Violence against Women

VIOLENCE AGAINST WOMEN

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DISCUSSION PAPER

PART A: DOMESTIC VIOLENCE

The problem of domestic violence has been seen primarily as a problem requiring legal solutions, thus response throughout the Commonwealth has tended to be legislative. The legal response to wife abuse varies from country to country. Nonetheless, a common pattern can be discerned:

(i) Most countries allow for divorce and judicial separation, remedies which may well be the principal responses to domestic violence, but which are, of course, applicable to married spouses only.

(ii) All countries in the Commonwealth render physical assault between spouses as criminal as if such activity had occurred between strangers. In all countries, criminal prosecutions may be brought by the state or by the victim as a private prosecution.

(iii) Quasi-criminal remedies derived from breach of the peace provisions exist in most Commonwealth jurisdictions. Their potential as a remedy for domestic violence has only recently been recognised.

(iv) Injunctions are available in all Commonwealth countries as ancillary proceedings to a matrimonial cause or a civil action. A number of countries have, however, gone further and enacted special legislation to provide protection for women who are the subject of domestic abuse, while others are contemplating such a step.

Divorce and judicial separation

2. Ending a marriage through divorce or judicial separation is the most basic remedy for domestic violence. It is impossible, however, to provide a short description of the divorce laws which exist throughout the Commonwealth, both because of the legal pluralism in marriage and divorce which exists in a number of Commonwealth countries and because of the differences of approach to the general law they exhibit. In a significant number of Commonwealth territories customary marriage and divorce principles, consisting not of a single uniform set of laws, govern the lives of many groups.[1] Very often, at the same time, a system based on English matrimonial law exists in each country.[2] In other Commonwealth countries, divorce is provided by religious laws which apply to those professing the particular religion, while, again, at the same time, a system based on the English law, runs in parallel.[3]

3. In very simple terms, it would appear that in those Commonwealth countries where the couple's marriage is governed by customary principles, such marriages may be dissolved, but

such dissolution is discouraged and is a matter between the families of the couple who will first attempt to reconcile them. Certainly, cruelty on the part of the husband will be accepted as grounds for the dissolution of a customary marriage.[4] Similarly, in those jurisdictions where marriages are governed by religious law, a woman who is treated with cruelty by her husband can divorce him.[5]

4. The general law governing divorce and judicial separation in most Commonwealth countries is based on the English law in its various stages from 1857 to 1969. As English law has travelled through various stages of development since 1857, again it is difficult to make a concise statement of the principles governing divorce and judicial separation throughout the jurisdictions. Suffice it to say, insofar as the general law is concerned, with some exceptions, divorce is available where the woman has been subjected to persistent cruelty.[6]

5. In a few jurisdictions, however, the legislation allows a woman to divorce her husband only where he has changed his religion to that of Christianity and gone though a form of marriage with another woman; where he has been guilty of incestuous adultery, bigamy with adultery; marriage with another woman with adultery, rape, sodomy and bestiality or adultery coupled with desertion for two years without reasonable excuse.[7] A man on the other hand, need only prove that his wife is guilty of adultery.

6. Most Commonwealth countries retain the decree of judicial separation, which relieves the petitioner of the duty to cohabit with her husband.[8] Such separation is normally allowed on the same grounds which support divorce.[9] Thus, judicial separation would be available to a spouse who was the subject of domestic assault.[10]

7. The fact that a woman who the subject of domestic violence may be able to proceed for matrimonial relief may provide a hollow solution to the victim. First, many women who are the subject of domestic violence are not prepared to separate from or divorce their husbands. Their priority is to end the violence in their relationship, rather than the relationship itself. Further, a victim may shun such relief in order to keep her family together or maintain her standard of living. Second, even where she wants to end her marriage, except in those jurisdictions where the sole evidence of breakdown is separation,[11] she will have to show that grounds for divorce exist. The burden of proof here is on the petitioner and she may be unfortunate to meet a judge who is of the opinion that her circumstance do not provide such grounds.[12]

8. Further, in most jurisdictions she may have to await the elapse of a time bar before she can proceed to divorce her husband.[13]

Criminal Proceedings

9. It is well settled throughout all Commonwealth jurisdictions, except insofar as sexual crimes are concerned, that a spouse is not entitled by reason of marriage or cohabitation to inflict violence on the other. In principle, therefore, the criminal law may be invoked against the violent spouse for common assault, aggravated assault, assault occasioning actual bodily harm, assault occasioning grievous bodily harm, unlawful wounding, manslaughter, murder or any other criminal act.[14]

10. In most Commonwealth jurisdictions, however, it is not a crime to rape or sexually assault a woman to whom one is married and from whom one is not legally separated. (See the discussion *under* Part B on Sexual Assault: Rape).

11. In practice the criminal law has proved to be of little assistance to the victim of domestic violence. Traditionally, the police have been blamed for the gap between abstract rights and actual remedies which the situation reveals. Throughout the Commonwealth, evidence

exists that the police, who have the potential for being the most important agency in any pattern of services for abused women, often exhibit an unwillingness to act.[15]

12. A number of reasons can be isolated to explain this reluctance. The most cynical explanation is that the police, like others in the community, are not interested in wife abuse, seeing it as a normal feature of domestic life. The second explanation is that while the police are interested in wife abuse, they see it as a non-criminal, social problem and thus not a police issue.[16]

13. The third explanation recognises that the police, in common with the rest of society, are deeply affected by the twin concepts of the privacy and autonomy of the family. They are dealing with people who, if not bound in matrimony, are living in a state which is almost indistinguishable from it.[17] They fear, also, that precipitate police action could exacerbate the situation.[18]

14. Other factors make the police reluctant to act. In many jurisdictions they lack clear legal authority to enter premises and investigate suspected offences and they are unclear as to the appropriate response they should make once they are in a situation of abuse.[19] 19

15. Moreover, police are disillusioned by the fact that a significant number of victims of family violence withdraw their complaints or fail to give evidence against their abuser when the incident comes before the courts.[20] This is exacerbated by the fact that in most Commonwealth jurisdictions the wife is a competent witness for the prosecution, but it is impossible for her to be compelled to give evidence. This legal rule allows a woman to be influenced by her abuser and others so that vital prosecution evidence is suppressed.[21]

16. Perhaps the most basic reason for police failure is that the police are but one element in a legal system which relegates domestic violence to a relatively unimportant status. Police response must be seen in the context of judicial response and evidence exists which suggests that the courts impose lighter sentences in cases of domestic assault than in cases of other assault.[22]

17. Certainly, no comprehensive study of differential sentencing practice in domestic cases has emerged from any Commonwealth country, and such research is important, but cases indicate that provocation is cited as a defence more frequently in a case in domestic circumstances than in other situations, and the behaviour which is viewed as provocation in the domestic context is much wider than in others. In the end analysis, police response is perhaps best seen as a reflection of societal attitudes towards wife abuse. Frequently, the issue is trivialised or at most viewed as a 'social problem' wherein the criminal law should have no part.

18. The fundamental issue becomes the appropriateness of the criminal law as a tool in domestic violence. Forceful arguments can be raised against its use in the domestic context:

(i) Treatment facilities are rarely available to help the accused control his aggression.

(ii) There are serious difficulties in gaining a conviction because the facts must be proven beyond all reasonable doubt.

(iii) If the husband if acquitted, albeit on a technicality, he will return to his family angry and vindicated and will almost certainly continue to abuse.

(iv) Even if he is convicted and sentenced, this is likely to be counter-productive for his victim in other ways. At most he will receive a fine or a short custodial sentence.

(v) If he is fined, the fine is likely to be paid out of the joint family finances, while if he is imprisoned, she may suffer financial disadvantage through the loss of a breadwinner.

(vi) Imprisonment will only temporarily relieve her situation. She may be confronted with a monster on his release.

19. On the other hand very forceful arguments can be raised to preserve and, indeed, strengthen the role of the criminal law in the domestic context. A criminal conviction carries with it a clear statement of the personal responsibility of the offender and the condemnation of society. Perhaps, most compellingly, it could be argued that decriminalisation of domestic assault would indicate that the issue had been relegated to the level of a social problem which in turn carries with it a societal acceptance of a certain level of violence in the family.

20. A number of Commonwealth jurisdictions have concluded that domestic violence must be viewed as a crime and have thus enacted specific legal provisions which guarantee this commitment. These jurisdictions have appreciated the potential of the police as the most essential facet of the legal system in the context of domestic violence. The police is the sole agency open 24 hours a day providing a comprehensive geographical coverage and which is invested with the legal authority to investigate and process complaints.

21. Thus, Canada has increased penalties for crimes of violence in all circumstances. In most provinces the police have been advised that they must proceed in all cases of spouse assault to lay a criminal charge even where the victim would prefer not to proceed with the complaint. This removes the element of choice which can put the victim under considerable pressure. In some provinces such causes may be heard by the Family Court. This trend should be carefully monitored as the Family Court setting may tend to decriminalise the issue of domestic violence and work against the stated policy of the Canadian Government.

22. Wives have been made compellable witnesses, unless exceptional circumstances can be made out:[23] Evidence Act, RSC 1970, Ch E-10, s.4. Again, this strategy has been introduced to remove the issue of choice from the victim and render her invulnerable to requests to withdraw her evidence. Finally, extensive training programmes have been established to sensitise the police and make them aware of their new responsibilities.

23. In New South Wales, one of the State jurisdictions of Australia, the Crimes (Domestic Violence) Amendment Act, 1982 was introduced to clarify police powers to enter and remain on premises in order to investigate complaints of domestic violence. The provisions of the Act, which were extended in 1983, empower a member of the police force to enter and remain in a dwelling house where he or she believes, on reasonable grounds, that a domestic violence has recently been, or is being or is likely to be committed or is imminent if he or she is invited to do so by a person who apparently lives in the dwelling house, whether or not that person is an adult. The police officer may remain if he or she has been invited on to the premises by the victim of a domestic violence offence, notwithstanding that the occupier has refused the officer authority to remain. If, however, the alleged victim of domestic violence does not give the officer authority to remain or if the officer is not given such power by common law, the officer must leave the premises.

24. New South Wales further introduced the novel concept of the issue of warrant by telephone. Where the police suspect that a domestic violence offence, a term which is widely defined, (s.4(1) Crimes Act, as amended by the Crimes (Domestic Violence) Act 1982 and the Crimes (Domestic Violence) Amendment Act 1983), has been or is likely to be committed and they have been denied entry into the premises and they believe that it is necessary for them to enter premises for investigation or to prevent further offences, they may apply for a telephone warrant. Such a warrant can only be issued by a magistrate who may issue the warrant by telephone either directly or indirectly.

25. As such a warrant could amount to a serious violation of civil liberties, safeguards have been incorporated into the legislation. Thus, proper records of such warrants must be kept, which include the address of the house, the name of the person who informed the police of the domestic violence and details as to whether and when the house was entered pursuant to the warrant.

26 As in Canada, New South Wales has introduced provisions to render married and unmarried spouses compellable witnesses, except in very limited circumstances, in domestic violence cases (Crimes (Domestic Violence) Amendment Act 1982 inserting s. 407AA into the Crimes Act 1900.)

27. The provisions introduced in Canada and New South Wales are very recent and there has thus been only a short period of time in which to evaluate the amendments. Clearly, it is essential that initiatives such as the mandatory laying of charges, compellability of spouses, increased police power to enter and remain on domestic premises, and telephone warrants must be carefully monitored, particularly in view of the fact that other countries may seek to use such provisions as a model for new legislative initiatives.

28. Although the provisions are new, a report from New South Wales (Domestic Violence Committee Report) published in June 1985 assesses the progress of its new provisions. The report indicates that although the legislation in New South Wales has adopted a criminal model requiring a commitment to the enforcement role of the police, arrests by police in domestic violence cases, indicated by bail returns has not shown a marked increase (page 20 of the report) and little use has been made of the telephone warrant system. Moreover, the number of spouses who have been excused from giving evidence in domestic violence cases is disturbingly high. (Report p.12ff and 31ff.)

29. Although the results of the report are disappointing, it must be reiterated that the change of governmental policy to a criminal justice approach to the issue is very new. It well may be that the continued police reluctance to prosecute is a relic of the past philosophy which stressed mediation and saw prosecution as a last resort. It is essential that the legislation continue to be monitored and assessed and special training for police be maintained and extended.

30. In all Commonwealth jurisdictions a woman who has been the subject of domestic assault has the option of pursuing a private prosecution where the police or state prosecutors[24] fail to prosecute[25].

31. In practical terms, the existence of such an option is of little value to such a victim. She must gather the evidence herself and be in charge of the conduct of the case. In most Commonwealth countries, legal aid is not available to bring a private prosecution. In sum, therefore, the procedure will be costly, emotionally taxing and it is fraught with the same difficulties which apply in public prosecutions. Hence, while no recommendation is made to remove the availability of private prosecutions, it must be admitted that the existence of such an action is of little help to a victim.

Quasi criminal remedies

32. In most Commonwealth jurisdictions, summary courts are given the power to bind over any person to keep the peace or to be of good behaviour towards a particular person. Such a remedy is usually awardable in proceedings commenced by a complainant who has[26] just "cause or fear that another will...do him some corporeal hurt."[27] After the complaint is made, the court may order the taking of recognisances without hearing any evidence, but if the defendant does not agree to this, the court must call for evidence on which to decide the issue. Where a bind over is breached. the defendant forfeits a specified sum of money.

33. Essentially this remedy lies between the criminal and the civil law. It is a criminal process, but involves a lower standard of proof. Binding over can occur before any actual violence has occurred which makes it particularly useful in the domestic context.

34. In most Commonwealth countries, the potential of the remedy in relation to spouse abuse has not been exploited. It has remained limited in usefulness in its current form because the defendant cannot be excluded from the home, nor can the court attach any particular conditions to regulate the conduct of the perpetrator. However, if the order is breached the defendant may face imprisonment. Law reformers in Australia recognised the potential of the breach of the peace provision and a number of Australian jurisdictions have recently amended provisions in their legislation pertaining to breach of the peace in order to make proceedings more useful in the domestic context[28]. The approaches taken vary from state to state. Because of their novelty and potential they are described in detail below.

South Australia and Western Australia

35. Legislation in South Australia (s.99 Justices Act 1921, as inserted in 1982) and Western Australia (ss. 172-174 Justices Act 1902, as inserted in 1982) now allows a magistrates' court to make an order imposing any restraints on a defendant that are necessary or desirable where he has caused or threatened to cause personal injury or damage to property and unless restrained is likely to do so again.

