

**THE ABUSED WOMEN IN SOUTH AFRICA:  
STATUTORY IMPLICATIONS AND THE USE OF  
MEDIATION TO RESOLVE DOMESTIC VIOLENCE  
DISPUTES**

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Submitted in the partial fulfilment of the academic requirements for the degree of Masters of Laws, in the Faculty of Law, University of Natal, Durban.

December 2000

## **DECLARATION**

I, Kasturi Moodaliyar, hereby declare that the work contained herein is entirely my own, except where indicated in the text itself, and that this work has not been submitted in full or partial fulfilment of the academic requirements for any other degree or qualification at any other university.

Signed and dated at Durban on this the 1<sup>st</sup> day of December 2000.

Kasturi Moodaliyar

## **ACKNOWLEDGEMENTS**

My dissertation is dedicated to my Mum, Dad and my siblings: Pragasen, Shamini, Shantini and Jayakumaran. I appreciate being driven to campus at the oddest hours and I thank you for all your support, encouragement and tolerance.

To have reached this level of study I could not have done it without inspiring lecturers like Ansu Padayachee, Divya Singh, Neil Van Dokkum, Ronald Louw and Karthigasen Govender. I was mesmerized by your words of wisdom and insightful lectures.

Special mention goes to my supervisor, Ronald Louw. Thank you for all your time, assistance and constructive criticism.

To the library staff, Sunny, Caroline, Reggie and Eileen, I thank you for your resourcefulness, always willing assistance and encouragement.

Ms C Edwards, Provincial Co-ordinator of the Kwa-Zulu Natal Network on Violence Against Women. I appreciate your helpful comments and admire your strength.

My good friend Nerisha. You have been supportive from the beginning. I welcomed your insightful comments and your inspiring ideas. I would also like to thank my friends of Legal Aid, Shebash and Mohamed. You guys were my sanity in an insane world.

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## INTRODUCTION

Domestic violence is a serious crime against society and is a prevalent offence in South Africa. The number of incidents of this nature is on the increase especially amongst women. However due to the 'private' nature of this crime many people ignore this problem hoping that it would go away or stay behind closed doors. The reality is that it happens too often and in too many homes. Victims of domestic violence have to endure social ostracism, reluctant help from authorities in addition to the abuse. We cannot begin to imagine their pain.

The vulnerable status of women is widely recognised. As a result, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)(1979) have tried to improve the protection of women. The South African Government has ratified this convention and in doing so took upon the obligation to protect these women. Thus, legislation in the form of the Prevention of Family Violence Act 133 of 1993 and the Domestic Violence Act 116 of 1998 were enacted to bring some sort of relief to these victims of abuse.

Preceding the Domestic Violence Act, the South African Law Commission has done extensive research on the problem of domestic violence in South Africa. The following was quoted by them from a document drafted by the US National Council of Juvenile and Family Court Judges which is an unequivocal reflection of the impact of family violence on



society:

'Domestic and family violence is a pervasive and frequently lethal problem that challenges society at every level. Violence in families is often hidden from view and devastates its victims physically, emotionally, spiritually and financially. It threatens the stability of the family and negatively impacts on all family members, especially the children who learn from it that violence is an acceptable way to cope with stress or problems or to gain control over another person. It violates our communities' safety, health, welfare, and economies by draining billions annually in social costs such as medical expenses, psychological problems, lost productivity and intergenerational violence.'<sup>1</sup>

Domestic violence is not unique to South Africa. In fact the problem of domestic violence is a universal one. It affects women from all walks of life. American author, Ginny NiCarthy<sup>2</sup>, correctly points out that.

'Although women who have been abused sometimes fit the stereotype of the

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<sup>1</sup> Model Code on *Domestic and Family Violence* Nevada (1994) cited in the South African Law Commission Discussion Paper 70 project 100 'Domestic Violence'(1997) at 2.

<sup>2</sup> NiCarthy G Second Edition *Getting Free-you can end abuse and take back your life* The Seal Press, Washington, 1986, at 10.

submissive, dependent, helpless woman, many are the opposite— strong, independent people. They sometimes hold important, demanding, professional positions as doctors, media performers, teachers, or they may work in traditionally male trades. These women have broken out of the restrictive traditional roles, yet are still capable of falling in love, feeling responsible for what happens in an intimate relationship, and committed to going beyond the last mile to make it work.'

Fedler<sup>3</sup>, in her article, listed three distinguishable factors between a situation of battering and other legal problems:

' ... first, the battered woman is, to a greater degree than other potential litigants, a reluctant user of legal remedies; secondly her problem is affected by social, economic, political and personal factors, all of which have a bearing on the suitability of a remedy to resolve her crises; and thirdly, the remedy offered by law, whilst useful in some cases, may be wholly inappropriate in her case.'

It is submitted that in as much as abused women may be reluctant to use legal remedies, many women however are not aware of the legal remedies available to them. In addition the Prevention of Family Violence Act 133 of 1993, which was in operation when the above article was written, may have been narrow in its approach and not catered for all types of

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<sup>3</sup> Fedler J 'Lawyering domestic violence through The Prevention of Family Violence Act 1993- An evaluation after a year in operation' (1995) 112 *South African Law Journal* 231 at 232.

abusive situations. However, with the advent of the Domestic Violence Act 116 of 1998, abused women are protected from a whole spectrum of domestic abuse scenarios.

We must also remember that we have evolved from time when the only legal remedies that a woman had against domestic abuse were that of common law assault and indecent assault charges.<sup>4</sup> The Prevention of Family Violence Act<sup>5</sup> was thus welcomed as some sort of hope by women in abusive relationships when it came into effect on 1 December 1993.

However, Fedler opines that:

‘on the face of it, this Act appears to take a serious line on domestic violence, and it caused initial excitement within feminist circles and organisations working with survivors of domestic abuse. Over the course of its first year in operation, however, it has become increasingly clear that the Act is flawed in many respects- some remediable, others perhaps symptomatic of the limits of law itself in restructuring embedded power relationships in society’<sup>6</sup>

Due to much criticism of the Prevention of Family Violence Act the South African Law

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<sup>4</sup> See Jagwanth S ‘The Prevention of Family Violence Act 1993: A Feminist Critique’(1995)8 *South African Journal of Criminal Justice* at 1.

<sup>5</sup> Act 133 of 1993.

<sup>6</sup> *Op cit* note 5 at 234.

Commission<sup>7</sup> investigated and highlighted the problems surrounding abused women and their access to justice.

The Law Commission grappled with and identified issues that caused the most concern as regards the Family Violence Act. They considered procedural issues, specifically the *audi alteram partem* rule and its breach thereof, as well as service of the interdict on the respondent, setting aside of the interdict, oral evidence, appeal and review procedures.

There was a need to clarify the present legal position as regards the criteria required for granting an interdict and the circumstances upon which the respondent may be evicted from the home and the regulation of the police as to their response to domestic violence. There was also a need to determine exactly what the ambit of the Act was and as to whether this ambit could be extended to protect people in relationships other than those who are just family members from various types of abuse.<sup>8</sup>

Upon review of the Law Commission's submissions it became evident that the Prevention of Family Violence Act did not provide adequate protection for the abused woman, and as a result, Sections 1,2,3,6 and 7 of the above Act were repealed by the Domestic Violence Act 116 of 1998, which came into operation on 15 December 1999.

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<sup>7</sup> South African Law Commission Discussion Paper 70 Project 100 'Domestic Violence' (1997).

<sup>8</sup> See Bonthuys E 'The Solution? Project 100- Domestic Violence' (1997)114 *South African Law Journal* 371 at 372.

The Domestic Violence Act recognises of a need to improve abusive relationships in society and the preamble to the Act takes the initiative to achieve this realisation:

'Recognising that domestic violence is a serious social evil; that there is high incidence of domestic violence within South African society; that victims of domestic violence are among the most vulnerable members of society; that domestic violence takes on many forms; that acts of domestic violence may be committed in a wide range of domestic relationships; and that the remedies currently available to the victim of domestic violence have proved to be ineffective.

'IT IS THE PURPOSE of this Act to afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide; and to introduce measures which seek to ensure that the relevant organs of state give full effect to the provisions of this Act, and thereby to convey that the State is committed to the elimination of domestic violence'<sup>9</sup>

With the advent of the new Domestic Violence Act, abused women now seem to have their rights to access to justice more accessible to them. However, the effect and the extent of such Act as regards to the needs of these women need to be investigated.

I will accordingly discuss issues that place women in a domestic violent setting. I will look

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<sup>9</sup> Preamble to Domestic Violence Act 116 of 1998.

at the definition and types of abuse; the 'battered woman syndrome'; the myths and misconceptions that people have about domestic violence as well as the reasons why women stay in and leave violent relationships.

I will thereafter critically analyse the Prevention of Family Violence Act and the Domestic Violence Act. In addition I will discuss the proposals for a new Act by the South African Law Commission which in turn led to the advent of the Domestic Violence Act. I will suggest further recommendations that may be useful to help improve conditions that women affected by domestic violence face.

Lastly I will focus on the issue of mediation as a way to resolve domestic disputes. In doing so I will look at the role a mediator plays when dealing with these issues and suggest guidelines which may be used by mediators in their attempt to resolve domestic disputes.

## CHAPTER ONE

### THE ABUSED WOMEN IN SOUTH AFRICA

#### 1.1 Definition and Types of Abuse

##### 1.1.1 Factors to consider in defining Abuse

Definitions of domestic abuse and what characterises a battered woman vary and as a result, becomes problematic.<sup>10</sup>

People Opposed to Woman Abuse (POWA), a non-governmental organisation formed to protect women against abuse defines abuse as 'any pattern of behaviour that controls another person, causes physical harm or fear, makes someone do things they do not want to, or prevents them from doing things they do want to do.'<sup>11</sup>

Abuse has been used in the description of other concepts such as domestic or family

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<sup>10</sup> See Kanuha V 'Domestic Violence, Racism, and the Battered Women's Movement in the United States' in Edleson JL and Eisikovits ZC (eds) *Future Interventions with Battered Women and their families* Sage Publications Inc, Thousand Oaks, 1996 at 38.

<sup>11</sup> POWA *Woman Abuse: The Basic Facts*  
<http://www/womensnet.org.za/pvaw/help/abusefac.html>

violence as well as battering. Stordeur & Stille<sup>12</sup> are however of the view that 'the term *violence* most often refers to all forms of physical aggression, while the term *abuse* refers to all those physical and non physical acts that cause physical and emotional injury.'

Existing definitions of battering differ in terms of the variety, frequency and severity of assaultive behaviour.<sup>13</sup> Deschner<sup>14</sup> defines battering as 'a series of physically injurious attacks on an intimate or family member that forms part of a repeated, habitual pattern.' Walker<sup>15</sup>, on the other hand, defines a battered woman as one 'who is repeatedly subjected to any forceful physical or psychological behaviour by a man in order to coerce her to do something he wants her to do without any concern for her rights.'

Whether it is termed domestic violence, family violence, woman abuse, battery or violence, it all still falls under the umbrella term of abuse and the fact that remains is that many women suffer at the hands of it. However, in South Africa, there is a trend to move away from the term 'family violence' which, in terms of the 1993 Act was narrow and restrictive, and therefore rather use the term 'domestic violence' which appropriately describes

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<sup>12</sup> Stordeur RA and Stille R *Ending Men's Violence Against their Partners* Sage Publications Inc. Thousand Oaks, 1996 at 19.

<sup>13</sup> *Ibid* 19.

<sup>14</sup> Deschner JP *The Hitting Habit: Anger Control for Battering Couples* Free Press, New York, 1984 at 21.

<sup>15</sup> Walker LE *The Battered Woman* Harper & Row, New York, 1979 at x.v.



violence in the domestic scene and is not restricted to family members only.

What is clear is that domestic violence is not random nor a one off event. There is a continuous pattern of violent behaviour incorporating many complexities which all constitute domestic violence.<sup>16</sup>

In an attempt to define abuse we should consider the profile of the woman to whom the abuse affects. Moore<sup>17</sup> profiles the battered woman as being of:

‘... all ages, all ethnicities, from all socioeconomic groups, has a low level of self esteem, and for the most part has very traditional notions of male and female behaviour. She may feel that her husband is supposed to be in charge of the family, even if that means beating her; she must be supportive of him, even if that means allowing herself to be abused repeatedly. Her role as a woman includes marriage, even a bad marriage, and to leave the home would be to admit that she is a failure as a woman.’

POWA<sup>18</sup> has compiled a list of the possible warning signs of abuse:

\* Frequent or repetitive physical injuries with poor or inconsistent explanations

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<sup>16</sup> See Schornstein SL *Domestic Violence and Health Care-What Every Professional Needs to Know* Sage Publication, Thousand Oaks, 1997 at 1.

<sup>17</sup> Moore DM *Battered Women* Sage Publications inc. Beverly Hills, 1979 at 20.

<sup>18</sup> *Op cit* note 15.

