

South Australia

3.10.22 The court must be satisfied that the defendant may, unless restrained, cause personal injury or damage to property or behave in an intimidating or offensive

36 Laws of Australia par [45].
37 Laws of Australia par [68].
38 Laws of Australia par [46].
39 Laws of Australia par [72].
40 Laws of Australia par [47].

manner.[41]

3.10.23 Stalking is a criminal offence. The South Australian provision is similar to that of the Northern Territory,[42] but it also includes giving or leaving offensive material.[43]

Tasmania

3.10.24 It must be established that the defendant has threatened violence and is likely to carry out that threat, or that he or she has been violent or harassing and is likely to repeat that conduct.[44]

Victoria

3.10.25 It must be established that the defendant has been violent or harassing to a family member, or has threatened violence, and is either likely to do so again or is likely to carry out the threat.[45]

Western Australia

3.10.26 It must be established that the defendant has been violent or harassing and is likely to be so again or has threatened violence and is likely to carry out the threat.[46]

Canada

Alberta

3.10.27 The Alberta Law Reform Institute[47] is of the view that an understanding of the nature of abusive relationships is necessary to begin to make effective and reasonable decisions about what sort of conduct should be seen as giving rise to a need for protection. Ultimately the view is held that an individual should be entitled to apply for an order in any circumstance where the court is of the view that controlling and

41 Laws of Australia par [76].
42 Par 3.10.19 above.
43 Laws of Australia par [46].
44 Laws of Australia par [80].
45 Laws of Australia par [84].
46 Laws of Australia par [88].
47 ALRI Report for discussion No 15 59.

abusive behaviour is such as to justify the granting of a right to apply.[48] Examples of what ought to be specified as included in an understanding of abusive and controlling behaviour are identified. It is, however, emphasised that these examples should not be taken as limiting the notion of controlling and abusive behaviour that the court might properly take into consideration in making a just determination of whether an application should be allowed.

3.10.28 In any given case it might be that a single type of conduct might be sufficient to warrant the granting of an order. Thus, it ought not to be required that multiple types of conduct be present before an individual be entitled to apply for an order. However, where multiple types of abuse are present, the legal process should allow for a broad contextual view of that abuse to be taken by the court in assessing the nature of a need for protection. Any of the behaviours considered taken in isolation might lead the court to conclude that protection is unnecessary or that limited remedies will suffice to meet the needs of the applicant. However, the court must at all times consider the full context of the abusive relationship with a view to understanding the effect and threat posed by any accumulation of abusive and controlling conduct.[49]

3.10.29 The Alberta Law Reform Institute[50] takes the view that legislation should begin by setting out a general section which entitles an individual to apply for an order where they can demonstrate controlling and abusive behaviour. The legislation should give examples of such behaviour that would justify the right to apply. However, the examples which are singled out should not be exclusive and other conduct which does not fall within the identified categories of abuse should not be precluded from being raised. The following examples of controlling and abusive behaviour are identified:

(a) Physical assault.

It should be broadly defined and should include threat of physical assault and conduct which creates a reasonable apprehension of imminent physical harm. There should be no qualification that the assault cause a

48 ALRI Report for discussion No 15 71.
49 ALRI Report for discussion No 15 72.
50 ALRI Report for discussion No 15 72 - 73.

specific degree of physical harm.[51]

(b) Sexual assault.

Sexual contact of any kind that is coerced by force or threat of force. Threats to make unwanted sexual contact by force should also be included.[52]

(c) Destruction of property.

Damage to any property that is done with the intention of intimidating or threatening the applicant or which would reasonably be interpreted as a threat to the applicant. [53]

(d) Forcible or unauthorised entry into the residence of the applicant.

The forcible or unauthorised entry of the respondent into the residence of the applicant without the applicant's consent where the respondent and the applicant do not occupy the same residence.[54]

(e) Coercive action.

Compelling another against their will to perform an act which that person has the right not to perform or compelling another against their will to refrain from doing an act which that person has a right to perform.[55]

(f) Harassment.

Making repeated telephone calls to the applicant's home or workplace; keeping a person under surveillance by following them or looking in their windows; repeatedly coming to the applicant's house, workplace or school; following the applicant in public places and so on.[56]

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51 ALRI Report for discussion No 15 75.
52 ALRI Report for discussion No 15 77.
53 ALRI Report for discussion No 15 78.
54 ALRI Report for discussion No 15 79.
55 ALRI Report for discussion No 15 81.
56 ALRI Report for discussion No 15 83.

(g) Emotional abuse.

Subjecting an individual to degradation and humiliation including repeated insult, ridicule or name calling, making repeated threats to cause the individual extreme emotional pain, making repeated threats in relation to the individuals children, family or friends, and consistently exhibiting obsessive possessiveness or jealousy in relation to the individual which is such as to constitute a serious invasion of the individual's privacy.[57]

New Zealand

3.10.30 "Violence" is defined[58] as -

(a) physical abuse;

(b) sexual abuse;

(c) psychological abuse, including, but not limited to -

(i) intimidation;

(ii) harassment;

(iii) damage to property;

(iv) threats of physical abuse, sexual abuse, or psychological abuse.

3.10.31 Without limiting the meaning of psychological abuse, a person psychologically abuses a child if that person -

(a) causes or allows the child to see or hear the physical, sexual, or psychological abuse of a person with whom the child has a domestic relationship; or

(b) puts the child, or allows the child to be put, at real risk of seeing or hearing that abuse occurring.[59]

3.10.32 Without limiting the meaning of violence -

(a) a single act may amount to abuse;

(b) a number of acts that form part of a pattern of behaviour

57 ALRI Report for discussion No 15 87.

58 Domestic Violence Act 86 of 1995, section 3(2).

59 Domestic Violence Act 86 of 1995, section 3(3).

may amount to abuse, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.[60]

USA

Model Code on Domestic and Family Violence

3.10.33 "Domestic or family violence" is defined as attempting to cause or causing physical harm to another family or household member; placing a family or household member in fear of physical harm; or causing a family or household member to engage involuntarily in sexual activity by force, threat of force, or duress.[61]

Kentucky

3.10.34 "Domestic violence and abuse" is defined as physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault.[62]

Model anti-stalking code for the States[63]

3.10.35 The model anti-stalking code development project has sought to formulate a constitutional and enforceable legal framework for addressing the problem of stalking. The model code encourages legislators to make stalking a felony offence; to establish penalties for stalking that reflect and are commensurate with the seriousness of the crime; and to provide criminal justice officials with the authority and legal tools to arrest, prosecute, and sentence stalkers.

E. Evaluation

3.10.36 It is clear that the fact that the Act does not adequately define the grounds upon which an interdict should be granted, makes it difficult for presiding officers to decide whether or not an interdict is warranted. The result is legal uncertainty and a

60 Domestic Violence Act 86 of 1995, section 3(4).
61 Model Code, section 102(1).
62 Kentucky Revised Statutes, section 403.720(1).
63 National Institute of Justice Project to develop a model anti-stalking code for States Washington: US

lack of consistency. The Commission therefore endorses the inclusion of a comprehensive definition of family or domestic violence in the legislation.

3.10.37 The Law Commission (England)[64] recommends that a broad statutory criterion, protecting the health, safety or well-being of the applicant or any child be adopted. The Commission does not consider this approach to be effective in redressing the present problems of legal uncertainty and inconsistency. An approach in terms of which the types of abusive behaviour are defined quite precisely, but not exhaustively, appears to be an adequate way of promoting legal certainty and uniformity.

3.10.38 The Commission is convinced that a proper understanding of the nature of abusive relationships requires that emotional or psychological abuse, not coupled with physical violence or threats of violence, should also be included in behaviour warranting protection. A comprehensive definition of domestic violence is suggested which includes physical, mental and sexual abuse. This is in line with the United Nations framework for model legislation[65] which urges States to adopt the broadest possible definition of acts of domestic violence with a view to compatibility with international standards. The examples identified by the Alberta Law Reform Institute[66] and the legislation of New Zealand[67] and jurisdictions in the USA[68] also reflect a wide range of controlling and abusive behaviour.

3.10.39 It is important that presiding officers should appreciate the complex nature of abusive relationships. After analogy of section 3(4) of the New Zealand Domestic Violence Act,[69] the Commission therefore considers that the legislation should direct presiding officers to take account of the fact that -

(a) a single act may amount to abuse;

(b) a number of acts that form part of a pattern of behaviour may amount to abuse, even though some or all of those acts, when viewed in isolation,

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Department of Justice 1993 43 et seq.

64 See par 3.10.13 - 14 above.

65 See par 3.10.12 above.

66 See par 3.10.29 above.

67 See par 3.10.30 et seq above.

68 See par 3.10.33 et seq above.

may appear to be minor or trivial.

3.10.40 The Commission notes that in certain jurisdictions "stalking" is recognised as an offence.[70] Although stalking is often associated with domestic violence, it is a problem which is much broader than the domestic sphere. An investigation into a criminal law response to stalking falls outside the Commission's present terms of reference. As regards stalking in the context of domestic violence, it is considered that an inclusion of "harassment" in the definition of domestic violence is sufficient to accommodate acts that amount to stalking.

F. Recommendation 10

3.10.41 **It is recommended that the legislation:**

(a) Define domestic violence as including, but not limited to -

(i) physical abuse or threat of physical abuse;

(ii) sexual abuse or threat of sexual abuse;

(iii) intimidation;

(iv) harassment; or

(v) destruction of property.

(b) Direct presiding officers to take account of the fact that -

(i) a single act may amount to domestic violence;

(ii) a number of acts that form part of a pattern of behaviour may amount to domestic violence, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.

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69 See par 3.10.32 above.

70 See Australia (New South Wales, Northern Territory, Queensland, South Australia) in par 3.10.15 et seq above and the Model Anti-Stalking Code for the States in par 3.10.35 above.

3.11 24 - hour service

A. Excerpt from Issue Paper[71]

Regulations under the Act should make clear provision for the procedure to be followed after hours since a 24-hour service is not available to applicants.

B. Problem analysis

3.11.1 Novitz[72] refers to the fact that most violent family incidents take place during the weekend or in the evening when courts are not in session. In theory, an after hours system has been set up. A police officer faced with an urgent application is supposed to call the on-duty prosecutor who will then contact the magistrate on duty and arrange a hearing. However, in practice, it seems that this system is seldom put into operation. Police tend to lack the necessary forms, or are not aware of the procedures. Women have been advised to come back first thing in the morning.

C. Submissions in respect of a 24 - hour service

Magistrate: Welkom

3.11.2 Problems are experienced in cases where an applicant who does not have the assistance of a legal representative contacts the SAPS. Any regulations in this regard will clearly have to spell out the role of the SAPS in after hours procedures.

Legal Resources Centre (PE)

3.11.3 The LRC avers that several jurisdictions are not adhering to the 24 - hour availability of the interdict.

Magistrate: Pietermaritzburg

3.11.4 The Magistrate: Pietermaritzburg insists that magistrates and clerks of the court are available 24 hours a day. In Pietermaritzburg several interdicts have been granted after hours and during weekends.

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71 At 9.
72 Novitz 50.

Transvaal Law Society / Cape Law Society

3.11.5 Regulations should be amended to ensure that the remedies described by the Act are made available 24 hours a day. The same principles that govern after hours bail applications should apply.[73]

Other submissions

3.11.6 The following respondents exhort that clear provision should be made for a 24 - hour service:

KZN Network on Violence against Women

Gauteng Regional Network on Violence against Women

SA Association of Social Workers in Private Practice

Mrs S J Mitchell

POWA

Black Sash

Ms J Fedler

D. Evaluation

3.11.7 It is evident that after hours procedures will have to involve the SAPS.[74] In paragraph 3.8.38 above specific comment is required on empowering the SAPS to apply for an interdict on behalf of the applicant. It is submitted that granting such a power to the SAPS would contribute significantly to making after hours procedures more efficient. In certain jurisdictions in Australia it is, for example, possible for a police officer to obtain a telephone interim order after hours.[75]

E. Recommendation 11

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73 In **Twayie v Minister van Justisie** 1986 2 SA 101 (O) it was held that a lower court is competent, as well as obliged, to hear and decide bail applications outside normal hours and on non-court days. In **Minister van Wet en Orde v Dipper** 1993 3 SA 591 (A) the Appellate Division approved the **Twayie** decision.

74 See par 3.11.1 above.

75 Laws of Australia Chapter 5.

3.11.8 **It is recommended that:**

(a) Proposals regarding the procedure to be followed after hours be kept in abeyance until clarity is obtained on the question of empowering the SAPS to apply for an interdict on behalf of the applicant.

(b) The Department of Justice take steps to promote the efficiency of the after hours system which has apparently been set up.

3.12 Penalties under the Act; sentencing options; rehabilitation and counselling for perpetrators of violence

A. Excerpt from Issue Paper[76]

The Act does not address the issue of rehabilitation and counselling for perpetrators of violence.

B. Problem analysis

3.12.1 Section 6 of the Act provides that contravention of an interdict constitutes an offence, punishable by a fine or imprisonment for a period not exceeding 12 months or both such fine and such imprisonment. It should be noted that the Act, read with section 297 of the Criminal Procedure Act 51 of 1977,[77] does appear to allow for rehabilitation and counselling as a sentencing option. Novitz[78] reports that compulsory individual counselling has been used by Cape Town magistrates as a sentencing option.

3.12.2 Novitz[79] submits that magistrates can and should explore sentencing options[80] other than a straightforward term of imprisonment, but that a suspended sentence[81] may

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76 At 9.

77 The relevant provisions read as follows:

> "(1) Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion-
>
> (a) postpone for a period not exceeding five years the passing of sentence and release the person concerned-
>
> (i) on one or more conditions, whether as to- . . .
>
> (dd) submission to instruction or treatment; . . .
>
> (ff) the compulsory attendance or residence at some specified centre for a specified purpose;
>
> (gg) good conduct;
>
> (hh) any other matter,
>
> and order such person to appear before the court at the expiration of the relevant period; or . . .
>
> (b) pass sentence but order the operation of the whole or any part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a) (i) which the court may specify in the order; . . ."

78 Novitz 20.

79 Novitz 56.

80 In **S v M** 1996 2 SACR 127 (T) the court rejected a submission that correctional supervision, the suspension of a sentence, placing an accused under the supervision of a probation officer, etc, were not true punishments. The court held that all those sentencing options were forms of punishment and they were so in every sense of the word.

81 Section 297(1)(b) of the Criminal Procedure Act 51 of 1977.

not be the preferable alternative. Periodical imprisonment[82] and community service[83] should also be considered. Counselling may be most effective as part of a sentence which, for example, includes community service, periodical imprisonment and a suspended sentence.[84]

3.12.3 The effectiveness of programmes for the rehabilitation of abusers and counselling is, however, the subject of controversy. Fedler[85] asserts that experience worldwide indicates overall that these programmes cannot be relied upon to stop the violent behaviour of the abuser. The following factors militate against counselling as remedial action in cases of family violence:[86]

(a) The abuser's decision to go into counselling has an inordinate influence on a woman's decision to return to the relationship.

(b) Abusers often use counselling as a form of manipulation rather than change.

(c) Success rates depend on the abuser's completing the programme and more than half drop out before completion of the treatment.

(d) Programmes are more effective when conducted with volunteers.

(e) Joint counselling will be inappropriate where the survivor feels threatened or intimidated, and has difficulty in being in the presence of her spouse.

(f) There is a danger that joint counselling will merely perpetuate the power of one party over the other. The factors which feed into this danger are the passivity of the battered woman; the non-mutual nature of violence; the serious nature of spousal violence, which makes it more accurately classified as a crime rather than a dispute.

3.12.4 The factors mentioned above should inform a court's recourse to the option of compulsory individual or joint counselling, or family mediation.

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82 Section 285 of the Criminal Procedure Act 51 of 1977.
83 Section 297(1)(a)(i)(cc) of the Criminal Procedure Act 51 of 1977.
84 Novitz 57.
85 Fedler 1995 SALJ 238.
86 Novitz 20 et seq; Fedler 1995 SALJ 238 - 239.

3.12.5 Daniels & Muntingh[87] report that their research shows that in all the cases where the interdict was violated and the abuser brought to court, a suspended sentence was imposed. It is recommend that more creative sentencing options be looked at by the courts in combatting domestic violence, for example coupling sentences with court-mandated treatment programmes aimed at rehabilitating abusers.

C. Submissions in respect of sentencing options and rehabilitation and counselling for perpetrators of violence

Dr A Allan - Head: Psycholegal Unit, University of Stellenbosch

3.12.6 Dr Allan is not aware of reliable evidence that demonstrates the success of rehabilitation and counselling efforts in respect of perpetrators of violence. It is commonly believed that a prerequisite for a successful rehabilitation programme is that the participants must be motivated and participate voluntarily. Programmes of this nature are very expensive. It will not serve any purpose at this stage to make provision for the compulsory rehabilitation or counselling of perpetrators of violence.

Ms J Fedler

3.12.7 Ms Fedler stresses the fact no decision as to whether rehabilitation programmes ought to be mandatory for perpetrators of violence should be made until thorough research into this field is undertaken. In her opinion such programmes are a waste of valuable time and resources.

Human Rights Watch /Africa

3.12.8 The perpetrator of violence needs to be rehabilitated to prevent recurrence of violence. Repression and punishment may not always prove helpful in curbing violence. There is a need to treat the assailant in a manner consistent with the promotion of his sense of dignity and worth. This will reinforce the assailant's respect for the human rights and fundamental freedoms of others. The desirability of promoting the assailant's reintegration and the assailant assuming a more constructive role in society should be given priority.

87 Daniels & Muntingh 17.

Gauteng Regional Network on Violence against Women

3.12.9 An offender should be assessed for suitability before being referred to a counselling service. The Network emphasises, however, that there should be an assessment of counselling and rehabilitation services. At present, an extremely limited number of agencies offer anger management programmes for abusive partners.

Transvaal Law Society

3.12.10 The question of rehabilitation and counselling of the respondent falls outside the scope of the Act. The aim of the Act is the prevention of family violence and not rehabilitation.

Other submissions

3.12.11 The following respondents hold the view that sentencing options should be fully considered and/or feel that the issue of rehabilitation and counselling should be addressed:

National Human Rights Trust (Where the parties are married and the abuser is liable for maintenance, a community service sentence or a court mandated support programme for batterers would be more appropriate than a fine or a prison sentence.)

SA National Council for Child and Family Welfare

KZN Network on Violence against Women (State sponsored mandatory rehabilitation programmes as an alternative sentencing option.)

Cape Law Society (A range of orders, including compulsory counselling, periodic detention and community service.)

Attorney D Burman

Lawyers for Human Rights

POWA (Before a perpetrator is referred for anger management, a detailed pre-sentencing report should be compiled by a person with experience in the field of domestic violence making such a recommendation.)

Black Sash (Mandatory counselling and rehabilitative programme.)

FAMSA - National (Mandatory treatment as a sentencing option.)

FAMSA - Pietermaritzburg (Rehabilitation and counselling as a sentencing option

upon the recommendation of a registered social worker.)