36. Complaints may be made by the victim of the violence or threats or by a member of the police force. In both cases, the onus of proof is on the balance of probabilities. Orders may be made in the absence of the defendant and on an interim basis. The court has been given power to limit the defendant's access to premises even where he has a legal or equitable right to such premises. Breach of such an order renders a person liable to imprisonment up to a maximum of six months and where any member of the police has reasonable cause to believe there has been a breach of such an order, he or she may arrest without warrant and detain the person suspected of the breach.

Queensland

37. Queensland provisions (Peace and Good Behaviour Act 1982) allow a person to make a complaint on oath and in writing to a justice of the peace to the effect that another person has threatened to assault or to do bodily injury to the complainant or someone under his or her care, or has threatened to get someone to assault or to do bodily injury to the complainant or a person under his or her care or to get someone to damage or destroy the property of the complainant. The complainant must also prove that he or she is in fear of the defendant. If the justice is satisfied that the facts have been substantiated and it is reasonable for the complainant to be in fear of the defendant, he or she may issue a summons or a warrant.

38. The justice may make his or her own inquiries or seek evidence from other persons as to whether the complaint is made in good faith and the court may hear the complaint whether the defendant is present or not. If the defendant does not appear in obedience to a summons, the court may issue a warrant, but if the defendant is present at the hearing, he will be given the opportunity to show that the order should not be made. Such evidence could include evidence that the complaint was made vexatiously or maliciously. The claimant may be dismissed or the defendant ordered to keep the peace and be of good behaviours for such period as the court thinks fit. Any stipulations or conditions may be attached to such an order. If the order is breached, the defendant will be prosecuted under the Act and if convicted is liable to a fine of $1,000 or imprisonment for one year. Unlike South Australia and Western Australia, there is no power for arrest without warrant for a suspected breach of the order.

New South Wales

39. It has been in New South Wales where the potential of the quasi-criminal action has been most recognised. Here a recent enactment (s.547AA Crimes (Domestic Violence) Amendment Act 1982, as amended in 1983) introduces "apprehended domestic violence orders", which attach a power of arrest for breach of the conditions of specialised "keep the peace" orders.

40. These orders may be sought either by an aggrieved spouse, defined as a person with whom the other person is living or has lived with on a bona fide domestic basis or a police officer. The order, which is issued by a court of summary jurisdiction, restricts the behaviour of the offending spouse for up to six months. Specifically, the court is empowered to prohibit or restrict approaches by the defendant spouse to the aggrieved spouse, prohibit or restrict access to any premises by the defendant spouse and prohibit or restrict specified behaviour.

41. Before a court makes an order to restrict access by a person to premises in which he resides, the court is instructed to consider the accommodation needs of the parties and the effect of any order upon any children. Orders may be made **interim** and ex parte and breach of any order is an offence punishable by imprisonment not exceeding 6 months. Where a member of the police force believes on reasonable grounds that a person has breached an order that person may be arrested without warrant and detained.

42. On its face, the quasi-criminal remedy would seem to have important potential in domestic violence cases. As previously stated, the standard of proof the complainant must reach is lower than in a criminal action, the remedy can be resorted to before the violence occurs and the remedy is simple and swift. However, although the quasi-criminal remedy has been available in general for some time, the remedies specifically aimed at domestic violence are new. Close attention to whether the remedies are as affective as they appear is essential. New South Wales has produced a report on the working of the remedy which, unfortunately, is disappointing.[29] Perhaps this is due to the newness of the remedy and general teething problems. It is clear that further close monitoring is a priority here.

Civil remedies: Injunctions

43. Throughout the Commonwealth, injunctions are available as a remedy for domestic violence. However, in most jurisdictions, such a remedy can only be granted as ancillary to a primary cause of action, such as divorce or judicial separation or a civil action for assault and battery.

44. The use of the injuction as an ancillary cause of action has its limitations. The spouse may not wish to proceed for matrimonial relief nor may she wish to bring a civil action against her husband or cohabitee. Further, in a number of jurisdictions, a married spouse is not competent to bring a civil action against her husband.[30]

45. Nonetheless, the injunction does have its advantages in the context of spouse abuse. It can be invoked speedily and often in the absence of the defendant and effective sanctions for breach of injunction exist.

46. Eleven Commonwealth jurisdictions have explored the potential of this remedy and have enacted specific legislation. Of these, several Canadian provinces, Singapore, Malaysia and the Australian federal legislature have taken a conservative approach, insisting that injunction proceedings be brought in association with a substantial claim, such as matrimonial relief or a tort action, a philosophy rooted in the traditional concept of the injunction. These countries usually grant relief to married spouses only and rarely allow for the attachment of an arrest power as a tool for enforcement.

47. England and Wales has totally abandoned the traditional concept of the injunction as ancillary relief. Here, legislation allows remedies for married and unmarried spouses and provides for the attachment of arrest powers to such relief. The other jurisdictions of the United Kingdom, Scotland and Northern Ireland, New Zealand and St. Vincent and the Grenadines have drawn on the example of England and Wales, but have added significantly different features.

48. As other Commonwealth countries are considering specific legislation of this nature, a comprehensive survey of the strengths and weaknesses of the current provisions follows.

Canada, Malaysia, Singapore and Australia

49. Canadian Provincial legislation in Ontario, Nova Scotia and Prince Edward Island (respectively, s.45 Family Law Reform Act 1980, s.12 Matrimonial Property Act 1980 and s.45 Family Law Reform Act 1978) allows exclusive possession of the matrimonial home to be granted to a spouse where, in the opinion of the court, other provision for shelter is inadequate or it is in the best interests of a child to make such an order. Such an order may be made irrespective of the legal ownership of the home. In addition, in Ontario and Prince Edward Island orders are available to restrain a spouse from molesting or harassing another spouse (respectively, s.34 of the 1980 Act and s.34 of the 1978 Act).

50. There are three limitations to the effectiveness of these provisions. First, exclusion orders are available to married persons only and thus provide no relief for unmarried cohabitees.[31] While the non-molestation orders in Ontario and Prince Edward Island extend to the unmarried, they are only available if couples have been living together for 5 years or if they have a child and have been living together for at least one year (respectively, s.14 of the 1980 Act and s.14 of the 1978 Act). Second, exclusion orders appear to be made in extreme circumstances only (Miller v Miller (1978) 2 RFL (2d) 129 (Ontario Provincial Court)).

51. Third, enforcement provisions are inadequate. In Ontario and Prince Edward Island there is no provision for the attachment of an arrest power. In Nova Scotia, although an order may be enforced by a police or peace officer, the jurisdiction is only available where the victim petitions for divorce or it is shown that the parties are living separately and apart and there is no reasonable prospect of the resumption of their cohabitation (s.12 Matrimonial Property Act 1980). Hence, a wife who does not wish to divorce her husband and remains in cohabitation with him cannot invoke the provisions.

52. In both Singapore (s.65A Women's Charter) and Malaysia (s.103 Law Reform (Marriage and Divorce Act 1976) protection orders are again available to married women only. In Malaysia a protection order is only available after a woman has filed for divorce or judicial separation. This is unfortunate as any application for matrimonial relief requires compulsory counselling[32] thus forcing a perhaps terrified wife to meet her husband. A problem in both countries is that such orders are unavailable to Muslim women and, in Malaysia, to native women from Sabah and Sarawak. Such women must depend on their religious or customary law for protection[33].

53. The Australian Federal legislation, similarly, limits its protection to married victims of domestic violence (s.114 Family Law Act 1975 (Cth)). Breach of the injunction amounts to contempt of court and the offender can be punished with a jail sentence. The orders that can be made under the Act include granting one party exclusive occupation of the home, restraining one party from coming into the vicinity of the other's place of residence or employment, restraining a party from assaulting, molesting or harassing the other party or a child of the marriage.[34] Orders can be obtained on an interim ex parte basis in an emergency. Moreover, the Family Court Counselling Service is available to the victim and her spouse.

54. The major limitations of the injunction under the Family Law Act are that they do not apply unless the parties are, or have been, married to each other and in cases where a party ignores an injunction, the contempt procedure is complex, costly and protracted. The victim must contact a solicitor to arrange for a fresh application to be made to the Family Court requesting that the respondent be dealt with for contempt.

55. This requires preparation of affidavit material and a court appearance. A full hearing into the matter takes a considerable time and may require more than one court appearance. Even where a finding of contempt is made, the Court is more likely to give a suspended sentence or a reprimand than to use its powers to fine or imprison.

56. In response to mounting criticism of the ineffectiveness of Family Court injunctions, the Act was amended in 1983, so that a court could attach a power of arrest to the injunction, but only if it was asked to do so by the victim (s.114AA Family Law Act 1975 (Cth)). Where an arrest power is attached and the injunction is breached, a police officer can immediately arrest without warrant, the offender having to be brought before the court within 24 hours. The court will only punish the offender if the victim applies to the court for the offender to be dealt with for breach of the injunction. If the victim does not, the offender must be released. Clearly, an important limitation of this procedure is the burden that is placed on the victim.[35]

England and Wales

57. All jurisdictions of the United Kingdom, New Zealand and St Vincent and the Grenadines have introduced more sophisticated legislation based on the injunction.

58. The most complicated scheme of such legislation exists in England where several acts combine to provide what has been called an "elaborate code regulating the rights inter se in relation to the matrimonial home" (B v B [1978] Fam 26, 36 per Bridge LJ).

59. The scheme attempts to provide a comprehensive coverage for the victim of domestic violence, but it suffers from the fact that three separate statutes enact remedies which apply in different situations. This is further complicated by the fact that the traditional power to grant an injunction as ancillary to a primary cause of action remains in the High Court. As far as the enacted legislation is concerned, the appropriate Act to use if the victim is married and if she wishes to have exclusive possession of the matrimonial home is the Matrimonial Homes Act 1983, while if she is unmarried and wishes to have exclusive possession of the home or if she is either married or unmarried and wishes to prevent her partner from molesting or harassing her she must apply under the Domestic Violence and Matrimonial Proceedings Act 1976. These proceedings may occur in different courts. At the same time the Domestic Proceedings and Magistrates' Courts Act 1978 provides in the Magistrates' Court parallel remedies to those provided in the higher courts, but these are only available to married victims. The scheme so presented is unnecessarily complicated, particularly in view of the fact that the victim may not have sufficient access to legal advice. Finally, it is apparent that certain victims fall outside the protection of the statutes. Thus, parties who are not or have never lived together either within or outside matrimony are outside the protection of the legislation, as are couples who are divorced.[36] The only possibility for injunctive relief for victims in these circumstances is as ancillary injunctive relief to a primary action, such as a tortious claim.

60. For some time injunctions had been available as ancillary to a substantial claim, for example, divorce or judicial separation or a claim for damages in tort, but the injunction was not pursuable as a primary cause. In 1976, the Domestic Violence and Matrimonial Proceedings Act, the result of a private member's bill, cured this defect and provided that a victim of domestic violence could apply to the county court for an injunction without taking other proceedings.[37]

61. The Act, which at one time was seen as a comprehensive code to deal with domestic violence, gives protection to cohabitants as well as married spouses, but it protects only those couples who are living together or those who have at least only recently separated.[38] 38Recently, however, the Act's claim to comprehension has been destroyed by the House of Lords decision in Richards v Richards [1984] AC 174 wherein it was decided that any orders concerning occupation of the matrimonial home between married spouses are governed by the principles of the Matrimonial Homes Act 1983. This Act, originally passed in 1967, was unconnected with domestic violence, but was enacted, rather, to protect the rights of a non-owing spouse whose spouse had transferred the matrimonial home to a third party.[39] 39In its current form, however, the Act gives the court power to prohibit either spouse from exercising his or her right to occupy the house, even where that spouse is the sole owner and it would appear that the Act gives the court the power to make permanent exclusion orders. The effect of the decision in Richards v Richards is that in situations where a woman is married and she wishes to have her husband excluded from the home, she must apply by originating summons in the High Court or the county under this Act (see Practice Direction (Matrimonial Home: Rights of Occupation) [1985] 2 All ER 1088).

62. The decision of Richards v Richards adds complications to this area of the law. There is, first, no jurisdiction under the Act to grant a non-molestation order, which must be applied for under the Domestic Violence and Matrimonial Proceedings Act 1976 in a different court. Second, unlike under the Domestic Violence and Matrimonial Proceedings Act, it appears that there is no jurisdiction under the Matrimonial Homes Act to prohibit the spouse from entering the neighbourhood. Finally, questions have been asked as to whether the order under the Act is properly classed as an injunction, an important issue as it is only to an arrest power that an injunction can be appended.[40]

63. In order to acquire relief under the Domestic Violence and Matrimonial Proceedings Act it is unnecessary to prove specific grounds. The court need only be persuaded that in the circumstances of the case an injunction is necessary. The application is by affidavit, although in urgent cases oral evidence may be heard by the judge who will require the applicant to file the affidavit within 24 hours or less. In the usual course of events the affidavit will be served on the other party at least four clear days before the hearing. In urgent and dangerous cases an application may be made ex parte. Both the fact that the application is by affidavit and may be made ex parte where necessary provide essential protection to battered wives where the situation is particularly dangerous.

64. The court has the power to make both non-molestation orders and exclusion orders under the Act. An arrest power may be attached to either order.

65. A non-molestation order will enjoin the person named in the injunction from molesting the victim or any children, not necessarily her own, who may be living with her (s.1(1)a). Molestation has a wide meaning and includes not only violence, but harassment.[41]

66. The court is given the power to exclude the man from the joint home entirely, regulate the use of the home, stop a man from coming into a specified area or allow the victim to re enter the home (s.1(1)c). Controversy has been caused by orders which exclude a man from a home in which he has an 'interest', whether as an owner or a protected tenant. Hence, a practice direction of 1978 (see [1978] 2 All E.R. 1056), advises the court to exclude owners or protected tenants for three months only in the first instance. This does not, however, prevent the court granting an injunction for a much longer period if the circumstances warrant it. As exclusion orders have extreme results, in some instances almost amounting to property transfers, courts exercise their discretion in giving the remedy carefully: Richards v Richards [1984] 1 AC 174, 215.

67. If the spouses are married, exclusion orders are governed by the principles of the Matrimonial Homes Act 1983 and the case of Richards v Richards. The Act makes clear that the

conduct of the spouses, their needs and resources and the needs of any children are the relevant considerations. The needs and welfare of the children are not the first consideration, except in cases where the child's custody or related matters are directly in point: Richards v Richards (supra) at 204 per Lord Hailsham, 222 per Lord Brandon. Unless a spouse has a joint interest in the property with her husband, her right of occupation will cease on the pronouncement of the decree absolute of divorce, unless the court has made an order under the Act directing otherwise during the course of the marriage. In order for the wife to retain an interest in the home after decree absolute, she must proceed in the divorce jurisdiction for ancillary relief.[42] Where they are unmarried, the principles are less clear. It is likely, however, that the same tests will apply.