- \* Avoiding going home or reluctant to do so
- \* Rushing home after work or social events
- \* Excessive privacy about her personal life
- \* Chequered work history
- \* Exceptional nervousness, jumpiness or fear
- \* Low self-esteem
- \* Refusal to socialise
- \* Cutting off contact with family and friends
- \* Wearing clothes that seem intended to cover injuries: dark glasses, hats, scarves, polonecks, or long sleeves, especially in warm weather.

This list is not an indication of a definite sign of abuse. But these are signs to watch out for which help detect abuse. In some cases the signs are not so clear as the women do all that they can to hide it and this is why domestic abuse continues for lengthy periods of time undetected.

### **1.1.2 Types of Abuse**

Apart from obtaining a general definition of abuse in a domestic scenario, the types of abuse also sheds light as to what constitutes domestic abuse..

The Family Violence Act, 1993 did not adequately cater for the types of abuse that existed

in a domestic violence relationship. This Act failed to define an abusive relationship and appeared to be restricted to pure physical and sexual assault.

'In an abusive dynamic, the abusive partner may use several types of coercion to force the victim to behave as he wishes: both to do things he wants her to do and not to do things he wants her to refrain from doing. The types of abuse are not always obvious, indeed, some tactics may be quite subtle.'<sup>19</sup>

The Domestic Violence Act, 1998, is not as restrictive as the Family Violence Acts as it specifically sets out the types of abuse that would constitute domestic violence<sup>20</sup> as follows:

- (a) **physical abuse:** means any act or threatened act of physical violence towards a complainant. The type of physical abuse itself varies in relation to the actual attack and the injuries as a result. According to Hague and Malos<sup>21</sup> the physical abuse 'commonly, it starts with a single slap or blow, followed by disbelief and shock on both sides and by commitments from the man that it will never be repeated. ... once it has happened a single time, it is rare for it not to happen again.'
- (b) **sexual abuse:** means any conduct that abuses, humiliates, degrades or otherwise

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<sup>19</sup> Schornstein SL *op cit* 46.

<sup>20</sup> *Op cit* note 12.

<sup>21</sup> Hague G and Malos E *Domestic Violence Action for Change* New Clarian Press, Great Britain, 1993 at 7.

violates the sexual integrity of the complainant...

(c) **emotional, verbal and psychological abuse:** means a pattern of degrading humiliating conduct towards a complainant, including-

- (a) repeated insults, ridicule or name calling;
- (b) repeated threats to cause emotional pain; or
- (c) the repeated exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of the complainant's privacy, liberty, integrity or security...

(d) **economic abuse:** includes-

- (a) the unreasonable deprivation of economic or financial resources to which a complainant is entitled under law or which the complainant requires out of necessity, including household necessities for the complainant, and mortgage bond repayments or payment of rent in respect of the shared residence;
- (b) the unreasonable disposal of household effects or other property in which the complainant has an interest...

(e) **intimidation:** means uttering or conveying a threat, or causing a complainant to receive a threat, which includes fear...

'...the use of intimidating threats is one of the commonest forms of violence, often used by men to exert control and dominance over their wives or lovers.'<sup>22</sup>

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<sup>22</sup> Hague G and Malos E *op cit* 9.

- (f) **harassment**<sup>23</sup> means engaging in a pattern of conduct that induces the fear of harm to a complainant including-
- (a) repeatedly watching, or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be;
  - (b) repeatedly making telephone calls or inducing another person to make telephone calls to the complainant, whether or not conversation ensues;
  - (c) repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant...
- (g) **stalking**: means repeatedly following, pursuing, or accosting the complainant...
- (h) **damage to property**: means wilful damaging or destruction of property belonging to a complainant or in which the complainant has a vested interest...
- (i) **entry into the complainant's residence without consent, where the parties do not share the same residence; or**
- (j) **any other controlling or abusive behaviour towards a complainant,**

where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant<sup>23</sup>;

The types of abuse included in this Act have been taken from the various submissions

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<sup>23</sup> Act 116 of 1998.

made to the Law Commission. The Act caters for the various threatening types of abuses which were not covered in the Family Violence Act. Therefore, women now have more adequate protection under the new Act. The Domestic Violence Act is less restrictive and apart from specifically identifying and defining the various types of abuse it also allows for any act that would detrimentally affect the wellbeing of the woman. Therefore any type of abuse not specifically mentioned in the Act would fall within the ambit of the Act and would constitute an offence.

## 1.2 Battered Woman Syndrome

American author, Lenore Walker has recognised a pattern of behaviour that occurs in abusive relationships. She has termed this phenomenon "battered woman syndrome" to help explain why women continuously suffer from violence in relationships.

Walker explains that the pattern of abuse occurs in 3 phrases: the tension-building phase; an acute phase and a tranquil loving, non violent phase, all which vary in time and intensity...<sup>24</sup>.

'Phase 1, the tension-building phase, is described as one in which the tension begins to rise and the woman can sense that the man is becoming edgy and more prone to react negatively to any minor frustration. He may begin to lash out at her

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<sup>24</sup> Walker LE 'How Battering Happens and How to Stop It' in Moore DM *Battered Women* Sage Publications Inc. Beverly Hills, 1979 at 64.

for some real or imagined wrongdoing and then quickly apologize and become docile again.’<sup>25</sup>

‘Phase 2, the batterer may start out by justifying his behaviour to himself; however, it usually ends with him not understanding what has happened. In his blind rage,..., he usually starts out wanting to teach her a lesson for some wrongdoing that he thinks she has committed.’<sup>26</sup>

‘The ending of phase two and the movement into the 3<sup>rd</sup> phase, which is characterized by extremely loving, kind, contrite behaviour, is welcomed by both parties.

Her man is genuinely sorry for what he has done, even though he often does not tell her so overtly and he tries with the same sense of overkill that is seen in the previous phases to make it up to her. His worst fear is that she will leave him and he is charming and manipulative enough to attempt to make sure that this does not happen. He believes that he can control himself and will never again hurt this woman he loves,... He manages to convince everybody concerned at this point that this time he means it... His sincerity is believable.’<sup>27</sup>

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<sup>25</sup> *Ibid* 66.

<sup>26</sup> *Ibid* 68.

<sup>27</sup> *Ibid* 69 and 70.

The severity and the violence increases over time unless there is some kind of realisation by the abused woman that she is in a continual violent relationship and that it is not going to stop until she does something about it. What is required is some kind of intervention that would break the cycle of violence. Jukes opines 'that in order for a man to stop physical abuse he must also learn about his cycle and give up the other forms of abuse which precede the physical attack.'<sup>28</sup> As correct as that may sound, an abused woman may not be in a position to wait around until her abuser comes to learn the error of his ways. She is the one who is going to take the initiative to end the violence.

### **1.3 Myths and Misconceptions**

Our society tends to conceal itself from the issue of domestic violence and discard it as a private issue. Ignorance of the intensities of domestic violence leads to various myths and misconceptions which are often disguised as the truth. As a result, due a lack of information on this issue, people are unaware of what constitutes domestic violence and how to detect it. Some people tend to deny that it ever occurs and others choose to ignore the problem and let it remain a private matter.

Listed below are various myths and misconceptions that have been heard over time as well as the truth behind these fallacies.

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<sup>28</sup> Jukes AE *Men Who Batter Women* Routledge, London, 1999 at 132.



**Myth: The assault is an isolated incident, unlikely to happen again<sup>29</sup>**

**Fact:** Because family violence is hidden and difficult to measure, it is impossible to estimate precisely how frequently it occurs. Although the fact that it is rarely seen should not be taken to mean that it rarely occurs.<sup>30</sup> Contrary to this myth, studies show that the violence tends to recur and to become more frequent and severe over time.<sup>31</sup>

**Myth: Abused woman are uneducated and/or working class women<sup>32</sup>**

**Fact:** Although the highest reported incidence of domestic violence is among the poor, this may be accounted for by the fact that the poor, unlike those with economic means, have little alternative but to seek help from public agencies, which maintain statistics.<sup>33</sup> Middle and upper-class women are more likely to have resources that give them the option of using private physicians and attorneys and staying at hotels. They are therefore less visible to agencies that gather statistics on battering.<sup>34</sup> As is the case with the abuser, women from all cultural, educational and economic levels of society are liable to be

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<sup>29</sup> Schornstein SL *op cit* 29.

<sup>30</sup> See Barnett O and Miller-Perrin CL and Perrin RD *Family Violence Across the Lifespan* Sage Publications Inc. Thousand Oaks, 1997 at 13.

<sup>31</sup> Walker LE *The Battered Woman* Harper & Row, New York, 1979.

<sup>32</sup> Linnegar J and McGillivray K (eds) *Women and the Law in South Africa* Juta & Co Ltd, Kenwyn, 1998 at 101.

<sup>33</sup> Hilberman E 'Overview. The "wife-beater's wife" Reconsidered' 1980 (137) *American Journal of Psychiatry* at 1336.

<sup>34</sup> Schornstein SL *op cit* 27.

subjected to abuse.<sup>35</sup> People of the upper classes see their behaviour as normal and less peculiar than those of the lower class. They use social standing to hide their atrocious behaviour. normal.<sup>36</sup>

**Myth: It is because of his childhood<sup>37</sup>**

**Fact:** According to Padayachee and Pillay this myth 'removes blame and responsibility from the abuser as well as attempts to generate sympathy for the abuser and assumes the abuser cannot heal from a bad childhood or assume adult responsibility. The fact is that most abusers grow up in abusive households, but NOT ALL abused boys grow up to be abusers. Men who DID NOT grow up in violent homes sometimes become abusers. Adult men CHOOSE to abuse as a way of dealing with their pain or problems and must be held accountable for that choice.'

**Myth: Battered Women 'ask for it'<sup>38</sup>**

**Fact:** The masochistic label puts blame on the victim. It implies that something is innately

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<sup>35</sup> Linnegar J and McGillivray K *op cit* 101.

<sup>36</sup> See Gelles RJ *Intimate Violence in Families* 3<sup>rd</sup> Edition, Sage Publications Inc. Thousand Oaks 1997 at 6.

<sup>37</sup> Padayachee A and Pillay N *Violence against Women: A Guide to your Rights* Durban: Advice Desk for Abused Women, University of Durban-Westville, 1993.

<sup>38</sup> Barnett O and Miller-Perrin CL and Perrin RD *op cit* 14.

wrong with her. She alone must be responsible for the abuse.<sup>39</sup> Nobody asks to be abused. Blaming a woman for deserving or 'asking for' abuse because she is 'cheeky' or 'nags' or 'does not know her place' is merely to provide an excuse for a man's wilful and unbridled behaviour. The reality is that people choose to abuse or not to abuse.<sup>40</sup>

### **Myth: Substance Abuse causes men to batter**

**Fact:** Many people refer to alcohol or drug use as 'liquid courage' or 'chemical courage'. They claim that the substance relaxes inhibitions in the user; therefore "he couldn't help himself".<sup>41</sup> This myth is an excuse rather than a cause of abuse. To show that the abuser was not in his sound and sober senses during the abuse only removes blame from the abuser and hides the real reason behind the abuse. The reality is that drunk or drugged men do not always abuse women and furthermore, alcoholics and drug abusers also abuse their spouses when they are sober and straight.

### **Myth: Stress causes abuse**

**Fact:** Stress may trigger violent behaviour, but it is not the cause of it. Consider a parallel situation: stress is also present in the workplace, but most men who abuse women do not also abuse their colleagues at work, where violent outbursts can usually be controlled.

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<sup>39</sup> *Op Cit* note 33.

<sup>40</sup> Linnegar J and McGillivray K *op cit* 101.

<sup>41</sup> Schornstein SL *op cit* 27.

There is no reason why they cannot be controlled at home too.<sup>42</sup>

**Myth: Domestic violence is a private family matter**

**Fact:** The fact is that the home is not the most safe place for a woman. A lot of abuse occurs behind closed doors and passed off a private matter especially when the abuser is a family member. This myth denies community responsibility for a social issue and silences and isolates abused women.<sup>43</sup>

**Myth: If he beat her up, he must be mentally ill**

**Fact:** It is true that just as there is mental illness in society at large, some men who batter their partners do suffer from mental illness. However, not everyone with mental illness is violent, and not all batterer's are mentally ill. Automatically attributing a man's violence to the belief that only someone mentally ill could do such a thing excuses the batterer's conduct and relieves him of responsibility for his actions.<sup>44</sup>

Each of the above myths display the same theme: they remove responsibility from the abuser's actions by either putting blame on the woman or by dispensing with the problem as a trivial issue so that it is away from the public eye.

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<sup>42</sup> Linnegar J and McGillivray K *op cit* 101.

<sup>43</sup> *Op cit* note 37.

<sup>44</sup> Schornstein SL *op cit* 30.

## 1.4 Why Women Stay in Abusive Relationships

This is one question that people want to understand to try to make any sense of abusive relationships. The abused woman may be faced with many fears in her decision to leave her home. Fears such as poverty, housing, the abuser himself and his reprisal of her actions.

‘When an abused woman overcomes her fear of poverty and the pervasive ideas about woman’s role and prepares to leave, she may be faces with the abusive man at his most irresistible :”I know I’m a brute, but I’m on my knees asking forgiveness...”’<sup>45</sup>

Before a woman can attempt to leave the abusive relationship there are various factors that they have to consider which plays a very important role in their decision. Unfortunately these factors usually hold a woman back from her decision to leave.