Magistrate: Welkom

D. Comparative survey of laws

Canada

Alberta

3.12.12 The Alberta Law Reform Institute[88] refers to the view that empowering the court to mandate counselling for an individual who has engaged in abusive conduct is too extensive an evasion of the autonomy of the individual respondent. The view opposing court requirement for counselling focuses on the fact that counselling is a deeply personal process requiring the participation of the individual and that therefore it cannot be effectively enforced by the justice system. The question of how to enforce a system of court mandated counselling is raised as a significant hurdle.

New Zealand

3.12.13 On making a protection order, the court must direct the respondent to attend a specified programme, unless the court considers that there is good reason for not making such a direction.[89] Such programme has the primary objective of stopping or preventing domestic violence on the part of the respondent.[90] Fees for programmes are paid out from money appropriated by Parliament for the purpose.[91]

E. Evaluation

3.12.14 In paragraph 4.1.30 below it is recommended that a contravention of the conditions of an interdict granted in terms of domestic violence legislation should be an offence which is prosecuted in the criminal court. The court would therefore have a discretion to apply sections 297,[92] 285[93] and 297(1)(a)(i)(cc)[94] of the Criminal Procedure

88 ALRI Report for discussion No 15 150 - 151.
89 Domestic Violence Act 86 of 1995, section 32(1).
90 Domestic Violence Act 86 of 1995, section 2.
91 Domestic Violence Act 86 of 1995, section 44.
92 See footnote 264 above.
93 Periodical imprisonment.

Act 51 of 1977.

3.12.15 In the light of the emphasis which is placed on the fact there is no reliable evidence that demonstrates the success of rehabilitation and counselling efforts in respect of perpetrators of violence, state sponsored mandatory rehabilitation and counselling programmes should be ruled out as an effective legal response to domestic violence. Moreover, in the absence of a thorough assessment of available rehabilitation and counselling services and the cost implications,[95] a recommendation of mandatory referral would certainly be refutable.

F. Recommendation 12

3.12.16 **It is recommended that the legislation should not provide for state sponsored mandatory rehabilitation and counselling programmes for perpetrators of domestic violence.**

94 Community service.
95 In New Zealand, Parliament appropriates money for programmes. See par 3.12.13 above.

3.13 Exclusion of the respondent from the matrimonial home

A. Excerpt from Issue Paper[96]

The exclusion of the respondent from the matrimonial home - should this be allowed and under what circumstances?

B. Problem analysis

3.13.1 Section 2(1)(b) of the Act provides that an interdict may be granted enjoining the respondent not to enter the matrimonial home or other place where the applicant is resident, or a specified part of such home or place or a specified area in which such home or place is situated. "Matrimonial home" is defined as the house, flat, room or other structure in which the parties to a marriage ordinarily live or lived together.

3.13.2 In terms of section 26(3) of the Constitution, 1996, no one may be evicted from their home without an order of court made after considering all the relevant circumstances and no legislation may permit arbitrary evictions.

3.13.3 In the **Rutenberg** case section 2(1)(b) of the Act was interpreted as follows:

> . . . in terms of section 2(1)(b) the respondent may be finally enjoined, in perpetuity, "not to enter the matrimonial home . . . or a specified area in which such home . . . is situated." This is tantamount to an *ex parte* ejectment of the respondent forever from what may be his or her own property. Moreover, he or she may similarly be prohibited even from entering the area in which his or her erstwhile home is situated.

3.13.4 Novitz[97] states that 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. Granting an application affecting an existing access order may impinge upon Supreme Court jurisdiction, by which such orders were originally made.

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96 At 9.
97 Novitz 42.

3.13.5 According to Novitz[98], however, it seems vital that a magistrate, convinced of past violence and recent threats, can take action to protect the survivor and her children. Where there is a serious risk to life, protection of the applicant and children should take priority over property rights. 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.

C. Submissions criticising the power to exclude the respondent from the matrimonial home

Magistrate: Durban

3.13.6 The Magistrate: Durban argues that a literal interpretation of section 2(1)(b) of the Act seems to authorise an order evicting the respondent from the matrimonial home. An interdict preventing a respondent from entering the matrimonial home where the applicant resides in the matrimonial home, but the respondent no longer does, does not create problems. The respondent has left the matrimonial home and the interdict preventing him from entering it, preserves the status quo.

3.13.7 However, an interdict preventing the respondent from entering the matrimonial home where he is living, may have the effect of denying existing rights of the respondent as well as third parties. The respondent's right of occupation as tenant or owner may be extinguished or the landlord's right of choice of tenant may be denied. Will such a respondent be obliged to pay rent or make mortgage payments when, through interference of the court, his rights as tenant or owner have been extinguished? Will the respondent's landlord or mortgagee be compelled to accept rent or repayments from the applicant?

3.13.8 The Magistrate: Durban refers to the British Matrimonial Homes Act, 1983 which confers upon a married person a statutory right to compel her partner's landlord or mortgagee to accept rent or repayments from her. It is inferred that the legislature of the British Act clearly intended to interfere with existing rights. If our legislation intended

98 Novitz 43.

to interfere with existing rights, it could easily have said so by adding to section 2(1)(b) the phrase "even if the respondent is the tenant or owner of the matrimonial home". Referring to **The Western Countries Railway Co v Windsor and Annapolis Railway Co**[99], **Casserley v Stubbs**[100] and **Menell, Jack Hyman & Co v Geldenhuys**[101], the Magistrate: Durban concludes that the legislature did not intend to interfere with existing rights and therefore a respondent who is residing in the matrimonial home, of which he is the tenant or owner, may not be prevented from entering that home.

Magistrate: Pietermaritzburg

3.13.9 The Magistrate: Pietermaritzburg agrees that the legislature could never have intended the eviction of a party from his or her home. The interdict which refuses a respondent access to the residence of the applicant (excluding the matrimonial home), denies the respondent access to the children born of the relationship only where abuse of the children form the basis of the interdict.

D. Submissions endorsing the power to exclude the respondent from the matrimonial home

Transvaal Law Society

3.13.10 According to the Society, excluding the respondent from the matrimonial home is often the only way in which violence can be prevented. There should, however, be guidelines to the effect that the said order may only be granted if it is absolutely necessary, subject to the normal principles in respect of an interdict and taking into account the balance of convenience.

Gauteng Regional Network on Violence against Women

3.13.11 The Network suggests that under certain circumstances there seems good reason to prevent the abuser from entering family premises. Such circumstances would include the following:

(a) Where a respondent has threatened or attempted to kill his partner.

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99 7 AC 188.
100 1916 TPD 312.

(b) Where the nature of the violence is frequent and repetitive.

Wits Law Clinic

3.13.12 Wits Law Clinic submits that, in the circumstances, this is a justifiable infringement of the abusive spouse's possessory rights. The reality of the situation is that most abused women reach a point where they fear for their lives and are compelled to leave the matrimonial home with their children, or are forcibly ejected by their spouses. It is submitted that where the situation reaches this crisis point, and the woman applies for an interdict, magistrates must exercise their discretion in the matter, and the Act should make this clear.

Cape Law Society

3.13.13 Provided the initial order is granted on an interim basis, any prejudice suffered by the respondent pursuant to the granting of such orders is far outweighed by the potential for harm to the applicant. The Society recommends, however, that the question of whether registered ownership of the matrimonial home does, as a matter of law, impact negatively on the remedies available under the Act, be investigated.

Ms J Fedler (gender policy consultant)

3.13.14 Ms Fedler points out that whilst the Act does make provision for an order for the eviction of the batterer from the matrimonial home, in practice magistrates are reluctant to make such an order. Sympathetic magistrates are understandably concerned that evicted husbands, often the registered owners of the property, may vindictively refuse to continue mortgage payments. It is also arguable that some magistrates harbour an antipathy to condemning husbands (even abusive ones) to homelessness in the absence of indications that they have alternative accommodation.

3.13.15 Bearing in mind the reality that domestic abuse is one of the most significant causes of homelessness of battered women and their children, it seems only fair that where one party has created a violent home environment, it is he or she that ought to bear the costs of relocation. An appropriate amendment to the Act could

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101 1972 1 SA 132 (C).

empower magistrates to order the abuser to continue to pay rent or payments on mortgage bonds on the property. Where the abusive partner is evicted, yet still has the keys to the family home, she suggests that, as is done by the Victim Service Agency in New York, the state should fund a locksmith to change the locks on the doors of a battered woman's house.

National Human Rights Trust

3.13.16 Removing the abusive partner from the family home is not done in practice for fear of violating the respondent's constitutional right of freedom of movement and enjoyment of his property. Where an interdict ejecting the abusive partner is granted, he then refuses to pay the rent or the bond instalments to exercise control.

Other submissions

3.13.17 The following respondents agree that the exclusion of the respondent from the matrimonial home should be allowed:

Human Rights Watch / Africa (If the presence of the respondent in the matrimonial home poses a threat to the right to life or bodily integrity of the applicant. Before an eviction order is made arguments should be heard from both sides.)

KZN Network on Violence against Women

Dr A Allan

SA Association of Social Workers in Private Practice

Lawyers for Human Rights

Mrs S J Mitchell

Justice College (Only where the *audi alteram partem* rule has been adhered to.)

POWA

Magistrate: Welkom (The Act cannot function effectively without such power.)

E. Comparative survey of laws

United Nations framework for model legislation on domestic violence

3.13.18 The court order may provide that the defendant be instructed to vacate the

family home, without in any way ruling on the ownership of such property.[102]

England

3.13.19 The Law Commission (England)[103] recommends that the court should have the power to make an occupation order with a variety of possible terms. Regulatory orders (orders which control the exercise of existing rights) available would, inter alia, be those -

(a) requiring one party to leave the home;

(b) suspending occupation rights and/or prohibiting one party from entering or reentering the home or part of the home;

(c) requiring one party to allow the other to enter and/or remain in the home;

(d) regulating the occupation of the home by either or both of the parties;

(e) terminating occupation rights; and

(c) excluding one party from a defined area in the vicinity of the home.

3.13.20 It is noted[104] that in cases of domestic violence an order ousting the respondent from the home will often be the only way of giving the applicant effective protection.

3.13.21 The Law Commission (England)[105] recommends that the court should have power to grant a regulatory occupation order in any case after considering all the circumstances of the case and in particular the following factors:

(a) The respective housing needs and resources of the parties and of any relevant child.

(b) The respective financial resources of the parties.

(c) The likely effect of any order, or of any decision by the court not to make an order, on the health, safety and well-being of the parties and of any

102 UN Framework par 38(b).
103 Law Com. No. 207 par 4.2.
104 Law Com. No. 207 par 4.6.
105 Law Com. No. 207 par 4.33.

relevant child.

However, the court should have a duty to make an order if it appears likely that the applicant or any relevant child will suffer significant harm if an order is not made and that such harm will be greater than the harm which the respondent or any relevant child will suffer if the order is made.

3.13.22 It is further recommended[106] that the court should have the power to impose on either party obligations regarding the discharge of rent, mortgage instalments and other outgoings, where it is just and reasonable to do so. In deciding whether an order is just and reasonable, the court should take into account the parties' financial resources and any financial obligations which they have or are likely to have in the foreseeable future, including any financial obligations to each other or to any relevant child.

Australia

3.13.23 In all jurisdictions it is possible to make an order to exclude the respondent from the home.[107]

The Australian Capital Territory / Northern Territory / Western Australia

3.13.24 It is possible to exclude the respondent from the home, notwithstanding any legal or equitable interest which the respondent might have in the property.[108]

New South Wales / Northern Territory / Queensland

3.13.25 The court must weigh up the accommodation needs of the parties, the effect which such an order will have on any children and the consequences for the victim and any children if such an order is made.[109] In Queensland any existing orders relating to guardianship, custody or access may also be taken into account.[110]

106 Law Com. No. 207 par 4.42.
107 Laws of Australia Chapter 5.
108 Laws of Australia par [62], [70], [90].
109 Laws of Australia par [66], [70].

Canada

Alberta

3.13.26 According to the Alberta Law Reform Institute,[111] a factor which would suggest a need for allowing exclusion of abusive individuals from the residence is the demand on public funds created by victims of domestic abuse having to flee from their residences to shelters. Where shelters are forced to turn away a large number of the victims due to lack of funds and lack of space, it would seem that anything that could provide an alternative to the victims having to flee to shelters would be desirable. Also, where the perpetrator's abuse has made continuing cohabitation unsafe, it is certainly arguable that it should be the perpetrator, not the victim, who should bear the burden of the upsetting of the status quo brought about by the abuse.

3.13.27 The Law Reform Institute[112] states that there are concerns as to the suitability of the remedy of exclusion from residence. The view which opposes the inclusion of such a remedy within a domestic abuse statute focuses on the invasive nature of the remedy and the extreme consequences that it will have for a respondent both in terms of the violation of property rights and the violation of the individual's right to peaceful and secure enjoyment of their home. Such a remedy could also give rise to opportunities for vexatious litigation by vindictive applicants. The concern to protect victims of abuse could be harnessed by mischievous litigants to obtain the advantage in property disputes. By allowing such a remedy, one could be allowing public outrage at domestic abuse to be used to create a legal carte blanche to be given to anyone alleging abuse. A further concern with the remedy it that it could obscure the need for funding to battered women's shelters. The existence of the remedy could create a false perception that safe houses for victims of domestic abuse were no longer necessary.

3.13.28 As regards orders permitting the respondent to remain in the same residence as the applicant but limiting the respondent's use of the residence, the Alberta Law Reform Institute[113] notes that there are obvious difficulties surrounding the

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110 Laws of Australia par [72].
111 ALRI Report for discussion No 15 140.
112 ALRI Report for discussion No 15 141 - 142.
113 ALRI Report for discussion No 15 111.

compliance and enforcement of such an order. In a family situation there would generally be no external observer to monitor the respondent's compliance with the order. Unless the breach of the order were also to constitute an offence such as assault, there would be a great deal of difficulty in determining after the fact whether a breach of the terms of the order had taken place. It is therefore recommended that a power to grant orders restricting the use of a residence should not be created.[114]

Nova Scotia / Saskatchewan / British Columbia

3.13.29 Proposed Nova Scotia legislation[115] provides that the court may make an order "granting the victim exclusive occupation of the residence regardless of whether the residence is jointly or solely owned by the parties or jointly or solely leased by the parties". Saskatchewan[116] and British Columbia[117] have similar provisions.

3.13.30 Proposed Nova Scotia legislation[118] also provides for an order which permits the victim and respondent to occupy the same premises but limits the respondent's use thereof, provided that the court is satisfied -

(a) that the victim voluntarily requests such an order;

(b) the victim is informed by the court that the order may not provide the same protection as an order excluding the respondent from the premises and may be difficult to enforce; and

(c) satisfactory conditions are imposed on the respondent to ensure against the repetition of domestic violence and which are agreed upon by the parties.

New Zealand

3.13.31 The court may make an occupation order granting the applicant the right to personally occupy a specified dwelling house, or an order vesting in the applicant the tenancy of a specified dwelling house, if it is satisfied that the order is necessary for the

114 ALRI Report for discussion No 15 112.
115 ALRI Report for discussion No 15 196, clause 4(1)(b).
116 Victims of Domestic Violence Act S.S. 1994, c. V-6.02, sections 3(3)(a) and 7(1)(a) quoted in ALRI Report for discussion No 15 193 - 194.
117 Sections 3(3)(a) and 7(1)(a) quoted in ALRI Report for discussion No 15 201 - 202.
118 Section 4(1)(p) quoted in ALRI Report for discussion No 15 198.

protection of the applicant or is in the best interests of a child of the applicant's family.[119]

3.13.32 A temporary occupation order or a tenancy order may be made on application without notice if the court is satisfied that the respondent has physically or sexually abused the applicant or a child of the applicant's family, and the delay that would be caused by proceedings on notice would or might expose the applicant or a child of the applicant's family to physical or sexual abuse.[120]

USA

Model Code on Domestic and Family Violence

3.13.33 A court may remove and exclude the respondent from the residence of the petitioner, regardless of ownership of the residence.[121] A respondent may be ordered to pay rent or make payment on a mortgage on the petitioner's residence.[122]

3.13.34 The Alberta Law Reform Institute[123] notes that all the American codes, except that of Delaware, make provision for an order excluding the perpetrator of domestic abuse from the residence. Some States simply provide that the court may order a respondent to vacate the home. Others note that the order may issue whether the residence is jointly or solely owned or leased by the parties.

F. Evaluation

3.13.35 The approach allowing for exclusion of respondents from the matrimonial home appears to command substantial support. All the foreign jurisdictions surveyed[124] have legislation to this effect. Although it is conceded that the inclusion of such a remedy in the legislation might have extreme consequences for a respondent, it seems clear that in cases of domestic violence an exclusion order will often be the only way of giving the applicant effective protection. Where there is a serious risk of physical

119 Domestic Violence Act 86 of 1995, section 53 and 57.
120 Domestic Violence Act 86 of 1995, section 60.
121 Model Code, section 305, 306(2)(c).
122 Model Code, section 306(3)(d).
123 ALRI Report for discussion No 15 140 - 141.

violence, protection of the applicant and children should take priority over property rights.

3.13.36 Eviction from a home in consequence of a court order made after considering all the relevant circumstances is conceivable in terms of the Constitution, 1996, but no legislation may permit arbitrary evictions.[125]

3.13.37 In the **Rutenberg** case[126] reference was made to "an *ex parte* ejectment of the respondent forever". This criticism is redressed by the recommendation in paragraph 3.1.60 above that provision be made for interim interdicts *ex parte* with a return day.

3.13.38 Because of the seriousness of the remedy, it is considered imperative that the legislation should provide for an appropriate criterium to be applied by the courts. The Commission is impressed by the recommendation made by the Law Commission (England)[127] that the court should have a duty to make an order if it appears likely that the applicant or any relevant child will suffer significant harm if an order is not made and that such harm will be greater than the harm which the respondent will suffer if the order is made.

3.13.39 The issue of the continuance of rent or mortgage payments by either the applicant or the respondent after an order preventing the respondent from entering the residence has taken effect, needs to be clarified. In principle there is no reason why an applicant who is occupying property which the respondent is prima facie entitled to occupy, whether solely or jointly, should not in an appropriate case be ordered to compensate the respondent. On the other hand, in times of crisis, financial matters are often a cause of great concern to applicants. In such circumstances, it seems fair that where the respondent has created a violent home environment, he should continue to pay rent or payments on mortgage bonds on the property.

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124 See par 3.13.18 et seq above.
125 Section 26(3).
126 See par 3.13.3 above
127 See par 3.13.21 above.

3.13.40 In appropriate cases the court should therefore have the power to impose on either party obligations regarding the discharge of rent or mortgage instalments. It is further suggested that it would promote consistency if it is provided that these discretionary powers should only be exercised after taking into account the parties' financial resources and any financial obligations which they have or are likely to have in the foreseeable future, including any financial obligations to each other or to any child.[128]

G. Recommendation 13

3.13.41 **It is recommended that the legislation:**

(a) Empower the court to exclude the respondent from the shared residence. ["Shared residence" is to be defined as the residence in which the applicant and respondent (whether the same or opposite gender) live or lived together in a marriage relationship or in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other, regardless of whether the parties are solely or jointly entitled to occupy the residence.]