68. While it appears that the Domestic Violence and Matrimonial Proceedings Act confers extensive property rights on unmarried spouses, it is clear that in practice such are not afforded. Any exclusion order is likely to be of short duration, not depriving the owner of property rights, but giving the parties breathing space and perhaps allowing the other party to acquire alternative accommodation[43]. 43Certainly, no order under the Act will prevent the owner dealing with his property and such an order will not bind third parties.[44]

69. The Domestic Violence and Matrimonial Proceedings Act contains provisions which seek to provide non-molestation and exclusion orders with 'teeth', so the woman does not find herself in the situation of protecting herself with a piece of judicial paper, which may not be worth the paper it is written on.[45] The Act provides that a power of arrest may be attached to certain injunctions specified in the Act. Such power enables the police to arrest, without warrant, anyone that they have reasonable cause to suspect is in breach of an injunction (s.2(1)).

70. The Act states that where a judge grants an injunction which restrains the other party from using violence against the applicant or a child living with the applicant or which excludes the other party from the matrimonial home or from a specified area in which the matrimonial home is situated, an arrest power may be attached (s.2(1)). The power to arrest may only be attached where two preconditions are fulfilled it must be proved by evidence that the respondent has caused actual bodily harm to the applicant or child and there must be a likelihood of further harm (s.2(1)). Actual bodily harm for this purpose is defined as any hurt or injury calculated to interfere with the health or comfort of the victim and is not confined to physical harm.[46]

71. It appears that as long as an injunction contains a provision as specified in the Act a power to arrest may be attached. It would seem, therefore, that it does not matter whether the injunction is conferred under the Domestic Violence and Matrimonial Proceedings Act 1976, the Supreme Court Act 1981 or the Matrimonial Homes Act 1983[47], such a power should be attachable.[48]

72. The power of arrest will be granted on the application of a married or unmarried spouse. However, where the parties are married there is no power to attach an arrest power to an injunction after the decree absolute of divorce.[49] Where the parties are unmarried the court may be more liberal and attach such a power even though the relationship has ended (Adeoso v Adeoso [1980] 1 WLR 1535). A power of arrest will not be attached to the injunction lightly and judges have considerable discretion in this area.[50]

73. Where such a power is attached, it is registered at the applicant's local police station. A constable will be empowered to arrest without warrant a person he suspects reasonably of being in breach of the injunction "by reason of that person's use of violence or, as the case may be, of his entry into any premises or area" (s.2(3) Domestic Violence and Matrimonial Proceedings Act 1976). If arrested, the man must be brought before a judge within 24 hours of his arrest and during that 24 hours he may not be released except on direction of a judge.

74. The ultimate sanction for breach of an injunction is committal to prison. In practice, however, courts are reluctant to commit for breaches of an injunction, except where there is serious violence or repeated breaches of the order. Usually the court deals with the matter by warning and where no power of arrest was attached to the original injunction, by adding such a power (Ansah v Ansah [1977] 2 AllER 638, 643 per Ormrod LJ).

75. The final piece of legislative help available to a victim of domestic violence is the Domestic Proceedings and Magistrates' Courts Act 1978, which is available to married spouses only. The Act empowers the magistrates' court to make protection orders which are analogous to non-molestation orders. Such orders will enjoin the respondent from using or threatening to use violence against the person of the applicant or a child of the family, or indeed not to incite or assist anyone to use or threaten violence (s.16). Such an order will only be made where it is proved that the husband has used or has threatened to use violence against his wife or any of the children and the court feels that because of the likely repetition of such conduct, an order is necessary. The jurisdiction of the magistrates is less extensive than the superior courts, there being, in particular, no jurisdiction to grant an order against molestation short of violence.

76. If the husband has actually used violence against the wife or the children of the family, or threatened them and used violence against a third party, such as the wife's boy friend, or has contravened a protection order by making further threats, the court has the power to order him to leave the matrimonial home or prohibit him entering it.[51] 51Again, the magistrates' jurisdiction is narrower than the superior courts in that they have no power to keep him away from the area in which the home is situated.

77. An application for a protection or exclusion order can be made at the same time that a summons is issued for a maintenance or custody order or independently. Where the case is urgent, an application may be made to a single magistrate or bench without notice to the husband for an 'expedited order'. Such an order requires the husband not to use or threaten violence to the complainant or the children of the family, but it cannot contain a provision that the husband leave the home.

78. An expedited order is designed to last only so long as it may be necessary and the matter to be brought before the court. Such an order will not be made unless there is imminent danger and it will not last more than 28 days at the longest (s.16 Domestic Proceedings and Magistrates' Courts Act 1978).

79. Two procedures are provided in the Act to secure enforcement of the orders. First, the wife can apply to a justice of the peace for a warrant to be issued directing the police to arrest the respondent for disobeying the order. It is to be noted that the wife must take the initiative of applying for the warrant.

80. On arrest and court appearance, the magistrates may order the defaulting husband to pay a fine, which has a maximum of £1,000, or commit him to prison for a period not exceeding two months (s.63(3) Magistrates' Courts Act 1980).

81. The second method to secure enforcement is for the court to attach an arrest power to the order. This can only be attached where the respondent has physically injured the applicant or a child of the family and the magistrates are of the opinion that he is likely to repeat his behaviour (s.18(1) of the 1978 Act). The attachment of such a power is not the rule and magistrates must give reasons for the attachment of such a power: Widdowson v Widdowson (1982) 4 FLR 121. Where such is attached the police are given the same power to arrest for suspected breach as under the Domestic Violence and Matrimonial Proceedings Act 1976.

82. The magistrates' court is not a popular forum for domestic violence disputes. The jurisdiction is narrower than the higher courts: there is no power to make orders to prevent

molestation and the emergency proceedings are restricted. Further, the legislative provisions granting jurisdiction appear unnecessarily complex. In numerical terms, however, a significant number of applications for relief are made to the magistrates. One reason for this is that legal aid may not be available to bring higher court proceedings where magistrates' court proceedings would provide appropriate relief.[52]

Scotland, Northern Ireland, New Zealand, St. Vincent & The Grenadines

83. Notwithstanding the difficulties that the English legislation indicates, a number of jurisdictions have followed its English lead in the drafting of their legislation. Few, however, exhibit the complexity and the difficulties of the English scheme.

84. In Scotland, the Matrimonial Homes (Family Protection) (Scotland) Act 1981 was introduced to remedy the fact that Scots law gave no occupancy rights in the matrimonial home to the spouse who was not the owner or tenant of it and that Scots law gave inadequate protection to the victim of domestic violence.

85. The Act creates an exclusion order (s.4), whereby one spouse (a term which includes persons living together as husband and wife)[53] may obtain an order suspending the occupancy rights of the other spouse in the matrimonial home. The court has the power, in making the exclusion order, to grant an order prohibiting the excluded spouse from entering the matrimonial home, removing furnishings and plenishings or approaching the matrimonial home (s.4).

86. Such an order must be made if it appears to the court (Court of Session or the sheriff) that the order is necessary for the protection of the applicant or of any child of the family[54] from any conduct or reasonably apprehended conduct of the non-applicant spouse which is or would be injurious to the physical or mental health of the applicant or child.[55] [55]

87. The Act also specifies that an exclusion order ought not be made if it appears to the court unjust or unreasonable to do so, having regard to the conduct of the spouses, their respective needs and financial resources, the needs of any child of the family, the extent to which the home is used in connection with a spouse's trade, business or profession and whether the spouse legally entitled to the legal use of the home offers or has offered to provide the other spouse with alternative accommodation (ss.3(3) and 4(3)). This list is not exhaustive.

88. Interdicts may be awarded independently of exclusion orders. Such interdicts are aimed to prevent the conduct of one spouse towards the other or towards a child of the family. They may also prohibit the interdicted spouse from approaching the matrimonial home or the area surrounding the home (s.14).

89. Unlike the English Act, the Scottish Act requires that a power of arrest be attached to certain matrimonial interdicts. This requirement was inserted into the Act to avoid the experience in England, where such an attachment is discretionary, of the courts being reluctant to impose the power.[56] [56]Accordingly, under s. 15 the court is given the duty to attach an arrest power to interdicts which are ancillary to exclusion orders, even where such orders are interim only and to any other interdict where the non applicant spouse has had the opportunity of being heard or represented before the court, unless it appears in all the circumstances to the court that the attachment of such an order is unnecessary. The court has no discretion to refuse to attach an arrest power to an interdict which is ancillary to an arrest power where the spouse requests it.

90. The arrest power does not become effective until the interdict is served on the non applicant spouse and it ceases to have effect on the termination of the marriage (s.15(2)).

91. Where a power of an arrest is attached, a constable may arrest without warrant any person who he has reasonable cause to suspect is in breach of an interdict (s.15(3)). The Act contains detailed provisions on the procedure to be followed when a person has been arrested for breach of an interdict to which an arrest power has been attached.

92. In short, after arrest, the officer in charge of the police station may liberate the arrestee unconditionally if he is satisfied that there is no likelihood of violence to the applicant spouse or a child of the family, or refuse to liberate him. Where the spouse is liberated, the facts and circumstances giving rise to the arrest must be reported to the procurator fiscal who may choose to take criminal proceedings. If the procurator fiscal chooses not to take such proceedings he will take all reasonable steps to inform the other spouse and her solicitor. If the arrestee is not liberated and the procurator fiscal chooses not to take criminal proceedings, the arrestee must be brought before the sherrif not later than during the day after the arrest. At this proceeding the procurator fiscal presents a petition containing a statement of the non-applicant spouse and a request that detention occur for a further period not exceeding two days. If it appears to the sheriff that (a) the statement of the facts discloses a prima facie breach of interdict, (b) that proceedings for breach of interdict will be taken, and (c) that there is substantial risk of violence by the arrested spouse against the other spouse or any child of the family, then he may order detention for a further period of two days.

93. All three requirements must be fulfilled or the arrestee must be released (ss.16,17). After this detention proceedings for breach of interdict will be taken.

94. The court also has power to make an interim exclusion order. Such an order can only be made if the non applicant spouse has been given an opportunity to be heard by or represented before the court (s.4(6)).

95. As in England, interdicts are available as ancillary relief. Thus, interim and full interdicts against molestation of a wife by her husband are obtainable as ancillary relief in divorce and other proceedings.[57]

96. Further, as in England and Wales, a Scottish spouse is able to sue her husband for any delict. Again this is subject to the qualification that such an action may be dismissed by the court if it appears that no substantial benefit would accrue to either party in the continuation of the proceedings (Law Reform (Husband and Wife) Act 1962).

97. An interdict of this nature could not prevent the husband entering the matrimonial home if he was the tenant or owner of the house. Further, at least one witness is necessary to prove that the spouse had been violent and was likely to be so again. No arrest power is attachable to the interdict.

98. Provisions in Northern Ireland are similar to the Scots interdict. Hence, the Domestic Proceedings (Northern Ireland) Order 1980 allows a magistrates' court to award a personal protection order to a married or unmarried spouse[58] where it is satisfied that the respondent has used or threatened to use violence against the applicant or a child of the family and it is necessary for the protection of the applicant or a child of the family that an order should be made (Art. 18(1)). The order restrains molestation of the applicant or the child of the family.

99. The court is also empowered to make exclusion orders where molestation has occurred in contravention of a personal protection order and such an order is necessary for the protection of the applicant or a child of the family (Art. 18(4)). An exclusion order will operate to exclude the respondent from the matrimonial home and the area in which it is situated (Art.18 (4)). The order may also forbid the respondent to enter in or in the vicinity of any other place, for example, the refuge where the victim has gone.

100. The exclusion order will require the spouse to leave the matrimonial home, forbid him from entering it, restrain him from disposing of the estate in it, prohibit him from damaging it and prohibit him from removing goods from it (Art. 18(4)). The order is a temporary measure, the maximum period of its duration being six months (Art. 18(9)).

101. A power of arrest may be attached to such exclusion orders. The attachment of such a power is discretionary, being attached when a court is satisfied that violence or the threat of violence has been used and there is a continuing threat that it may occur again. Such a power allows the police to arrest without warrant any person they have reasonable grounds to believe is in breach of such an order. An arrest may be made with reasonable force and the police are granted reasonable entry rights to affect the arrest (Art.19).

102. On arrest the police have the power to release the offender unconditionally, release him on condition he reports to a police station or appears in court or keep him in custody. Where the police select the latter option, the offender must be brought before a court within 24 hours of his arrest or release.

103. The Order provides for interim orders where such are appropriate as for example, where there is imminent danger. These become effective when they are served on the respondent and can last up to 5 weeks during which time a full order can be applied for (Art.21).

104. The St Vincent and the Grenadines' legislation is very close to the Scottish protective legislation. Power is given to judges of the High Court to grant injunctions to a woman, who may or may not be a married spouse to restrain the man from using violence against her, restrain the man from using violence against any child who is living with her and to exclude the man from the matrimonial home or from a specified area, including the matrimonial home (s.3(1)). In cases where such an injunction exists and actual bodily harm has been caused to the applicant or child and it is likely there will be a repetition of such violence, one may attach a power of arrest to the injunction. This allows the police to arrest any person who is believed, on reasonable grounds, to be breaching the injunction (s.3(3)). Provision exists in the Act to exclude a man from the matrimonial home where the court believes such a course to be reasonable, bearing in mind the conduct of the parties, their respective needs and financial resources and the needs of any relevant children (s.4).

105. Currently, the only other Commonwealth jurisdiction which has enacted injunctive proceedings for domestic violence is New Zealand which, in the Domestic Protection Act 1982 brings together all the rules relating to domestic violence, untying them from the law relating to matrimonial causes and the dissolution of marriage. Clearly, this indicates that the New Zealand Parliament has concluded that domestic violence should be separate from the rest of family law and that the general criminal law has been conceived of as inadequate to deal with the problem of violence in the home.

106. The legislation itself extends protection to those "living together in the same household" as well as to those that are married (ss.4, 13, 19, 24). Further, those who have been married, but whose marriages have been dissolved fall under the umbrella of the Act. The law applies only to persons of the opposite sex, the Act expressly referring to "a man and a woman ..... living together in the same household". Hence parties living together in a homosexual domestic relationship are not covered by the Act. While the Act is clearly designed to cover those who are living in heterosexual de facto relationships, the Act is not limited in this way. The Act applies to a man and a woman living in the same household, but does not require any element of conjugality.