It is often the abused woman who blames herself for the torment that she has endured and she tries to avoid provoking her husband who may lash out another attack. ‘She will go to great lengths to avoid a confrontation only to discover that while he may beat her one night for putting the kids to bed too late, he may very well turn around and beat her the next for

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<sup>45</sup> NiCarthy G *Op cit* 11.

putting them to bed too early.<sup>146</sup>

Factors that play on the woman's mind is her '... guilt, her concern for him, her feelings that she's responsible for his life and feelings, her hopefulness, her idea that she should be a trusting, nurturing, forgiving woman, and that it would be wrong not to give him another chance, wrong to turn her back on him just as he's finally really ready to change. She unpacks her bags.'<sup>47</sup> This behaviour continues until she is ready to break the cycle and empower herself to leave this relationship.

In a situation where children are involved the women believe that they have no choice but to stay in the abusive relationship. There is an enormous responsibility in trying to support not only herself but the children as well. Also, some men may threaten to take away the children if she leaves him. We may be living in the twenty-first century but there is a negative social stigma attached to single-parent families and no mother would want her children to grow up with that sort of stigma attached to them. It is these traditional family values that keep women in abusive relationships making it difficult for them to leave.

Although common sense would indicate that continued exposure to parental violence is extremely dangerous and that there are untold numbers of healthy and happy children in single-parent homes, the traditional values frequently held by the

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<sup>46</sup> Fleming JB *Stopping Wife Abuse* Anchor Press, New York, 1979 at 81.

<sup>47</sup> NiCarthy G *op cit* 11.

battered woman make it difficult for her to realise that it is the current situation that is harmful and her children would undoubtedly be better off in a violent-free environment no matter what the living situation...'<sup>48</sup>

Fear of poverty makes the decision to leave even more difficult especially where children are involved. Women also find themselves in a bleak situation where they have not worked before or during the relationship. She needs more than just a positive attitude to survive independently.

However, even a woman who has a good job will suffer a big loss in income when she leaves a man, especially if she has custody of children. The man she left probably earns much more than she; child support is almost never enough to cover expenses and it's often not paid at all. The fear of poverty or a greatly lowered standard of living is a major reason women stay in abusive situations, hoping year after year it will change and that they won't have to risk making it on their own.'<sup>49</sup>

The self-esteem of a woman is very fragile when she is in an abusive relationship. A battered woman's low self-esteem leaves her feeling that she is worthless and this is the reason that the battering is warranted. Fleming opines that:

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<sup>48</sup> Fleming JB *op cit* 86.

<sup>49</sup> NiCarthy G *op cit* 11.

'Although each beating serves to reinforces the abused woman's negative self-image, she may also feel that tasks as wife. She has provided her husband with the opportunity to reaffirm his "manhood" and has fed and boosted his ego.'<sup>50</sup>

This may help her feel that she is doing something positive in her marriage by allowing the beatings to go on. The minute level of achievement that she feels comes with its painful consequences.

Fear is one of the reasons which keep women in abusive relationships. Moore argues that the woman experiences a : '... fear of death if she stays, and fear of the unknown if she leaves. Although she know only too well that her current battering is endangering her life, and perhaps the lives of her children, she also is afraid to leave and experience the loneliness, financial devastation, failure, possible loss of friends and family, and fear of the unknown.'<sup>51</sup> As a result her low level of self-esteem keeps her 'immobilized both physically and psychologically.'<sup>52</sup>

Walker used the theory of 'learned helplessness' as a psychological rationale to explain why battered women stay with their abusers. This phenomenon has been extensively explored and criticised. To explain this theory Walker used the example of experiments

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<sup>50</sup> Fleming *op cit* 84.

<sup>51</sup> Moore DM *op cit* 22.

<sup>52</sup> *Ibid* 24.



by psychologist Martin Seligman.

'Seligman and his researchers placed dogs in cages and administered electrical shocks at random and varied intervals. These dogs quickly learned that no matter what response they made, they could not control the shock. At first, the dogs attempted to escape through various voluntary movements. When nothing they did stopped the shocks, the dogs ceased any further voluntary activity and became compliant, passive, and submissive. When the researchers attempted to change this procedure and teach the dogs that they could escape by crossing to the other side of the cage, the dogs still would not respond. In fact, even when the door was left open and the dogs were shown the way out, they remained passive, refused to leave, and did not avoid the shock. It took repeated dragging of the dogs to the exit to teach them how to respond voluntarily again.'<sup>53</sup>

Walker applied this theory of learned helplessness to the situation of battered women.<sup>54</sup> According to Walker, repeated batterings, like electric shocks, cause a decrease in the victim's motivation to respond. The woman becomes passive, does not believe that her response will benefit her, believes that she has no power to alter the outcome of the situation, and becomes more prone to depression and anxiety.<sup>55</sup>

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<sup>53</sup> Walker LE (1979) *op cit* 46.

<sup>54</sup> Walker LE (1979) *op cit* xvi.

<sup>55</sup> See Schornstein SL *op cit* 60.

Ms Walker's explanation is a useful one but has been criticised by many academics. Strube<sup>56</sup> is of the opinion that 'the learned-helplessness model holds promise for helping us understand why some women remain in abusive relationships. However, it is evident that not all women remain with their abusers; some decide to terminate the relationship and break out of the learned helplessness cycle.'

Feminists are critical of using learned helplessness in court as it does not explain the complexities of the battered woman syndrome. In addition to this when using this theory the woman must prove her helplessness after killing her abusive partner.

Mahoney explains that:

'To the extent of the theory of learned helplessness is based on repeated violence, women may have trouble establishing the appropriateness of expert testimony if they strike back after experiencing one severe prior incident of abuse.<sup>57</sup> ... as long as an explanation emphasizes "helplessness" in the psychology of individual women, it runs into the danger of contributing to stereotyping.'<sup>58</sup>

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<sup>56</sup> Strube MJ 'The Decision to leave an Abusive Relationship' in Hotaling GT Finkelhor D Kirkpatrick JT and Straus MA *Coping with Family Violence- Research and Policy Perspectives* Sage Publications Inc. Newbury Park, 1988 at 101.

<sup>57</sup> Mahoney MR 'Legal Images of Battered Women: Redefining the Issue of Separation'(1991)90 *Michigan Law Review* 1 at 41.

<sup>58</sup> *Ibid* 42.

As an explanation as to why women stay in abusive relationships, Mahoney uses the theory of "separation assault". She argues that:

'separation assault is the attack on the woman's body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return. It aims at overbearing her will as to where and with whom she will live, and coercing her in order to enforce connection in a relationship. It is an attempt to gain, retain, or regain power in a relationship, or to punish the woman for ending the relationship. It takes place over time.'<sup>59</sup>

It is submitted that the separation assault theory would hold more weight in court as opposed to the learned helplessness theory. Mahoney's theory places less burden on the abused woman and helps explain exactly how the abuser operates and the lengths he would go through to force the woman to stay in the abusive relationship.

These factors are considered by women when they realise that they are in an abusive relationship and therefore contribute to the woman's decision to stay. It is rare that some women might actually recognise abusive behaviour when it initially happens and they find a way out before the situation worsens. Most often women are in abusive relationships for years and the longer they stay, the more severe and frequent the abuse gets and it becomes harder to leave. There is always hope that the battering would stop and the

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<sup>59</sup> *Ibid* 65.

relationship would be more loving in the future and it is that kind of hope that the abused women cling to and continue to stay in abusive relationships.

## 1.6 Why Women Leave Abusive Relationships

Reasons for leaving the abusive relationship seem far fewer than reasons for staying. That is because the woman would do everything she can to continue the relationship rather than give up and walk away. Leaving the relationship is not about giving up on it or a sign of weakness. On the contrary, it is a sign of empowerment and taking charge of one's life

Dobash and Dobash speak about women leaving the home temporarily and permanently.

According to these authors at first :

'the intention is not to leave the relationship permanently but to try to gain some form of redress and to change the relationship by removing the violence from it. At this very early stage the sequence is always the same: the woman's husband goes after her, apologizes for hitting her, acknowledges the error of his ways, promises that it will never happen again, reaffirms his affection for her, and pleads with her to come home.'<sup>60</sup>

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<sup>60</sup> Dobash RE and Dobash R *Violence Against Wives* The Free Press, New York, 1979 at 144.

Dobash and Dobash believe that ' women who do consider the possibility of leaving the relationship permanently usually do so , at least initially, with very mixed personal feelings about themselves and their husbands. It is not easy to decide to leave a man who may not be "all bad" and to give up a marriage that may have many positive features.'<sup>61</sup>

Women who break out of the cycle of abuse realise that there is no hope of change in their spouse's behaviour. The abuse is on going. The reasons for initiating the abuse become more frivolous and the woman knows that she is not at fault and cannot continue this abusive relationship.

Working women are more likely to leave than those who do not. By working, they gain more independence not only financially but also in their thought process whereby they are able to admit that they are in an abusive relationship and take the necessary course of action to leave. Women who work also come into contact with other people who do not have abusive relationships and thus the abused woman becomes aware of how unhealthy her relationship is and therefore guards against it.

'A woman is far more likely to leave if she has a system of support for leaving. This support can come from friends, family, women's groups, shelters churches, or any other person(s) who let her know that she is really okay and need not take such abuse.'<sup>62</sup>

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<sup>61</sup> *Ibid* 147.

<sup>62</sup> Moore DM *op cit* 25.

‘Further, a woman is more likely to leave a battering home if she does not have children, for a number of reasons. She may be able to find a home for herself but finding one which will accept children is much harder.’<sup>63</sup>

Women may stay in abusive relationships because of the children but they may also leave the relationship “for the sake of the children”. ‘... a women with children may stay only as long as she is the only one being beaten; for may women it is when the children start being beaten that she finally gathers the strength to leave her spouse.’<sup>64</sup>

Even if there are no children involved, there comes a time when one cannot endure the repetitive abusive behaviour and takes the initiative to leave the relationship. The more frequent and more violent the battering becomes the less the likelihood that the woman would continue to stay and try to make the relationship work. It is the lucky ones who come to this conclusion and manage to escape in time, for the others, it may take years to gain all the courage they can to leave.

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<sup>63</sup> *Ibid* 26.

<sup>64</sup> *Ibid* 26.

## CHAPTER TWO

### STATUTORY IMPLICATIONS

#### **2.1 The Prevention of Family Violence Act 133 of 1993**

Before the enactment of the Prevention of Family Violence Act on the 1 December 1993 the remedies available to abused women were negligible. The civil procedures that existed at that time to obtain court interdicts were not only expensive, as they had to be issued by the then Supreme Court, but were also long, drawn out processes.

The memorandum for a new draft bill called for a 'new, more effective system (that) may contribute to a strategy to deal with domestic violence outside the criminal courts in order to maintain family unity.'<sup>65</sup> Included in this memorandum was for the criminalizing of the rape of a wife by her husband. At the time, whenever a man had been convicted of assaulting his wife, rape was regarded as an aggravating circumstance at the passing of sentence.<sup>66</sup> There was thus an obvious need to allow for legislation that would prevent family abuse and further tragedies.

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<sup>65</sup> Explanatory Memorandum 'Draft Bill on the Prevention of Domestic Violence' 1993 *Government Gazette* 19-02-93 No 14591 at 38.

<sup>66</sup> *Ibid.*

The Act consists of nine sections which essentially consists of the definitions<sup>67</sup> of a magistrate, matrimonial home, prescribed and parties protected by the Act; the interdict with regard to family violence<sup>68</sup>; execution and warrant of arrest<sup>69</sup>; obligation to report ill-treatment of children<sup>70</sup>; rape of wife by her husband<sup>71</sup>; offences and penalties<sup>72</sup> and regulations<sup>73</sup>.

### **2.1.1 Persons to Whom the Interdict May be Granted**

The Act allows for a man or woman who was married by any law or custom to obtain an interdict. Relief may also be granted to any man or women who were not married but rather living together as husband and wife as well as any persons, who at any stage previously, formed such a union.<sup>74</sup>

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<sup>67</sup> s 1.

<sup>68</sup> s 2.

<sup>69</sup> s 3.

<sup>70</sup> s 4.

<sup>71</sup> s 5.

<sup>72</sup> s 6.

<sup>73</sup> s 7.

<sup>74</sup> s 1(2).



### 2.1.2 How to Apply for an Interdict

Anyone with a material interest may apply for an interdict on behalf of the abused person.<sup>75</sup>

It could be a parent, child or even a neighbour. The person obtaining the interdict can do so, by applying to the clerk of the court at the Magistrates Court of High Court nearest to where he/she lives.

A prescribed form<sup>76</sup> by way of an affidavit needs to be filled out requiring details of the applicant and of the events for which the relief is sought.<sup>77</sup> The regulations require the prescribed form to be filled in order to uniform and speed up the process.

Persons who have knowledge of this matter may too, submit supporting affidavits in addition to the applicant's application.<sup>78</sup>

To obtain an interdict the abused woman does not have to appear before a judge or magistrate. The clerk of the court will take the application to the rooms of the judge or magistrate who will immediately grant or deny the application.<sup>79</sup> If granted, the interdict will

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<sup>75</sup> s 2(1).