(b) Provide that orders of this nature may only be made if it appears likely that the applicant or any relevant child [see recommendation 17(e)] will suffer significant harm if an order is not made and that such harm will be greater than the harm which the respondent will suffer if the order is made.

128 The Law Commission (England) (Law Com. No. 207 par 4.41) observes that these powers should not be invoked as a disguised form of maintenance for those who are not entitled to it, although they could be used in part discharge of a maintenance obligation (whether to an adult or a child) which does exist.

(c) Empower the court to impose on either party obligations regarding the discharge of rent or mortgage instalments.

(d) Provide that the discretionary power in (c) may only be exercised after taking into account the parties' financial resources and any financial obligations which they have or are likely to have in the foreseeable future, including any financial obligations to each other or to any child.

3.14 Application by applicant for amendment or setting aside of the interdict

A. Excerpt from Issue Paper[129]

The Act does not allow for the applicant to apply for the amendment or setting aside of the interdict.

B. Problem analysis

3.14.1 In terms of section 2(2)(c) of the Act the respondent may, after 24 hours' notice to the applicant and the court concerned, apply for the amendment or setting aside of the interdict.

3.14.2 Daniels & Muntingh[130] point out that the Act and Regulations do not make provision for an eventuality where, for example, an applicant would like the protection of the interdict extended to children who are being abused or threatened, or where an applicant decides subsequently that an eviction order is necessary to remove an abusive partner from the premises or make sure that a former partner does not enter the premises. Although the Act does make provision for the children of an applicant to be protected by the interdict, applicants may not realise this at the time the interdict was granted and may subsequently want the protection of the interdict extended to any children living with them. Changes to the interdict need also to be made where, for example, an applicant has an eviction order included in the interdict but then moves - the new place of residence is not protected by the interdict. To apply for a totally new interdict, and then have this served, would seem to be a cumbersome and costly exercise.

3.14.3 It is suggested[131] that clarity should be provided as to the manner in which an applicant could make changes or add new orders once an interdict has already been granted and served. A procedure should be outlined whereby a respondent could be notified of any changes made to the original interdict or any new conditions imposed,

129 At 9.
130 Daniels & Muntingh 14 - 15.
131 Daniels & Muntingh 16.

without an applicant having to make application for the interdict *de novo* , which is time-consuming and would involve paying the sheriff's fee again.

C. Submissions in respect of allowing the applicant to apply for the amendment or setting aside of the interdict

South African Association of Social Workers in Private Practice

3.14.4 The Association is of the opinion that the Act should not allow the applicant to apply for the amendment or setting aside of the interdict, as the applicant may be manipulated in this regard.

Dr A Allan

13.4.5 Respondents may put pressure on applicants to bring applications for the setting aside of the interdict. This could lead to a revolving door situation where applicants frequently apply for an interdict, just to apply for the setting aside thereof the next week.

Other submissions

3.14.6 The following respondents hold the view that the applicant should be allowed to apply for the amendment or setting aside of the interdict:

National Human Rights Trust

KZN Network on Violence against Women

Gauteng Regional Network on Violence against Women

Cape Law Society

Mrs S J Mitchell

Justice College

POWA

FAMSA Pietermaritzburg

Magistrate: Welkom (The present position produces problems in practice.)

Magistrate: Pretoria (It happens that an applicant relocates and the address mentioned in the interdict becomes irrelevant.)

D. Comparative survey of laws

Australia

3.14.7 In all jurisdictions either party may apply to have an order varied or revoked.[132] In Queensland, someone authorised by either party or a police officer may also apply to have an order revoked or modified.[133] In Victoria, in addition, "any other person" may with leave of the court apply for a variation, revocation or extension, for example, where the original applicant was a person providing assistance to the victim.[134]

New Zealand

3.14.8 The court may, if it thinks fit, on the application of the applicant or the respondent, vary or discharge a protection order.[135] An application for variation or discharge or the defending of such application made by the respondent may be made on behalf of a protected person.[136]

E. Evaluation

3.14.9 In paragraph 3.7.26 above it is recommended that the respondent's power to apply for the amendment or setting aside of the interdict after 24 hours' notice to the applicant and the court concerned be retained in respect of the interim order and final order.

3.14.10 It is recognised that allowing applicants to apply for the amendment or setting aside of the interdict might open the door for manipulation by respondents. On the other hand, the present situation might be to the prejudice of the applicant, for example in the instances alluded to above.[137] The Commission is of the opinion that a practical way of resolving the dilemma would be to allow the applicant to apply for the amendment of the interdict only. This has the advantage of placing the applicant in a position to apply for the protection to be extended when circumstances so require, while

132 Laws of Australia Chapter 5.
133 Laws of Australia par [74].
134 Laws of Australia par [82].
135 Domestic Violence Act 86 of 1995, sections 46 - 47.
136 Domestic Violence Act 86 of 1995, section 48.
137 Par 3.14.2.

at the same time preventing a revolving door situation where applicants frequently apply for an interdict, just to apply for the setting aside thereof soon after.

3.14.11 In paragraph 3.2.35 above it is recommended that the power to apply for an interdict by any other person who has a material interest in the matter on behalf of the applicant be retained. To be consistent, it should also be possible to apply for the amendment of the interdict on behalf of the applicant.

F. Recommendation 14

3.14.12 **It is recommended that the legislation:**

(a) Allow for the applicant to apply for the amendment of the interdict, but not for the setting aside of the interdict.

(b) Empower any other person who has a material interest in the matter to apply for the amendment of the interdict on behalf of the applicant.

4. OTHER CONCERNS NOT DEALT WITH IN ISSUE PAPER 2 ON FAMILY VIOLENCE

4.1 The State as party to criminal prosecutions

A. Problem analysis

4.1.1 It would seem that the question of whether the Act provides a civil, criminal or "hybrid" remedy causes uncertainty in practice.

4.1.2 Section 3(4) and (5) of the Act provides as follows:

> (4) The judge or magistrate before whom a respondent is brought in terms of subsection (2) shall enquire into the respondent's alleged breach of the conditions of the order made in terms of section 2 (2) and may at the conclusion of such enquiry -
>
> (a) order the release of the respondent from custody; or
>
> (b) convict the respondent of the offence contemplated in section 6.
>
> (5) The provisions of the Criminal Procedure Act, 1977 (Act 51 of 1977), relating to the procedure which shall be followed in respect of an enquiry referred to in section 170[138] of that Act, shall apply mutatis mutandis in respect of an enquiry under subsection (4).

4.1.3 In **S v Chaplin**[139] the applicant appealed against a conviction and sentence imposed in terms of the Act. Scott J analysed the application of section 170 of the

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138 "Failure of accused to appear after adjournment or to remain in attendance

(1) An accused at criminal proceedings who is not in custody and who has not been released on bail, and who fails to appear at the place and on the date and at the time to which such proceedings may be adjourned or who fails to remain in attendance at such proceedings as so adjourned, shall be guilty of an offence and liable to the punishment prescribed under subsection (2).

(2) The court may, if satisfied that an accused referred to in subsection (1) has failed to appear at the place and on the date and at the time to which the proceedings in question were adjourned or has failed to remain in attendance at such proceedings as so adjourned, issue a warrant for his arrest and, when he is brought before the court, in a summary manner enquire into his failure so to appear or so to remain in attendance and, unless the accused satisfies the court that his failure was not due to fault on his part, convict him of the offence referred to in subsection (1) and sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months."

139 1996 1 SA 191 (C).

Criminal Procedure Act to an enquiry under section 3(4) of the Act as follows:[140]

> What this section contemplates is that the mere failure to appear will justify a conviction in the absence of an explanation. In other words, what is presumed is that the failure to appear was wilful in the sense that it was due to the fault of the accused person. It follows that an accused person must be informed of the onus upon him, otherwise he might be justified in tendering no explanation, in the belief that his mere failure to appear did not in itself indicate that he was at fault and that the State had failed to establish fault on his part. The reference in s 3(5) of the Act to s 170 of the Criminal Procedure Act indicates, I think, that in the absence of an explanation by the respondent, a conviction under s 6 of the Act will be justified at a s 3(4) enquiry, once it is shown that the respondent engaged in conduct which prima facie was in conflict with the provisions of an interdict, previously granted and served. In other words, in order to procure a conviction it will not be necessary to establish a wilful breach of the terms of the interdict, even in circumstances where it is conceivable that there may be an innocent explanation for the conduct. Wilfulness will be presumed in the absence of an explanation by the respondent. In such circumstances, that is to say where wilfulness is to be presumed, justice and common sense require that the presiding officer should inform the respondent that in an absence of an explanation he will be presumed to have acted wilfully. The reason for this is that, unless warned, an undefended respondent may conceivably think that a case of wilful breach of the interdict has not been made out against him.

4.1.4 Van Rensburg[141] exemplifies that an enquiry under section 3(4) of the Act takes place in a summary manner and the State is not directly involved in proceedings under this provision. The magistrate must explain to the respondent that it *prima facie* appears that the interdict was served on him, that he breached a condition regarding compliance with the interdict and that there is a burden on him to rebut such *prima facie* facts. The respondent's rights regarding legal representation must be explained to him and he must be informed that he may call witnesses or testify personally.[142] Although the prosecutor is not directly involved in the enquiry, Van Rensburg [143] contends that it is standard procedure that the prosecutor is given an opportunity to give evidence and to cross-examine the respondent if the latter gives evidence under oath.

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140 At 195.
141 Van Rensburg 1994 The Magistrate 104.
142 Van Rensburg 1994 The Magistrate 105.
143 Van Rensburg 1994 The Magistrate 105.

4.1.5 Daniels & Muntingh[144] state that according to a survey, where the respondent had legal representation at the stage of the criminal enquiry, the matter was postponed. As no state prosecutor is involved, an imbalance will be created where the "defence" (respondent) is represented in court but the "prosecution" is not. They recommend[145] that the enquiry should be conducted in the form of an ordinary criminal trial and not in the form of an enquiry referred to in section 170 of the Criminal Procedure Act 51 of 1977. In this way the victim's interests would be better served as a state prosecutor interested in obtaining a conviction would be present in court in addition to the presiding officer.

B. Submissions in support of the view that the State is not or should not be involved in an enquiry under section 3(4) of the Act

Attorney-General: Cape Town

4.1.6 The Attorney-General: Cape Town holds the view that state prosecutors have no right of appearance in section 3(4) enquiries. It is, however, conceded that in certain cases exceptional circumstances may exist where the magistrate is of the opinion that in the interest of justice the prosecutor should give assistance. However, it is clear that the intention of the legislature was that magistrates should follow an inquisitorial procedure and making use of the services of prosecutors should be the exception.

Attorney-General: Grahamstown

4.1.7 It is doubted whether, legally, the prosecutor has any right of appearance. It was not the legislature's intention that there should be a prosecution in the true sense of the word for an offence contemplated in section 6(a) of the Act. The intention of section 3(4) is clear - an enquiry should be conducted in a summary manner.

Magistrate: Germiston

4.1.8 The very nature of a family violence interdict is founded in civil law, and the failure to comply with the interdict can be compared to contempt of court proceedings in

144 Daniels & Muntingh 15.
145 Daniels & Muntingh 17.

the Supreme Court. These proceedings are merely expedited by means of the section 3(4) enquiry, only differing from the Supreme Court in that a specific offence has been created which is punishable. The State is not involved in such proceedings in the Supreme Court and there is no reason why it should be involved in a section 3(4) enquiry.

4.1.9 The respondent has not been prosecuted and no criminal charge has been put to him. He appears at an enquiry held at the instigation of the complainant, and not the State. Although the enquiry has criminal consequences, it is not a trial. The presence of a prosecutor at an enquiry referred to in section 170 of the Criminal Procedure Act 51 of 1977 only stems from the fact that a prosecution and trial are in progress. The section ensures that an accused who fails to attend his trial in consequence of a court order to do so, is punished.

Magistrate: Randburg

4.1.10 The State should not become involved in the matter. It is a civil action between two parties with a criminal sanction. Should the prosecution enter the arena, one party will be prejudiced.

Magistrates of the Cape Peninsula

4.1.11 The Act provides for a peculiar procedure and the State should not be involved. The Supreme Court has confirmed sentences on review in cases where no prosecutors were involved.

Magistrate: Johannesburg (Magistrate 1)

4.1.12 If the State is involved as a party the nature of the enquiry can then be deemed to be a procedure similar to a criminal trial. If the respondent who is alleged to be in breach of an interdict is charged simultaneously in a criminal court on a count of assault, this could lead to an untenable situation.

C. Submissions in support of the view that the State is or should be involved in an enquiry under section 3(4) of the Act

Magistrate: Johannesburg (Magistrate 2)

4.1.13 The State should, as is the case with maintenance enquiries, become a party to the proceedings once the enforcement of a warrant of arrest is in issue.

Magistrate: Pietermaritzburg

4.1.14 The Act specifically provides that a person who contravenes any part of the interdict shall be guilty of an offence punishable by law. If the State does not prosecute the offender, who does? Legislation provides for only one prosecuting authority, namely the State via the Attorney-General.

Magistrate: Bloemfontein

4.1.15 The maximum sentence provided for in section 170(2) of the Criminal Procedure Act 51 of 1977 is a fine not exceeding R300 or imprisonment for a period not exceeding three months. Contravention of an interdict, on the other hand, is a much more serious offence with a maximum penalty of a fine or 12 months imprisonment or both such fine and imprisonment. To conduct an enquiry of such serious nature where the presiding officer acts in the dual capacity of judicial officer and prosecutor is inappropriate and can only detract from the impartiality of the bench.

Magistrate: Pretoria

4.1.16 Section 3 of the Act contains numerous references to the Criminal Procedure Act 51 of 1977. In addition, the use of the phrases “convict the respondent of the offence” (section 3(4)(b) of the Act) and “shall be guilty of an offence and liable on conviction” (section 6 of the Act), indicates an intention by the legislature that the breach of the conditions of an interdict ought to be regarded as a criminal matter. Intervention by the State is therefore imperative

Magistrate: Kempton Park

4.1.17 The Act is interpreted as enjoining the State to be a party when section 3(4) of the Act is implemented.

Magistrate: Kuilsrivier

4.1.18 For practical considerations it is necessary to make use of the services of the prosecutor in every case. The section 3(4) enquiry is considered to be in the nature of criminal law and should be accommodated in the criminal court. Although the enquiry is instituted in a summary manner, it often happens that evidence must be given to rebut the respondent's version. When the respondent gives evidence, he must also be questioned to test his evidence. These are functions that pertain to the state prosecutor.

Magistrate: Welkom

4.1.19 At present it is expected of a magistrate to play an inquisitorial role in a section 3(4) enquiry and to execute the functions of presiding officer and prosecutor in respect of a criminal charge for an offence with a relatively severe penalty. The fact that a prosecutor is not involved in the proceedings generates a number of practical problems which the magistrate has to resolve. According to the Magistrate: Welkom, the Attorney-General of the Free State agrees that there is an imperfection in the Act in this regard.

D. Submissions in respect of the applicability of section 170 of the Criminal Procedure Act 51 of 1977

Magistrate: Durban

4.1.20 It is submitted that the procedures to be applied are not clear at all and certain procedures should be prescribed to ensure uniformity and clarity.[146]

Magistrate: Welkom

4.1.21 It is difficult to see how section 170 of the Criminal Procedure Act can be made applicable to a section 3(4) enquiry. The burden of proof in section 3(4) could never be on the respondent, as this would be in conflict with section 25(3)(c) of the Constitution, 1993.[147]

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146 See paragraph 4.1.4 above.

147 Every accused person shall have the right to a fair trial, which shall include the right to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial.

Magistrate: Port Elizabeth

4.1.22 It is clearly wrong to burden the respondent with an onus to prove on a balance of probabilities that he did not violate the terms of the interdict, but the question is posed whether the procedure prescribed by section 170 of the Criminal Procedure Act 51 of 1977 can be utilised without such an onus.

E. Comparative survey of laws

Australia

4.1.23 In all jurisdictions, if the order is breached, the respondent is guilty of an offence.[148] In the Australian Capital Territory, for example, the Domestic Violence Act 1986, does not contain any provision relating to enquiry proceedings after contravention of a protection order. It is merely provided that where the respondent contravenes the order in any respect, he or she is guilty of an offence, punishable, on conviction, by a fine or imprisonment, or both.[149]

New Zealand

4.1.24 The Domestic Violence Act 86 of 1995 contains no reference to enquiry proceedings. Contravention of a protection order is an offence and any person who commits such an offence is liable on conviction to imprisonment or to a fine.[150] Where a person is arrested for breaching a protection order, he or she is charged with an offence against contravention of a protection order.[151]

F. Evaluation

4.1.25 The Commission is of the opinion that the fact that the nature of a family violence interdict is founded in civil law, does not preclude an interpretation that the Act contains provisions which are, as a rule, identified with criminal proceedings. Specific provision

148 Laws of Australia Chapter 5.
149 Australian Capital Territory Domestic Violence Act 1986, section 27.
150 Domestic Violence Act 86 of 1995, section 49.
151 Domestic Violence Act 86 of 1995, section 51.

is made that a person who contravenes an interdict or other order granted by a judge or magistrate shall be guilty of an offence and liable to conviction to a fine or imprisonment (Section 6 of the Act). An argument that a section 3(4) enquiry should be interpreted as being in the nature of a criminal trial is therefore not devoid of merit. Consultation suggests that the view that the State is not or should not be involved in an enquiry under section 3(4) of the Act presents a number of pressing problems:

(a) It is expected of a presiding officer to play an inquisitorial role and to execute the functions of a presiding officer and prosecutor.

(b) Contravention of an interdict is a serious offence with a maximum penalty of a fine or 12 months imprisonment or both such fine and imprisonment. It appears to be inappropriate to conduct an enquiry of such serious nature in the dual capacity of presiding officer and prosecutor. This can detract from the impartiality of the bench.

(c) For practical considerations it may often be necessary to make use of the services of the prosecutor. This fact is conceded by the Attorneys-General: Cape Town and the Free State.[152]

(d) An imbalance is created where the respondent is represented in court and there is no prosecutor who has the objective of obtaining a conviction.

4.1.26 The applicability of section 170 of the Criminal Procedure Act 51 of 1977 to a section 3(4) enquiry[153] presents further problems. As interpreted in **S v Chaplin**,[154] in the absence of an explanation by the respondent, a conviction under section 6 of the Act will be justified at a section 3(4) enquiry, once it is shown that the respondent engaged in conduct which *prima facie* was in conflict with the provisions of an interdict. Wilfulness will be presumed in the absence of an explanation by the respondent. The respondent is therefore burdened with an onus to prove on a balance of probabilities that he did not violate the terms of the interdict. Should he not satisfy the burden of proof, he might be convicted and sentenced to a fine or imprisonment or both.