107. Thus the Act will cover relationships with no sexual overtones, as for example a brother and a sister living together. The Act, however, is of no assistance to unmarried couples where there is no element of cohabitation. Hence, in situations where lovers are living apart the Act will be irrelevant. Finally, the Act is of no assistance to a minor,

even in those cases where he or she is affected by the violence occurring between his or her parents. However, the Act does give some protection to a "child of the family" upon the application of an adult (ss. 5(1) a, 7, 20(1), 21(2)b, 25(1), 26(2)b, 30(2).

108. The orders available under the Act are similar to orders available in the other Commonwealth jurisdictions.[59] First, occupation orders and tenancy orders are available in order to exclude the violent partner from the family home. Both of the orders are available ex parte only in situations where violence has occurred and where delay caused by proceeding on notice would be dangerous (ss.20, 25). The court has power to make a final order if it is satisfied that such an order is necessary for the protection of the applicant or in the best interests of a child of the family. An occupation order remains in force until the period of the order expires or either party makes a further application to the court (s.23), while a tenancy order has the effect of transferring the tenancy to the applicant until the tenancy itself expires or the court orders that the tenancy revest in the respondent on the application of the respondent (s.28).

109. These orders have been attacked because they may result in a being deprived of his property rights. Certainly, a valid objection could be taken to the legislation in situations where the violent partner has a legal or equitable estate in the property. No guidance is given to the court in the Act as to how long the period of exclusion of the violent partner should be. In the case of married or formerly married partners, ultimate recourse may be made for the reallocation of property rights under the Matrimonial Property Act 1976, but no such relief is available to unmarried parties. Clearly more guidance on this issue from the legislature would have been helpful. If the period of exclusion is short it may be of little help to the victim, while if the period is long, an estate holder may have valid objections.

110. Second, furniture orders grant to the applicant, for such period and on such terms and subJect to such conditions as the court thinks fit, the use of all or any of the furniture, household appliances and household effects in the premises to which the occupation order or tenancy order relates. The order is only available as ancillary to the grant of an occupation or tenancy order and will only be made if there is a child living on the premises. It expires after three months or when the order lapses, whichever is the sooner (s.30).

111. Third, non-molestation orders are available to persons who are already living apart or for whom living apart is a possibility by virtue of some other proceedings, such as separation proceedings (s.13). The orders cease to have effect if the persons concerned resume living together (s.17). The orders are aimed to stop actions of harassment such as entering and remaining on land or in buildings occupied or used by persons in whose favour orders, for example, occupation orders are in force, waylaying people in public places or persistent telephone calls. Breach of a non-molestation order is an offence punishable by imprisonment (s.18). Under the previous legislation, it had been the practice of the courts to grant these orders only on evidence of the likelihood of future violence and only on such evidence which was accompanied by evidence of actual violence. Suggestions have been made that because non-violence orders are available under the Act, the courts may be more likely to issue non-molestation orders in situations which fall short of actual violence, but which may be aptly characterised as psychological or emotional violence.[60]

112. Fourth, the Act provides that the courts may issue non-violence orders against persons who have already engaged in physically violent activities and who are likely to do so again (s.6). The orders prohibit the use of violence and threats of violence (s.7), and are available to persons who are living together or living apart (s.4).

113. The unusual feature of non-violence orders is that breach of such an order is not an offence, but is sanctionable by detention (ss.9, 12). The police are empowered to arrest without warrant, any person who they have good cause to suspect of having committed a breach

of a non violence order, if they believe that the arrest is reasonably necessary for the protection of the person in whose favour the order is made (ss.9, 10). Once the person has been arrested, he must be detained in police custody for a mandatory period of 24 hours unless that person or the police decide to initiate an appearance before a judge or a justice, who may then direct an earlier release from custody (s.12) No detention is allowed beyond the 24 hour period and no charge may be laid for the breach of the order as that breach is not an offence per se.

114. The non-violence order has proved controversial. First, the unusual power given to the police of arresting and detaining without warrant for a period of 24 hours is believed by some to be a breach of natural justice. It is argued that due process requires that the detainee be brought before an adJudicatory body as soon as possible to determine whether detention is necessary. In the case of the non-violence order, adjudication will be available only if the police or the detainee decide to initiate an appearance before a court or a Justice. By contrast, if the perpetrator had been arrested under the ordinary criminal law for assault, there would be an automatic right to a hearing. Second, the Act lacks a charge for a breach per se. This means that persons who are arrested for the breach of such an order are liable to be branded with guilt without any hearing because no charge follows from a breach per se. Arrest gives them no opportunity for acquittal or even for dropping of a charge.

115. On the other hand, proponents of the Act argue that the order is particularly useful in the context of domestic violence because it allows the police a freedom of action to which they have been unused. Previously, they had to choose between arrest and attempting to calm the situation, but here they are given an opportunity to follow a middle path. The victim is given 24 hours in which to consider her situation, while the perpetrator is given a necessary 'cooling off' period. Abuse of the order is unlikely, it is argued, as police detention cannot occur unless there is already a court decided order in force. Moreover, the detainee has a right to be brought before a judge for an individual determination as soon as practicable and in any event any abuse would only result in detention for 24 hours.[61]

116. Atkin, Sleek and Ullrich in their 1984 comment on the Act[62] conclude that the non-violence order, carrying with it the possibility of violation of rights, may prove less useful for victims of domestic violence than had been hoped. They argue that the main purpose behind the Act's power of detention without charge is to provide the victim of domestic violence who is not willing to see legal proceedings of assault through, for whatever reason, with a remedy. They believe that there will be few victims of domestic violence who will have the courage to use the non-violence order and not have the courage to use the criminal process. Further, they believe 24 hours is not long enough for a perpetrator to cool off, but it is long enough for him to become increasingly hostile towards his victim and plan means of retaliation. Moreover, they are of the opinion that the police will be no more willing to enforce these orders than they are to pursue other cases of domestic violence. Their net conclusion is that it would have been better for the legislature to have made breach of non-violence orders an offence and have enacted a provision forbidding the granting of police bail to persons arrested for such a breach and directing that a court fail to award bail unless it was shown that further violence was not likely. This would mean that all persons who were arrested for a breach of a non-violence order would have to be brought before a court as soon as possible to decide the need for continued detention, a decision that would be based on the application of general principle to individual circumstances, including the important issue of the protection of victims from violence. If no continued detention were necessary, the arrestee would be released, while if the reverse were the case the arrestee could be detained for a longer period of time. This would mean that the victim would be given a longer period of time in which to determine how to achieve more permanent protection.

117. Finally, section 37 of the Act allows the court to recommend that either or both parties participate in counselling that the court specifies. this raises the issue of

training for counsellors dealing with this area of family law. At present it would appear that there is a need for specialised training for not only counsellors, but judges, lawyers and the police who administer the Act.

Comment

118. It is clear that the aim of the injunctive procedures described above is to provide a wife with a short term measure, falling short of a criminal sanction, where she is the victim or potential victim of domestic violence.

119. While this aim is laudable, it is apparent that much of this legislation is technical and complex. Certainly, most jurisdictions avoid the overcomplex pattern of the English scheme, but in most jurisdictions the remedies require a degree of legal literacy, awareness and expertise not possessed by most laypeople and indeed, often possessed only by specialised lawyers. Further, most injunctive procedures rely upon a co-operative and understanding police force, and thus the same difficulties which confront women in the criminal context exist in the context of the injunction.

120. Despite these criticisms, it is not suggested that such procedures be dismantled or that Commonwealth countries contemplating the passage of such legislation[63] should reconsider. What is suggested, is that such legislation should be rendered less complex, more accessible and that a sufficient social context for the legislation, including, for example, police training and short term shelters be established.

PART B: SEXUAL ASSAULT: RAPE

121. All Commonwealth countries provide criminal sanctions for sexual offences against women, such offences being variously described as abduction, defilement, indecent assault, procuration, unlawful detention for immoral purposes, unlawful carnal knowledge and rape. Rape, which is most commonly defined in the jurisdictions as the penetration of a vagina with a penis without the consent of the woman concerned is the most important and serious of such crimes.

122. Considerable agitation for the reform of the law relating to sexual offences and in particular, the crime of rape, exists in a number of Commonwealth countries. Some of these countries have embarked upon comprehensive reforms of both a substantive and procedural nature, but, more commonly, the crimes are defined and the procedural rules remain in the same form as last century.

123. Two basic objectives are behind the current move for legal reform in the area. First, it is hoped that reforms will lead to the improvement of reporting, prosecuting and conviction rates for sexual assault. Second, reformers hope to minimise the victimisation of the complainant by the legal system itself.

124. A number of common questions confront Commonwealth jurisdictions in their attempt to realise these objectives and to introduce appropriate strategies to confront the problem of sexual assault of women.

They are:

1. The definition of rape.

2. Whether sexual assault within marriage should be criminalised.

3. The issue of the consent of the victim and the related question of the belief of the accused as to the alleged victim's consent.

4. Whether procedural reforms are necessary to ameliorate the alleged victim's ordeal at trial. Here it is important to consider evidentiary requirements such as that of corroboration and evidence of the woman's past sexual history.

5. Whether systems can be established to make the treatment of the alleged victim less victimising.

The definition of rape

125. Most Commonwealth jurisdictions model their definition of rape upon that of the English law. Hence rape is defined as unlawful intercourse by a man with a woman who is not consenting to the act and who is not the man's wife.[64] Sexual intercourse is defined as existing on proof of the slightest penetration by the penis of the vagina, ejaculation being unnecessary: Hughes (1941) 9 C & P 752.

126. A number of jurisdictions have widened the definition of sexual intercourse required for rape beyond penile penetration of a vagina to include other sexual assaults.. Thus, South Australia defines sexual intercourse to include the introduction of the penis of one person into the mouth of another (s.5 Criminal Law Consolidation Act). Victoria goes further and defines "sexual penetration" as the introduction of the penis into the vagina, anus or

mouth of a person irrespective of their sex and the non-consensual introduction of an object into the vagina or anus of a person, whatever their sex, otherwise than as part of some accepted medical treatment.[65] New Zealand, similarly, introduces the concept of "sexual violation". This is defined as (a) the act of a male who rapes a female, which is defined in traditional terms and (b) "unlawful sexual connection" which is defined as penetration of the vagina or anus of any person by any part of the body of another person or by an object otherwise than for bona fide medical purposes and any connection between the mouth or the tongue of any person and any part of the genitalia of any other person (s.128 Crimes Act 1961). Again, New South Wales redefines sexual intercourse to include penetration of the vagina or anus of any person by any part of the body of another or by an object, sexual connection occasioned by the introduction of the penis of a person into the mouth of another and cunnilingus.[66]

127. Canada also widens the definition of sexual conduct for the purposes of sexual offences, but its definition is not specific, being tied to a definition of assault [67] 67which covers the intentional application of direct or indirect force in the absence of consent, the threatened use of force and also accosting, impeding or begging, while openly in possession of a real or imitation weapon (s.244 (1) Criminal Code, RSC, 1970). Consent for these purposes will not exist if it is obtained by force, threats, fraud or exercise of authority (s. 244 (3) Criminal Code). No clarification exists in the legislation to indicate the factors which will transform the assault into sexual assault and it is clear that this has already presented the courts with difficulty. Thus, the New Brunswick Court of Appeal has decided that assault to the breasts is not sexual as it took the view that secondary sexual characteristics must be excluded as otherwise touching a man's beard would be a sexual assault: Chase v The Queen (1984) 40CR (3d) 282, 13 CCC (3d) 187. Other Canadian courts have refused to follow this narrow approach and have concluded that assault with intent to have sexual intercourse without consent, assault for the purposes of sexual gratification (R v Alderton (1985) 44CR (3d) 254 (Ont)), an act of force including an act intended to degrade and to demean for sexual gratification (R v Taylor (1985) 44 CR (3d) 263 (Atla)), assault with a sexual motivation[68] 68and assault in an "aura of sexuality"[69] as coming within the definition.

128. It is clear that the definition of proscribed activity lends itself to a narrow approach, perhaps limiting it to the traditional definition of rape, but at the same time a liberal approach is equally possible, allowing the legislation to condemn a wide variety of unwanted sexual activity.[70] The interpretation of the legislation has been left to the judiciary. It is hoped that judges will exercise their discretion with some knowledge of women's perspectives of sexual conduct.[71]

129. Beyond redefining sexual intercourse in terms which are gender-neutral and encompass a wide range of sexual assault, New South Wales and Canada also introduce categories of sexual assault ranging from what would have been deemed aggravated rape in their previous legislation and will still be deemed as such in most jurisdictions, to indecent assault. Penalties escalate in accordance with the seriousness of the offence, such seriousness being judged in the light of the violence or any other act used to gain submission and which accompanies the unwanted sexual connection.

130. Hence, in New South Wales, sexual assault category 1, which is defined as "sexual connection" involving malicious infliction of grievous bodily harm and malicious infliction of actual bodily harm, carries the highest criminal penalty;[72] while sexual assault category 2 is defined as sexual connection by means of the threat of or infliction of harm by an offensive weapon; sexual assault category 3 is defined as sexual connection with another knowing that the other person does not consent or with reckless indifference as to whether the other consented; and, finally, sexual assault category 4 is defined as an assault with indecency with or towards a person under 16. Canada, similarly, creates three degrees or tiers of sexual assault. Grade 1 penalises simple sexual assault; grade 2, sexual assault,

accompanied with the possession, use of or threatened use of a weapon, threats to a third party or the causing of bodily harm; and grade 3, aggravated sexual assault (Bill C-127).

131. A number of other jurisdictions are considering amendments to their rape laws based on the models provided by the Australian states and Canada.[73] South Australia is considering proposals sufficiently different from the current legislation that scrutiny of them is warranted here.[74] As in the other jurisdictions, sexual assault is widened from penile penetration of a vagina and the crimes are gender neutral,[75] but the degrees of sexual assault sanctioned differ. Sexual assault grade 1 is defined as sexual penetration of another without consent where that person is under 17 or over 65, where more than one person is involved in the offence and where sexual penetration was preceded, accompanied or followed by the abduction of the victim, the accused forcibly gaining access to the place where the victim was present, an attempt or threat to render the victim insensible, unconscious or incapable of resistance, an act of gross indecency performed on the victim, an act calculated to humiliate the victim substantially (or the threat of such an act), the intimidation of the victim with an offensive weapon, the assault of any person or the threat or commission of a criminal act against any person. Sexual assault grade 2, which is recognisable as the traditional crime of rape, is sexual penetration by another without consent. Sexual assault grade 3 is indecent assault in the circumstances of sexual assault grade 1, but sexual penetration is not required. Sexual assault grade 4 is indecent assault.