<sup>76</sup> Form 1.

<sup>77</sup> s 2(1).

<sup>78</sup> Reg 2(2).

<sup>79</sup> Reg 2(3).

remain in force indefinitely, unless the respondent succeeds in having the interdict set aside.<sup>80</sup>

Two further prescribed forms<sup>81</sup> accompany the application which enables the presiding officer to issue the interdict simultaneously with a warrant of arrest. The warrant of arrest is brought into effect by lodging an affidavit with a peace officer and only becomes of force and effect when it is served in the prescribed manner.<sup>82</sup>

**2.1.3 The Granting of an Interdict**

The judge or magistrate uses his discretion as to whether to grant the interdict or not. If granted the respondent may be ordered:

- (a) not to assault or threaten the applicant or a child living with the parties or with either of them.<sup>83</sup>

The Act prevents verbal abuse and physical violence in the form of sexual assault or any other assault that impacts on a child's or party to a marriage fundamental human rights.

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<sup>80</sup> See 2.1.5

<sup>81</sup> Form 2 and Form 3.

<sup>82</sup> Reg 3(2).

<sup>83</sup> s 2(1)(a).

- (b) not to enter the matrimonial home or other place where the applicant is resident or a specified part of such home or place or a specified area in which such home or place is situated.<sup>84</sup>

Here the Act ensures peaceful security of the abused woman and her family by prohibiting the abuser from entering the premises upon which she lives.

- (c) not to prevent the applicant or a child who ordinarily lives in the matrimonial home from entering and remaining in the matrimonial home or a specified part of the matrimonial home.<sup>85</sup>

This is to prevent the abuser from denying the woman or child or both access to the home.

- (d) not to commit any other acts specified in the interdict.<sup>86</sup>

This allows for a variety of orders to be granted depending on the type of order requested and it is at the discretion of the presiding officer to award them.

The Respondent is then advised of his right to apply for the setting aside or the amendment of the interdict granted against him. He would have to give 24 hours notice to the applicant and the court if he wishes to do so.<sup>87</sup>

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<sup>84</sup> s 2(1)(b).

<sup>85</sup> s 2(1)(c).

<sup>86</sup> s 2(1)(d).

<sup>87</sup> s 2(2)(c).

#### 2.1.4 Service of the Interdict

The registrar of the High Court or the clerk of the magistrate's court serves the interdict by delivering or presenting for delivery a copy thereof to the respondent if the respondent is present at court.<sup>88</sup> Proof of delivery is endorsed on the original. Even if the respondent refuses to accept the documentation it would still be regarded as effective service of the interdict upon him.

After service of the interdict the registrar or clerk of the court must deliver or send by registered post a certified copy of the interdict and the original warrant of arrest to the applicant.<sup>89</sup>

The interdict may also be served by a sheriff of the court.<sup>90</sup> Service may be in the form of delivering, or presenting for delivery, a copy thereof to the respondent named therein or, if he cannot be found, by delivering it at his place of residence, work or business to some person apparently not less than 16 years of age and apparently residing or working there.<sup>91</sup>

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<sup>88</sup> Reg 3(1).

<sup>89</sup> Reg 3(2).

<sup>90</sup> Reg 4.

<sup>91</sup> Reg 4(2).

The manner of service differs slightly to the High Court procedure<sup>92</sup> which requires the person aged apparently not less than 16 years of age to be in charge of the premises at the time of delivery. The relaxed rules prescribed by the Act and regulations allow for effective and easy service.

In the event that the respondent refuses the person delivering the interdict to enter his place of residence or work or business, a copy of the interdict may be affixed to the outer or principal door of such premises, which will constitute effective service.<sup>93</sup> If requested, the sheriff may be obliged to show the respondent the original interdict.<sup>94</sup>

A prescribed form<sup>95</sup> of the return of service is rendered by the sheriff giving details of the precise manner and to whom the interdict had been delivered to. The return of service is annexed to the original interdict and filed with the registrar or clerk of the court.

The applicant is then notified that service has been effected.<sup>96</sup> After service the registrar or the clerk of the court must deliver or send by registered post a certified copy of the

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<sup>92</sup> Rule 4(1)(a)(ii).

<sup>93</sup> Reg 4(3).

<sup>94</sup> Reg 4(4).

<sup>95</sup> Reg 4(5); Form 4.

<sup>96</sup> Reg 4(6).

interdict and the original warrant of arrest to the applicant.<sup>97</sup>

**2.1.5 Application to Set Aside or Amend the Interdict**

The Act allows the respondent, upon notice to the applicant, the right to apply to court to set aside or amend the interdict. However the Act does not specify the actual process to apply for the setting aside or amendment of the interdict and one has to turn to the regulations.<sup>98</sup>

The above applications can be made on the prescribed form<sup>99</sup> by way of an affidavit. The affidavit must state the reasons as to why the respondent wishes to make such an application.<sup>100</sup>

People who have knowledge of the matter may also file supporting affidavits to accompany the respondent's application.<sup>101</sup> The application must be filed with the registrar of the High Court or the clerk of the court who would thereafter stamp the date of hearing on the

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<sup>97</sup> Reg 4(7).

<sup>98</sup> Reg 5.

<sup>99</sup> Form 5.

<sup>100</sup> Reg 5(1).

<sup>101</sup> Reg 5(2).

original application.<sup>102</sup> A copy of the application must then be served upon the applicant. The applicant may then, before the date of hearing, lodge an affidavit stating reasons as to why the amendment or setting aside of the interdict should not be granted.<sup>103</sup>

### **2.1.6 The Hearing**

On the date upon which the application is to be heard, all the papers filed in court, including the original application and any application for the setting aside or amendment of the interdict, are handed to the presiding officer.

The presiding officer then considers the papers before him and on a prescribed form<sup>104</sup> and decides whether to grant, set aside or amend the interdict. The regulations do not call for oral evidence to be heard as the matter is decided on the papers itself.

After the presiding officer has made his decision, a copy of the order is forwarded to the applicant and the respondent by personal delivery or by registered post.<sup>105</sup>

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<sup>102</sup> Reg 5(3).

<sup>103</sup> Reg 5(5).

<sup>104</sup> Form 6.

<sup>105</sup> Reg 5(7).

### **2.1.7 Breach of the Interdict**

The applicant is served with the copy of the interdict as well as the warrant of arrest. If the respondent breaches a condition set out in the interdict then the warrant of arrest can be executed by a peace officer. The applicant must show the peace officer the copy of the interdict as well as the attached affidavit.

The applicant must state the manner in which the respondent has breached the conditions of the interdict and further state reasons why the interdict should not be set aside.

The respondent must, not later than 24hrs after his arrest, be brought before a judge, magistrate or peace officer who may or may not grant his release.<sup>106</sup> If convicted of the offence the respondent may be given a fine or imprisonment not exceeding 12 months or both.<sup>107</sup>

## **2.2 Criticisms of the 1993 Act**

The Prevention of Family Violence Act does not recognise domestic violence as a unique problem and therefore does not address problems which are peculiar to the nature of

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<sup>106</sup> s 3(2)(b).

<sup>107</sup> s 6.



domestic violence.<sup>108</sup> There is a lack of practicality to the Act and the many deficiencies in this piece of legislature are displayed in the definition of domestic violence<sup>109</sup> (or the lack thereof); who the Act protects<sup>110</sup>; the lack of police protection<sup>111</sup> and issues such as maintenance<sup>112</sup>; the actual procedure in obtaining an interdict<sup>113</sup> as well as the *audi alteram partem* rule<sup>114</sup>.

### 2.2.1 Definition of Violence

The Prevention of Family Violence Act does not specifically define domestic violence.

'Where there is no clear definition of family violence the experience in the US has been that a victim has had to prove a substantial degree of violence has been used against her

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<sup>108</sup> See Fedler J *op cit* 251.

<sup>109</sup> See Burman D 'Prevention of Family Violence Act: Criticism misses the Point' *De Rebus* May 1994 at 317; Clark B 'Cold Comfort? A Commentary on the Prevention of Family Violence Act' 1996 (12) *South African Journal of Human Rights* 587 at 591.

<sup>110</sup> See Clark B *op cit* 592; Fedler J *op cit* 239.

<sup>111</sup> See Clark B *op cit* 596; Jagwanth S *op cit* 4.

<sup>112</sup> See Fredericks IN and Davids LC 'The Privacy of Wife Abuse' 1995 (3) *TSAR* 481 at 489.

<sup>113</sup> See *Ibid* at 488.

<sup>114</sup> See Dicker L 'The Prevention of Family Violence Act: Innovation or Violation?' March 1994 *De Rebus* at 212.

before she becomes eligible for a restraining order.’<sup>115</sup> Clark opines that ‘the lack of definition in the Act might lead to similarity high burdens of proof being placed upon South African applicants.’<sup>116</sup>

Further to this there are no specific grounds upon which the court should grant the interdict. The Act mentions “assault” as an act of domestic violence and this presumes to be a physical assault. The Act does not indicate whether the category of assault extends to emotional abuse, financial abuse, verbal abuse, stalking or harassment.

Victims of domestic violence require protection inside and outside of their homes. The Act does not foresee circumstances where a woman would require protection outside her home, for example, in the case of stalking where the woman is under threat away from the home. ‘Stalking often forms an integral part of the abuse suffered by a battered woman and should be addressed directly.’<sup>117</sup>

The Act refers to violent behaviour in Sec 2(1) as being that of an assault or threat of assault. Fredericks and Davids opine that ‘it is clear, however, that the act is aimed only at physical violence and a threat is relevant only to the extent that it is ancillary to the

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<sup>115</sup> Bradburn WE ‘Stalking Statutes: An Effective Legislative Remedy for Rectifying Perceived Problems with today’s Injunction System’ 1992 *Ohio Northern University* at 19 in Clark B *op cit* 593.

<sup>116</sup> Clark B *op cit* 593.

<sup>117</sup> *Ibid.*

violence.<sup>118</sup> It is submitted that the 1993 Act does not adequately address the grounds as to what constitutes domestic violence.

### **2.2.2 Parties Protected by the Act**

The Act protects parties who are married formally either by law or custom as well as a man and woman who have or are cohabiting together.<sup>119</sup> This is a narrow definition of parties affected by domestic violence.

According to Jagwanth 'the distinction between cohabiting and non-cohabiting parties is an unjustifiable one and serves to undermine the magnitude of violence in relationships where the parties do not or have not lived together.'<sup>120</sup>

The Act does not consider women who are not in a marital relationship or living with their abuser. The Act therefore excludes women affected by domestic violence between siblings; same-sex relationships; external family members; domestic workers; who may be living on their employer's property and have not lived as 'man and wife' with their partners<sup>121</sup> and

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<sup>118</sup> Fredericks IN and Davids LC *op cit* 487.

<sup>119</sup> s 1(2).

<sup>120</sup> Jagwanth S *op cit* 2.

<sup>121</sup> See Fedler J *op cit* 239.

teenage girls residing with their parents but are abused by their boyfriends<sup>122</sup>. As a result many people do not have proper recourse for help when they are abused in a domestic setting.

### 2.2.3 Disregard of the *Audi Alteram Partem* Principle.

The Act has been criticised<sup>123</sup> for disregarding the rules of natural justice in terms of the *audi alteram partem* rule. The Act is said to be procedurally unfair as it allows the presiding officer to grant a final interdict, in terms of Section 2, which may have serious repercussions on the respondent without having heard evidence from him.<sup>124</sup>

In addition to this, in both the respondent's application to amend or set aside of the interdict or at a hearing as to his alleged breach of the interdict, the respondent bears the burden of proof to satisfy the court on a balance of probabilities that the interdict should be amended, set aside or that he is not guilty of the breach of the interdict.<sup>125</sup>

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<sup>122</sup> *Ibid.*

<sup>123</sup> Dicker L *op cit* 212.

<sup>124</sup> See Clark B *op cit* 594.

<sup>125</sup> *Op cit* n115.

The Constitutional Court in *S v Baloyi and Others*<sup>126</sup> ruled on the issue as to whether section 3(5) of the Prevention of Family Violence Act 113 Of 1993 should be declared unconstitutional to the extent that it placed an onus on the respondent to disprove his guilt<sup>127</sup>.

The Court acknowledged the seriousness of domestic violence in South Africa and the effect it had on society<sup>128</sup> and held that as fairness was expected to the complainant which meant that the enquiry proceedings be speedy and that the normal process of charge and plea be dispensed with, so too was the respondent entitled to fairness whereby the presumption of innocence should apply<sup>129</sup>.

According to Dicker, the Act assumes that 'applicant for the interdict is always right and that hallowed principles such as *audi alteram partem* are an unnecessary procedural obstacle to the need for a speedy remedy.'<sup>130</sup>

Jagwanth contradicts Dickers view as she says that it does not take into account the reason for the enactment. Jagwanth argues that:

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<sup>126</sup> 2000 (1) BCLR 86 (CC).

<sup>127</sup> *Ibid* 88 para 1.

<sup>128</sup> *Ibid* 93 para 12.

<sup>129</sup> *Ibid* 103 para 31.