4.1.27 In terms of the Constitution, 1996, everyone who is arrested for allegedly

152 See par 4.1.6 and 4.1.19 above.
153 As provided by section 3(5) of the Act.
154 1996 1 SA 191 (C). See par 4.1.3 above.

committing an offence has the right to remain silent[155] and every accused person has the right to a fair trial, which includes the right to be presumed innocent, to remain silent, and not to testify during the proceedings.[156] In **S v Zuma**[157] proviso (b)(ii) to section 217(1) of the Criminal Procedure Act 51 of 1977 was scrutinised by the Constitutional Court. Kentridge AJ held that the words "unless the contrary is proved" placed an onus on the accused which had to be discharged on a balance of probabilities. He did not discharge the onus by merely raising a doubt. If, at the end of the trial-within-a trial the probabilities were evenly balanced the presumption prevailed. Kentridge AJ reached the following conclusion:[158]

> . . . the common-law rule in regard to the burden of proving that a confession was voluntary has been not a fortuitous but an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession, and the right not to be a compellable witness against oneself . . . Reverse the burden of proof and all these rights are seriously compromised and undermined . . . I therefore consider that the common-law rule on the burden of proof is inherent in the rights specifically mentioned in s 25(2) and 3(c) and (d), (of the Constitution, 1993)[159] and forms part of the right to a fair trial.

It was accordingly held that section 217(1)(b)(ii) violated the provisions of the Constitution, 1993.

4.1.28 If the reasoning in the **Zuma** case were applied to section 170 of the Criminal Procedure Act 51 of 1977, the section would probably not survive constitutional scrutiny. Naturally, this conclusion casts doubt upon the constitutionality of section 3(4) and (5) of the Act.

4.1.29 The Commission is of the opinion that accommodating the enquiry into the respondent's alleged breach of the interdict in the criminal court, would obviate many of the problems experienced at present. Making the contravention of an interdict granted in terms of domestic violence legislation and offence which is prosecuted in the criminal

155 Section 35(1)(a).
156 Section 35(3)(h).
157 1995 2 SA 642 (CC).
158 At 659.
159 Comparable to section 35 of the Constitution, 1996.

court, thus resulting in a criminal record, would also send out a clear message to respondents upon whom an interdict has been served that the continuation of domestic violence has serious consequences for them.[160]

G. Recommendation 15

4.1.30 **It is recommended that the contravention of the conditions of an interdict granted in terms of domestic violence legislation be an offence which is prosecuted in the criminal court.**

160 See par 5.7 below for the argument that the creation of a specific enquiry (section 3(4) of the Act) has contributed in creating a safe haven for many offenders shielding them from real prosecution and the full extent of criminal procedure.

4.2 Warrant of arrest

A. Problem analysis

4.2.1 In granting an interdict the judge or magistrate shall make an order authorising the issue of a warrant for the arrest of the respondent and suspending the execution of such warrant subject to such conditions regarding compliance with the interdict as he may deem fit (section 2(2)(a) and (b) of the Act). The interdict and the order shall have no force and effect until served on the respondent in the prescribed manner (section 2(3) of the Act). After the interdict has been served, a certified copy of the interdict and the original warrant of arrest shall be delivered or send by registered post to the applicant (regulations 3(2) and 4(7)). The warrant of arrest may be executed by a peace officer upon receipt of an affidavit in which it is stated that the respondent has breached any of the conditions contained in the order (section 3(1) of the Act).

4.2.2 According to Van Rensburg[161] the peace officer should execute the warrant of arrest if it *prima facie* appears from the affidavit that a condition contained in the order has been breached. He also suggests[162] that, for the applicant to enjoy perpetual protection, she should be provided with a duplicate warrant of arrest and a certified copy of the interdict after the conclusion of the enquiry in terms of section 3(4) of the Act.

4.2.3 Daniels & Muntingh[163] recommend that there should be clarity about the issuing of second or further warrants of arrest once the interdict is violated. In the meantime applicants are left vulnerable and unprotected as the interdict is toothless without the attached warrant of arrest.

161 Van Rensburg 1994 The Magistrate 102.
162 Van Rensburg 1994 The Magistrate 106.
163 Daniels & Muntingh 16.

4.2.4 Novitz[164] remarks that the Act is curious in that it places no duty upon police to respond to domestic violence, unless an affidavit in the proper form has been signed and delivered to them, stating that the interdict has been breached. Moreover, the police officer may execute the conditional warrant of arrest, leaving the officer with a discretion as to actual execution. There should be provision for police to arrest a violent abuser without a second affidavit where circumstances clearly warrant action.[165]

4.2.5 Burman[166] submits that the Act should be amended to empower the judge or magistrate to issue a warrant of arrest summarily, i.e. without having to suspend it.

B. Submissions in respect of the duration of a warrant of arrest

Magistrates of the Cape Peninsula

4.2.6 Warrants should be cancelled by the courts on the first appearance of an accused and a new warrant of arrest should thereafter be issued to the applicant.

Magistrate: Randburg

4.2.7 The warrant of arrest cannot be cancelled on the first appearance, but only on the conclusion of the enquiry in terms of section 3(4) of the Act. This is so because if the respondent is released after the first appearance, he might fail to attend the hearing and he needs to be arrested.

Attorney-General: Grahamstown / Magistrates: Pietermaritzburg; Port Elizabeth (1)

4.2.8 Once a warrant of arrest has been executed and the enquiry in terms of section 3(4) of the Act completed, the warrant lapses. The only way in which an applicant can then be assisted, is by way of a criminal prosecution for assault or a contravention of section 6(a) of the Act.

Magistrate: Port Elizabeth (2)

4.2.9 Attention is drawn to the fact that it has become practice in some districts for a

164 Novitz 45.
165 Novitz 58.
166 Burman 1994 De Rebus 317.

duplicate warrant to be issued and given to the applicant after each enquiry.

Justice College

4.2.10 Once a warrant has been executed the warrant automatically lapses and must be cancelled. It is suggested that a court may grant leave to issue a new warrant and suspend it on the initial affidavit. The court would exercise its discretion on the facts before it.

C. Submissions in respect of the execution of the warrant of arrest

Cape Law Society

4.2.11 Magistrates and judges should be empowered to issue warrants of arrest for summary execution in appropriate cases and should not be obliged to suspend the execution of the warrant.

SAPS - Divisional Chief: National Standards and Management Services / Legal Resources Centre (PE)

4.2.12 Section 3(1) of the Act presupposes that the applicant will be in a position to notify the police of the contravention by way of affidavit. The reality of the matter is that this is highly unlikely and the requirement is an onerous one for an applicant whose life may be in imminent danger. The police are necessitated to intervene and arrest such perpetrators during the attack on the applicant and not after the event. An applicant should be able to telephonically or verbally inform the police of a contravention of the interdict. Although the police will, for example, be able to arrest the perpetrator for assault, the Act will presently not be applicable until the applicant furnishes an affidavit, which in effect means that the perpetrator may be free to go after a warning or be let out on bail.

D. Comparative survey of laws

England

4.2.13 The Law Commission (England)[167] recommends that where there has been violence or threatened violence the court should be required to attach a power of arrest to any specified provisions of an order in favour of any eligible applicant unless in all the circumstances the applicant or child will be adequately protected without such a power. Once a power of arrest has been attached to an order, a constable may arrest the respondent without a warrant if he has reasonable cause to believe that there has been a breach of the provisions to which the power of arrest was attached.[168]

New Zealand

4.2.14 Where a protection order is in force, any member of the police may arrest, without warrant, any person whom the member of the police has good cause to suspect has committed a breach of the order. In considering whether or not to arrest a person, the member of the police must take the following matters into account:

(a) The risk to the safety of the protected person if the arrest is not made.

(b) The seriousness of the alleged breach of the protection order.

(c) The length of time since the alleged breach occurred.

(d) The restraining effect on the person liable to be arrested of other persons or circumstances.[169]

USA

Minnesota

4.2.15 A peace officer shall arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated an order restraining the person or excluding the person from the residence or the petitioner's place of employment, even if the violation of the order did not take place in the presence of the peace officer, if the existence of the order can be verified by the officer.[170]

E. Evaluation

167 Law Com. No. 207 par 5.14.
168 Law Com. No. 207 proposed clause 15(4).
169 Domestic Violence Act 86 of 1995, section 50.
170 Minnesota Domestic Abuse Act (1992), section 14(b).

4.2.16 If the warrant of arrest lapses and is cancelled after the conclusion of the enquiry in terms of section 3(4) of the Act, applicants are left vulnerable and unprotected as the interdict is ineffective without their being in possession of a warrant of arrest. In paragraph 4.1.30 above it is recommended that the contravention of the conditions of an interdict granted in terms of domestic violence legislation be an offence that is prosecuted in the criminal court. For applicants to enjoy perpetual protection, they should be provided with a duplicate warrant of arrest on the conclusion of the trial.

4.2.17 The Act places no duty upon police to respond to domestic violence, unless they are in receipt of an affidavit. The Commission agrees that the requirement (section 3(1) of the Act) that the applicant make an affidavit in which it is stated that the respondent has breached any of the conditions contained in the order, is an onerous one for an applicant whose life may be in imminent danger. The requirement presupposes that the applicant will be in the unlikely position to notify the police accordingly. The police should be empowered to intervene and arrest respondents during the attack on the applicant.

4.2.18 The Law Commission (England)[171] recommends that once a power of arrest has been attached to an order, the police may arrest the respondent without a warrant if there is reasonable cause to believe that there has been a breach of the provisions to which the power of arrest was attached. This recommendation has been implemented in section 47(6) of the Family Law Act 1996, which provides that if a power of arrest is attached to certain provisions of an order, a constable may arrest without warrant a person whom he has reasonable cause for suspecting to be in breach of any such provision. In New Zealand[172] the police may arrest, without warrant, any person whom the police have good cause to suspect has committed a breach of the order. In Minnesota[173] the police shall arrest without a warrant a person whom they have probable cause to believe has violated an order.

4.2.19 The Commission considers that the making of an affidavit as contemplated in

171 See par 4.2.13 above.
172 See par 4.2.14 above.
173 See par 4.2.15 above.

section 3(1) of the Act should not be a precondition for execution of the warrant of arrest. A peace officer should be empowered to execute a warrant of arrest if he or she has reasonable cause for suspecting that -

(a) an interdict is in force;

(b) a warrant for the arrest of the respondent has been issued; and

(c) the respondent has breached any of the conditions regarding compliance with the interdict.

However, to ensure that there is sufficient proof in the ensuing proposed criminal trial, the peace officer who executed the warrant of arrest should obtain an affidavit from the applicant as soon as possible after execution of the warrant of arrest.

4.2.20 The Commission does not support a proposal that magistrates and judges should be empowered to issue warrants of arrest for summary execution in appropriate cases and that they should not be obliged to suspend the execution of the warrant. At the time of granting the interdict, such interdict has not yet been served on the respondent and the respondent would therefore not have known that an order of court has been issued against him.

F. Recommendation 16

4.2.21 **It is recommended that the legislation provide that:**

(a) The applicant be issued with a duplicate warrant of arrest on conclusion of the prosecution of the respondent for the offence of contravening the conditions of the interdict.

(b) A peace officer may execute a warrant of arrest if he or she has reasonable cause for suspecting that -

(i) an interdict is in force;

(ii) a warrant for the arrest of the respondent has been issued;

(iii) the respondent has breached any of the conditions regarding

compliance with the interdict.

(c) The peace officer who executed the warrant of arrest obtain an affidavit from the applicant as soon as possible after the execution of the warrant of arrest.

4.3 Terms of the order

A. Problem analysis

4.3.1 The only relief provided for in the Act is contained in section 2 in terms of which an interdict may be granted enjoining the respondent -

(a) not to assault or threaten the applicant or a child living with the parties or with either of them;

(b) not to enter the matrimonial home or other place where the applicant is resident, or a specified part of such home or place or a specified area in which such home or place is situated;

(c) not to prevent the applicant or a child who ordinarily lives in the matrimonial home from entering and remaining in the matrimonial home or a specified part of the matrimonial home; or

(d) not to commit any other act specified in the interdict.

In terms of section 2(2)(b) of the Act the execution of a warrant for the arrest of the respondent must be suspended subject to such conditions regarding compliance with the interdict as the judge or magistrate may seem fit.

4.3.2 The issue of the definition of family violence ties in with the issue of the scope of interdicts and for the purpose of this analysis regard should be had to the relevant opinions and responses referred to in the discussion on the definition of family violence.[174]

B. Comparative survey of laws

England

174 See 3.10 above.

4.3.3 Under existing English law the precise scope of a non-molestation injunction can be tailored to the requirements of the particular case. Traditionally, a common form of order restrains the respondent from assaulting, molesting, or otherwise interfering with the applicant. A general prohibition can be followed by a more precise injunction against specific kinds of behaviour complained of.[175] The Law Commission[176] considers it important that orders should retain this dual capability. Where it is obvious that there should be a limitation on a particular sort of behaviour, the order should be specific so that the respondent is left in no doubt about what he must stop doing. However, the order also needs to be sufficiently general to cover any objectionable behaviour in which the respondent may subsequently decide to indulge. It is therefore recommended that the power to make non-molestation orders be so framed as to make it clear that the order is a flexible one, capable of being tailored to the requirements of the particular case, but the court should also be able to prohibit molestation in its general form if the case so demands.

Australia

4.3.4 In most jurisdictions the court has flexible powers to tailor a protection order to meet not just violent conduct but harassing and pestering conduct which may not in itself be criminal.[177]

The Australian Capital Territory / Northern Territory

4.3.5 It is possible to order that the respondent not approach within a certain distance of the person for whose protection the order is made.[178]

New South Wales

4.3.6 Unless otherwise ordered, every order is taken to prohibit stalking or intimidation.[179] Intimidation means conduct amounting to harassment or molestation, the making of repeated telephone calls or any conduct that causes a reasonable apprehension of injury to a person, or of violence or damage to any person or

175 Law Com. No. 207 par 3.2.
176 Law Com. No. 207 par 3.2.
177 Laws of Australia par [56].
178 Laws of Australia par [62], [70].

property.[180]

Queensland

4.3.7 The order must impose a condition that the respondent be of good behaviour and not commit violence against the aggrieved spouse. The order may also include a condition excluding the violent party from specified property or preventing him or her from approaching the aggrieved party or any relative or associate of the aggrieved party.[181]

Victoria

4.3.8 Conditions which may be imposed include restricting or prohibiting access to premises, keeping the defendant a specified distance from the victim, excluding the defendant from a specified locality, such as a suburb, prohibiting the defendant from making contact, for example, by telephone.[182]

Canada

Alberta

4.3.9 Referring to no-contact provisions, the Alberta Law Reform Institute[183] observes that the clearer and the more inflexible the primary no-contact provision is, the less difficulty both the police and the litigants have in understanding and complying with the terms of the order. It is recommended[184] that the legislation should empower the court to make an order prohibiting the respondent from making direct or indirect contact with the applicant. For further clarity and to assist in compliance with and enforcement of the order the meaning of "no-contact" should be explained. The order should give examples of the sorts of things that it includes in the meaning of contact. It should not, however, limit the meaning of "no-contact" to the examples set forth in the order. Things listed in the meaning of "no-contact" should include:

(a) Telephoning the applicant at the applicant's residence, place of

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179 Laws of Australia par [66].
180 Laws of Australia par [45].
181 Laws of Australia par [74].
182 Laws of Australia par [86].
183 ALRI Report for discussion No. 15 106.
184 ALRI Report for discussion No 15 108.

employment or school.

(b) Going to the applicant's place of employment, school or residence.

(c) Approaching the applicant if the respondent accidentally sees the applicant in a public place.

(d) Watching the applicant or the applicant's residence, place of employment or school from a distance.

(e) Communicating with the applicant in any other way including but not limited to mail, fax, telegram, or any other form of written communication.

(f) Communicating or attempting to communicate with the applicant in any of the above ways by enlisting the help of any other person.

4.3.10 While it would seem preferable from an enforcement point of view to have a very comprehensive and inflexible no-contact provision, the Alberta Law Reform Institute[185] concedes that in some instances such an order would not be feasible. It is recommended[186] that where the circumstances of the case lead to the inference that a protection order is needed but where, as a matter of practical necessity or at the request of the applicant, the parties must, or could potentially desire to, have safe contact with one another, the order should be very specific structuring the terms of that contact to ensure that it does not -

(a) provide an opportunity for continued abuse; or

(b) make it impossible for the police to effectively enforce the order.

Saskatchewan

4.3.11 The Saskatchewan Victims of Domestic Violence Act[187] contains the following provisions restraining the respondent from -

(a) communicating with or contacting the victim and other specified persons;

(b) attending at or near or entering any specified place that is attended regularly by the victim or other family members, including the residence, property, business, school, or place of employment of the victim and other family members;

185 ALRI Report for discussion No 15 109.
186 ALRI Report for discussion No 15 110.
187 S.S. 1994, c. V-6.02, sections 3(3) and 7, quoted in ALRI Report for discussion No 15 193 -195.

(c) making any communication likely to cause annoyance or alarm to the victim, including personal, written or telephone contact with the victim and other family members or their employers, employees or co-workers or others with whom communication would likely cause annoyance or alarm to the victim;

(d) taking, converting, damaging or otherwise dealing with property that the victim may have an interest in.

Nova Scotia

4.3.12 Proposed Nova Scotia legislation[188] provides for orders restraining the respondent from -

(a) subjecting the victim to domestic violence;

(b) harassing the victim;

(c) entering the residence, property, school or place of employment of the victim or other family or household members of the victim and requiring the respondent to stay away from any specified place that is named in the order and is frequented regularly by the victim or other family or household members;

(d) making any communication likely to cause annoyance or alarm including but not limited to personal, written or telephone contact with the victim or other family members or their employers, employees or fellow workers or others with whom communication would be likely to cause annoyance or alarm to the victim;

(e) taking, converting or damaging property in which the victim may have an interest.

British Columbia

4.3.13 British Columbia legislation[189] has similar provisions.

188 ALRI Report for discussion No 15 195 - 200.
189 ALRI Report for discussion No 15 201 - 203.

New Zealand

4.3.14 It is a standard condition of every protection order that the respondent must not -

(a) physically or sexually abuse the protected person;

(b) threaten to physically or sexually abuse the protected person;

(c) damage, or threaten to damage, property of the protected person;

(d) engage, or threaten to engage, in other behaviour, including intimidation or harassment, which amounts to psychological abuse of the protected person; or

(e) encourage any person to engage in behaviour against a protected person, where the behaviour, if engaged in by the respondent, would be prohibited by the order.[190]

4.3.15 It is a condition of every protection order (referred to as the non-contact provision) that at any time other than when the protected person and the respondent are living in the same dwelling house, the respondent must not -

(a) watch, loiter near, or prevent or hinder access to or from, the protected person's place of residence, business, employment, educational institution, or any other place that the protected person visits often;

(b) follow the protected person about or stop or accost the protected person in any place;

(c) without the protected person's express consent, enter or remain on any land or building occupied by the protected person;

(d) where the protected person is present on any land or building, enter or remain on that land or building in circumstances that constitute a trespass; or

(e) make any other contact with the protected person (whether by telephone, correspondence, or otherwise), except such contact -

(i) as is reasonably necessary in any emergency;

(ii) as is permitted under any order or written agreement relating to custody of, or access to, any minor; or

(iii) as is permitted under any special condition of the protection

190 Domestic Violence Act 86 of 1995, section 19(1).

order.[191]

4.3.16 The court may in addition impose any special conditions that are reasonably necessary to protect the protected person from further domestic violence by the respondent.[192]

USA

Model Code on Domestic and Family Violence

4.3.17 The court may grant the following relief:

(a) Enjoin the respondent from threatening to commit or committing acts of domestic or family violence against the petitioner.