132. The clear intention behind the redefinition of the crime of rape to include gender-neutral acts is to stress the violent aspects of the act of rape, rather than its sexual nature, a philosophy which is taken even further in those jurisdictions where sexual assaults are graded. The new definitions acknowledge that violation may occur in the absence of penile penetration. Forcible penetration by a foreign object is as violating as forcible sexual intercourse. Likewise forced oral sex and sodomy often accompany forced intercourse. Widening of the definition is thus in line with the understanding of rape as a means of humiliation, degradation and violence through sexual means.[76]

133. Such redefinition does not receive unanimous support. The English Criminal Law Revision Committee[77] for example, argues strenuously for the retention of rape in its present definition, recommending that penalties for indecent assault, which encompasses other penetrations and oral intercourse should be raised.[78] Its view rests on two grounds. First, that "the concept of rape as a distinct form of criminal misconduct is well established in popular thought and corresponds to a distinctive form of wrongdoing".[79] Second, the risk of pregnancy is an "important distinguishing characteristic of rape".[80]

134. Neither of these reasons are particularly compelling. The first would suggest that reform of any area of the law is impossible where the public has a particular view of the law,[81]81while the second ignores the fact that pre-pubertal, menopausal and sterlized women are all covered by the law of rape. Moreover, this is inconsistent with the Committee's view that non-consensual buggery of a man or a woman was similarly an offence deserving special condemnation.[82]

135. While the views of the English Committee are worthy of serious consideration, it may be that its view of rape is too narrow. Forcible penetration by a penis or a bottle is similarly outrageous and the latter may involve an act of sadism likely to cause the victim greater pain and damage than rape in its traditional definition. Similarly, non-consensual oral sex may well be more disturbing than penile penetration. However, the current redefinitions warrant one serious reservation. In those jurisdictions where tiers of offences have been introduced, such tiers are based in escalating degrees of violence other than the sexual attack itself. Rape, therefore, which is committed in circumstances where the victim submits out of fear or her attacker which does not arise out of actual or threatened violence comes low in the tier. This may lead to the misconception that sexual aggression per se is trivial in comparison with sexual aggression accompanied by violence.

It is essential that jurisdictions wherein redefinition on this model has occurred closely monitor the application of their legislation so that the seriousness of sexual assault simpliciter is not underrated.

136. An issue which is closely associated with the question of whether rape should be redefined is whether the offence should continue to be termed "rape". Certainly, a number of Commonwealth jurisdictions have rejected the word "rape" in favour of a more neutral term which covers all offences, which are distinguished only by a number which indicates a level of seriousness[83] 83and others indicate in their reform proposals that they will shortly follow this lead.[84] At the same time, the term is specifically maintained in the legislation of other jurisdictions.[85]

137. The principal reason advanced for the maintenance of the term is that it carries with it the special opprobrium and condemnation that should be reserved for the act of forced sexual intercourse. It is suggested that to discard the term would be to "water down" the special character of rape.[86]

138. A number of serious objections can be raised against the continued use of the term. First, juries have preconceived notions of the crime of "rape". They consider it to be a violent and destructive crime and may thus be loathe to convict in circumstances in which their preconceptions are not fulfilled, as for example, where the accused and alleged victim are past lovers and the crime is not violent.[87] Second, defence counsel may exploit the known preconceptions of the jury, indicating that the events which are under consideration are not particularly bad and that the alleged victim has lost very little. Third, the term carries with it a social stigma for the victim, particularly in view of the current societal attitude that she may have "asked for it".[88] Finally, "rape" is a fixed term covering a range of violations.[89]

139. The case for abandoning the term "rape" rests in sum on its emotive and stigmatising character. This character may well outweigh the risks of weakening the impact of the law and of causing confusion by rejecting the traditional concept.

Sexual assault within marriage

140. In most Commonwealth jurisdictions, sexual assault by a husband on his own wife is not a crime.

141. The rule is believed to originate in a statement by Sir Matthew Hale, an English judge, in his History of the Pleas of the Crown.[90] No authority is provided for his statement and it has been suggested that prior to this statement convictions for rape by husbands had occurred.[90] Nonetheless, Hale's statement has proved critical and since the case of Clarence[92] in 1888 a wife has been considered to have no right or power to refuse her consent to intercourse with her husband.

142. It is possible, however, for a husband to be convicted of assault upon his wife in those circumstances where violence has been used to gain her submission.[93] Furthermore, where the parties are separated by agreement or there is a non-molestation order or an order of judicial separation or divorce a husband can be convicted of rape.[94] The same would, it would seem, apply to a magistrates' order excluding the husband from the home, but not to a personal protection order which prohibits only violence or the threat of violence.[95] The marital immunity, as it is called, does, however, apply in circumstances where a husband and wife are living separately without any form of separation order or agreement.

143. A number of arguments are raised by those who favour the retention of the marital immunity. First, it is argued that rape within marriage would face serious difficulties of

proof and the threat of unjustified proceedings could be used by a vindictive wife against her husband. Second, it is argued that the criminal law should not intervene in marital relationships, the wife being, at all times, adequately protected by her matrimonial remedies.[96] Finally, perhaps the most fundamental plea for the retention can be seen in the conclusion of the English Criminal Law Revision Committee which stated:

> "Spouses have responsibilities towards one another and to any children there may be as well as having rights as against each other. If a wife could invoke the law of rape in all circumstances in which the husband forced her to have sexual intercourse without her consent, the consequences for many children could be grave, and for the wife too."[97]

144. The arguments for the retention of the immunity appear to be based on the view that rape within marriage is infrequent and even if it does occur, such is not as serious as rape where the victim is unrelated to the offender. Whilst there is only little research into the phenomenon, the studies[98] which exist indicate that such a view is erroneous. Indeed, evidence exists that there is considerable unwilling participation by wives in sexual activity and that the injuries suffered by such women, be they physical or psychological, can be serious.[99]

145. A number of Commonwealth jurisdictions have abolished the immunity entirely or have seriously curtailed it, while still others are in the course of seriously questioning the immunity.

146. It would appear that the exemption does not exist in Scotland where the husband could and still can be convicted of raping his wife.[100] 1In South Australia a woman will be regarded as a rape victim if she is raped by her spouse and an assault occasioning actual bodily harm is threatened or inflicted, an act calculated to seriously and substantially humiliate the spouse is threatened or inflicted or there is the threat of the commission of a criminal act (s.73(5) Criminal Law Consolidation Act 1976). Victoria (s.62(2) Crimes Act 1958) takes a more conservative view, removing the immunity where the spouses are living separately and apart. The most radical jurisdictions are New South Wales (s.61A(4) Crimes Act 1900) Canada (s.246.8 Criminal Code 1970), New Zealand (s.128 Crimes Act 1961) and Western Australia (Act Amendment (Sexual Assaults) Act 1985) where the marital relationship of the victim and the offender is irrelevant in sexual offences.[101]

147. The question of rape within marriage is clearly controversial. Unwanted sexual activity is just as offensive to a wife as to any other woman. Indeed, given the breach of trust involved in such conduct, it may well be more offensive. While it is acknowledged that difficulties of proof may confront such a charge, this does not appear to be a valid reason to deny a spouse the ultimate sanction of the criminal law. Many other crimes confront the courts with similar difficulties of proof and others are capable of being used vindictively. Such arguments usually do not provide sufficient reason not to condemn and criminalise objectionable behaviour. It is up to the woman to complain of her husband's activities. As it stands, the immunity may have dubious distinction of preserving the privacy of the family, but it removes from the wife autonomy over her own body and relegates her to the status of a chattel.

Consent

148. Consent is the crux of the definition of the crime of rape in most Commonwealth countries. Rape is defined as sexual intercourse without the consent of the victim. Further, consent, or more properly, the lack of it, determines the guilt of the accused, as not only must he perform the act of penetration, but he must be aware that his victim is not consenting or at least be recklessly indifferent as to whether she is or not. Consent,

therefore, becomes the all important question in the context of the interaction between the accused and the victim. Lack of consent is the only thing which distinguishes rape from the lawful act of sexual intercourse.

149. The issues which arise from the question of whether the victim consented will not be canvassed, followed by the issues which arise from the belief of the accused as to her consent.

The victim's consent

150. In most Commonwealth countries, rape is defined as sexual intercourse against the will of the victim. Originally, the law required that the accused apply or threaten force to the victim. This changed with time, so that intercourse with a sleeping, drunk or drugged woman was deemed rape, as was intercourse which was consensual where such consent was induced by fraud[102] as for example, if the man impersonated the woman's husband.[103] Further, if the accused deceives the victim as to the nature or quality of the act of sexual intercourse, the act is said to occur without her consent: R v Flattery [(1977)] 2 QBD 410; R v Williams [(1923)] 1 KB 340. In short, there has been a shift from the view that force is required to the view that lack of consent is sufficient. Here, submission is not to be taken to imply consent: R v Olugboja [(1982)] 1 WLR 133. Notwithstanding this, it is clear that severe problems face a victim who wishes to prove that she did not consent, particularly if she shows no overt signs of injury or if she has had a sexual relationship with the accused.[104]

151. The reasons for this are varied. Most fundamentally, the victim is fighting traditional stereotypes of how women behave in sexual relations generally and in sexual assault in particular. Women are considered to be passive in sexual relations, requiring seduction. They are believed to feign lack of interest in, or even exhibit aversion to, sex, even when deeply interested.[105] On the other hand, women who are forced to have sexual relations are expected to behave in a conventional fashion: screaming, crying and fighting for their virtue.[106] These stereotypes colour police, jury and judicial reaction to a complainant. A complainant who is uninjured, behaves calmly and rationally will inevitably run the risk of being regarded as a consenting party. Even if the complainant is injured, even seriously, the prosecution will nonetheless suggest that she consented, relying on the jury to conclude that she acted consensually.[107]

152. A number of jurisdictions, recognising the difficulties presented by the requirement of lack of consent, have attempted to shift the emphasis of the definition of the crime. Most take as their model the 1974 Michigan Sexual Conduct Statute which introduced a rape law which omitted all references to consent. Prior to this, Michigan had defined rape as sexual intercourse against the will of the victim. The new law focussed upon the prohibited conduct of the offender, rather than the consent of the complainant. Thus, the crime is committed either when sexual intercourse occurs by the use of force or coercion or in circumstances wherein the victim is deemed incapable of giving her consent. Force or coercion includes situations where the accused overcomes the victim through the threatened or actual use of physical force or physical violence, when the accused coerces the victim to consent by threats of future retaliation against the victim or any other person, retaliation being defined to include threats of punishment, kidnapping or extortion, when the offender engages in the medical treatment or examination or the victim in a manner or for purposes which are recognised as medically unethical or unacceptable and when the accused, by concealment or surprise is able to overcome the victim. The situations where the victim is deemed incapable of resistance are where she suffers from a mental disease or defect which renders her temporarily incapable of appraising her conduct because of the influence of anaesthetic or any other substance administered to her without her consent and where the victim is unconscious, asleep or for any other reason physically unable to communicate unwillingness to act.[108]

153. The above model has been described in detail because it has been followed, with variations, in a number of Commonwealth jurisdictions. Thus, for example, in New South Wales, the Crimes (Sexual Assault) Amendment Act 1981 replaces the crimes of rape and indecent assault with a ladder of four sexual offences. Where the offender maliciously inflicts grievous bodily harm, actual bodily harm or where he threatens to inflict actual bodily harm with a weapon,[109] all that need be proven is that he intended to have sexual intercourse. In these circumstances it is not necessary to prove either a completed act of non-consensual sexual intercourse or the accused's knowledge of his victim's lack of consent for other incidents of not-consensual intercourse, the law has remained essentially the same and the problems of consent remain.

154. Evidence exists to show that the amendments in Michigan and in New South Wales have had little success in shifting the focus of the crime from the victim's consent. It is clear that except where the rape is particularly brutal, the question of whether the woman has consented or not remains the crux of the crime.[110]

155. Other attempts to solve the problem of consent involve legislative identification of circumstances where consent will be deemed to be vitiated and legislative definition of consent to provide guidance for the jury. New South Wales, thus, deems consent to be absent where the victim consents under a mistaken belief as to the identity of the other person or under a mistaken belief that she is married to the offender or where submission to the intercourse is gained as a result of threats or terror, whether the threats are against the victim or any other person. It is specifically provided that a victim who does not offer actual physical resistance to the intercourse shall not be regarded by reason only of that fact as consenting.[111] Tasmania[112] provides that consent will exist where given freely by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which she consents. Consent will not be regarded as freely given when procured by force, fraud or threats of whatever character. Canada provides a more specific definition, indicating that consent will not exist where submission results from the application of force or threats of force to the victim or someone else, fraud or the exercise of authority.[113]

156. The above provisions attempt to spell out the behaviours the law regards as indicating consent or lack of consent. This to some extend relieves the fact finder of a major decision and must be of assistance in an area which is nebulous and surrounded by prejudice and assumption. Caution must be taken so that provisions of this nature are clear and do not unnecessarily limit the offences by fixing a static definition of consent.

157. The provisions so described and similar provisions under consideration in other jurisdictions[114] codify and clarify the current law, but rarely go further. While there is a case for such clarification in that the fact finder is provided with a clear legislative guideline and the provision carries with it condemnation and criminalisation of acts of intercourse submitted to through force or fear, the issue which remains is whether such provisions should go beyond the current law. Reformers in South Australia, for example, advocate a provision which indicates that consent which is grudging or elicited by substantial pressure of the victim should be regarded as inoperative. They suggest that any submission occurring by the imposition of the other person's position of authority over, or position of trust in relation to the victim, by detention, whether lawful or otherwise of the person or by the exertion of the offender's influence over the victim where the victim is under the age of 18 and is living in the family home of the offender who is either a step-parent or parent of the victim should not constitute consent.[115]

158. A provision of this nature recognises pressure which women may suffer, acknowledging that submission in such circumstances is unlikely to be true consent. A number of countries, while recognising this, have preferred to establish new sexual offences. Hence, India has criminalised intercourse between a public servant and women in his custody, superintendents of jails, remand homes etc. with inmates and members of the management or staff of a hospital

and women in the hospital.[116] Similarly, New Zealand had introduced the novel crime of "inducing sexual connection", which criminalises sexual activity where the offender knows that his victim submits because of his position of power. Sexual activity submitted to because of (i) an express or implied threat that the offender or some other person will commit an offence punishable by imprisonment, which does not involve the actual or threatened application of force to any other person, (ii) an express or implied threat that the offender or some other person will make an accusation or disclosure, whether true or false, about the misconduct of any person, living or dead, and the disclosure is likely to damage that person's reputation, and (iii) an express or implied threat by the offender to make improper use of any power or authority arising out of any occupational or vocational post held by the offender to the detriment of the victim, or any commercial relationship existing between the offender and the victim is criminalised and carries a possible penalty of 14 years imprisonment (s.129A Crimes Act 1961). The crime is based on the appreciation of the fact that persons in a position of vulnerability, whether psychologically or commercially, should be protected from sexual exploitation. It will be interesting to monitor the responses of practitioners and judges to this novel crime.