<sup>130</sup> Dicker L *op cit* 215.

'...the purpose of the Act is to provide protection to the applicant, and the effect of the interdict is preventive and not punitive. It does not seek to limit the rights of the respondent, but merely to preclude him from violating the bodily integrity of the applicant. In addition the respondent does have the opportunity to respond if he wishes to contest the interdict'<sup>131</sup>

Jagwanth looks at the seriousness and extent of domestic violence as a factor that should be the basis for allowing the respondent's rights in terms of the *audi alteram partem* principle to be limited.<sup>132</sup>

It is submitted that for one to regard the Act protecting women against domestic violence as a legitimate one, it should be valid in both the procedural and practical application of the Act.

#### **2.2.4 Lack of Police Co-operation**

In circumstances of domestic violence it is of pivotal importance to have police co-operation especially in circumstances where the woman is in imminent danger due to the extent and

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<sup>131</sup> Jagwanth S *op cit* 10.

<sup>132</sup> *Ibid* n119.

nature of the violence performed upon her<sup>133</sup>. However, the Act does not entrench the roles of the police and police procedure as to the manner in which they should conduct themselves in a domestic violence situation.

In fact, there is no legal duty on the police to react to a call of domestic violence, unless an affidavit in the prescribed form has been signed and delivered to them stating that the interdict has been delivered to them. Section 3(1) of the Act allows the police discretion as to whether or not to execute the warrant even if he is in possession of the interdict.

Jagwanth believes that:

‘The police are arguably the greatest single obstacle to the effective operation of legislation which give victims of domestic violence legal protection. ...While the act authorises arrest on breach of the interdict, it may have the inadvertent effect of exacerbating the problem of traditional police practices in cases where the victim does not have an interdict and calls on the police for assistance. The absence of an interdict in terms of the Act may result in the police taking the matter less seriously and may even further preclude an appropriate response.’<sup>134</sup>

By the nature of the violence being in a domestic setting, may also add to the apathetic

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<sup>133</sup> See Clark B *op cit* 596.

<sup>134</sup> Jagwanth S *op cit* 4.

attitude of the police towards domestic violence as some may feel that the violence is of a 'private nature' and should therefore not involve the police. The abused woman thus faces far less protection if the police are not willing to acknowledge the crime of domestic violence and co-operate by responding to the call for help.

### **2.2.5 Maintenance**

Women who are dependant on their partners for maintenance are not catered for by the Act. Maintenance is especially necessary where there are circumstances of financial abuse as well as where the woman is forced to move out of the house and find a shelter or boarding house, or where she remains at home and has to take care of the household expenses and maintain the children.

### **2.2.6 Problems with obtaining an Interdict**

The intention of the Act was to provide legal relief for violence against women. However, the woman is placed with the burden of obtaining the interdict and initiating the process.<sup>135</sup> She has to go through the arduous task of filling in the prescribed forms and drafting supporting affidavits. One of the problems lies in the drafting of these affidavits. This is

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<sup>135</sup> s 2(1).



a document upon which the court relies heavily upon to determine whether to grant the interdict or not. In most cases it would not be drafted in a manner which would to justice to the woman's plight<sup>136</sup> and properly set down the circumstances for obtaining the interdict.

Fredericks and Davids opine are of the belief that 'this procedure accords too much respect to the sanctity of the family; the law cannot wait to intervene when the relationship has run its course or when the loving and contrite phase of the cycle of abuse has begun.'<sup>137</sup> The law should be able to provide for the woman's needs at the outset of the violence and be effective enough to prevent further violence.

Another problem is that the presiding officer has discretion as to whether to grant the interdict or not.<sup>138</sup> The Act does not set out the grounds upon which the application can be granted or refused nor does it take in to account that the presiding officer may perhaps have patriarchal values which influence his decisions.<sup>139</sup>

It is submitted that the criticisms of the Prevention of Family Violence Act stated above do not go unfounded. Due to the procedural problems and lack of practicality of the Act there was a call for more effective legislation to aid women in domestic violent relationships.

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<sup>136</sup> See Fredericks IN and Davids LC *op cit* 488.

<sup>137</sup> Fredericks IN and Davids *op cit* 488.

<sup>138</sup> *Op cit* note 117.

<sup>139</sup> See Jagwanth *op cit* 2.

## **2.3 Proposals for a new Act**

### **2.3.1 Submissions by the South African Law Commission**

As a result of the criticism of the Prevention of Family Violence Act 133 of 1993 the South African Law Commission (SALC) aimed to introduce a Domestic Violence Bill<sup>140</sup> which would replace the 1993 Act in its entirety. The SALC published an issue paper<sup>141</sup> which was open for comment.

The issue paper requested comments on:

- 1) the necessity to change the 1993 Act;
- 2) whether the amendment of the Act would result in alleviating the problem of domestic violence and should other measures be considered;
- 3) the need to address violence of women in a specific context rather than including it in an investigation of family violence.

The comments made by various organisations were then incorporated into a discussion paper<sup>142</sup> which was also published for comment and submitted for hearings.

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<sup>140</sup> The Domestic Violence Bill W75-98.

<sup>141</sup> South African Law Commission Issue Paper 2 Project 100 'Family Violence' (1996).

<sup>142</sup> South African Law Commission Discussion Paper 2 Project 100 'Domestic Violence' (1997).

The following recommendations were thus put forth by the SALC:

#### **2.3.1.1 Granting of the Interdict**

The SALC recommended the granting of interim interdicts *ex parte* and a rule *nisi* calling upon the respondent to show cause on the return day of the order why the provisional interdict granted against the respondent should not be made final. A prima facie case must have been made out and the fact that the respondent has not been given prior notice of the application shall not be a ground for refusing to grant an interim interdict.<sup>143</sup>

The respondent must return on the return date (which shall be not less than 10 days after service has been effected on him) and show cause as to why the interim interdict granted against him should not be made final. There shall be no set time line on the duration of a final interdict granted in terms of the legislation. The respondent should retain his power to apply for the amendment or setting aside of the interdict after 24 hours' notice to the applicant and the court concerned in respect of the interim order and the final order.<sup>144</sup>

The 1998 Act has improved on this issue in terms of Section 6 of the Act.

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<sup>143</sup> *Op cit* note 142 at 3 Recommendation 1.

<sup>144</sup> *Op cit* note 142 at 5 Recommendation 7.

### 2.3.1.2 Who may Apply for the Interdict.

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

- (i) They are or were married to each other (including marriage according to any law or custom).
- (ii) They (whether the same or opposite gender) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other.
- (iii) They are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time).
- (iv) They are family members related by consanguinity, affinity or adoption.
- (v) They would be family members related by affinity if the persons referred to in (ii) above were, or were able to be, married to each other.<sup>145</sup>
- (vi) They are or were in an engagement or dating relationship.
- (vii) They share or shared the same household.

Any person who has an interest in the matter may also apply for the interdict on behalf of the applicant.<sup>146</sup> The persons as stated above were defined as parties to a domestic

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<sup>145</sup> *Op cit* note 142 at 3 Recommendation 2.

<sup>146</sup> *Ibid* 4.

relationship in the 1998 Act.

#### **2.3.1.3 Jurisdiction of the Court**

It is recommended that the legislation afford the applicant a choice of jurisdictional factors as regards the conferment of jurisdiction in respect of the initial application for an interdict.

The court in whose area of jurisdiction-

- (i) the applicant resides (permanently or temporarily), carries on business or is employed;
- (ii) the respondent resides, or carries on business or is employed; or
- (iii) the cause of action arose;

shall have jurisdiction to entertain an application for an interdict.

The interdict shall also be enforceable throughout the Republic.<sup>147</sup> This proposal was included in the 1998 Act in terms of Section 12.

#### **2.3.1.4 Legal Representation**

The SALC recommended that no legislation in respect of legal representation be

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<sup>147</sup> *Op cit* note 142 at 4 Recommendation 3.

introduced. The Department of Justice must also investigate the matters of assistance by the Clerk of the Court or Registrar during the initial application phase and the issuing of uniform guidelines to promote effectiveness.<sup>148</sup>

The 1998 Act has provided that any party may be represented by a legal representative in terms of Section 14 of the Act.

#### **2.3.1.5 Oral Evidence**

It was recommended that further oral evidence or evidence by affidavit may be required at the discretion of the judge or magistrate before an interdict is granted. The substance of oral evidence heard must be noted.<sup>149</sup> Oral evidence is has been included as an option in terms of Section 6 (2) (b) of the 1998 Act.

#### **2.3.1.6 Service of Interdict and Sheriff's Fees**

The SALC recommends that the regulations must specify under what circumstances and how one may apply for the Sheriff's fees for the service of the interdict to be borne by the State.

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<sup>148</sup> *Op cit* note 142 at 4 Recommendation 4.

<sup>149</sup> *Op cit* note 142 at 4 Recommendation 5.

The prescribed manner of service should be retained that allows delivery of the interdict at the respondent's place of residence, work or business, to some person apparently not less than 16 years of age and apparently residing or working there or by affixing a copy to the principal door.

In addition to the interdict, the copies of the initial application, supporting affidavit and, in the event of oral evidence having been heard, a note by the magistrate/judge giving particulars of the supplementary facts which emerged from such oral evidence, must also be served upon the respondent.<sup>150</sup>

This method of service of documents have been provided for in terms of Section 13 of the 1998 Act.

#### **2.3.1.7 The South African Police Services (SAPS)**

It is recommended that the Department of Justice investigate, in consultation with the SAPS, the possibility of furnishing police stations with the necessary application for interdict forms and requiring the SAPS to assist applicants with the affidavits.<sup>151</sup>

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<sup>150</sup> *Op cit* note 142 at 5 Recommendation 6.

<sup>151</sup> *Op cit* note 142 at 5 Recommendation 8.

Procedure for after hours application should be kept in abeyance until clarity is obtained on the question of empowering the SAPS to apply for an interdict on behalf of the applicant. Steps must be taken to promote the efficiency of the after hours system which has apparently been set up.<sup>152</sup>

The 1998 Act has listed duties that the SAP have to comply with in terms of Section 2 of the Act.

#### **2.3.1.8 Appeal and Review**

It is recommended that the legislation provide that the provisions in respect of appeal and review contained in the Magistrates' Court Act 32 of 1944, the Supreme Court Act 59 of 1959, and the Criminal Procedure Act 51 of 1977, shall apply to the interdict proceedings and criminal investigation.<sup>153</sup> This has been included in the 1998 Act in terms of Section 16.

#### **2.3.1.9 Definition of Domestic Violence**

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<sup>152</sup> *Op cit* note 142 at 6 Recommendation 11.

<sup>153</sup> *Op cit* note 142 at 5 Recommendation 9.



The SALC recommended that the definition of domestic violence should include but not, be limited to:

- (i) physical abuse or threat of physical abuse;
- (ii) sexual abuse or threat of sexual abuse;
- (iii) intimidation;
- (iv) harassment;
- (v) destruction of property;

In addition the police officers must take into account that a single act may amount to domestic violence and that a number of acts that form part of a pattern of behaviour may amount to domestic violence, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.<sup>154</sup> The 1998 Act has included the above list to the definition of types of domestic violence.

#### **2.3.1.10 Counselling**

The SALC recommends that the legislation should not provide for state sponsored mandatory rehabilitation and counselling programmes for perpetrators of domestic violence.<sup>155</sup> The 1998 has not provided for counselling programmes to be implemented.

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<sup>154</sup> *Op cit* note 142 at 6 Recommendation 10.

<sup>155</sup> *Op cit* note 142 at 6 Recommendation 12.

### 2.3.1.11 Eviction

It is recommended that the court be empowered to exclude the respondent from the shared residence. A shared residence is to be defined as the residence in which the applicant and respondent (whether the same or opposite gender) live or lived together in a marriage relationship or in a relationship in the mature of marriage, although they are not, or were not married to each other, or are not able to be married to each other, regardless of whether the parties are solely or jointly entitled to occupy the residence.

The court should be empowered to impose on either party obligations regarding the discharge of rent or mortgage instalments. The court's discretion may only be exercised after taking into account the parties' financial resources and any financial obligations which they have or are likely to have in the foreseeable future, including any financial obligations to each other or to any child.<sup>156</sup>

It is recommended that, the court, in addition to having the power to exclude the respondent from the shared residence, shall also be empowered to prohibit the respondent to:

- (i) enter a specified part of the shared residence or a specified area in which the shared residence is situated; or
- (ii) prevent the applicant or any relevant child who ordinarily lives or lived in the shared residence from entering or remaining in the shared residence or a specified part of the

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<sup>156</sup> *Op cit* note 142 at 6-7 Recommendation 13.

shared residence.<sup>157</sup>

This has been provided for in terms of Section 7 of the 1998 Act.

#### **2.3.1.12 Amendment of the interdict**

The SALC recommends that the applicant apply for the amendment of the interdict, but not for the setting aside of the interdict or allow for any other person who has a material interest in the matter to apply for the amendment of the interdict on behalf of the applicant.<sup>158</sup>

The 1998 Act has allowed for the amending and setting aside of the interdict in terms of Section 10 of the Act.