(b) Prohibit the respondent from harassing, annoying, telephoning, contacting, or otherwise communicating with the petitioner, directly or indirectly.

(c) Order the respondent to stay away from the residence, school, place of employment of the petitioner, or any specified place frequented by the petitioner.

(d) Order such other relief as the court deems necessary to protect and provide for the safety of the petitioner.[193]

C. Evaluation

4.3.18 In paragraph 3.10.41 above it is recommended that the legislation:

(a) Define domestic violence as including, but not limited to -

(i) physical abuse or threat of physical abuse;

(ii) sexual abuse or threat of sexual abuse;

(iii) intimidation;

(iv) harassment; or

(v) destruction of property.

191 Domestic Violence Act 86 of 1995, section 19(2).
192 Domestic Violence Act 86 of 1995, section 27(1).
193 Model Code, section 305, 306.

(b) Direct presiding officers to take account of the fact that -

(i) a single act may amount to abuse;

(ii) a number of acts that form part of a pattern of behaviour may amount to abuse, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.

4.3.19 Orders relating to the exclusion of the respondent from the shared residence have already been dealt with.[194] In paragraph 3.13.41 above it is recommended that the legislation:

(a) Empower the court to exclude the respondent from the residence (shared residence) in which the applicant and respondent (whether the same or opposite gender) ordinarily live or have lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other, regardless of whether the parties are solely or jointly entitled to occupy the residence.

(b) Provide that orders of this nature may only be made if it appears likely that the applicant or any child will suffer significant harm if an order is not made and that such harm will be greater than the harm which the respondent will suffer if the order is made.

(c) Empower the court to impose on either party obligations regarding the discharge of rent or mortgage instalments.

(d) Provide that the discretionary power in (c) may only be exercised after taking into account the parties' financial resources and any financial obligations which they have or are likely to have in the foreseeable future, including any financial obligations to each other or to any child.

194 See 3.13 above.

4.3.20 The arguments in favour of the adoption of a comprehensive definition of domestic violence in the legislation[195] are equally convincing as regards the scope of the interdict. The relief provided for in section 2(1)(a) - (c) of the Act is clearly inadequate and the extent to which section 2(1)(d) can be used to introduce innovative limitations on a particular sort of behaviour remains uncertain. The Commission is of the opinion that an inclusion in the legislation of a comprehensive list of actions which the respondent may be ordered to refrain from doing, would ensure that orders are specific so that the respondent is left in no doubt about what he must stop doing. The inclusion of a list of possible prohibitions would, in addition, provide clarity and promote consistency in determining what type of relief may be granted.

4.3.21 However, the inherent danger of an exhaustive list of prohibitions is that some kind of abusive behaviour might not be covered. With a view to ensuring that the legislation extends maximum protection to victims of domestic violence, the retention of a flexible power (section 2(1)(d) of the Act) to tailor the prohibitions to meet conduct which may not be included in the list, appears to be unavoidable. This fact is recognised by the Alberta Law Reform Institute.[196]

4.3.22 The New Zealand Domestic Violence Act[197] empowers the court to impose any special conditions that are reasonably necessary to protect the protected person from further domestic violence by the respondent. In terms of the Model Code on Domestic and Family Violence[198] the court may order such other relief as the court deems necessary to protect and provide for the safety of the petitioner. A provision of this nature would empower the court to devise conditions for "safe" contact with the applicant where, for whatever reason, such contact is necessary.[199]

4.3.23 The domestic sphere in which domestic violence takes place provides the basis for extending protection to persons other than the applicant. Children would obviously require such protection. Although, in terms of the recommendation in paragraph 3.2.35

195 See 3.10 above.
196 See par 4.3.9 above.
197 See par 4.3.16 above.
198 See par 4.3.17 above.

(b) above, any other person who has a material interest in the matter would be entitled to apply for an interdict on behalf of the child, the "paramount importance of a child's best interests"[200] dictates that the court should of its own accord make orders for the protection of a child. It is clearly desirable for the court to have a discretion to make orders in relation to as wide a range of children as possible. The Commission is impressed by the definition in the English Family Law Act 1996 which defines a "relevant child" as any child whose interests the court considers relevant.[201]

D. Recommendation 17

4.3.24 **It is recommended that the legislation:**

(a) In addition to the power to exclude the respondent from the shared residence,[202] empower the court to prohibit the respondent to -

(i) enter a specified part of the shared residence or a specified area in which the shared residence is situated;[203] or

199 For example, where there is a right of access to a child.
200 Constitution, 1996, section 28(2).
201 Family Law Act 1996, section 62(2)(c).
202 See par 4.3.19 above.
203 Section 2(1)(b) of the Act.

(ii) prevent the applicant or any relevant child [see recommendation 17(e)] who ordinarily lives or lived in the shared residence from entering or remaining in the shared residence or a specified part of the shared residence.[204]

(b) Provide that the court may grant an interdict against the respondent prohibiting the respondent to -

(i) physically or sexually abuse the applicant;[205]

(ii) threaten to physically or sexually abuse the applicant;

(iii) intimidate the applicant;

(vi) harass the applicant;

(v) damage property in which the applicant may have an interest;

(vi) threaten to damage property in which the applicant may have an interest;

(vii) enter, watch, loiter near, or prevent or hinder access to or from, the applicant's place of residence, business, employment, educational institution, or any other place that the applicant visits often;

(viii) follow the applicant or stop or approach the applicant in any place;

(ix) make any contact with the applicant by telephone or any form of written communication; or

(x) enlist the help of another person to act in any of the above ways.

(c) Retain the power (section 2(1)(d) of the Act) to prohibit any other act specified in the interdict.

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204 Section 2(1)(c) of the Act.

205 "Applicant" includes a person on whose behalf an application for an interdict has been made. See the recommendation in par 3.2.35 above.

(d) **Empower the court to impose any special conditions that are reasonably necessary to protect and provide for the safety of the applicant or any relevant child [see recommendation 17(e)].**

(e) **Empower the court to order that all or any of the prohibitions or conditions contained in the interdict apply for the benefit of any relevant child. ["Relevant child" is to be defined as any child whose interests the court considers relevant.]**

4.4 Temporary maintenance, custody and access orders

A. Problem analysis

4.4.1 Fedler[1] asserts that women's lack of material resources permeates the abusive context. Aside from fear, economic dependence is the single most common reason why women remain with or return to their abusers. To offer substantive relief, available remedies must necessarily respond to this reality. While women can survive better without violence, they cannot survive at all without maintenance for themselves and their children. In the United States, a majority of states statutorily authorise the payment by the abuser of support to a spouse and maintenance for children as part of a civil protection order. It is submitted that magisterial discretion should be increased to include maintenance orders simultaneously with the issuing of the interdict.

4.4.2 It is further pointed out[2] that children often become the contact point through which a batterer can retain control over women, by asserting his rights to custody and reasonable access. Batterers often fight for child custody, refuse to pay maintenance for children and sometimes even resort to kidnapping children. Domestic violence, custody and maintenance, properly viewed, are facets of one predicament. Accordingly, eliminating parts of the predicament, while leaving others unaddressed, often fails to provide the woman with a sense of safety. Unless the custody issue is resolved in her favour, she is always potentially at risk that her abusive partner will gain physical access to her through an exercise of his legal rights as the father of her children. On issuing an interdict, magistrates are apprised of sufficient facts on the strength of which temporary orders of custody could be made. Such powers ought to be extended to them.

B. Submissions in respect of temporary maintenance, custody and access orders

Legal Resources Centre (PE)

1 Fedler 1995 SALJ 241.
2 Fedler 1995 SALJ 241 - 242.

4.4.3 A more comprehensive treatment of relief is required which embraces some of the most prevalent problems that beset battered women and maintenance is one of these. Historically women have been economically dependant on their spouses and the economic dependance on men is exacerbated when a battered woman is armed with an interdict prohibiting the perpetrator from entering the home which in return results in him failing to pay maintenance. The inclusion of a maintenance order together with the interdict will enable women to freely use the interdict without fear that maintenance will be cut off and it will indeed make the interdict more accessible and more responsive to the peculiar needs of battered women.

4.4.4 Legislation that attempts to provide holistic redress to survivors must necessarily take cognisance of another consequence of an interdict that restricts the perpetrator's access to the matrimonial home, namely custody. Abusive men have often resorted to utilising their custody and access to their children as a means of asserting control over the battered woman. The presiding officer should accordingly be vested with a discretion to make an order for temporary custody in appropriate circumstances.

Cape Law Society

4.4.5 Serious consideration should be given to empowering magistrates/judges to grant, together with an interdict and where appropriate, temporary custody, access or maintenance orders. Unless an adequate range of orders is included, practical considerations (such as the applicant's financial dependance on the perpetrator of violence or fears of losing children) will prevent victims of domestic violence from taking advantage of protection afforded them under the Act.

Black Sash

4.4.6 Many women already in abusive relationships are reluctant to seek relief through an interdict from fear of losing financial support from the spouse. Children are used as leverage to gain control over the partner. Magisterial discretion should be increased to include temporary maintenance and custody orders together with the issuing of interdicts.

Family Advocate: Bloemfontein

4.4.7 Where the violence is not aimed against the concerned child/children, access should be arranged on neutral grounds.

C. Comparative survey of laws

Canada

Alberta

4.4.8 The Alberta Law Reform Institute[3] concludes that there are a number of reasons why the issue of custody and access should be dealt with in domestic violence legislation:

(a) The children may also be at immediate risk of violence from the respondent at the time of hearing the protection application.

(b) It may be the case that while the children are not themselves at risk of being assaulted, they may be used as pawns in the conflict between the respondent and the applicant.

(c) The absence of well-structured access provisions may provide opportunities for contact between an applicant and respondent thereby rendering the order in respect of the applicant ineffective.

4.4.9 It is noted[4] that even where there is a potential risk to the applicant arising out of the exercise of access, it may be that the best interests of the child dictate that contact with the respondent should not be prohibited. Where there is no risk to the children themselves but where an unstructured situation with respect to access would compromise the safety of the applicant, the court should be able to make an order granting access to the respondent. However, such an order should include specifications as to the logistics of the access so as to ensure that the exercise of access does not pose a risk to the applicant and does not compromise the no-contact provisions with respect to the applicant. Such provisions should be structured with a view to eliminating all opportunity for contact between the respondent and the applicant and should include:

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3 ALRI Report for discussion No 15 121.

4 ALRI Report for discussion No 15 126 - 127.

(a) The precise times that the meeting is to begin and end.

(b) The precise place where the meeting is to begin and end.

(c) The manner of transportation and the person or persons to provide transportation of the children to the place where the children meet up with the respondent.

(d) Wherever possible, it should be stipulated that a third party take the children to the meeting place.

4.4.10 Where children involved are at risk of harm from the respondent, it is submitted[5] that the court should be empowered to make an order of custody in the party who does not pose the threat to the children. The court should be further empowered to order no-contact between the respondent and the children. Where, however, the court is of the view that it is in the best interests of the children to have some contact with the respondent notwithstanding the risk, the court should be empowered to order supervised access with the respondent and it must be specified who is to supervise access.

4.4.11 It is emphasised[6] that any award of custody or access made under the legislation should be seen as limited and subsisting only until such time as there is a review under other legislation dealing expressly with custody and access.

4.4.12 As regards financial provision for the applicant and children, the Alberta Law Reform Institute[7] notes that in many instances victims of domestic abuse are unable to leave abusive situations as a result of their economic dependency on their abusers. An order requiring the respondent to pay some financial provision to the applicant and potentially any children of the applicant could be very beneficial as a means of providing the applicant with a better chance of breaking free from the cycle of abuse.

4.4.13 It is recommended[8] that where the respondent has a duty to support the applicant

5 ALRI Report for discussion No 15 128.
6 ALRI Report for discussion No 15 126, 128.
7 ALRI Report for discussion No 15 145.
8 ALRI Report for discussion No 15 147.

or any children in the applicant's care, the court should be empowered to make a limited emergency order of financial provision (emergency enforcement of an obligation to support the applicant and children). This would provide the applicant with immediate financial support that would provide a window of self-sufficiency for the applicant at the moment of the attempt to separate from the abuser. As in the situation of custody and access, it may be that ultimately domestic abuse proceedings are not the optimal forum for long-term determinations of issues of maintenance and support. Any order of maintenance made under the protection legislation should therefore be reviewable upon application by either party under other legislation.[9]

Nova Scotia

4.4.14 Proposed Nova Scotia legislation[10] provides that the court may make an order -

(a) awarding temporary custody of a child and in making such an order the court shall presume that the best interests of the child are served by an award of custody to the nonviolent party;

(b) providing for access to children provided that -

(i) the order shall protect the safety and well being of the victim and children and shall specify the place and frequency of visitation;

(ii) visitation arrangements shall not compromise any other remedy provided by the court by requiring or encouraging contact between the victim and the respondent;

(iii) such order may include a designation of a place of visitation away from the victim's residence, the participation of a third party or supervised visitation;

(iv) the court upon motion of the victim considers a request for an investigation or evaluation by an appropriate person or agency to assess the risk of harm to the child where the victim has a sound basis for making the request; and

(v) the court orders that the cost of supervised access and any investigation or evaluation shall be borne by the respondent.

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9 ALRI Report for discussion No 15 146.

10 Quoted in ALRI Report for discussion No 15 123.

4.4.15 As regards financial provision for the applicant, the court may make an order requiring the respondent to pay emergency monetary relief to the victim and other dependants, if any, until such time as an obligation for support shall be determined pursuant to any other Act.[11]

New Zealand

4.4.16 The court may impose special conditions which may relate to the manner in which arrangements for access to a child are to be implemented.[12]

USA[13]

Model Code on Domestic and Family Violence

4.4.17 The court may grant temporary custody of a minor child to the petitioner.[14] It may also specify arrangements for visitation of any minor child by the respondent and require supervision of that visitation if necessary to protect the safety of the petitioner or child.[15] The court may order the respondent to pay for the support of the petitioner and minor child if the respondent is found to have a duty to support the petitioner or minor child.[16]

Minnesota

4.4.18 The court may award temporary custody or establish temporary visitation with regard to minor children of the parties on a basis which gives primary consideration to the safety of the victim and the children. If the court finds that the safety of the victim or the children will be jeopardized by unsupervised or unrestricted visitation, the court shall condition or restrict visitation as to time, place, duration, or supervision, or deny visitation entirely, as needed to guard the safety of the victim and the children. The court may also establish temporary support for minor children or a spouse, and order

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11 Proposed Nova Scotia legislation quoted in ALRI Report for discussion No 15 196 - 197.

12 Domestic Violence Act 86 of 1995, section 27(2)(a).

13 The Alberta Law Reform Institute (ALRI Report for discussion No 15 122, 145) notes that most American codes allow for the granting of an order for custody and access and spousal and child support along with the order for protection.

14 Model Code, sections 305(3)(f), 306(2)(g).

15 Model Code, section 306(3)(b).

16 Model Code, section 306(3)(d).

the withholding of support from the income of the person obligated to pay the support.[17]

New Jersey

4.4.19 The court may grant an order providing for visitation. The order shall protect the safety and well being of the plaintiff and minor children and shall specify the place and frequency of visitation. Visitation arrangements shall not compromise any other remedy provided by the court by requiring or encouraging contact between the plaintiff and defendant. Orders for visitation may include a designation of a place of visitation away from the plaintiff, the participation of a third party or supervised visitation.[18] The court is also allowed to order the respondent to pay emergency monetary relief to the applicant and other dependants noting that any ongoing obligation of support is to be determined at a later date pursuant to applicable law.[19]

D. Evaluation

4.4.20 The Commission agrees that the question must be addressed as to what financial provision may be necessary to reinforce the applicant's ability to live outside of the abusive relationship. In paragraph 3.13.41 above it is recommended that the legislation empower the court to impose on either party obligations regarding the discharge of rent or mortgage instalments.

4.4.21 Where the respondent has a duty to support the applicant or any children in the applicant's care, the duty of support continues where the joint household breaks up as a consequence of the respondent's abusive behaviour. On the principle that no one can escape a legal obligation by his or her own wrongdoing, it continues if the separation was caused by the person liable for support - one spouse deserts the other or drives him or her away by matrimonial misconduct.[20] A logical reply to the legal position would be to empower the court to grant a maintenance order together with the interdict.

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17 Minnesota Domestic Abuse Act (1992), section 6(3), (4).
18 N.J. Stat. Ann., s. 2C:25-29.b(3), quoted in ALRI Report for discussion No 15 122.
19 N.J. Stat. Ann., s. 2C:25-29(10), quoted in ALRI Report for discussion No 15 145.
20 Sinclair 444.

As pointed out by the Alberta Law Reform Institute,[21] it may be that ultimately domestic violence proceedings are not the optimal forum for long-term determinations of issues of maintenance and support. Any order of maintenance under the domestic violence legislation should therefore subsist only until such time as an obligation for maintenance is determined pursuant to any other applicable law.

4.4.22 It seems that there is a need to deal with the relationship between custody and access and domestic violence in an effective way, or else the safety of a victim of domestic violence can seriously be compromised. Children should not become the contact point through which the respondent can retain control by asserting his rights to custody and access.

4.4.23 Consultation suggests strong support for vesting presiding officers with a discretion to make an order for temporary custody and access in appropriate circumstances. The comparative survey of laws[22] also points in this direction. In the context of domestic violence the goals of such orders are to ensure that children who are at risk are protected from abuse and that the protection of the adult applicant is not compromised by the arrangements relating to the contact between the respondent and any children living with the applicant.

4.4.24 Section 28(2) of the Constitution, 1996, provides that a child's best interest is of paramount importance in every matter concerning the child. Hence, where children are at risk of harm from the respondent, the court should be empowered to award custody to the applicant and deny visitation rights to the respondent. Even where there is no risk of safety to the children, the extent to which the respondent may use control over the children to gain physical access to the applicant, may also warrant a conclusion that the best interests of the child are served by granting custody to the applicant.

4.4.25 Where custody is awarded to the applicant, it may be that the best interests of the child dictate that contact with the respondent should not be prohibited. In this case

21 See par 4.4.13 above.
22 See par 4.4.8 et seq above.

an access order should include specifications as to the logistics of the access so as to ensure that the exercise of access does not pose a risk to the applicant and does not compromise the conditions of the interdict. The legislation of foreign jurisdictions surveyed[23] embody detailed specifications in this regard. The New Zealand Domestic Violence Act,[24] on the other hand, simply provides that the court may impose special conditions which relate to the manner in which arrangements for access to a child are to be implemented.