The mental state of the accused

159. For the crime of rape to be established, the Crown must prove that not only did the necessary non-consensual physical penetration occur, but also that the accused had the requisite mental state or mens rea for the crime. The Crown is required to prove, accordingly, beyond all reasonably doubt either that the accused knew that the victim was not consenting or that he was recklessly indifferent as to her consent. Here, except in very few Commonwealth jurisdictions (the Australian Code states and New Zealand), the tribunal of fact is not required to consider whether the accused's belief as to the victim's wishes was reasonable from the point of view of an objective standard,[117] although the objective reasonableness of the belief may be considered when the tribunal of fact judges whether the accused actually believed the facts that he is asserting.[118] In short, the usual test of whether the accused is guilty depends on his honest and genuine belief, not on what the reasonable person might have believed at the time. Thus if he can show that notwithstanding what a reasonable man would conclude from the behaviour of the victim at the time, he honestly and genuinely believed that she was consenting to his actions he must be acquitted.

160. This mental element has been considered by a number of Commonwealth law reform bodies, who have chosen to retain its current formulation.[119] Nonetheless, the mental element continues to be a matter of controversy. Critics raise the fundamental objection that it poses the Crown with too demanding a task in that it must prove two subjective elements: the accused's belief and the state of mind of the complainant. This, it is argued, leads to an unfair weighting of the case in favour of the accused, leading to the acquittal of guilty accuseds and opening the complainant to suggestions, at trial, that notwithstanding evidence which would indicate dissent to most reasonable persons, the accused believed that she was consenting to his actions.[120]

161. Proponents of the current formulation argue from the premise that rape is not a singular crime and that there is little or no evidence to indicate that guilty rapists are unjustly acquitted.[121] They then argue that the formulation is a statement of the general and principled position existing throughout the criminal law which posits a subjective test of intention to allow an accused to be judged according to facts as he believed them to be and not as they really were. Thus, it is merely a particular instance of the general statement that the law should punish what the offender is and not what he or she ought to be.[122]

162. In essence, opponents suggest three reform proposals.[123] The first, which is only a slight variation on the current law,[124] requires the Crown to prove that the intercourse

took place without the victim's consent. Both then provide that it is a defence for the accused to argue that he honestly believed that the victim was consenting, a fact that he must convince the jury of on the balance of probabilities. One proposal goes further and requires the accused to show not only the he honestly and reasonably believed that the victim was consenting, but he must also persuade the jury on the balance of probabilities of his honest and reasonable belief.

163. Both proposals involve a complete reworking of the mental element of the crime and have serious implications for the burden of proof and thus require close scruitney.

164. At present, the only jurisdictions where an objective element enters into the assessment of the alleged rapist's mental state are Tasmania, Western Australia, Queensland and New Zealand.[125] The New Zealand provision, which commenced on 1 February 1986, fixes the Crown with the burden of proving that the accused had sexual connection without the consent of the victim. If, however, the Crown is able to show that there were no reasonable grounds upon which the accused could base a belief of consent its task is fulfilled (s.128). An objective element of this nature should mean that the complainant will cease to run the risk of the accused suggesting that he honestly and genuinely believed in her consent because he thought she enjoyed "kinky sex" or because he honestly and genuinely believed all women fought and screamed when involved in intercourse.[126]

165. The issues of whether the accused's mental state should be judged objectively or whether the accused should be required to give an account of his actions by bearing a burden of proof are in essence political. They become so whether the crime of rape is viewed as a singular crime, deserving of special treatment and whether the rights of the accused in a criminal trial should be modified. Here it may be important to differentiate between classes of offenders. They may, for example, be cogent argument for the reversal of the burden of proof in certain particular cases. Thus, a police officer or jail superintendent accused should perhaps be required to give an account of himself where his victim is in custody.[127]

Procedural reforms

166. The complainant in a rape trial is a singular witness, facing special problems which do not confront other victims of crime. Frequently, she is the sole witness and the success of the Crown's case depends on her evidence, especially as to consent. The events described in the courtroom will be intimate and often, the details humiliating. Defence attempts to discredit her will inevitably touch on her past sexual activity, which she will wish to keep private. It is essential that the trial process, whilst fairly weighted towards the accused, should result in a minimum of distress to an victimisation of the complainant.

167. Traditionally, the testimony of the complainant has been treated with suspicion and reserve. Two aspects of the trail process particularly highlight this. First, the requirement of corroboration of the complainant's evidence which is, in most jurisdictions, essential to conviction and second the fact that the victim's evidence can be impugned by evidence of her past sexual history.

168. In general, persons accused of crime can be convicted on the testimony of one individual, but where the crime is sexual, the evidence of the victim alone is insufficient and must be corroborated in some way. The justification for the rule lies in the fear, often articulated by trial judges that rape and other sexual crimes are easy to allege, but

difficult to disprove. Women are alleged to have a tendency to make false allegation of sexual assault,[128] perhaps because of inherent biological or psychological factors or because they wish to hide consensual sexual activity of which they are ashamed.[129]

169. Both the justification for and the value of the corroboration requirement are doubtful. First, it is unlikely that sexual assault is ever an easy crime to allege. There are many disincentives to report and evidence shows that the current system deters and weeds out shaky stories.[130] Moreover, false allegations can be made in any other criminal process, particularly, for example, in crimes wherein insured property is involved. The trial process, with the safeguards of cross-examination and the penalties for perjury should act as sufficient disincentives to false allegation. Finally, there is no evidence beyond received wisdom, that women are particularly prone to hysterical or malicious allegations of sexual interference. On the other hand, evidence exists which indicates that the requirement impedes the conviction of sexual offenders. If the victim has submitted to intercourse through fear or where she is not seriously injured or if she delays in her complaint,[131] the prosecution may be unable to raise sufficient evidence to corroborate her story. This will have a serious effect on the mind of the jury at trial and the absence of corroborative evidence may lead the police to refuse to prosecute at the outset.[132]

170. A number of Commonwealth jurisdictions have abolished the strict requirement of corroboration, but it remains a rule of law that the judge must direct the jury that it is unwise to convict on the uncorroborated testimony of the complainant.[133] In effect, such a rule amount to a requirement of corroboration as it gives judges an opportunity, of which they unfortunately take advantage, of casting aspersions on the veracity of the complainant. The manner in which the warning is given shows wide variation, ranging from complete impartiality to remarks such as: "It is known that women in particular and small boys are liable to be untruthful and to invent stories."[134]

171. Some countries have abolished both the requirement of corroboration and the judge's warning of the danger of conviction on uncorroborated testimony.[135] Thus, Canada provides that no corroboration is required for conviction and "the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration" (s.246.6 Criminal Code 1970). Such an approach appears to be appropriate. The evidence of the complainant should be assessed in accordance with the usual standard of credibility. Certainly, sufficient safeguards exist within the pre-trial and trial process to safeguard the interests of the accused. Moreover, in the absence of clear evidence indicating women to be congenitally unreliable, the further safeguard of corroboration is unjustified.

172. In many jurisdictions, the credibility of the complainant is open to impugnment by legislation which allows her character to be brought into question during the trial[136] and by common law rules which allow her to be questioned about past sexual relationships with men other than the accused. Where the common law rules exist, evidence as to her past sexual activity can be introduced either to prove that the women is of "notoriously bad character", for example a prostitute or highly promiscuous and thus likely to have consented or to prove that she is unreliable and her evidence thus suspect.[137]

173. In general, the law as it exists allows examination of the complainant's past sexual activity on fairly narrow grounds. As it is practised, however, it allows a barrage of questions pertaining to her past sexual, social and medical experience in cross examination. Such are put with the aim of protecting the defendant and destroying the character of the complainant. A complainant who is or who was a prostitute or is promiscuous will be considered to be willing participant, even where violence is involved.[138] Even if a virgin, a woman with little sexual experience cross-examination can be savage, destructive and demeaning, leaving her with the impression that she is on trial.[139]

174. A number of jurisdictions have limited the introduction of evidence of this nature.[140] The provisions restrict evidence of sexual activity with men other than the

accused, but grant the judge a discretion to admit such evidence if he or she considers it is just or reasonable to do so. Differences exist in the formulationof the discretion. In the English legislation (ss.2,3 Sexual Offences (Amendment) Act 1976) such evidence can only be admitted if an application to do so is made to the judge in the absence of the jury and the judge is satisfied that it would be unfair to the accused to refuse to allow the evidence to be adduced or a question of such nature to be asked. The Canadian provision is less general (s.246.6 Criminal Code 1970). Here evidence of the complainant's past sexual activity with persons other than the accused cannot be adduced unless it falls into one of three categories. These are, evidence which rebuts evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution, evidence of specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge or evidence relating to the consent that the accused alleges he believed was given by the complainant to the sexual activity that is the subject matter of the charge. Even if the evidence falls within one of the categories, it is admissible only after reasonable notice in writing has been given to the prosecutor of the evidence and its particulars and the judge has conducted a closed hearing, wherein he or she decides that the evidence falls within one of the allowed categories.

175. The absence of specific guidelines in the English legislation has resulted in uneven interpretation of the discretion by individual judges. Thus, Zsusanna Adler's Old Bailey study found that in 60% of rape cases applications to admit evidence as to the complainant's past sexual history are made and of those 75% are accepted.[141] Law reformers must appreciate that legislation which leaves wide discretion to individual judges is subject to differential treatment and that more specific guidance may be valuable.

176. It is clear that the past sex life of the complainant will be relevant in very few cases. Prostitutes are as susceptible to sexual assault as virgins, but the evidence of the past prostitution of a woman will almost inevitably lead a jury to acquit the accused. Prior sexual activity with the accused is clearly relevant to the issue of consent and thus stands on a different footing. Automatic introduction of such evidence may nonetheless be problematic as it becomes an easy task to argue that because the complainant once consented to sexual activity with the accused or perhaps cohabited with the accused, she must have consented yet again. Judges and legal practitioners must be made aware of the impact of such evidence on the jury. Introduction of the evidence is necessary to assure the accused a fair trial, but it must be introduced sensitively.

177. Sensitivity by magistrates, judges and counsel for both prosecution and defence could alleviate the ordeal of the complainant in the courtroom. Whilst the defence must destroy her testimony in order to succeed, such an end should be achieved without the destruction of the complainant. Independent representation of complainants at trial to shield them from irrelevant and harassing questions has been suggested.[142] Such representation should be unnecessary as the judge and prosecution counsel should protect her from such questions. Further, defence counsel should exercise a proper discipline and guard against questions intended to insult or annoy.[143] Experience shows that defence counsel frequently cross-examine brutally and judges fail to fulfil their protective function, indeed proving sometimes to be more harassing and irrelevant than the defence.[144] The behaviour of the bench and bar can only be improved by education, both during legal training and as part of a continuing education programme. Such education should introduce the profession to women's perspectives in sexual assault and ideally incorporate knowledge from other disciplines.

Strategies to alleviate the ordeal of the alleged victim during police investigation and trial

178. Clear evidence exists which indicates that rape victims are reluctant to report the incident to the police, because of the stereotypical attitudes with which police have traditionally received such complaints.[145] Such attitudes manifest themselves in various ways. First, the initial complaint may be totally disbelieved and the complainant discouraged completely. Second, police investigation may consist of insensitive and bullying questioning of the complainant. This may involve several, or a succession, of officers and medical examination in unpleasant or threatening surroundings. Moreover, the complainant may not be supplied with basic information, or, indeed, more helpful information which could lead her to agencies offering comprehensive victim support services.

179. As police stations are the traditional rape victim reception agencies, the response of the police to complainants requires priority treatment. It is crucial that the treatment which she receives is sympathetic and helpful, but at the same time investigation into her complaint must be meticulous. Important here is education and training. Police at all levels must be educated so that prejudicial and stereotypical visions of rape complainants are eliminated. Training must sensitise all police to the behaviour that victims may exhibit following sexual assault which may depart from general stereotypes.

180. It is important that the initial interview of the complainant occur in pleasant physical surroundings, in private, unless the victim requests the support of a relative or friend or rape crisis worker. Consideration could be given to the training of specialist personnel, who may be female. It is important to note, however, that many police forces are understaffed and that the response of the officer at desk level to the complainant is critical. The training of specialised teams should thus not detract from the importance of general training for all police officers.

181. The complainant should be told of all the procedures to be followed throughout the enquiry and the reasons for these procedures. Particularly important here is the medical examination. The victim must be told of the importance of this procedure which may be particularly distasteful. While it is important that the doctor conducting the examination should be trained in forensic examination, the alleged victim should be given the option of a woman doctor or a doctor of her choice, if the doctor is sufficiently knowledgeable to conduct a thorough and proper examination.

182. Serious consideration should be given to the introduction and implementation of kits to facilitate the culling of evidence in rape enquiries. A kit of this nature, entitled the "Sexual Assault Examination Kit" has been designed and implemented by the Royal Canadian Mounted Police. The kit is inexpensive and is used in the examination and precautionary treatment of a rape victim, its aim being to aid the collection and preservation of evidence and to allow it to be presented sympathetically. The R. C. M. P. kit cannot be used until the complainant completes a consent form. It contains an information guide for the complainant which explains legal procedures, medical examinations, the trial and victim services, a guide for police officers, a guide for the examining physician, various forms to be completed by the physician and receptacles for collecting and preserving physical evidence such as fingernail scrapings, swabs, hair and clothes. All guides and forms are in the two official languages of the country.

183. Kits of this nature serve two purposes. Most obviously, they assist in the treatment of individual complainants. At the same time, the use of the Kit continues the work of training and educating officers, making them more meticulous in their collection of evidence and directing their enquiry in a manner which is less heavy-handed than heretofore.

184. Sympathetic treatment of the alleged victim should continue up to and during the trail. The delay between incident and trial should be as short as possible,[146] bail should

be refused to the accused unless very exceptional circumstances exist and information of developments in the case should be supplied as a matter of course. Certainly, sufficient notice of the commencement of the trial should be afforded to the complainant and perhaps a carefully worded explanatory summons could be sent to her.

185. The physical aspects of the court require careful attention. Separate waiting rooms and other facilities should be arranged so that the complainant does not meet the accused and/or his family and friends in the precinct of the court. The complainant and victim should not be within too close proximity within the courtroom - indeed, courtrooms should be arranged so that complainant and accused are invisible to each other.