#### **2.3.1.13 Offence**

It is recommended that the contravention of the conditions of the interdict granted in terms of domestic violence legislation be an offence which is prosecuted in the criminal court.<sup>159</sup>

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<sup>157</sup> *Op cit* note 142 at 8 Recommendation 17.

<sup>158</sup> *Op cit* note 142 at 7 Recommendation 14.

<sup>159</sup> *Op cit* note 142 at 7 Recommendation 15.

#### **2.3.1.14 Executing a Warrant of Arrest**

It is recommended that the applicant be issued with a duplicate warrant of arrest on conclusion of the prosecution of the respondent for the offence of contravening the conditions of the interdict.

A peace officer may execute a warrant of arrest if he has reasonable cause for suspecting that-

- (i) an interdict is in force;
- (ii) a warrant for the arrest of the respondent has been issued;
- (iii) the respondent has breached any of the conditions regarding compliance with the interdict.

The peace officer who executed the warrant of arrest obtain an affidavit from the applicant as soon as possible after the execution of the warrant of arrest.<sup>160</sup> The executing of the warrant of arrest is dealt with in terms of Section 8 of the 1998 Act.

#### **2.3.1.15 Types of Abuse**

It is recommended that the court may grant an interdict against the respondent prohibiting

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<sup>160</sup> *Op cit* note 142 at 8 Recommendation 16.

the respondent to-

- (i) physically or sexually abuse the applicant;
- (ii) threaten to physically or sexually abuse the applicant;
- (iii) intimidate the applicant;
- (iv) harass the applicant;
- (v) damage property in which the applicant may have an interest;
- (vi) threaten to damage property in which the applicant may have an interest;
- (vii) enter, watch, loiter near, or prevent or hinder access to or from, the applicant's place of residence, business, employment, educational institution, or any other place that the applicant visits often;
- (viii) follow the applicant or stop or approach the applicant in any place;
- (ix) make any contact with the applicant by telephone or any form of written communication.
- (x) enlists the help of another person to act in any of the above ways.<sup>161</sup>

#### **2.3.1.16 Powers of the Court**

The SALC recommends that the court be empowered to:

- \* impose any special conditions that are reasonably necessary to protect and provide for the safety of the applicant or any relevant child.

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<sup>161</sup> *Op cit* note 142 at 8 Recommendation 17.

\* order that all or any of the prohibitions or conditions contained in the interdict apply for the benefit of any relevant child.<sup>162</sup>

\* grant, together with the interdict, maintenance, custody and access orders;<sup>163</sup>

The courts powers have been included in the 1998 Act in terms of Section 7.

#### **2.3.1.17 Costs**

It is recommended by the SALC that the legislation should not provide for a costs order to be granted at any stage of the proceedings.<sup>164</sup>

The 1998 Act has dealt with the issue of costs in terms of Section 15 of the Act.

#### **2.3.1.18 *In Camera* Proceedings**

It is recommended that the proceedings shall, in except in so far as the court may in special

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<sup>162</sup> *Ibid.*

<sup>163</sup> *Op cit* note 142 at 9 Recommendation 18.

<sup>164</sup> *Op cit* note 142 at 9 Recommendation 19.

cases otherwise direct, be held *in camera*.<sup>165</sup> This has been provided for in terms of Section 11 (1)(b) of the 1998 Act.

### **2.3.1.19 Marital Rape**

The SALC recommends that the legislation incorporates section 5 of the 1993 Act (rape of wife by her husband) until such time as the law of rape is reviewed.<sup>166</sup>

### **2.3.1.20 Department of Justice**

The SALC recommends that the Department of Justice should:

- \* investigate the need for consultation between the Magistrate/Judge and the Family Advocate in domestic violence proceeding.<sup>167</sup>
- \* initiate programmes aimed at ensuring that:
  - (i) the criminality of domestic violence is recognised;
  - (ii) the criminal justice system holds offenders accountable for the criminal behaviour, and
  - (iii) procedures relating to police, prosecution and court practice take account of the special dynamics of domestic violence and the special vulnerability of the victim.

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<sup>165</sup> *Op cit* note 142 at 9 Recommendation 20.

<sup>166</sup> *Op cit* note 142 at 9 Recommendation 21.

<sup>167</sup> *Op cit* note 142 at 9 Recommendation 22.

This discussion paper was put up for comment and as a result of the recommendations made the Domestic Violence Bill<sup>168</sup> was created.

### 2.3.2 Comparison between the Domestic Violence Bill and the 1993 Act

The Domestic Violence Bill was created in an attempt to address the inadequacies of the Prevention of Family Violence Act 133 of 1993.

The Bill acknowledges that domestic violence is a serious crime against society and that the majority of victims affected are women.<sup>169</sup>

The 1993 Act is too narrow in it's scope and the Bill offers a more progressive and wider scope.

The Bill allows anyone to apply for a protection order on behalf of the victim, because in most cases the victim is disempowered for some time after the violent incident.<sup>170</sup> Courts can issue suspended warrants to immediately *arrest the respondent when he breaches the*

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<sup>168</sup> W75-98.

<sup>169</sup> Preamble to the Bill.

<sup>170</sup> Clause 4(4).



protection order.<sup>171</sup> The 1993 Act provides limited relief to victims.

The Bill offers protection to any victim who is in a domestic relationship and goes on to define a domestic relationship.<sup>172</sup> The 1993 Act applies only to 'parties to a marriage' and does not define family violence.

The Bill provides that peace officers may now arrest anyone reasonably suspected of a domestic violence crime at the scene of the crime.<sup>173</sup> Previously women were left at the scene at the mercy of the assailant.

The Bill empowers the court to ensure that people accused of domestic violence pay the rent and other expenses for their dependants.<sup>174</sup> Dangerous weapons may also be seized at the scenes of domestic violence.<sup>175</sup>

In terms of the Bill, the perpetrators of domestic violence are regarded as violent criminals as the period of imprisonment has increased from a maximum of one year (under the 1993

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<sup>171</sup> Clause 11(1).

<sup>172</sup> Clause 1(vi).

<sup>173</sup> Clause 3.

<sup>174</sup> Clause 6(4).

<sup>175</sup> Clause 7.

Act) to a maximum of five years.<sup>176</sup>

The Bill thus ensures that the domestic violence cases must be handled with the sensitivity and credibility it deserves.

## **2.4 The Domestic Violence Act 116 of 1998**

The Domestic Violence Act 116 of 1998 was welcomed as a more effective means to combat domestic violence. The Act declared that Sections 1,2,3,6,and 7 of the Prevention of Family Violence Act 1993 were repealed.<sup>177</sup> This in effect meant that the substance of the 1993 Act is no longer applicable and in fact was repealed by the Domestic Violence Act of 1998.

There is a vast difference between the 1993 Act and the 1998 Act. In comparison the 1993 Act does not come across as a well-thought out piece of legislation due to its impracticality in aiding women affected by domestic violence whereas the 1998 Act provides guidelines and ensures that the abused women's rights are protected at all levels in the criminal justice system.

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<sup>176</sup> Clause 20.

<sup>177</sup> s 21.

The 1998 Act is broad and clearly defines concepts such as a domestic relationship as well as what actually constitutes domestic violence. In addition, jurisdiction of the courts are clearly distinguished and there lies no confusion as to the right to legal representation as both parties are entitled to this right.<sup>178</sup> Other changes include that a suspect committing an act of domestic violence can be arrested without a warrant and the extent of punishment that could be handed down has also increased. The parties may also be entitled to costs<sup>179</sup> at the discretion of the court and will be allowed appeal and review proceedings.<sup>180</sup> These changes were made in the hope to provide adequate protection to the people experiencing abuse in domestic violent relationships.

The 1998 Act consist of twenty-two sections which essentially consists of the definitions of terms in the Act such as 'domestic violence'<sup>181</sup>; the duty to assist any inform complainant of rights<sup>182</sup>; arrest by peace officer without warrant<sup>183</sup>; application for protection order<sup>184</sup>; consideration of application and issuing of interim protection order<sup>185</sup>; issuing of protection

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<sup>178</sup> s 14.

<sup>179</sup> s 15.

<sup>180</sup> s 16.

<sup>181</sup> s 1.

<sup>182</sup> s 2.

<sup>183</sup> s 3.

<sup>184</sup> s 4.

<sup>185</sup> s 5.

order<sup>186</sup>; court's powers in respect of protection order<sup>187</sup>; warrant of arrest upon issuing of protection order<sup>188</sup>; seizure of arms and dangerous weapons<sup>189</sup>; variation or setting aside of protection order<sup>190</sup>; attendance of proceedings and prohibition of publication of certain information<sup>191</sup>; jurisdiction<sup>192</sup>; service of documents<sup>193</sup>; legal representation<sup>194</sup>; costs<sup>195</sup>; appeal and review<sup>196</sup>; offences<sup>197</sup>; application of Act by prosecuting authority and members of South African Police Service<sup>198</sup>; regulations<sup>199</sup> and repeal of laws and savings<sup>200</sup>.

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<sup>186</sup> s 6.

<sup>187</sup> s 7.

<sup>188</sup> s 8.

<sup>189</sup> s 9.

<sup>190</sup> s 10.

<sup>191</sup> s 11.

<sup>192</sup> s 12.

<sup>193</sup> s 13.

<sup>194</sup> s 14.

<sup>195</sup> s 15.

<sup>196</sup> s 16.

<sup>197</sup> s 17.

<sup>198</sup> s 18.

<sup>199</sup> s 19.

<sup>200</sup> s 20.

### 2.4.1 Who Can Apply for a Protection Order?

The abused person (the complainant)<sup>201</sup> can obtain a protection order against her abuser (the respondent). A complainant<sup>202</sup> is described as any person who is or has been in a domestic relationship with a respondent and who has been subjected to any acts of domestic violence, including a child in the care of the complainant. A respondent<sup>203</sup> is one who is or was in a domestic relationship with the complainant and has committed acts of domestic violence against the complainant.

The definition of the complainant and respondent extends beyond parties to a marriage only. In terms of the 1998 Act parties to a domestic relationship<sup>204</sup> include:

- \* married couples (including religious or customary marriages);
- \* divorced or separated couples;
- \* couples who are living together (including same-sex couples);
- \* parents or guardians of a child;
- \* children;
- \* family members (including extended family and adopted family);
- \* couples who are engaged, dating or in a customary relationship.

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<sup>201</sup> s 4(1).

<sup>202</sup> s 1 definitions.

<sup>203</sup> *Ibid.*

<sup>204</sup> *Ibid.*

The person bringing an application for the protection order may extend so far as any person who has a material interest in the matter, which may include a teacher, social worker or health service provider, provided that the complainant consents in writing unless the complainant is a minor; mentally retarded; unconscious; or a person whom the court is satisfied is unable to provide the required consent.<sup>205</sup>

A minor or any person acting on his/her behalf may apply for a protection order without the assistance of a parent guardian or any other person.<sup>206</sup> This is necessary where the minor is in need of protection against members of the household.

**2.4.2 Application for a Protection Order**

The complainant may apply for a protection order at a magistrate’s court or family court where:

- (a) the complainant permanently or temporarily resides, carries on business or is employed;<sup>207</sup>
- (b) the respondent resides, carries on business or is employed;<sup>208</sup> or

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<sup>205</sup> s 4(3).  
<sup>206</sup> s 4(4).  
<sup>207</sup> s 12(1)(a).  
<sup>208</sup> s 12(1)(b).

(c) the cause of action arose<sup>209</sup>.

The abused woman therefore does not need to be permanently resident within the courts jurisdiction and if living in a shelter, may be able to apply for a protection order at the nearest court. The protection order is enforceable throughout the Republic.<sup>210</sup> The complainant may bring the application outside court hours or on a day that is not a court day only if she has substantial reason to and the court is satisfied that the complainant may suffer undue hardship if the application is not dealt with immediately.<sup>211</sup>

The application may be accompanied by supporting affidavits by persons who have knowledge of the matter.<sup>212</sup> The application and affidavits must be lodged with the clerk of the court.<sup>213</sup>

The court must then, as soon as reasonably possible, consider the application as well as any additional evidence which may include oral evidence or affidavits.<sup>214</sup> The court may issue an interim protection order against the respondent only if it is satisfied that there is

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<sup>209</sup> s 12(1)(c).

<sup>210</sup> s 12(3).

<sup>211</sup> s 4(5).

<sup>212</sup> s 4(6).

<sup>213</sup> s 4(7).

<sup>214</sup> s 5(1).

*prima facie* evidence that:

- (a) the respondent is committing, or has committed an act of domestic violence;<sup>215</sup> and
- (b) undue hardship may be suffered by the complainant as a result of such domestic violence if a protection order is not issued immediately.<sup>216</sup>

The interim protection order<sup>217</sup> as well as a copy of the application and the record of any evidence<sup>218</sup> must be served on the respondent calling upon him, on the specified date, to give reasons as to why the protection order should not be issued.<sup>219</sup>

Even if the court is not satisfied that there is *prima facie* evidence of domestic violence, the clerk must serve copies of the application and supporting affidavits upon the respondent who will then have to, on a specified return date, give reasons as to why the protection order should not be issued.<sup>220</sup>

Therefore whether or not the complainant is able to show the court that the respondent has committed some act of domestic violence, the respondent will still have to show cause as

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<sup>215</sup> s 5(2)(a).