4.4.26 In paragraph 4.3.24 (d) above it is recommended that the legislation empower the court to impose any special conditions that are reasonably necessary to protect and provide for the safety of the applicant. The Commission is of the opinion that a further provision that such conditions may also relate to the manner in which arrangements for access to a child are to be implemented, will ensure that the court has sufficient discretion to structure the terms of the access order in such a way that the safety of the applicant is not compromised.

4.4.27 As in the case of maintenance orders, any determination made about custody and access under the domestic violence legislation should subsist only until such time as the matter is determined pursuant to any other applicable law.

E. Recommendation 18

4.4.28 **It is recommended that the legislation:**

(a) Empower the court to grant, together with the interdict, maintenance, custody and access orders.

(b) Provide that such orders shall subsist only until such time as a determination in respect thereof is made pursuant to any other applicable law.

23 See par 4.4.8 et seq above.
24 See par 4.4.16 above.

(c) Provide that conditions imposed in terms of the recommendation in paragraph 4.3.24 (d) above,[25] may also relate to the manner in which arrangements for access to a child are to be implemented.

4.5 Costs

A. Problem analysis

4.5.1 The Act makes no provision for a costs order to be granted at any stage of the proceedings.

B. Submissions in respect of costs

Magistrates of the Cape Peninsula

4.5.2 One view is that the lack of authority to apply for a costs order means that applicants who are in a position to afford to apply for other remedies are discouraged from making use of the interdict procedure, leaving more time for applicants in need. Another view is that it is a matter for the court to decide and that discretionary powers should be granted to the courts.

Magistrate: Randburg

4.5.3 The successful party should be entitled to costs but in the prescribed tariff this should be kept to a minimum to ensure that the amount of costs involved does not overshadow the purpose of the Act. The court should also be given a discretion in this respect so as to discourage senior counsel and prayers for excessive costs.

Chief Family Advocate

4.5.4 Little cost is generally involved in applications of this nature. Making provision for costs orders may result in complicated applications making a simple and swift procedure

25 It is recommended that the legislation empower the court to impose any special conditions that are reasonably necessary to protect and provide for the safety of the applicant.

once again expensive and time consuming.

C. Comparative survey of laws

Australia

New South Wales / Northern Territory / Queensland

4.5.5 Costs may be awarded but not against the person seeking protection unless the application for an order was frivolous or vexatious.[26] Northern Territory refers to an application which was in bad faith and was unreasonable.[27]

Tasmania

4.5.6 Costs may be awarded against either party.[28]

Victoria

4.5.7 Each party bears his or her own costs unless the court considers there are exceptional reasons for making an order for costs.[29]

Canada

Alberta

4.5.8 The Alberta Law Reform Institute[30] maintains that it would seem reasonable to allow the court to award costs to the applicant.

Nova Scotia

4.5.9 Proposed legislation[31] provides for an order requiring the respondent to pay the reasonable legal and other costs or expenses of the application necessarily incurred by the victim.

Saskatchewan

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26 Laws of Australia par [66], [74].
27 Laws of Australia par [70].
28 Laws of Australia par [82].
29 Laws of Australia par [86].
30 ALRI Report for discussion No 15 150.
31 Quoted in ALRI Report for discussion No 15 199.

4.5.10 A victim's assistance order may contain a provision requiring the respondent to pay the victim compensation for monetary losses suffered as a direct result of the domestic violence, including legal expenses and costs of an application pursuant to the relevant Act.[32]

D. Evaluation

4.5.11 The Commission agrees with the view[33] that provision for costs orders may result in complicated applications making an intended simple and swift procedure once again expensive and time consuming.

E. Recommendation 19

4.5.12 **It is recommended that the legislation should not provide for a costs order to be granted at any stage of the proceedings.**

4.6 Open court or behind closed doors?

A. Problem Analysis

4.6.1 In the **Rutenberg** case the use of the phrase "in chambers" in section 2(1) of the Act was scrutinised. Thring J came to the following conclusion:

32 Victims of Domestic Violence Act S.S. 1994, c. V-6.02, section 7(1)(f) quoted in ALRI Report for discussion No 15 194.

33 See par 4.5.4 above.

> . . . it does not necessarily follow that, merely because a Judge or magistrate sits in his chambers, members of the public are excluded from attending the proceedings . . . Nowhere in the Act or regulations is it stipulated that applications for interdicts under section 2(1) thereof are to be held *in camera* or, to use the language of section 5(2) of the Magistrates' Courts Act, "with closed doors". . . Of course, in particular circumstances the judge or magistrate concerned may, in the exercise of his discretion under section 16 of the Supreme Court Act[34] or section 5(2) of the Magistrates' Courts Act [35] . . . direct that particular proceedings, including an application for an interdict under the Act, be conducted *in camera* . . . In other words, it is not the place where the judicial officer sits which governs whether or not the session is to be open to the public, but the application or non-application of the provisions of section 16 of the Supreme Court Act or section 5 of the Magistrates' Courts Act . . .
>
> It seems to me that the phrase "in chambers" was introduced into the Act as a purely permissive measure, because it was envisaged that many applications for interdicts under section 2(1) would be made outside normal court hours, when a courtroom and court staff would not be readily available. To read more into it than that is . . . simply not warranted.

4.6.2 Referring to the enquiry in section 3(4) of the Act, Thring J held that the conviction and sentence of persons for criminal offences was a purely judicial function and that section 25(3)(a) of the Constitution, 1993 (every accused person shall have the right to a fair trial, which shall include the right to a public trial before an ordinary court of law) was applicable.[36]

B. Submission by Magistrate: Welkom

4.6.3 The Magistrate: Welkom points out that one of the main reasons why applicants are reluctant to make use of the remedy afforded by the Act, is that disquieting affairs of the family will be exposed in public. The Act is unique in many ways and because rehabilitation of the family is part of the objective of the prevention of family violence, and because the interests of minors are often involved, serious consideration should be given

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34 "Save as is otherwise provided in any law, all proceedings in any court of a division shall, except in so far as any such court may in special cases otherwise direct, be carried on in open court."

35 "The court may in any case, in the interests of good order or public morals, direct that a civil trial shall be held with closed doors, or that (with such exceptions as the court may direct) minors or the public generally shall not be permitted to be present thereat."

36 Section 35(3)(c) of the Constitution, 1996, provides that every accused has a right to a fair trial, which includes the right to a public trial in an ordinary court.

to providing that all the proceedings in terms of the Act are to be held *in camera*.

C. Comparative survey of laws

New Zealand

4.6.4 The court has the power to hear proceedings in private or to exclude any person from the court.[37]

D. Evaluation

4.6.5 The Appellate Division concluded[38] that while it was probably not correct to say that an application should never be heard *in camera* and without notice to the respondent, this should happen only in very clear cases where justice could not be served otherwise than by depriving the respondent of his right to be heard. In the **Rutenberg** case[39] it was held that a judge or magistrate had a discretion to direct that an application for an interdict be conducted *in camera*.

4.6.6 With a view to protecting the interests of the victims of domestic violence, the Commission considers that proceedings in terms of domestic violence legislation should be held with closed doors. Because of the nature of domestic violence, such a provision will probably survive constitutional scrutiny. However, if the court in special cases determines that *in camera* proceedings are not warranted, it should have the power to direct that proceedings be carried on in open court.

E. Recommendation 20

4.6.7 **It is recommended that the legislation provide that proceedings shall, except in so far as the court may in special cases otherwise direct, be held *in camera*.**

37 Domestic Violence Act 86 of 1995, section 83.
38 See par 3.1.20 above.

4.7 Obligation to report ill-treatment of children

4.7.1 Section 4 of the Act reads as follows:

> Any person who examines, treats, attends to, advises, instructs or cares for any child in circumstances which ought to give rise to the reasonable suspicion that such child has been ill-treated, or suffers from any injury the probable cause of which was deliberate, shall immediately report such circumstances -
>
> (a) to a police official; or
>
> (b) to a commissioner of child welfare or a social worker referred to in section 1 of the Child Care Act, 1983 (Act 74 of 1983).

4.7.2 Failure to comply with the provisions of section 4 constitutes an offence for which a penalty of a fine or imprisonment for three months or both such fine and such imprisonment may be imposed (section 6 of the Act).

4.7.3 According to Sinclair[40] section 4 ties in well with section 30(1)(d) of the Constitution, 1993, which entrenches the right of children not to be neglected or abused.[41]

A. Submissions in respect of section 4 of the Act

Dr A Allan: Head of Psycholegal Unit, University of Stellenbosch

4.7.4 Dr Allan points out that section 4 is a very broad section which to some extent appears to overlap with section 42 of the Child Care Act 74 of 1983.[42] The following

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39 See par 4.6.1 above.

40 Sinclair 137 fn 366.

41 In terms of section 28(1)(d) of the Constitution, 1996 every child has the right to be protected from maltreatment, neglect, abuse, or degradation.

42 "Notification of injured children and children who suffer from nutritional deficiency disease

(1) Every dentist, medical practitioner, nurse or social worker who examines, attends or deals with any child in circumstances giving rise to the suspicion that that child has been ill-treated, or suffers from any injury, single or multiple, the cause of which probably might have been deliberate, or suffers from a nutritional deficiency disease, shall immediately notify the Director-General or any officer designated by him for the purposes of this section of those circumstances.

(2) On receipt of a notification in terms of subsection (1) the Director-General or the said officer may issue a warrant in the prescribed form and manner for the removal of the child concerned to a place of safety or a hospital.

(3) The Director-General or the said officer shall thereupon arrange that the child and his parents receive such treatment as the Director-General or the said officer may determine.

(4) This section shall not exclude any other action against or treatment of the parent and his child in terms

problems are highlighted:

(a) The concept “ill-treated” is not defined and unlike section 42 there is no context within which to interpret the word.

(b) The word “child” is not defined.

(c) Section 4, unlike section 42, does not indemnify a person who makes a bona fide but erroneous report.

(d) Section 42 does not make it mandatory for professionals such as psychologists to report the ill-treatment of a child, but section 4 does. While it may be time to consider introducing mandatory reporting for other professions than those mentioned in section 42, such a provision has important consequences for therapeutic professions such as psychology. To Dr Allan’s knowledge no profession was consulted prior to the introduction of this provision.

(e) While section 42 provides that the Director-General can take appropriate steps to safeguard the interests of the child, there is no such provision in section 4.

4.7.5 Dr Allan suggests that -

(a) the various terms used in section 4 should be better defined;

(b) care should be taken to bring section 4 in line with section 42 of the Child Care Act; and

(c) professions whose members are likely to be affected by a redrafted section 4, should be consulted.

SAPS: National Crime Investigation Service

4.7.6 A definition of “ill-treatment” will promote legal certainty. With regard to the persons who are compelled to report the ill-treatment of children there is a need to extend this obligation to other persons such as neighbours, the general public, etc.

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of this Act.

(5) Any dentist, medical practitioner, nurse or social worker who contravenes any provision of this section shall be guilty of an offence.

(6) No legal proceedings shall lie against any dentist, medical practitioner, nurse or social worker in respect of any notification given in good faith in accordance with this section.”

SA National Council for Child and Family Welfare

4.7.7 Section 4 of the Act is a very important section and should remain intact.

B. Evaluation

4.7.8 The Commission is convinced that mandatory reporting of ill-treatment of children is an effective step in the direction of preventing, identifying and dealing with child abuse. Both section 4 of the Act and section 42 of the Child Care Act 74 of 1983 provide for mandatory reporting. A significant difference is that section 42 specifies the professionals who are mandated to report ill-treatment, whereas section 4 is much broader and refers to "any person" who performs certain duties in respect of the child. As pointed out by Dr Allan,[43] the introduction of mandatory reporting for professions other than those specified in section 42, has important consequences for those professional groups and may require further consultation.

4.7.9 As regards suggestions that " ill-treatment" be defined, the following observation by the Community Law Reform Committee of the Australian Capital Territory[44] highlights the difficulty in this regard:

> There is great difficulty involved in defining child abuse, not only with regard to the inclusion or otherwise of emotional or sexual abuse, but also with regard to distinguishing such cases from cases of neglect. The area is too vague to allow for legislative definitions of the circumstances in which a duty to report arises. Confusion as to whether a case comes within the definition will probably lead to a failure to report or over-reporting with resources being diverted to the investigative phase.

4.7.10 The Commission is of the opinion that consultation in respect of section 4 of the Act has not been sufficient to warrant proposals for reform at this stage. Moreover, the Commission has misgivings about the inclusion of section 4 in domestic violence legislation. Clearly, mandatory reporting in terms of section 4 is not confined to the domestic sphere. Section 4 also seems to be out of step with the interdict procedure laid

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43 See par 4.7.4 above.

44 Community Law Reform Committee of the Australian Capital Territory Report on mandatory reporting of child abuse Report No 7 Canberra 1993 par 165.

down in the Act. An amendment of section 42 of the Child Care Act 74 of 1983 appears to be the obvious approach to extend mandatory reporting of ill-treatment of children.

C. Request for comment 3

4.7.11 **Specific comment is requested on the possible improvement of section 4 of the Act and/or its incorporation in section 42 of the Child Care Act 74 of 1983.**

4.8 Marital rape

A. Problem analysis

4.8.1 Section 5 of the Act reads as follows:

> Notwithstanding anything to the contrary contained in any law or in the common law, a husband may be convicted of the rape of his wife.

4.8.2 "Husband" and "wife" should be interpreted with reference to section 1(2) of the Act.[45]

4.8.3 Marital rape is an issue of importance in several jurisdictions. An exemption from prosecution for rape enjoyed by a husband in respect of his wife is widely seen as discriminatory against (married) women.[46]

4.8.4 Fredericks & Davids[47] affirm that marital rape has been directly linked to family violence, since it often occurs in circumstances where women are being physically abused. The exclusion of wife rape from the definition of family violence, as has been the case prior to the Act, ignored one of the most serious violations of a woman's bodily integrity. However, according to the authors, section 5 of the Act is clearly a legislative afterthought as the procedure laid down in the Act is inappropriate in the case of marital rape. The provision belongs in the Criminal Procedure Act 51 of 1977 since the proper

45 M Jansen "Verkragting binne huweliksverband: die laaste spykers in die doodkis" 1994 SACJ 78 91.
46 Sinclair 133.
47 Fredericks & Davids 487.

forum for such a crime is the ordinary criminal courts.

4.8.5 Fedler[48] laments that no real changes which would encourage women to lay charges of marital rape have been made by the mere abolition of the common law marital rape exemption by the Act. The private locus of domestic violence means that proof of sexual assault or rape by a partner is very difficult to obtain. Given the fact that our criminal law has been criticised for its treatment of rape survivors who have been raped by strangers, women who have been raped by their husbands are in an invidious position. She claims that consent will always be an issue and that one can only assume that the cautionary rule remains intact, as do the provisions of section 227(2) of the Criminal Procedure Act 51 of 1977.[49]

4.8.6 Sinclair[50] maintains that two concerns about marital rape remain, namely sentencing and the definition of rape itself. On sentencing, the abolition of the marital rape exemption could be rendered virtually nugatory if the judiciary fails to respond appropriately to the legislative acknowledgement of the seriousness of this offence. On the definition, she states that there are feminists who contend that the focus should be shifted away from the issue of lack of consent on the part of the victim to the coercion employed by the assailant. Other points of criticism against the traditional definition of rape are that the definition -

(a) is too narrow because it relates only to one form of sexual intercourse;
(b) demonstrates a male bias in that it constructs rape as a sexual act while the available evidence suggests that rape victims do not view rape as a sexual act but as a form of violence; and
(c) reflects the ideology of male proprietary interests in female sexuality.

4.8.7 Human Rights Watch[51] recognises the marital rape provision as an important reform, but claims that the difference that it will make in practice to women in abusive

48 Fedler 1995 SALJ 245.
49 Evidence as to previous sexual encounters with people other than the accused is not admissible except with the leave of the court. However, questions pertaining to previous sexual encounters with the accused are still admissible on the basis of relevance.
50 Sinclair 436.
51 Human Rights Watch 107.

marriages is probably limited. Because marital rape is most likely to occur in the home, proof of rape by a husband is difficult to obtain. The use of the cautionary rule further reduces the likelihood of achieving a conviction.

B. Submission by Gauteng Regional Network on Violence against Women

4.8.8 The Network calls for an investigation into the criminal laws and procedures governing sexual offences. The cautionary rule in respect of sexual offences, for example, is profoundly discriminatory and violates the Constitution's commitment to gender equality.

C. Evaluation

4.8.9 The Commission takes cognisance of the concerns about marital rape. It is to be noted, however, that these points of criticism apply not only to marital rape, but also to rape in general. In **S v D**,[52] for example, Frank J criticised the cautionary rule in sexual offences as follows:

> The cautionary rule relating to cases of sexual assault applies to all cases of this nature irrespective of the sex of the complainant (S v C 1965 (3) SA 105 (N)).
>
> This, however, does not alter the fact that in the overwhelming majority of cases the complainants are female. Given the social fabric of society in Namibia this state of affairs is hardly likely to change. In this Court, for example, there were 31 cases involving sexual assault during 1990 with not a single one involving a male complainant. In my view one can safely assume that in at least 95% of the cases of this nature the complainants are female. Taking this factual situation into consideration, I am of the view that the so-called cautionary rule has no other purpose than to discriminate against women complainants. This rule thus probably also is contrary to art 10 of the Namibian Constitution which provides for the equality of all persons before the law regardless of sex.[53]
>
> To sum up, in my view, the cautionary rule evolved in cases of rape has no rational basis for its existence and should therefore not form part of our law and is probably contrary to the provisions of the Namibian Constitution.

4.8.10 It is clearly incongruous to recommend changes to the legal position in respect of

52 1992 1 SA 513 (Nm).

53 Section 9(1) of the Constitution, 1996, provides that everyone in equal before the law and has the right to

marital rape without reviewing the law of rape. The Commission's terms of reference for the present investigation do not include a review of the law of rape.

D. Recommendation 21

4.8.11 **It is recommended that the legislation incorporate section 5 of the Act (Rape of wife by her husband) in its present form until such time as the law of rape is reviewed.**

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equal protection and benefit of the law.

4.9 Consultation between Magistrate / Judge and Family Advocate

A. Problem analysis

4.9.1 The Act contains no provision directing a presiding officer to consult with the Family Advocate prior to granting an interdict in cases which have a bearing on the interests of minor children.

B. Submissions in respect of consultation

Family Advocate: KwaZulu Natal

4.9.2 The Family Advocate: KwaZulu Natal reports that investigations have revealed that the interdict does not always serve the best interest of the child. The functioning of the Family Advocate is seriously constrained by the fact that a recommendation that contradicts the interdict cannot be made. It is submitted that a presiding officer, before granting an interdict, should establish whether the matter has been dealt with, is being dealt with, or will be dealt with by the Family Advocate. The presiding officer should thereafter confer with the Family Advocate before granting an interdict.