186. The anonymity of the complainant at pre-trial, trial and post trial stages must be assured. Provisions allowing for the victim's evidence by affidavit or in closed court should be considered[147] as should provisions limiting the revelation of information which may lead to her identification beyond the trial.[148] Such provisions should be carefully drafted to provide comprehensive coverage of sexual crimes[149] and discretions to allow the revelation of such information should be exercised with extreme responsibility.[150]

187. Finally, sentences for those convicted of sexual assault should reflect the opprobrium with which such crimes should be judged. Any sentence which is light will trivialise the victim's ordeal and trivialise the crime of sexual assault generally.[151]

FOOTNOTES

1. See, for example, Commonwealth Africa, Phillips, A, and Morris, H P, Marriage Laws in Africa, Oxford University Press, 1971, p.118ff. See also, the situation in countries of the Commonwealth Pacific, for example, Vanuatu, Joint Regulation No. 16 of 1970.

2. See, for example, Nigeria, Matrimonial Causes Decree, No. 18 of 1970; Ghana, Matrimonial Causes Act, 1971; Tanzania, Law of Marriage Act, 1971; Zimbabwe, Matrimonial Causes Act (Cap. 35); Sierra Leone, Matrimonial Causes Act (Cap. 30); The Seychelles, Matrimonial Causes Ordinance (Cap. 72); Botswana, Matrimonial Causes Act, 1973; Uganda, Divorce Act, 1964.

3. See, for example, Malaysia, Islamic Family Law Acts, 1976; Singapore, Administration of Muslim Law Act (Sing) (Cap. 42); Malaysia, Law Reform (Marriage and Divorce) Act, 1982; Singapore, Women's Charter 1961.

4. See, for example, with respect to Zimbabwe, Bello, E G, The Status of Women in Zimbabwe, Harare 1985, p.12-14; and Akande, J O Law and the Status of Women in Nigeria. UN 1979

5. See, for example, Ibrahim, A, Family Law in Malaysia and Singapore, 1978, p. 206-222. See also, the Administration of Muslim Law Act (Sing) (Cap. 42) s.49, Islamic Family Law Acts (Malaysia) 1985, s.52.

6. Legislation allowing divorce throughout the Commonwealth falls into one of three models. First, the undeveloped divorce law which insists on fault before divorce is granted, second, divorce law which allows for divorce on the proof of irretrievable breakdown which is evidenced by one of various grounds, which are reminiscent of the 'fault' provisions and finally, divorce law which provides for divorce on proof of irretrievable breakdown evidenced by separation alone. An example of the first model is the Sierra Leone, Matrimonial Causes Act (cap. 35), the second, England, Matrimonial Causes Act, 1973 and the last, Barbados, Family Law Act No. 29 of 1981.

7. Divorce Act (Uganda) 1964, S.5. See also, Vanuatu's divorce legislation. Evidence exists which indicates that informal separation is far more common in Uganda than formal divorce proceedings, a fact which is not surprising given the grounds for divorce. See, Mukasa-Kikonyogo, L E M, Presentation delivered at the International Federation of Women Lawyers, Sydney, 26-31 August, 1984. In Uganda there are rarely more than 100 petitions to the High Court each year.

8. Some countries have abolished 'judicial separation'. See, for example, Australia, Family Law Act 1975 (Cth.) 5.8.

9 See, for example, Northern Ireland, Matrimonial Causes (N.I) Order, art. 19.

10. In some Commonwealth countries judicial separation decrees can be awarded in the magistrate' courts. In Kenya, for example, the Subordinate Courts (Separation and Maintenance) Act (Cap. 153) s.3, allows for separation where a husband has caused the wife actual bodily harm by unlawfully wounding or assaulting her.

11. Family Law Act 1975 (Australia, s.48); Family Law Act (Barbados) No 29 of 1981; Family Proceedings Act 1980, (NZ).

12. This might be particularly difficult in jurisdictions where physical chastisement of a wife is accepted. See, for example, Nigeria, where s. 55(1)(d) of the Northern

Nigerian Criminal Code justifies a reasonable amount of physical chastisement of a wife. See, also, Atkins, S, and Hoggett, B, Women and the Law, Blackwells, 1984, 127ff, which outlines a number of English cases where divorce was disallowed although the wife was the subject of abuse.

13. Malaysia, Law Reform (Marriage and Divorce) Act 1976, ss.53, 54 bars divorce, except where there are exceptional circumstances, unless the marriage has lasted two years. The bar is 3 years in Singapore: Women's Charter, 1961, s.81; Trinidad and Tobago, Matrimonial Proceedings and Property Act, Cap. 45:51 provides that the bar is 5 years. In England the bar is absolute and is one year: Matrimonial Causes Act 1973 (England and Wales) s.3(1).

14. The English Offences Against the Person Act 1861 gives an indication of the sort of provisions which are viable in the domestic context: s.42 provides for common assault, punishable on a summary conviction with two months' imprisonment or a fine not exceeding £200, s.43 aggravated assault, s.47 providing for assault 'occasioning actual bodily harm'. This is triable on indictment and is punishable with five years' imprisonment. The actual bodily harm required is not particularly serious and includes injury to the state of the victim's mind as well as her body: R v Miller [(1954)] 2 QB 282, p. 29. s.16 provides an offence of threatening to kill another, s.18 wounding and s.20 causing grievous bodily harm. Other criminal offences may be relevant in the context of domestic violence. Criminal provisions which aim to protect property or goods ma be useful where the abusive spouse has damaged property or pets. All Commonwealth countries have similar criminal provisions. In some countries there are special criminal provisions concerning wife assault: see, for example, Malaysia, Islamic Family Law Act (Federal Territory) 1985, s.127.

15. Pahl, J, 'Police Response to Battered Women' [(1982)] Journal of Social Welfare Law 337.

16. House of Commons, Select Committee on Violence in Marriage, Report H.C (1975) Lond. HMSO.

17. House of Commons, Select Committee Report on Violence in the Family, op. cit., paras. 10, 20, 21.

18. Faragar, T, 'The Police Response to Violence Against Women in the Home' in Pahl, J (ed.), Private Violence and Public Policy, Routledge and Kegan Paul, 1985, 110, 118ff.

19. Atkins, S and Hoggett, B, Women and the Law, Blackwell, 1984, p. 136

20. Faragher, T, op. cit, p. 116 ff. However police reluctance to proceed because of complaint withdrawa may well be based on common wisdom rather than reality. Recent research in the UK indicates that the level of withdrawal is no greater than any other criminal proceeding. See: Wasoff, F, 'Legal Protection from Wife Beating: The Processing of Domestic Assaults by Scottish Prosecutors and Criminal Courts', (1982) 10 International Journal of the Sociology of Law 187.

21. This has been ameliorated in some jurisdictions: See Police and Criminal Evidence Act (UK) 1984 s.80.

22. Atkins, S, and Hoggett, B, Women and the Law, Blackwell, 1984, p.137.

23. See, Federal/Provincial/Territorial Report on Wife Battering to the Meeting of Ministers responsible for the Status of Women, Niagara-on-the-Lake. May 28-30, 1984. See also, Bill C-127 of 1983.

24. See, for example, Scotland, where prosecutions are brought by professional prosecutors, independent of the police, called Procurators Fiscal.

25. See Foakes, J, Family Violence. Law and Practice. London, 1984, p. 131; Swaziland, Criminal PrOcedure and Evidence Act. No. 67 of 1938; and Cyprus, Trofinus v Theocharides [(1983)] 2 Cyprus Law Reports 363.

26. See, for example, Magistrates Summary Proceedings Act 1975 (Vic.) s. 150, Canadian Criminal Code, RSC 1970, s.745, Scotland, 'law burrows'.

27. Hawkins, Pleas of the Crown, Book 1, Ch. 60.

28. Victorian Government Domestic Violence Committee, Report of the Legal Remedies Sub-Committee, November 1983. The Law Reform Commission, Community Law Reform, Domestic Violence in the A.C.T. Discussion Paper, ACTLR 4, May 1984.

29. Domestic Violence Committee Report, NSW, Government Printer, Sydney, 1985.

30. A number of jurisdictions provide for civil actions between married spouses, but allow the court to stay proceedings where no substantial benefit would accrue to either party from the continuation of the proceedings. See, for example, Law Reform (Husband and Wife) Act (England and Wales) 1962.

31. Pibus, CJ, "Civil Remedies for Interspousal Violence in England and Ontario" (1980) 3 UT Fac L Rev 33.

32. Samuel, C., "Abused Women" in Malaysian Women.. Problems and Issues, Hong, E, ed., CAP Penang, 1983, p. 123, 124.

33. Joned, A, Rape Victims and Battered Wives in Malaysia, 1985, unpublished.

34. See, for example, Plows and Plows (1979) FLC 90-712. Here an injunction was awarded to prevent the mental violence of insulting and denigrating the victim in front of the children.

35. The Australian Family Law Act injunction may not be used where there is state or territory legislation in place which deals specifically with domestic violence and the victim is seeking a court order under that legislation. Family Law Act 1975 (Cth.) s. 114AB.

36. Maidment, S, "Domestic Violence and the Law: the 1976 Act and its aftermath" in Johnson, N, Marital Violence, Routledge" and Kegan Paul, 1985 p.4, at 16.

37. It appears that the High Court is not given jurisdiction: see, Cretney, S, Principles of Family Law, Butterworths, London, 1985, p. 264-265.

38. s. 1(2), Davis v Johnson [1979] AC 264, See also Adeoso v Adeoso [1981] 1 All ER 107.

39. The Act was passed primarily to combat the decision in National Provincial Bank Ltd. v Ainsworth [19651 AC 1175 where a wife was unable to bind a third party with her personal right to reside in the matrimonial home.

40. Ray, M, and Le in, J, "Ouster Injunctions since Richards" [1983] LAG Bul. 145.

41. Vaughan v Vaughan [19731 1 WLR 1159: here the husband was enjoined to stop molesting his wife, his previous behaviour being calling at the wife's house early in the morning and in the evening and at her place of work.

42. Note, the recent case of Ainsbury v Millington [19861 1 All ER 73 where the Court of Appeal chose to take a conservative view of the ancillary relief power under the Guardianship of Minors Act 1971.

43. Note, the speeches in Davis v Johnson [1979] AC 264 which emphasise that the Act's aim was to achieve personal protection for a spouse and not confer property rights.

44. The situation is different under the Matrimonial Homes Act 1983 where the wife's interest in occupation will be protected while the marriage subsists and there is a machinery whereby her interest may be effective against a third party... see Cretney, S, Principles of Family Law. op. cit., p. 255-260.

45. See, Report of the Select Committee on Violence in Marriage, Vol 1, para 45. Injunctions on occasions are "not worth the paper they were written on".

46. Practice Direction [1974] 2 All ER 1119; see also R v Miller [19541 2 QB 282, 292 per Lynskey J.. "Including hurt or injury likely to interfere with health or comfort".

47. Note, Ray, M, and Levin J, "Ouster Injunctions since Richards" [1983] LAG Bul. 145 where doubts are expressed whether an order under the Matrimonial Homes Act 1983 is properly an injunction.

48. Cretney, S, Principles of Family Law, op. cit., p. 241-242.

49. White v White (1983) 2 All ER 51. divorced persons are held to be adequately protected by the power of the court to commit for contempt where there has been breach of an injunction.

50. Practice Note, 22 December 1980 encourages judges, where they attach an arrest power to an injunction to limit such a power to three months unless there is sufficient reason for its extension beyond that time.

51. Note the difference between this and the Domestic Violence and Matrimonial Proceedings Act 1976 where the threatened child need not be that of the family. A child of the family for the purposes of the Domestic Proceedings and Magistrates' Courts Act 197B is given a wide definition by s. 88 and extends to a child who is ordinarily a member of the family.

52. Cretney, S, Principles of Family Law, op. cit., p. 284.

53. s. 18. The Act does not apply equally to married and unmarried spouses. Cohabitants are not given occupancy rights by the Act where he or she is not entitled to them at law, unlike a married spouse. Second, while such occupancy rights may be awarded by the court they will be of limited duration only.

54. This includes any child or grandchild of either spouse and any person who has been brought up or accepted by either spouse as if a child of that spouse: s.22.

55. It should be noted that such a power is only available where it is "necessary", a word not used in the English legislation. See Clive, E.M., The Law of the Husband and Wife in Scotland, 2nd ed., 1982, Edinburgh, p.720.

56. See Report on Occupancy Rights in the Matrimonial Home and Domestic Violence (Scot Law Com, No. 6, July 16, 1980, para 4.38).

57. Rules of Court, 97, 170B (1), 170D (4) and see Murdoch v Murdoch [1973] SLT (Notes) 13. It was unclear prior to the Matrimonial Homes (Family Protection) (Scotland) Act

1981 whether such an interdict could be awarded while the spouse were cohabiting: see Scot Law Com, No. 60, para 4. 26.

58. The Order was extended by Family Law (Miscellaneous Provisions) Northern Ireland Order 1984, article 20. In order to qualify for the protection of the Order factors such as the couple's length of cohabitation and whether they have children will be taken into account.

59. Orders may be made ex parte, but such will be interim: s.31.

60. Atkin et al., "Protecting the Victims of Domestic Violence - the Domestic Protection Act 1982" (1984) 14 Victoria University Law Rev. 119, 127.

61. Atkin et al, "Protecting the Victims of Domestic Violence - the Domestic Protection Act" (1984) 14 Victoria Univ. Law Rev. 119, 128.

62. Atkin et al., op cit., pp 130-131.

63. See, for example, the proposed Malaysian Domestic Violence Act which establishes wide protective orders which include eviction orders and anti-molestation orders.

64. See, for example, Sexual Offences (Amendment) Act 1976 (England and Wales) s.1. Recent amendments in Canada, New Zealand and a number of the Australia states provide exceptions to this general rule.

65. Crimes (Sexual Offences) 1980 (Vic.). See also, Western Australia, Criminal Code as amended by Acts Amendment (Sexual Assaults) Act 1985.

66. Crimes Act 1900 (NSW) s.61A introduced by Crimes (Sexual Assault) Amendment Act 1981 (NSW). The Victorian legislation also "grades" rape in levels of seriousness: level 1 is rape simpliciter, level 2 is where the circumstances are aggravated. See also, Western Australia, Criminal Code as amended by Acts Amendment (Sexual Assaults) Act 1985.