<sup>216</sup> s 5(2)(b).

<sup>217</sup> Form 4.

<sup>218</sup> s 5(3)(b).

<sup>219</sup> s 5(3)(a).

<sup>220</sup> s 5(4).



to why the protection order should not be issued.

The interim protection order only becomes effective once it has been served on the respondent.<sup>221</sup> A copy of the interim protection order and the original warrant of arrest must also be served on the complainant.<sup>222</sup>

### **2.4.3 Unopposed Applications**

A protection order may be granted<sup>223</sup> in the absence of the respondent if he does not appear on the return date and the court is satisfied that the application had been properly served on the respondent and that prima facie evidence exists that the respondent has committed an act of domestic violence.

### **2.4.4 Opposed Applications**

Should the respondent appear on the return date and opposes the application<sup>224</sup> then the court must consider all the evidence including supporting affidavits and oral evidence which

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<sup>221</sup> s 5(6).

<sup>222</sup> s 5(7)(a) and (b).

<sup>223</sup> s 6(1)(a) and (b).

<sup>224</sup> s 6(2)(a) and (b).

will form part of the record. Witnesses may be examined upon request by the court or complainant.<sup>225</sup> However, a respondent who does not have a legal representative is not entitled to cross-examine directly a person who is in a domestic relationship with the respondent.<sup>226</sup> The respondent may put any question to the witness via the court.<sup>227</sup> The court will then repeat their interpretation of the question to the respondent to ensure the accuracy of the question then put to the witness. Thus the manner in which the respondents questions are put to the witnesses by the court may be less intimidating.

After hearing all the evidence before it, the court may issue a protection order if it finds, on a balance of probabilities that the respondent has committed an act of domestic violence.<sup>228</sup> The clerk of the court must then serve the original protection order upon the respondent and a copy of the order as well as the warrant of arrest must be served on the complainant.<sup>229</sup> Copies of the order and the warrant of arrest must then be served to the police station of the complainant's choice.<sup>230</sup>

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<sup>225</sup> s 6(3).

<sup>226</sup> s 6(3)(a).

<sup>227</sup> s 6(3)(b).

<sup>228</sup> s 6(4).

<sup>229</sup> s 6(5)(a) and (b).

<sup>230</sup> s 6(6).

Another warrant of arrest may be issued to the complainant if the first one has been executed or cancelled or lost or destroyed, if the complainant files an affidavit explaining why the warrant is required for her protection.<sup>231</sup>

The protection order remains in effect until it is set aside. It is not automatically set aside pending appeal.<sup>232</sup>

#### **2.4.5 Attendance at Court Proceedings**

Attendance at the court proceedings are restricted to:

- (a) officers of the court;
- (b) parties to the proceedings;
- (c) any person bringing an application on behalf of the complainant;
- (d) any legal representative of the parties;
- (e) witnesses;
- (f) not more than 3 people each who would provide support to the complainant and respondent respectively;
- (g) any other person whom the court permits.<sup>233</sup>

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<sup>231</sup> s 8(3)(a) and (b).

<sup>232</sup> s 6(7).

<sup>233</sup> s11(1)(a)-(h).

If in the interest of justice the court may exclude any person attending the proceedings.

#### **2.4.6 Powers of the Court**

The Domestic Violence Act of 1998 allows the courts extensive powers in respect of the protection order. In terms of Section 7 of the Act the court may prohibit the respondent from:

- (i) committing any act of domestic violence;
- (ii) getting assistance from another person to commit any such act;
- (iii) entering a residence shared by the complainant and the respondent if it is in the best interest of the complainant;
- (iv) entering a specified part of such a shared residence;
- (v) entering the complainant's residence;
- (vi) entering the complainant's place of employment;
- (vii) preventing the complainant who ordinarily lives or lived in a shared residence from entering or remaining in the shared residence or a specified part of the shared residence; or
- (viii) committing any other act as specified in the protection order.<sup>234</sup>

These listed factors might be necessary to prevent the respondent from harming the

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<sup>234</sup> s 7(1)(a)-(h).

complainant and to ensure protection of the complainant. In addition to these factors the court may make the following conditions to protect and provide for the safety, health or wellbeing of the complainant<sup>235</sup>:

- to seize any arm or dangerous weapon in the possession or under the control of the respondent;<sup>236</sup>
- a peace officer may accompany the complainant to a specified place to assist with regards to the collection of personal belongings;<sup>237</sup>
- the respondent may be obliged to continue rent or mortgage payments;<sup>238</sup>
- the respondent may be ordered to pay emergency monetary relief;<sup>239</sup>
- the physical address of the complainant may be omitted from the protection order;<sup>240</sup> may refuse the respondent contact with any child if it is in that child's best interest;<sup>241</sup>
- order contact with such child if it is appropriate;<sup>242</sup>

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<sup>235</sup> s 7(2).

<sup>236</sup> s 7(2)(a).

<sup>237</sup> s 7(2)(b).

<sup>238</sup> s 7(3).

<sup>239</sup> s 7(4).

<sup>240</sup> s 7(5)(a).

<sup>241</sup> s 7(6)(a).

<sup>242</sup> s 7(6)(b).

The court may issue a protection order even if there are other legal remedies available to the complainant.<sup>243</sup> There may be instances where the court believes that, in the interest of justice, a certain condition in the protection order should be dealt with further, in terms of any other Act.<sup>244</sup> In such cases, the condition will remain in force for a limited period of time until the party concerned seeks relief for that condition in terms of the other Act.

### 2.4.7 Warrant of Arrest

To execute the warrant of arrest the complainant must hand the warrant and an affidavit stating which of the conditions the respondent has contravened, to the police.<sup>245</sup> The respondent will only be arrested if the police officer believes that there are reasonable grounds to suspect that the complainant may suffer imminent harm.<sup>246</sup> They must consider the risk to the safety, health or wellbeing of the complainant; the seriousness of the conduct; and the length of time since the alleged breach occurred.<sup>247</sup> The police must further inform the complainant of her right and process to laying a criminal charge against

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<sup>243</sup> s 7(7)(a).

<sup>244</sup> s 7(7)(b).

<sup>245</sup> s 8(4)(a).

<sup>246</sup> s 8(4)(b).

<sup>247</sup> s 8(5).

the respondent.<sup>248</sup>

There may be instances where the police officer does not believe that there are reasonable grounds to arrest the respondent. In such instances, the police officer must then hand a notice to the respondent. This notice calls upon the respondent to appear in court on a certain day and time on a charge of committing an act of domestic violence.<sup>249</sup>

A duplicate of the notice must be handed to the clerk of the court which would serve as *prima facie* proof that the original was handed to the respondent.<sup>250</sup>

This procedure tries to eliminate the apathetic attitude that police officers had about domestic violence being family issues and should not involve the police. By handing the respondent this notice, the police do not have a wide discretion when it comes arresting the respondent on the charge of domestic violence. Even if the police officer does not believe that there are no grounds to execute the warrant the respondent will still have to appear in court.

If a police officer fails to comply with any order in terms of this Act, their actions would constitute a misconduct and will be subjected to disciplinary procedures under the South

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<sup>248</sup> s 8(6).

<sup>249</sup> s 8(4)(c).

<sup>250</sup> s 8(4)(d).

African Police Service Act, 1995.<sup>251</sup>

#### 2.4.8 Seizure of Arms and Dangerous Weapons

The court may order that the police confiscate any arm or dangerous weapon in the possession of the respondent if there is sufficient evidence that the respondent has threatened to kill or injure himself or any other person in the domestic relationship, whether by use of the weapon or not.<sup>252</sup> The court will also consider the respondent's state of mind or mental condition; inclination to violence or use of or dependence on intoxicating liquor or drugs, to determine whether it would be in the respondent's or any other person's best interest if such weapons be confiscated.<sup>253</sup>

The weapon will remain in police custody for a period of time as determined by the court.<sup>254</sup> The weapon may be returned at the court's discretion.<sup>255</sup> The court may order that such weapon be confiscated to the state if it is satisfied that its value is less than R200 or if the return of the weapon has not been ordered within 12 months after it has been seized or that

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<sup>251</sup> s 18(4)(a).

<sup>252</sup> s 9(1)(a).

<sup>253</sup> s 9(1)(b).

<sup>254</sup> s 9(3)(a).

<sup>255</sup> s 9(3)(b).



it would be in the interest of any person if returned.<sup>256</sup>

#### **2.4.9 Amending or Setting Aside the Protection Order**

An application to set aside or vary the protection order can be brought by either the complainant or respondent and a copy of the notice must be served upon the opposing party and the court.<sup>257</sup> The court must be satisfied that the application has been made freely and voluntarily and that good cause is shown for varying or setting aside the protection order.<sup>258</sup> A notice of the variation or setting aside must then be forwarded to the complainant and respondent by the clerk of the court.<sup>259</sup>

#### **2.4.10 Penalties**

Any person who fails to comply with any condition by the court and protection order or makes a wilful false statement in an affidavit will be committing an offence in terms of the Domestic Violence Act and will be subject to penalties.

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<sup>256</sup> s 9(3)(b)(i)-(iii).

<sup>257</sup> s 10(1).

<sup>258</sup> s 10(2).

<sup>259</sup> s 10(3).

Penalties range from a fine or imprisonment for a period not exceeding 5 years or both if the person has contravened any condition in the protection order in that he has committed an act of domestic violence.<sup>260</sup>

Where a person makes an affidavit in terms of Section 8 (4)(a) relaying events in which the respondent has contravened the conditions of the protection order and these accounts of the events are false or where a person contravenes Section 11 (2)(a) and (b) then that person will be subject to a fine or imprisonment not exceeding 2 years or both for such offence.<sup>261</sup>

## **2.5 Criticisms of the 1998 Act and Recommendations for Effective Procedure**

The 1998 Act appears to be a well thought out Act taking into consideration the submissions made by the South African Law Commission and in doing so trying to eradicate the shortfalls presented by the Prevention of Family Violence Act of 1993.

Issues such as the *in camera* proceedings, the extent of the protection order, the powers of the court and the severity of the penalties imposed, entrenched in the 1998 were welcomed.

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<sup>260</sup> s 17.

<sup>261</sup> *Ibid.*

However, the problem lies not with the Act *per se* but rather in its implementation. In order for women to have the best protection that the Act can afford, all members of the criminal justice system need to have a thorough appreciation of this Act as well an understanding of what their roles are when dealing with domestic violence cases.

### **2.5.1 Inadequate Policing**

The police have a crucial role to play in their assistance of the domestic violence victim. They are the victim's first port of call. Therefore they should be able to be properly equipped to handle domestic violence matters and not discard them as being a 'private matter'.

The Kwa-Zulu Network on Violence against Women<sup>262</sup> has listed various problems that they have encountered with regard to the police officers' handling of domestic violence cases:

- \* in adequate police training: the police officers should undergo gender sensitive training whereby they would be able to understand the needs of the victim and what their roles are in protecting her. They should not deter victims from dropping the abuse charge.
- \* Attitudes of the police officers need to change: They cannot be judgmental. They need

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<sup>262</sup> Telephonic interview with Ms C Edwards-Provincial Co-ordinator of the Kwa-Zulu Natal Network on Violence Against Women.

to take the calls for help seriously and show the victim the respect they deserve.

- \* inability to communicate with the victim: the charge office should be equipped with staff who are able to communicate in the language of the victim.

- \* intimidating charge office: the charge office should have more female officers to handle domestic violence cases. The reason being that women victims are more comfortable explaining their situation with a fellow female rather than face an intimidating male officer who does not take her or the crime of domestic violence seriously. The police should also involve women from the community or non governmental agencies (NGO's) to assist at the charge office.

- \* The police need to network with other organisations in the community, for example, NGO's, counselors, social workers to get a perspective on the type of assistance that can be provided to the abused woman. The police should disseminate information to the public as to the seriousness of domestic violence and what they as a member of the criminal justice system can do to help the victims in need.

The police should also liaise with court officials as regards the filing of the protection order. A copy of the order is usually given to the respondent and another copy to the complaint. The complainant has to furnish her copy to the police if she calls them for help. In the advent that her copy is found and destroyed by her abuser, the police should be able to

obtain a duplicate copy from the clerk of the court. In this way all is not lost if the complainant is unable to produce her protection order due to it being destroyed.

### 2.5.2 Courts

For the courts to function efficiently adequate training must be given to the clerks, prosecutors and magistrates handling domestic violence cases. The court itself should be structured in a victim-friendly manner that would make it simple for the victim to know which office to go to in order to obtain the protection order.

The clerks should be approachable and should be able to provide the correct information to the victims as to what their rights are. They should also be given a list of the community centres, counselors , shelters and police stations nearest to where they live.

One of the problems encountered is that the time period between the interim order and the final protection order is too long.<sup>263</sup> In some cases the period can be as long as three months. The finalisation of the protection order needs to be a speedy one and the backlog of cases should be dealt with timeously.