Magistrate: Port Elizabeth

4.9.3 Experience has shown that many applications for interdicts stem from alcohol and substance abuse related problems. There is no consultation with either social workers nor the Family Advocate who may already have had contact with the family. It would be helpful to have a proviso that parties applying for interdicts should first have made contact with relevant service providers in an attempt to find a solution to underlying problems.

C. Evaluation

4.9.4 The Commission appreciates that there is a need for interaction between the court and the Family Advocate where children are involved in domestic violence proceedings. There is, however, concern that a proviso that the court first confer with the Family

Advocate before granting an interdict, might cause delays that will thwart the granting of urgent relief. The Commission is of the opinion that the Department of Justice should address this problem on an administrative level.

D. Recommendation 22

4.9.5 **It is recommended that the Department of Justice investigate the need for consultation between the Magistrate/Judge and Family Advocate in domestic violence proceedings.**

4.10 Renaming the Act

A. Submission by Lawyers for Human Rights

4.10.1 Lawyers for Human Rights submit that by changing the word "Family" to "Domestic, one might expand the class of persons who qualify for protection under the Act. By changing "Prevention" to "Elimination", the focus may shift toward long-term, comprehensive remedies in addition to short-term emergency precautions. They therefore submit that the Act should be renamed as follows: Act to Eliminate All Forms of Domestic Violence.

B. Comparative survey of laws

England

4.10.2 The Law Commission (England)[54] proposes a "Family Homes and Domestic Violence Bill".

Australia

The Australian Capital Territory / Northern Territory / South Australia

4.10.3 "Domestic Violence Act".

Queensland

4.10.4 "Domestic Violence (Family Protection) Act".

Canada

Saskatchewan

4.10.5 "Victims of Domestic Violence Act".

New Zealand

4.10.6 "Domestic Violence Act".

54 Law Com. No. 207 62.

USA

4.10.7 The National Council of Juvenile and Family Court Judges drafted a “Model Code on Domestic and Family Violence”.

Minnesota

4.10.8 “Domestic Abuse Act”.

C. Evaluation

4.10.9 In paragraph 3.2.35 above it is recommended that the protective ambit of the legislation be extended to a broad range of persons that does not fit into a narrow perspective of “family”. The endeavour is to limit the scope of the legislation to the domestic realm. “Domestic Violence Act” appears to be an encompassing title.

D. Recommendation 23

4.10.10 **It is recommended that the legislation be called the “Domestic Violence Act”**.

5. CRIMINAL JUSTICE RESPONSE TO DOMESTIC VIOLENCE

A. Problem analysis

5.1 Murray & Kaganas[55] draw attention to the view that the Act's approach and underlying philosophy (of dealing with family violence outside criminal courts) are considered by some to undermine its overall value. Commentators have argued that the emphasis on civil remedies in the Act, and its reference to "family violence", underscores the impression held by many people, that violence in the home or between family members is less serious than assaults that take place in other circumstances.

5.2 Fredericks & Davids[56] observe that a critical issue in obtaining an interdict in terms of the Act is that the burden to initiate the process lies with the victim. The procedure places too much reliance on the initiative of the complainant in reporting and monitoring the abuse - it treats the victim as an equal when the reality is that the abuse is the result of a lack of equality. Where the interdict causes the husband to retaliate and reassert his challenged "authority", it can hardly be seen as an effective tool to prevent future violence.

5.3 They claim[57] that empirical evidence in the United States has shown that arrest was the most effective mechanism to prevent further abuse. Research done in the United Kingdom indicates that the enforcement of restraining orders was not effective since only a small percentage of women believed that they offered meaningful protection. In view of this and the practical problems experienced, Fredericks & Davids question whether an interdict granted in terms of the Act is an appropriate mechanism to counter abuse. Where there are no protective provisions which allow for crisis intervention, such as providing for physical refuge or shelter from the violent situation, counselling and rights informational services, an interdict may leave little comfort for abused women.[58]

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55 C Murray & F Kaganas "Law and women's rights in South Africa: An overview" in Murray et al Gender and the new South African legal order Kenwyn: Juta 1994 125.

56 Fredericks & Davids 1995 TSAR 488.

57 Fredericks & Davids 1995 TSAR 488.

5.4 It is further pointed out[59] that even if the abuser is arrested during the second stage of the procedure, it is not for the criminal offence (that is the abuse), but for violating the authority of the court that granted the order. Arrests should relate to crimes against women, not to the flouting of the authority of the courts.

5.5 Novitz[60] observes that one obvious concern is that the Act may have effectively diverted attention away from arrest of abusers at the scene of a violent domestic incident, or the laying of criminal charges. She asserts[61] that the criminal law probably remains one of the most effective ways of addressing cases of family violence. A criminal charge has certain advantages, such as few financial costs for the complainant, the deterrent effect of a criminal conviction and the fact that sentences can be precisely tailored to the particular case.

5.6 Sinclair[62] notes that the effectiveness and appropriateness of any criminal sanction in the context of matrimonial violence has been questioned, inter alia because victims are loath to report the matter or press charges. The emotional strain which prosecution will put on the victim, the financial loss which would be suffered if the offender were to be incarcerated and/or were to lose his job, the fear of reprisals if the offender were released on bail pending trial, the fact that imposition of prison sentence would, usually, offer only temporary respite, and the unhelpful attitude and ineffective approach of the police have, inter alia, been cited as reasons for the widespread reluctance to press charges. The criminal law is further considered to be an inappropriate and inadequate tool for the resolution of the problem of matrimonial violence because it places the emphasis on the offender, not on the victim. It merely punishes the offender without seeking to solve the underlying problem. The punishment imposed may also be too lenient to serve any real purpose.

B. Submission by Magistrate: Mitchells Plain

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58 Fredericks & Davids 1995 TSAR 489.
59 Fredericks & Davids 1995 TSAR 489.
60 Novitz 44.
61 Novitz 26.

5.7 The main problem, as seen by the Magistrate: Mitchells Plain, is the adulteration and total separation of the criminal act or acts that give rise to the application for an interdict and the procedure in dealing with a breach of the interdict. It is contended that initial prosecution and trial would resolve and preempt the application procedure in terms of the Act and also create a culture and awareness of the issues concerned. The opinion is held that the creation of a specific enquiry (section 3(4) of the Act) has contributed in creating a safe haven for many offenders shielding them from real prosecution and the full extent of criminal procedure. It has also isolated a division and contributed to a specific attitude and perception amongst offenders, victims and even magistrates. Taking the offenders back to the criminal court would be the first of many corrective measures to instill more universal condemnation and uniform procedure. Whether this court is specially assigned or erected, the main consideration should be the role of the prosecution, as regulated by statute.

C. Comparative survey of laws

England

5.8 The Law Commission (England)[63] points out that criminal law is primarily intended to punish the offender. However, most victims of domestic violence are not primarily interested in punishment. They want the violence to stop and they want protection. It is argued[64] that civil remedies are prospective and positive: their main is to regulate and improve matters for the future, rather than to make judgments upon or punish past behaviour. Unlike criminal proceedings, they can also provide an immediate means of evicting the perpetrator from the home. This is often the only effective method of stopping abuse. If the perpetrator is arrested and charged with a criminal offence, he will usually be released on bail, albeit with conditions regulating his conduct, until the trial. Unless there are serious injuries, he is likely to receive a fairly short sentence and be released, whereupon he is free to return home. The consequences of criminal sanctions in domestic cases bear no relation to the future needs of the victim.

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62 Sinclair 424 fn 31.
63 Law Com. No. 207 par 2.9.
64 Law Com. No. 207 par 2.11.

5.9 Because civil remedies are not in general designed to handle violence and other forms of extreme behaviour normally dealt with under the criminal law, it has been found necessary to develop certain specialised quasi-criminal machinery to make the remedies properly effective for the purposes they are intended to serve.

Australia

The Australian Capital Territory

5.10 The Community Law Reform Committee[65] contends that although breach of a protection order is a criminal offence this means that generally two criminal acts will have been committed before the offender is held criminally accountable. Civil processes are primarily remedial and preventative and consequently, civil processes are not a substitute in law or effect for criminal charges.

5.11 The basic thrust of revising the criminal justice response to domestic violence is to work to ensure that domestic violence cases are not screened out of the criminal justice system and that the system holds offenders of criminal behaviour committed in the context of domestic violence, accountable to the same extent as offenders of other similar criminal offences.[66] According to the Community Law Reform Committee,[67] research indicates that bringing domestic violence cases, which involve breach of the criminal law, into the criminal justice system generally results in a substantial reduction in the violence. It is recognised that to effectively deal with domestic violence in a criminal justice context, the special dynamics of the violence and the special vulnerability of the victim have to be understood and taken into account in procedures relating to police, prosecution and court practice.[68]

D. Evaluation

5.12 The Commission considers that an effective legal response to domestic violence involves both a civil remedy (interdict procedure) and a criminal law response. Civil

65 The Community Law Reform Committee of the Australian Capital Territory Report on domestic violence Report No 9 Canberra 1995 par 119.
66 CLRC No 9 par 189.
67 CLRC No 9 par 191.

processes should not be seen as a substitute for criminal charges and vice versa. As can be inferred from the literature and comparative survey of laws discussed above, both approaches have certain advantages and victims of domestic violence should have the benefit of both.

5.13 In paragraph 4.1.30 above it is recommended that the contravention of the conditions of an interdict granted in terms of domestic violence legislation be an offence which is prosecuted in the criminal court. In terms of this recommendation the respondent accordingly becomes an accused who is held criminally accountable. Although the criminal accountability is not in consequence of the criminal act or acts that induced the applicant to apply for an interdict, the procedure does bring the domestic violence case within the criminal justice system, thus no longer making it a "safe haven for . . . offenders shielding them from real prosecution and the full extent of criminal procedure".[69]

5.14 The Commission wishes to reiterate that the proposed legislation should certainly not be interpreted as an attempt to divert attention away from a criminal justice response to domestic violence. The seriousness of this statement is underscored by the USA Model Code on Domestic and Family Violence[70] which enumerates the range of criminal conduct employed by many perpetrators of domestic violence:

(a) Arson;
(b) Assault offences;
(c) Burglary, Breaking and Entering;
(d) Destruction, Damage, Vandalism of Property;
(e) Homicide Offences;
(f) Kidnapping, Abduction;
(g) Sex Offences;
(h) Stolen Property Offences;
(i) Weapon Law Violations;
(j) Disorderly Conduct; and

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68 CLRC No 9 par 194.
69 See par 5.7 above.
70 Model Code, section 201.

(k) Trespass.

E. Recommendation 24

5.15 **It is recommended that the Department of Justice and the Department of Safety and Security initiate programmes aimed at ensuring that -**

(a) the criminality of domestic violence is recognised;

(b) the criminal justice system holds offenders accountable for the criminal behaviour; and

(c) procedures relating to police, prosecution and court practice take account of the special dynamics of domestic violence and the special vulnerability of the victim.

6. VICTIM SUPPORT

A. Problem analysis

6.1 Fedler[71] concludes as follows:

> . . . legislative tinkering by lawmakers unexposed to the brutal mundaneness of abused people's lives can produce little more than a law to appease the conscience that recoils from the horror of cruelty to women and children. It is not sympathy that battered women seek. Nor is it their goal to become the symbol of the extent to which a particular government cares for the disempowered. They need safety. They need maintenance. They need a roof over their heads. They need work. They need legal advice that is responsive to the unique circumstances in which they find themselves. A commitment to ending violence in the home must deliver to women the means of survival. Only then will legislative improvements to the Prevention of Family Violence Act be a measure of the extent to which women's lives are valued.

6.2 To Fredericks & Davids[72] it appears to be imperative that the state proffers a measure of assistance to complainants, particularly when a return to the common home is fraught with danger or when they are left homeless when a relationship has been terminated. They contend that an effective measure of supporting victims of wife abuse is the provision of shelters[73] that are integrated with other programmes involving counselling and legal services. Shelters may therefore, in addition to providing temporary housing, serve as a mechanism to inform abused women of the options of criminal prosecutions, restraining orders or other alternatives. This will not only heighten abused women's awareness of services and facilities but also facilitate their access to legal and related support systems. Without any other form of intervention, an interdict order granted on its own will not achieve the desired result.

6.3 Human Rights Watch[74] emphasises that government assistance to battered women can only succeed through a concerted and coordinated effort on the part of a number of different departments. There is a need for agreed strategies for response and referral at national level, coupled with direct funding to provide shelters, welfare

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71 Fedler 1995 SALJ 251.
72 Fredericks & Davids 1995 TSAR 489 - 490.
73 The authors point out that there are no state-funded shelters for abused women in South Africa.
74 Human Rights Watch 88.

payments, health services, legal assistance, counselling services and education for survivors of abuse.

B. Submissions in respect of victim support

6.4 The following respondents support the view that victim support should be provided by the State:

Human Rights Watch / Africa (Safety, shelter, information and referral.)

KZN Network on Violence against Women

Gauteng Regional Network on Violence against Women (Shelters for abused women and children.)

Lawyers for Human Rights (System of shelter services. Advice and referral services linking abused women with legal, medical, shelter, social, counselling and economic support services.)

Ms J Fedler (Shelters)

C. Evaluation

6.5 There is a clear need for support services offered to victims of domestic violence. The proposed legislation should be fortified by the provision of shelters and advice and referral services linking victims of domestic violence with appropriate support systems. In this regard it is encouraging to note that a victim support movement is gaining momentum in South Africa. A national programme on victim empowerment and support is an integral part of the National Crime Prevention Strategy. In paragraph 3.8.4 - 3.8.6 above reference is made to the SAPS RDP victim support programme. At the end of August 1996, a national workshop on the empowerment and support of victims of crime was held. An initiative in the Eastern Cape, which carries the support of the Department of Justice, is aimed at the compilation of a Charter of Survival Rights for Victims of Gender Violence. The Commission is also a stakeholder in the national victim empowerment programme since the project committee on sentencing has identified the need to review legislation pertaining to victims of crime as part of its investigation into all

aspects related to sentencing.[75]

75 An Issue Paper on Restorative Justice which contains proposals for victim support services is being prepared for publication.

7. CONCLUSION

7.1 The Community Law Reform Committee of the Australian Capital Territory[76] makes the following notable observation:

> Over the past 10 years every major report dealing with domestic violence at an international, national, and state level has stressed the need for a co-ordinated and comprehensive approach to the problem. It has become apparent that there is little hope of effectively stopping the violence unless players in the system work co-operatively. The players include the courts, the police, the prosecution, lawyers, correctional services, health, housing, crisis and victim support workers, refuges, and the legislature.

7.2 The view that domestic violence is a social problem that must be dealt with holistically, also commanded substantial support on consultation. It is clear that the law does not hold an exclusive position in either the response to, or the prevention of, domestic violence. The law cannot play its part in a meaningful way in isolation from the larger community of services. The whole society must be involved in helping to reduce the problem, because directly or indirectly it affects the quality of life of the whole society.

7.3 It is the aspiration of the Commission that this Discussion Paper will contribute to an effective legal response to domestic violence.

76 CLRC No 9 par 120.

ANNEXURE A

PREVENTION OF FAMILY VIOLENCE ACT 133 OF 1993

[ASSENTED TO 24 SEPTEMBER 1993] [DATE OF COMMENCEMENT: 1 DECEMBER 1993]

(English text signed by the Acting State President)

ACT

To provide for the granting of interdicts with regard to family violence; for an obligation to report cases of suspected ill-treatment of children; that a husband can be convicted of the rape of his wife; and for matters connected therewith.

1 Definitions

(1) In this Act, unless the context indicates otherwise-

'magistrate' includes a family magistrate appointed under section 9 (1) (a) (v) of the Lower Courts Act, 1944 (Act 32 of 1944);

'matrimonial home' means the house, flat, room or other structure in which the parties to a marriage ordinarily live or lived together;

'prescribed' means prescribed by or under this Act.

(2) Any reference in this Act to the parties to a marriage shall be construed as including a man and a woman who are or were married to each other according to any law or custom and also a man and a woman who ordinarily live or lived together as husband and wife, although not married to each other.

2 Interdict with regard to family violence

(1) A judge or magistrate in chambers may, on application in the prescribed manner by a party to a marriage (hereinafter called the applicant) or by any other person who has a material interest in the matter on behalf of the applicant, grant an interdict against the other party to the marriage (hereinafter called the respondent) enjoining the respondent-

(a) not to assault or threaten the applicant or a child living with the parties or with either of them;

(b) not to enter the matrimonial home or other place where the applicant is resident, or a specified part of such home or place or a specified area in which such home or place is situated;

(c) not to prevent the applicant or a child who ordinarily lives in the matrimonial home from entering and remaining in the matrimonial home or a specified part of the matrimonial home; or

(d) not to commit any other act specified in the interdict.

(2) In granting an interdict contemplated in subsection (1) the judge or magistrate, as the case may be, shall make an order-

(a) authorizing the issue of a warrant for the arrest of the respondent;

(b) suspending the execution of such warrant subject to such conditions regarding compliance with the interdict as he may deem fit; and

(c) advising the respondent that he may, after 24 hours' notice to the applicant and the court concerned, apply for the amendment or setting aside of the interdict contemplated in subsection (1).

(3) The interdict contemplated in subsection (1) and the order contemplated in subsection (2) shall have no force and effect until served on the respondent in the prescribed manner.

3 Execution of warrant of arrest

(1) Subject to the provisions of section 2 (3) a warrant of arrest issued and suspended in terms of section 2 (2) may be executed by a peace officer as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977), upon receipt of an affidavit in which it is stated that the respondent has breached any of the conditions contained in the order contemplated in section 2 (2).

(2) A respondent arrested in terms of subsection (1)-

(a) shall not be released unless a judge or magistrate orders his release; and

(b) shall as soon as possible but not later than 24 hours after his arrest be brought before a judge or magistrate by a peace officer contemplated in subsection (1).

(3) Subject to the provisions of this section, all the provisions of the Criminal Procedure Act, 1977 (Act 51 of 1977), relating to the form and manner of execution of warrants of arrest, the arrest, detention, searching and other treatment necessary for the control of persons named in warrants of arrest, shall mutatis mutandis apply in respect of warrants of arrest issued under section 2 (2).

(4) The judge or magistrate before whom a respondent is brought in terms of subsection (2) shall enquire into the respondent's alleged breach of the conditions of the order made in terms of section 2 (2) and may at the conclusion of such enquiry-

(a) order the release of the respondent from custody; or

(b) convict the respondent of the offence contemplated in section 6.

(5) The provisions of the Criminal Procedure Act, 1977 (Act 51 of 1977), relating to the procedure which shall be followed in respect of an enquiry referred to in section 170 of that Act, shall apply mutatis mutandis in respect of an enquiry under subsection (4).