67. Criminal Code Amendment Act 1980 (Can.) (Bill C-127). This was proclaimed in force on January 1, 1983.

68. R v Lang, unreported, quoted in Boyle, C M, Bertrand, M-A, Lacerte-Lamontagne, C and Shamai, C, A Feminist Review of Criminal Law, Minister of Supply and Services Canada, 1985, p.58-59.

69. R v Thorne (1984) 13 W.C.B. 261 (Ont Co Ct). See also, R v Ramos (1984) 42 C.R.(3d) 370 (N.W.T. Terr Ct) and Gardynik v The Queen (1984) 42 C.R.(3d)362 (Ont.Co.Ct.)

70. See here, Osborne, J A "Rape Law Reform: The New Cosmetic for Canadian Women" in Criminal Justice, Politics and Women, Haworth Press, 49 at p. 59.

71. Bertrand, M A et. al, A Feminist Review of Criminal Law, op. cit. p.59.

72. Crimes (Sexual Assault) Amendment Act 1981 (NSW) adding ss. 61A, 61B,61C, 61D and 61E to Crimes Act 1900 (NSW).

73. See, for example, the reform proposals under consideration in Malaysia and Tasmania: Warner, K, "The Mental Element and Consent under the new 'Rape Laws'" (1983) 7 Crim L J 245.

74. Naffin, N, An Inquiry into the Substantive Law of Rape, Women's Adviser's Office, Department of Premier and Cabinet, Adelaide, 1984. This inquiry will be called the "Naffin Report" hereafter.

75. The definition of sexual intercourse is the same as that of New South Wales but is called "sexual penetration".

76. This was initially propounded in the United States Model Penal Code in the early 1960's: Chappel, D, "The Impact of Rape Legislation Report: Some Comparative Trends" (1984) 17 International Journal of Women's Studies 70, p.73, fn.19.

77. Criminal Law Revision Committee, Sexual Offences, Working Paper, London, HMSO, 1980; Criminal Law Revision Committee, 15th Report, Sexual Offences Cmnd. 9213, London HMSO, 1984.

78. Criminal Law Revision Committee, 15th Report, Sexual Offences, Cmnd. 9213, London HMSO, 1984, paras, 4.8 and 4.24: see now Sexual Offences Act 1985 (England and Wales).

79. Criminal Law Revision Committee, Sexual Offences, Working Paper, 1980, para. 45. This is a quote of the Advisory Group on the Law Rape (the Heilbron Committee) Cmnd. 6352 (1975), para 80.

80. Criminal Law Revision Committee, Sexual Offences (1980) para. 45.

81. Temkin, J, "Towards a Modern Law of Rape" (1982) 45 M L R 399, 411.

82. Criminal Law Revision Committee, 1984.

83. Canadian Criminal Code, R S C 1970, s.244; Crimes Act 1900 (NSW), s.61A-D; Western Australia, Criminal Code, as amended by Acts Amendment (Sexual Assaults) Act 1985.

84. See for example, the Naffin Report, p. 65.

85. For example: England and Wales. See also New Zealand which takes the usual step of introducing a new crime, "sexual violation", which it defines as including the act of a male who "rapes" a female.

86. Women's National Commission, Violence Against Women, Report of an Ad Hoc Working Group, London, 1985, p.37. This report will be referred to hereinafter as the Women's National Commission Report.

87. Atkins, S, and Hoggett, B, Women and the Law, Blackwells, 1985, p.67ff.

88. Rape : A Drama from Two Perspectives, Report of a European Seminar Organised by the Swedish Association for Sex Education, June 3-7, Tynningo, Sweden, Hedlund, E., ed., IPPF, 1985, p.17ff.

89. The Naffin Report, p.64.

90. Hale, M, History of the Pleas of the Crown, 1736, p. 636: 'The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given up herself in this kind unto her husband which she cannot retract'.

91. Freeman, M D A, "Doing his best to sustain the sanctity of marriage" in Marital Violence, Johnson, N, ed., Routledge and Kegan Paul, London 1985, p. 124.

92. [(1888)] 22 Q B D 23. In reality this case is slender authority for the proposition it is used to support. The remarks pertaining to marital rape were obiter and two judges point to the inconsistency in convicting a husband for assault, but not rape.

93. Miller [(1954)] 2 Q.B. 282. Here the wife was reduced to an hysterical and nervous condition and this was held to amount to actual bodily harm.

94. Miller (supra), per Lynskey J, p. 292. See also, O'Brien [(1974)] 3 All E R 663, Steele [(1977)] Crim L R 290, Clarke [(1949)] 2 All E R 448.

95. Atkins, S and Hoggett, B, Women and the Law, Blackwell, Oxford, 1985, p. 72.

96. Criminal Law Revision Committee, Working Paper, Sexual Offences, London, HMSO, 1980; CriminaL Law Revision Committee, 15th Report, Sexual Offences, London, HMSO, 1984.

97. Criminal Law Revision Committee, Sexual Offences, London HMSO, 1980, para 33.

98. Finkelhor, D, and Yllo, K, "Rape in Marriage : A Sociological View" in Rape: A Drama From Two Perspectives, Report of a European Seminar Organisex by the Swedish Association for Sex Education, June 3-7, Tynningo, Sweden, Hedlund, E, ed., IPPF, Stockholm, 1985, p. 57, p57-58.

99. Finkelhor, D, and Yllo K, op. cit, p. 62ff.

100. HM Advocate v D [(1982)] SCCR 182; Forte [(1983)] 99 LQR.

101. See also, Sexual Offences Bill (Trinidad and Tobago) clause 4 which creates a new offence called "sexual assault" which is committed by a husband who has forceful intercourse with his wife without her consent. Such is punishable by imprisonment for 10 years.

102. See, however, Scotland, where the use of force has been traditionally emphasised. Hence, it is not rape where the victim is unconscious or sleeping, drunk or drugged, unless the drugs or alcohol is given with intent to make her insensible for the purpose of intercourse: H M Advocate v Logan (1963) J C 100.

103 See, for example, the English Sexual Offences Act 1956, s. 1(2). The situation may be different where the accused obtains consent be impersonating a person other than the husband, but the leading academic authorities suggest it should be the same: Smith, J C and Hogan B, Criminal Law, 1983.

104 Naffin Report, p.22ff; Consumers Association of Penang, Memorandum on Amendments to Rape Laws, 1985, p.4; Edwards, S, Female Sexuality and the Law, martin Robertson, Oxford 1981, Chapter 4.

105. Edwards, S, Female Sexuality and the Law, op. cit., Chapter 4.

106. The Naffin Report, p.23ff.

107. Edwards, S, Female Sexuality and the Law, op. cit., Chapter 4. Consider also the suggestions of defence counsel in R v Morgan [(1976)] A C 182, quoted in Edwards at p.111.

108. The Naffin Report, p.50ff.

109. This introduced s. 61 A - E into the Crimes Act 1900.

110. People v Kahn (1978) 264 N W 2d. 360, 80 Mich. App. 605; Marsh, J C, Geist, A and Caplan, N, Rape and the Limits of Law Reform, Boston, Mass., 1982; The Naffin Report, p.26-29.

111. Crimes (Sexual Assault) Amendment Act 1981. See also, New Zealand where s. 128A of the Crimes Act 1961 (NZ) inserted by the Crimes Act Amendment Act (No 3) 1985 provides that consent will not be taken to exist when gained through fear of or actual force to the victim or another or mistake as to the identity of the other person or mistake as to the nature and quality of the act.

112. Warner, K, "The Mental Element and Consent under the New "Rape Laws" (1983) 7 Crim L J 245.

113. Canadian Criminal Code, R S C 1970, s. 244. There is little authority on the meaning of "exercise of authority". It has been suggested that it is likely to be construed to cover only the most blatant cases of exploitation of power: Boyle, C L M, Bertrand, M-A, Lacerte-Lamontagne, C and Shamai, R, A Feminist Review of Criminal Law, Ministry of Supply and Services Canada, 1985, p.61.

114. Tasmania: see Warner K, "The Mental Element and Consent under the New "Rape" Laws" (1983) 7 Crim L J 245; South Australia: The Naffin Report.

115. The Naffin Report.

116. Indian Penal Code, s.376 A-376-B. See also, Sexual Offences Bill (Trinidad and Tobago) Clause 8 which creates the offence of unlawful sexual intercourse with adopted daughters, foster daughter and female wards, and intercourse with minors in the employ of the defendant. A similar provision is under consideration in Malaysia: proposed Penal Code, s.376 A.

117. This is the test in the English case of R v Morgan [(1976)] A C 182 now codified in the Sexual offences Act 1976 s. 1(2). The test appears to apply throughout the Commonwealth: see, e.g. Scotland: Meek v H M Advocate [(1982)] SCCR 613, 618; Canada: Pappajohn v The Queen [(1980)] 52 CCC (2d) 481; NSW: Crimes (Sexual Assault) Amendment Act 1981; South Australia: Criminal Law Consolidation Act 1976.

118. See, for example, Sexual Offences (Amendment) Act 1976, s. 1(2) England and Wales) which directs that the grounds for the accused's belief is an issue for the jury to consider particularly in assessing whether the accused is to be believed. See the Canadian Criminal Code, RSC 1970 s.244 (4) which appears to have the same effect.

119. Report of the Advisory Group on the Law of Rape, HMSO, London, Cmnd 6352 (the Heilbron Committee); Royal Commission on Human Relationships, Final Report, AGPS, Canberra, 1977, Volume 5, Annexe VIIb; Criminal Law and Penal Methods Reform Committee of South Australia Special Report: Rape and Other Sexual Offences, 1976 (The Mitchell Committee).

120. The Naffin Report; The Consumer's Association of Penang, Memorandum on Amendments to Rape Laws, Penang, 1985, p.16-17; Boyle, C L M, et al., A Feminist Review of Criminal Law, Ministry of Supply and Services, Canada, 1985, p.59ff.

121. Goode, M, "The Mental Element of Rape: the Naffin Report and Other Questions: A Defence of the Common Law" (1985) 9 Crim. L. Journal 17 provides a good example of the traditional arguments raised in favour of the status quo.

122. Goode, M., op., cit p.22-23.

123. The Naffin Report; Pickard, T, "Culpable Mistakes and Rape: Harsh Words on Pappajohn" (1980) 30 U T L J 415; Boyle, C L M et al, A Feminist Review of Criminal Law, Ministry of Supply and Services, Canada, 1985, p.59ff; Wells, C, "Swatting the Subjectivist bug" [(1982)] Crim L R 209.

124. Goode, M, op cit, suggests that this in fact the current position in practice: see p.24-25.

125. Goode, M, op cit p.39ff. discusses the provisions in these states; Crimes Act 1961 (NZ) s.128.

126. Edwards, S, Female Sexuality and the Law, op cit Chapters 4 and 5.

127. Indian Penal Code, s. 376 provides an example of this approach.

128. Edwards, S, Female Sexuality and the Law, Martin Robertson and Co, 1981, Chapter 5.

129. Heydon, J H, Cases and Materials on Evidence, Butterworth, London 1975, p.81.

130. Edwards, S, Female Sexuality and the Law, op cit Chapter 5.

131. Legrand, C, E, "Rape and Rape Laws: Sexism in Society and the Law" (1973) 61 Calif. L. Rev. 919.

132. Chambers, G, and Millar, A, Investigating Sexual Assault, Scottish Office Social Research Study, Edinburgh, HMSO 1983.

133. Williams, G, "Corroboration and Sexual Cases" [(1962)] Crim. L. R. 662.

134. Suttcliffe J in 1976, quoted in Edwards, Female Sexuality and the Law, op cit, p.164.

135. See Canada, New South Wales, Victoria, South Australia, Western Australia, Tasmania and New Zealand. other jurisdictions contemplating such a step are Malaysia and Trinidad and Tobago.

136. See, for example, Evidence Act, 1950 (Malaysia) s.155d: "When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character."

137. R v Krausz (1973) 57 Cr App 466; R v Riley (1887) 18 Q,B,D, 481; R v Bashir and Manzur [(1969)] 3 All E, R, 692.

138. Edwards, S, Female Sexuality and the Law, op cit, p.62ff.

139. Consumers Association of Penang, Memorandum on Amendments to Rape Laws, 1985, p.15-16; Edwards, S, Female Sexuality and the Law, op cit, p.152-157.

140. Sexual Offences Amendment Act 1976 (England and Wales) s.2. Sexual Offences Order 1978 (NI). See also, NSW, Tasmania, Queensland, Northern Territory, South Australia, Victoria, New Zealand, Western Australia, Canada. Jurisdictions considering such amendments are Malaysia and Trinidad and Tobago.

141. Adler, Z, "The Intention of Parliament and the Practice of the Courts" [(1982)] M.L.R. 664; Adler, Z, "The Relevance of Sexual History Evidence in Rape: Problems of Subjective Interpretation" (1985) Crim. L. R. 769.

142. Violence Against Women, Report of an Ad Hoc Working Group, Women's National Commission, London, 1985, p.44.

143. Edwards, S, Female Sexuality and the Law, op cit, chapter 6.

144. Edwards, S, op cit, chapters 4 and 5.

145. Violence Against Women, Report of an Ad Hoc working Group, Women's National Commission, 1985, p.24ff; Rowland, J, Rape: the Ultimate Violation, Pluto Press, 1985: see particularly the Introduction to the English edition by Helena Kennedy; Sebba. L, and Cahan. S, "Sex Offenses: The Genuine and the Doubted Victim", Victimology: A New Focus, Vol 5, p. 29. Brownmiller. S, Against Our Will, Penguin, 1975, pp.364-368.

146. Violence Against Women, Report of Ad Hoc Working Group, op cit, at p.39 indicates that the usual time lag in the UK is one year.

147. Crimes Act 1961 (NZ) s.375A introduced by Crimes Amendment Act (No.3) 1985, s.5; see also, Indian Code of Criminal Procedure, s.327.

148. See for example, the provisions in Indian Penal Code, s.228-A, Crimes Act 1961 (NZ) s.375A, Sexual Offences (Amendment) Act 1976 (England and Wales) s.4. Similar provisions exist in Tasmania, Western Australia, Queensland, Northern Ireland and The Northern Territory. Trinidad and Tobago and Malaysia have such provisions under consideration.

149. The English provision is flawed as it protects complainants in cases of rape or attempted rape and not indecent assault.

150. Most give the judge a discretion to allow publication. Here not only must the judge act with responsibility, but so must the press. Violence Against Women, Report of an Ad Hoc Working Group, op cit, p.42-43 gives an example of a recent English trial where publication was allowed and the press acted without restraint.

151. See here R v Billam [(1986)] 1 All ER 985 where the English Court of Appeal attempts to lay down guidance for sentences in cases of rape and attempted rape.