4 Obligation to report ill-treatment of children

Any person who examines, treats, attends to, advises, instructs or cares for any child in circumstances which ought to give rise to the reasonable suspicion that such child has been ill-treated, or suffers from any injury the probable cause of which was deliberate, shall immediately report such circumstances-

(a) to a police official; or

(b) to a commissioner of child welfare or a social worker referred to in section 1 of the Child Care Act, 1983 (Act 74 of 1983).

5 Rape of wife by her husband

Notwithstanding anything to the contrary contained in any law or in the common law, a husband may be convicted of the rape of his wife.

6 Offences and penalties

A person who-

(a) contravenes an interdict or other order granted by a judge or magistrate under section 2 (1) or (2); or

(b) fails to comply with the provisions of section 4,

shall be guilty of an offence and liable on conviction in the case of an offence referred to in paragraph (a) to a fine or imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment and in the case of an offence referred to in paragraph (b) to a fine or imprisonment for a period not exceeding three months or to both such fine and such imprisonment.

7 Regulations

The Minister of Justice may make regulations-

(a) prescribing the manner in which an application contemplated in section 2 is to be made;

(b) prescribing the manner in which the interdict and order shall be served on the respondent in terms of section 2 (3); and

(c) in general, as to any matter which he may consider necessary or expedient to prescribe or regulate in order to achieve the objects of this Act.

8 Repeal of section 1 of Act 39 of 1989

Section 1 of the Criminal Law and the Criminal Procedure Act Amendment Act, 1989 (Act 39 of 1989), is hereby repealed.

9 Short title and commencement

This Act shall be called the Prevention of Family Violence Act, 1993, and shall come into operation on a date fixed by the State President by proclamation in the Gazette.

ANNEXURE B

PERSONS WHO AND INSTITUTIONS WHICH REACTED TO ISSUE PAPER 2 ON FAMILY VIOLENCE AND OTHER CONTRIBUTORIES

African Christian Democratic Party
Attorney D Burman
Attorney-General: Grahamstown
Attorney-General: Cape Town
Black Sash
C Smuts
Cape Law Society
Chief Family Advocate
Department Social Work: Weskoppies Hospital
Dr A Allan: Head Psycholegal Unit, University of Stellenbosch
Family Advocate: Bloemfontein
Family Advocate: Kwazulu Natal
Family and Marriage Society of South Africa (National and Regions)
Gauteng Regional Network on Violence against Women
Human Rights Watch / Africa
Justice College
Kwazulu Natal Network on Violence against Women
Lawyers for Human Rights (National Directorate)
Legal Resources Centre (Port Elizabeth)
Magistrates of the Cape Peninsula (Combined submission)
Magistrates: Welkom; Verulam; Kuilsrivier; Pretoria; Mitchells Plain; Paarl; Pinetown; Germiston; Kempton Park; Bloemfontein; Pietermaritzburg; Durban; Randburg; Port Elizabeth; Johannesburg; Pretoria North;
Mr K R Makola
Ms J Fedler (Gender Policy Consultant)
Mrs S J Mitchell
Natal Law Society

National Human Rights Trust
NICRO Women's Support Centre: Cape Town
Northern Province Legal Services
People Opposing Women Abuse
Professor J T R Jones (University of Louisvill School of Law, Kentucky, USA)
Society of Advocates (TPD)
Society for Social Workers (Witwatersrand)
South African Association of Social Workers in Private Practice
South African Council for Child and Family Welfare
South African Police Service: National Crime Investigation Service
South African Police Service: Divisional Chief: National Standards and Management Services
Transvaal Law Society
University of the Western Cape: Institute for Child and Family Development
Wits Law Clinic

ANNEXURE C

REPUBLIC OF SOUTH AFRICA

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DOMESTIC VIOLENCE BILL

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(As introduced)

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(MINISTER OF JUSTICE)

BILL

To provide for the granting of interdicts with regard to domestic violence; for an obligation to report cases of suspected ill-treatment of children; that a husband can be convicted of the rape of his wife; and for matters connected therewith.

_____

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

EXPLANATORY NOTES

Definitions

1. (1) In this Act, unless the context otherwise indicates -

(i) "Applicant" means an applicant as contemplated in section 2;

(ii) "court" means -
(a) any court contemplated in the Magistrates' Courts Act, 1944 (Act No. 32 of 1944); and
(b) any provincial or local division of the Supreme Court contemplated in the Supreme Court Act, 1959 (Act No. 59 of 1959);

(iii) "domestic relationship" means a relationship between an applicant and respondent in any of the following ways:
(a) They are or were married to each other, including marriage according to any law or custom.

The definition of "domestic relationship" implements recommendation 2 (a) in par 3.2.35 of the Discussion

(b) They (whether of the same or the opposite gender) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other.
(c) They are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time).
(d) They are family members related by consanguinity, affinity or adoption.
(e) They would be family members related by affinity if the persons contemplated in paragraph (b) were, or were able to be, married to each other.
(f) They are or were in an engagement or dating relationship.
(g) They share or shared the same household;

Paper.

(iv) "domestic violence" includes -
(a) physical abuse or threat of physical abuse;
(b) sexual abuse or threat of sexual abuse;
(c) intimidation;
(d) harassment; or
(e) destruction of property;

The definition of "domestic violence" implements recommendation 10(a) in par 3.10.41 of the Discussion Paper.

(v) "peace officer" means a peace officer as defined in section 1 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977);

The definition of "peace officer" is derived from section 3(1) of the Act.

(vi) "prescribed" means prescribed by or under this Act;

The definition of "prescribed" is derived from section 1 of the Act.

(vii) "relevant child" means any child whose interests the court considers relevant;

The definition of "relevant child" implements recommendation 17(e) in par 4.3.24 of the Discussion Paper.

(viii) "respondent" means a respondent as contemplated in section 2;

(ix) "shared residence" means a residence where the applicant and respondent (whether of the same or opposite gender) live or lived together in a marriage relationship or in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other, regardless of whether the parties are solely or jointly entitled to occupy the residence;

The definition of "shared residence" implements recommendation 13(a) in par 3.13.41 of the Discussion Paper.

(2) For the purposes of subsection (1)(iv) -

(a) a single act may amount to domestic violence; or

(b) a number of acts that form part of a pattern of behaviour may amount to domestic violence, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.

Clause 1(2) implements recommendation 10(b) in par 3.10.41 of the Discussion Paper.

Application for interdict

2. (1) Any person (hereinafter called the applicant) who is or has been in a domestic relationship with another person (hereinafter called the respondent), or any other person who has a material interest in the matter on behalf of the applicant, may in the prescribed manner apply to the court for an interim interdict contemplated in section 3.

Clause 2(1) implements recommendation 2(a) and (b) in par 3.2.35 of the Discussion Paper.

(2) (a) In considering an application contemplated in subsection (1) the court may require further oral evidence or evidence by affidavit.

(b) The court shall notice the substance of oral evidence heard under paragraph (a).

Clause 2(2) implements recommendation 5 in par 3.5.25 of the Discussion Paper.

Power to grant interim interdict

3. (1) If the court is satisfied that the respondent is using, or has used, domestic violence against the applicant, it may grant an interim interdict against the respondent even though the respondent has not been given notice of the proceedings.

Clause 3(1) - (3) implements recommendation 1 in par 3.1.60 of the Discussion Paper.

(2) In exercising its powers under subsection (1), the court shall not refuse to grant an interim interdict solely by reason of the fact

that the respondent has not been given notice of the proceedings.

(3) (a) An interim interdict granted under subsection (1) shall call upon the respondent to show cause against it on a return day which shall not be less than 10 days after service has been effected upon the respondent in the prescribed manner.

(b) The return day contemplated in paragraph (a) may be anticipated by the respondent upon 24 hours' notice to the applicant and the court concerned.

Clause 3(3) implements recommendation 7(a) and (c) in par 3.7.26 of the Discussion Paper.

Power to grant final interdict

4. (1) On the return day contemplated in section 3(3) the court may set aside the interim interdict granted under section 3(1) or grant a final interdict against the respondent.

(2) The respondent may, after 24 hours' notice to the applicant and the court concerned, apply for the amendment or setting aside of the final interdict granted under subsection (1).

Clause 4(2) implements recommendation 7(c) in par 3.7.26 of the Discussion Paper.

(3) The applicant, or any other person who has a material interest in the matter on behalf of the applicant, may, after 24 hours' notice to the respondent and the court concerned, apply for the amendment of the final interdict granted under subsection (1).

Clause 4(3) implements recommendation 14 in par 3.14.12 of the Discussion Paper.

Terms of interdict

5. (1) In granting an interim interdict contemplated in section 3 or a final interdict contemplated in section 4 the court may -

(a) prohibit the respondent from -

(i) physically or sexually abusing the applicant;

(ii) threatening to physically or sexually abuse the applicant;

(iii) intimidating the applicant;

(iv) harassing the applicant;

(v) damaging property in which the applicant may have an interest;

(vi) threatening to damage property in which the applicant may have an interest;

(vii) entering, watching, loitering near, preventing or hindering access to or from, the applicant's place of residence, business, employment, educational institution, or any other place that the applicant visits often;

(viii) following the applicant or stopping

Clause 5(1)(a)(i) - (xi) implements recommendation 17(b) in par 4.3.24 of the Discussion Paper.

or approaching the applicant in any place;

(ix) making any contact with the applicant by telephone or any form of written communication;

(xi) enlisting the help of another person to act in any of the above ways;

(xii) entering the shared residence: Provided that the court may impose this prohibition only if it appears likely that the applicant or any relevant child will suffer significant harm if the prohibition is not imposed and that such harm will be greater than the harm which the respondent will suffer if the prohibition is imposed;

Clause 5(1)(a)(xii) implements recommendation 13(a) and (b) in par 3.13.41 of the Discussion Paper.

(xiii) entering a specified part of the shared residence or a specified area in which the shared residence is situated;

(xiv) preventing the applicant or any relevant child who ordinarily lives or lived in the shared residence from entering or remaining in the shared residence or a specified part of the shared residence; or

Clause 5(1)(a)(xiii) and (xiv) implements recommendation 17(a) in par 4.3.24 of the Discussion Paper.

(xv) committing any other act specified in the interdict;

Clause 5(1)(a)(xv) implements recommendation 17(c) in par 4.3.24 of the Discussion Paper.

(b) impose any special conditions that are reasonably necessary to protect and provide for the safety of the applicant or any relevant child;

Clause 5(1)(b) implements recommendation 17(d) in par 4.3.24 of the Discussion Paper.

(c) order that all or any of the prohibitions or conditions contained in the interdict apply for the benefit of any relevant child.

Clause 5(1)(c) implements recommendation 17(e) in par 4.3.24 of the Discussion Paper.

(2) (a) In imposing a prohibition contemplated in subsection 1(a)(xii), the court may impose on either party obligations as to the discharge of rent or mortgage payments.

Clause 5(2) implements

(b) In deciding whether and, if so, how to exercise its powers under paragraph (a), the court shall have regard to the financial needs and financial resources of the parties and the financial obligations which they have, or are likely to have in the foreseeable future, including any financial obligations to each other and to any relevant child.

recommendation 13(c) and (d) in par 3.13.41 of the Discussion Paper.

(3) Without limiting subsection (1)(b), a condition imposed under subsection (1)(b) may relate to the manner in which arrangements for access to a child are to be implemented.

Clause 5(3) implements recommendation 18(c) in par 4.4.28 of the Discussion Paper.

Temporary maintenance, custody and access orders

6. (1) In granting an interim interdict contemplated in section 3 or a final interdict contemplated in section 4 the court may make a temporary order as to -

(a) maintenance for the applicant or any relevant child;

(b) custody or access to any relevant child.

Clause 6 implements recommendation 18(a) and (b) in par 4.4.28 of the Discussion Paper.

(2) An order made under subsection (1) shall subsist only until such time as a determination in respect thereof is made pursuant to any other applicable law.

Warrant of arrest

7. (1) In granting an interim interdict contemplated in section 3 the court shall make an order -

(a) authorising the issue of a warrant for the arrest of the respondent; and

(b) suspending the execution of such warrant subject to compliance with any prohibition, condition or obligation imposed under section 5 or any order imposed under section 6.

Clause 7(1) corresponds to section 2(2)(a) and (b) of the Act.

(2) Subject to the provisions of section 8 a warrant of arrest issued and suspended under subsection (1) may be executed by a peace officer -

(a) upon receipt of an affidavit by the applicant in which it is stated that the respondent has breached any prohibition, condition or obligation imposed under section 5 or any order imposed under section 6; or

Clause 7(2)(a) corresponds to section 3(1) of the Act.

(b) if he or she has reasonable grounds for suspecting that -

(i) an interim interdict contemplated in

Clause 7(2)(b) implements recommendation 16(b) in par

section 3 or a final interdict contemplated in section 4 has been granted;

(ii) an order contemplated in subsection (1) has been made; and

(iii) the respondent has breached any prohibition, condition or obligation imposed under section 5 or any order imposed under section 6.

4.2.21 of the Discussion Paper.

(3) A peace officer who has executed a warrant of arrest in the manner contemplated in subsection (2)(b) shall, as soon as possible after the execution of the warrant of arrest, obtain an affidavit from the applicant in which it is stated that the respondent has breached any prohibition, condition or obligation imposed under section 5 or any order imposed under section 6.

Clause 7(3) implements recommendation 16(c) in par 4.2.21 of the Discussion Paper.

(4) Subject to the provisions of this section, all the provisions of the Criminal Procedure Act, 1977 (Act 51 of 1977), relating to the form and manner of execution of warrants of arrest, the arrest, detention, searching and other treatment necessary for the control of persons named in warrants of arrest, shall with the necessary changes apply in respect of warrants of arrest issued under subsection (1).

Clause 7(4) reenacts section 3(3) of the Act.

(5) A respondent arrested under subsection (2) -

(a) shall not be released unless a court orders his or her release;

Clause 7(5)(a) reenacts section 3(2)(a) of the Act.

(b) shall be brought before a court as soon as reasonably possible, but not later than -

(i) 48 hours after the arrest; or

(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day; and

Clause 7(5)(b) corresponds to section 3(2)(b) of the Act but employs the wording of section 35(1)(d) of the Constitution, 1996.

(c) shall be charged with an offence contemplated in section 14 or be informed of the reason for the detention to continue, or be released.

Clause 7(5)(c) implements recommendation 15 in par 4.1.30 of the Discussion Paper.

(6) (a) On conclusion of the proceedings contemplated in subsection 5(c) the court shall make an order authorising the issue of a duplicate warrant for the arrest of the respondent.

(b) The provisions of this section and of section 8 shall apply to the duplicate warrant of arrest contemplated in paragraph (a).

Clause 7(6) implements recommendation 16(a) in par 4.2.21 of the Discussion Paper.

Validity of interdict and warrant of arrest

8. The interim interdict contemplated in section 3, the final interdict contemplated in section 4 and the order contemplated in section 7 shall have no force and effect until served on the respondent in the prescribed manner.

Clause 8 corresponds to section 2(3) of the Act.

Jurisdiction

9. (1) Any court within the area of jurisdiction in which -

(a) the applicant contemplated in section 2 permanently or temporarily resides, carries on business or is employed;

(b) the respondent contemplated in section 2 resides, carries on business or is employed; or

(c) the cause of action arose;

shall have jurisdiction to grant an interim interdict contemplated in section 3.

Clause 9(1) implements recommendation 3(a) and (b) in par 3.3.23 of the Discussion Paper.

(2) An interim interdict granted under section 3 or a final interdict granted under section 4 shall be enforceable throughout the Republic.

Clause 9(2) implements recommendation 3(c) in par 3.3.23 of the Discussion Paper.

Obligation to report ill-treatment of children

10. Any person who examines, treats, attends to, advises, instructs or cares for any child in circumstances which ought to give rise to the reasonable suspicion that such child has been ill-treated, or suffers from injury the probable cause of which was deliberate, shall immediately report such circumstances -

(a) to a police official;

(b) to a commissioner of child welfare or social worker referred to in section 1 of the Child Care Act, 1993 (Act No. 74 of 1983).

Clause 10 reenacts section 4 of the Act. Specific comment is requested on the possible improvement of this section and/or its incorporation in section 42 of the Child Care Act 74 of 1983. [Request for comment 3 in par 4.7.11 of the Discussion Paper]

Rape of wife by her husband

11. Notwithstanding anything to the contrary contained in any law or in the common law, a husband may be convicted of the rape of his wife.

Clause 11 reenacts section 5 of the Act and implements recommendation 21 in par 4.8.11 of the Discussion Paper.

Proceedings *in camera*

12. Proceedings under this Act shall, except in so far as the

Clause 12

court may in special cases otherwise direct, be held *in camera*.

implements recommendation 20 in par 4.6.7 of the Discussion Paper.

Appeal and review

13. The provisions in respect of appeal and review contemplated in the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), the Supreme Court Act, 1959 (Act No. 59 of 1959) and the Criminal Procedure Act, 1977 (Act No. 51 of 1977) shall apply to proceedings under this Act.

Clause 13 implements recommendation 9 in par 3.9.22 of the Discussion Paper.

Offences and penalties

14. (1) Any person who -

(a) contravenes any prohibition, condition or obligation imposed under section 5 or any order imposed under section 6; or

(b) fails to comply with the provisions of section 10,

shall be guilty of an offence and liable on conviction in the case of an offence contemplated in paragraph (a) to a fine or imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment and in the case of an offence referred to in paragraph (b) to a fine or imprisonment for a period not exceeding three months or to both such fine and such imprisonment.

Clause 14 corresponds to section 6 of the Act and implements recommendation 15 in par 4.1.30 of the Discussion Paper.

Regulations

15. The Minister of Justice may make regulations -

(a) prescribing the manner in which an application contemplated in section 2 is to be made;

(b) prescribing the manner in which the interim interdict, final interdict and warrant of arrest shall be served on the respondent in terms of section 8; and

(c) in general, as to any matter which he or she may consider necessary or expedient to prescribe or regulate in order to achieve the objects of this Act.

Clause 15 reenacts section 7 of the Act.

Repeal of laws

16. Section 1 of the Criminal Law and the Criminal Procedure Act Amendment Act, 1989 (Act No. 39 of 1989) and the Prevention of Family Violence Act, 1993 (Act No. 133 of 1993), are hereby repealed.

Short title

17. This Act shall be called the Domestic Violence Act, 19.. .

Clause 17 implements recommendation 23 in par 4.10.10 of the Discussion Paper.

The following recommendation is to be embodied in Regulations made under clause 15 of the Bill:

Recommendation 6 (a), (c) and (d) [Par 3.6.29]

(a) It should be specified under what circumstances and how one may apply for the Sheriff's fees for the service of the interdict to be borne by the State.

(c) The prescribed manner of service which allows for delivery of the interdict at the respondent's place of residence, work or business, to some person apparently not less than 16 years of age and apparently residing or working there [Regulation 4(2)] or affixing a copy to the principal door [Regulation 4(3)] should be retained.

(d) Provision should be made for service on the respondent, together with the interdict, of copies of the initial application, supporting affidavit and, in the event of oral evidence having been heard, a note by the court giving particulars of the supplementary facts which emerged from such oral evidence.