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<sup>263</sup> *Ibid.*

Counselling for offenders should also be required.<sup>264</sup> This should be incorporated into the sentencing of the abuser. It is not only the abused woman that requires counselling. Programmes should be set up to enlighten abusers as to the error of their ways and provide some kind of rehabilitation for the offenders. The court should refer the abuser for counselling as part of his sentence.

For the 1998 Act to survive any scrutiny, all members of the Criminal Justice System need to work together and perform and carry out their required duties. It involves a network of government organisations as well as community organisations to communicate with each other in order to provide the best protection possible for the abused victim. An understanding of the needs of the victim and the nature of the Act is required in order to assist the victim. If all the organisations work together to end domestic violence, this might send a message to abusers and potential abusers that this type of violence is not to be tolerated.

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<sup>264</sup> *Ibid.*

## CHAPTER THREE

### USE OF MEDIATION IN DOMESTIC VIOLENCE DISPUTES

The widespread violence of women in domestic relationships is alarming. South Africa has tried to curb this violence by introducing the Prevention of Family Violence Act<sup>265</sup>. However, as stated previously, this Act, though a breakthrough for abused women, has received much criticism as to its ineffectiveness in helping these women.

The Domestic Violence Act<sup>266</sup> offers strong protection for women against abuse. However the Act does not consider the issue of mediation which may also be use as an effective method in trying to restore an amicable relationship between the parties. This is not to say that mediation should be used as a method to reconcile the parties, but rather, be used as a means to move away from the abusive behaviour that one party may show to another. In this way, mediation would be used as a mechanism to end the abuse.

Mediation is a fairly new concept in the new South Africa and is most often used in disputes of labour matters. It is an accepted form of resolving disputes and has evolved to cover

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<sup>265</sup> Act 133 of 1993.

<sup>266</sup> Act 116 of 1998.

areas of family issues as well.<sup>267</sup> It is used quite often in divorce proceedings where spouses are contesting issues such as custody and property.<sup>268</sup>

Scott-Macnab<sup>269</sup>, a leading writer on mediation in South Africa, opines that:

'It is accepted that family mediation is here to stay; recent developments in the private and public mediation fields in South Africa have shown that interest is firmly entrenched in academe and in the private practice sphere, and we must now accept developments as they take place,...'

Universally, the issue of mediation used in family violence, is a controversial one.<sup>270</sup> Much criticism has been received on this method in aiding the family violence issue.<sup>271</sup> However, the use of mediation in domestic violence disputes has not been developed.<sup>272</sup> We have

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<sup>267</sup> See Bosman-Swanepoel H and Fick A and Strydom N *Custody and Visitation Disputes: A Practical Guide* Butterworths Publishers, Durban, 1998 at 101.

<sup>268</sup> *Ibid.*

<sup>269</sup> Scott-Macnab D 'Mediation and Family Violence' *South African Law Journal* 109 1992 at 282.

<sup>270</sup> *Ibid.*; Rowe K 'The Limits of the Neighbourhood Justice Centre: Why Domestic Violence cases should not be Mediated' 1985 (34) *Emory Law Journal* at 855; Clerke R 'Mediation and Legal Help' 30 August 2000 *Family Law* at 574; Scott-Macnab 'Mediation in the Family Context' 1998 (105) *South African Law Journal* 709 at 722.

<sup>271</sup> See 5.3.

<sup>272</sup> See Scott-Macnab *op cit* 282.



no law governing this method of resolving domestic violence disputes and no real guideline as to how to go about the use of mediation in domestic violence issues.

It is submitted that since the use of mediation is a new concept to South Africa it should not be ruled out entirely, but rather, we should work on guidelines that would be suitable to the people affected by domestic abuse in our country. Perhaps there are legitimate means of using mediation that would serve as a positive effect to people suffering from abuse and to stop the abuse totally. '... mediation is here to stay as part of the spectrum of resources available for couples and families going through relationship breakdowns and the period of transition which must inevitably follow.'<sup>273</sup>

### 3.1 Definition Of Mediation

Some authors<sup>274</sup> define mediation as being part of the negotiating process. However, Scott-Macnab opines that 'mediation must be distinguished from negotiation, where usually lawyers or third parties hammer out compromises; and arbitration, where an adjudicator's decision is final.'<sup>275</sup>

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<sup>273</sup> Clerke R *op cit* 574.

<sup>274</sup> See Halpern A *Negotiating Skills* Butterworths, Durban, 1997 at 69; Pretorius P ed *Dispute Resolution* Juta & Co, Kenwyn, 1993 at 39.

<sup>275</sup> Scott-Macnab D 'Mediation in the Family Context' 1988 (105) *South African Law Journal* at 715.

It is submitted that mediation does have an element of negotiation in it but does not go so far as to determine the outcome of the session and the mediator does not make decisions for the parties.

Mediation is a process whereby parties to a dispute are assisted by a third party (the mediator) who helps them reach decisions on issues of disputes which are amenable to both parties.<sup>276</sup> The mediator, from an objective position, helps the parties gain a clear perspective on how to deal with the issues at hand.<sup>277</sup> The decisions are then made by the parties themselves as they would have to live with and abide by their own decision.

Mediation exists in two forms- facilitative and evaluative:

'Where the facilitative form is used, the mediator does no more than help the parties communicate with each other so that they can reach agreement. In these cases the mediator acts largely to defuse anger and frustration and divert confrontation. Where evaluation mediation is used, the mediator learns the facts of the case, each party's views and each party's position, and then expresses to each party a view of the overall merits as he or she sees them.'<sup>278</sup>

It is submitted that the facilitative method to mediation would be most appropriate when

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<sup>276</sup> See Pretorius P *ed op cit* 39.

<sup>277</sup> Clerke R *op cit* 574.

<sup>278</sup> Halpern A *op cit* 70.

dealing with matters concerning domestic violence. Couples experiencing violence in their relationship need to find a way to move from the violent behaviour and the mediator should be able to facilitate this transition.

Mediation offers parties a platform to openly communicate and to express the conflict between themselves and explore the root of these disputes and thus understand their differences.<sup>279</sup> Mediation is also said to 'offer a risk free means to learn more about the situation and about the other side's point of view.'<sup>280</sup>

### 3.2 The Role Of The Mediator

The mediator is a neutral third party who guides the parties to the dispute to focus on the issues at hand. They cannot allow their own bias to interfere with the decision-making process. 'They must be perceived as fair and even handed in their treatment of the parties as well as trustworthy or they face the prospect of rejection.'<sup>281</sup> 'The mediator operates as a "facilitator" who has no personal stake in the dispute, but who does have a personal stake in helping the parties to achieve a settlement.'<sup>282</sup>

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<sup>279</sup> See Pretorius P ed *op cit* 39-40.

<sup>280</sup> Halpern A *op cit* 69.

<sup>281</sup> Pretorius P ed *op cit* 41.

<sup>282</sup> Ibid 70.

A mediator may hold meetings with both parties or have separate meetings with the individual (a caucus).<sup>283</sup> In a caucus, the mediator will discuss strengths, weaknesses and fears that a party may have. The mediator may lend suggestion as to how to combat these fears. Meetings held in caucuses are strictly confidential between the mediator and that individual party.

The mediator's role is to help parties reduce the anger and aggression that they may show towards each other and to stop the violence. To complete this task the mediator should have an understanding of the couple's behavioural patterns and what causes the abuser to react in the way that he does.<sup>284</sup>

According to Halpern the mediator will thus:

'enable both sides to define and clarify their positions and objectives as they listen to and disentangle a mixture of fact, emotion and prejudice, perception, assumption and opinion. Mediators need to be able to think creatively. Mediators have to work to build trust, have to be able to use their personality, convey human warmth, sympathy and have a sense of humor. Mediators have to be professionals in the sense of having absolute integrity, being impartial at all times and trained.'<sup>285</sup>

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<sup>283</sup> See Newman P *Alternative Dispute Resolution* CLT Professional Publishing, Hertfordshire, 1999 at 40.

<sup>284</sup> *Ibid.*

<sup>285</sup> Halpern A *op cit* 70.

The mediator should be able to understand the parties position and empathise if need be<sup>286</sup>. If he disagrees with a particular point of view, he must be able to convey his opinion in a least aggressive manner and without causing the parties any irritation. If the party changes his point of view he must do so of his own accord and not because he was bullied into doing so.

Mediators need to be patient and allow the parties to shift their stances or make their own decisions.<sup>287</sup> One mediation session may not produce instant results and therefore more than one session might be required if parties are at loggerheads with each other.

Mediators should produce self-assurance and clarity of thought.' Being able to instil a sense of confidence in the minds of the parties, with a game plan for what is to be achieved, without hectoring or obviously leading the parties. A good mediator will ask questions which are intelligent and provoke answers, rather than make speeches.'<sup>288</sup>

The mediator should be able to bring a fresh approach to resolving the dispute and propose novel solutions to be developed by the parties.

When working with parties to a domestic relationship, the mediator should take special care

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<sup>286</sup> See Newman P *op cit* 38.

<sup>287</sup> *Ibid.*

<sup>288</sup> *Ibid.*

in trying to build a relationship of trust between himself and the parties.<sup>289</sup> This would help to regain trust between the parties themselves which otherwise would have been lost. The mediator must, at all times, be in control of the session.<sup>290</sup> When dealing with issues of domestic violence the abuser may become defensive and retaliate in a manner that may jeopardize the mediation process. The mediator must be in a position to calm everyone down and avoid aggressive behaviour by laying down the ground rules at the outset of the session.

However, in the same vein mediators should be able to read into emotional behaviour. 'Mediation aspires to acknowledge the emotional and psychological dimensions of conflict more than some forms of conflict management. ... Where mediators ignore overt or underlying emotions, there is a danger that the parties might not be ready to move to a resolution, that they will find the process alienating and ungratifying, or that a settlement may later become unstuck.'<sup>291</sup>

The mediator must thus be in control of the process and act with impartiality in order for the parties to the abusive relationship to respect him and the proceedings. When all parties are focused on the proceedings there is a chance of acquiring an amicable decision.

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<sup>289</sup> See Pretorius P ed *op cit* 44.

<sup>290</sup> See Boulle L and Rycroft A *Mediation-Principles Process Practice* Butterworths Publishers, Durban, 1997 at 168.

<sup>291</sup> *Ibid.*

### 3.3 Problems Associated With Mediation In Domestic Violence Disputes

There has been an overwhelming negative response to the use of mediation as a means to domestic violence resolution. According to Boulle and Rycroft:

‘Mediation is particularly problematic in cases of domestic violence, which can result in chronic disempowerment for the victim. ...there are differences between those who argue that there can never be mediation where there is a history of domestic violence and those who argue that, subject to a range of safety precautions, victims should be able to give their informed consent to the process.’<sup>292</sup>

There is no legislation governing the conduct of mediators and the Domestic Violence Act 116 of 1998 does not cover the issue of the use of mediation as a means to resolve domestic violence disputes. As a result the issue of confidentiality and mediator's privilege has not been governed upon in South Africa. ‘In civil proceedings a mediator may be able to rely on the agreement of the parties that the contents of the mediation proceedings would be “without prejudice”. However as this privilege belongs to the parties they may waive that privilege and compel the mediator to testify.’<sup>293</sup>

Newman has listed some reasons as to why mediation may not work:

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<sup>292</sup> Boulle L and Rycroft A *op cit* 54.

<sup>293</sup> Pretorius P *ed op cit* 42.

- \*Where the dispute is centered more on law than on fact and established precedent strongly favours one party over the other;
- \*One party wishes to delay the resolution of the dispute for as long as possible;
- \* Either one or other, or even both, the parties are not acting in good faith, are happy to exaggerate or even lie to a mediator and have no real commitment to resolve the dispute;
- \*One or other of the parties believe that litigation will be a complete vindication of his position;
- \*There is inequality of bargaining positions between the parties.<sup>294</sup>

The inequality of parties to domestic violent relationship is a contentious issue as regards maintenance. Most often it is the abusive spouse that is in the dominant, controlling, and threatening position and the abused spouse, who is oppressed in this relationship is afraid to talk about the abuse for fear of further abuse.

We cannot make rash statements like the abused woman is in an unequal bargaining position. In all disputes there is always going to be one party that is not on par with the other. This occurs most often in labour disputes where the employee is not in an equal position of power to his employer's counterpart. In such a case it might be wise to hold a caucus and discuss the abuse with each of the parties. The abused spouse is more likely to be open about the abuse as she is not in the presence of her abuser.

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<sup>294</sup> Newman P *op cit* 29.



According to American writer Lerman<sup>295</sup>:

'In most disputes which reach mediation, no formal legal action has been initiated, or the criminal charges which have been filed are suspended or dismissed when the case is referred to a mediation program. In general, the agreements reached are not enforceable in court. The parties participate voluntarily in mediation (neither is under a court order to appear) and if they fail to reach an agreement, no resolution is imposed on them by the third party.'

Scott-Macnab on the other hand believes that family violence is well suited to mediation.

He believes that:

'The benefits are obvious. Instead of a criminal charge being laid, with its destructive consequences for the marriage, the parties can submit the problem for mediation. Underlying causes may be revealed and the result of the mediation may well be compensation for the victims and a non-recurrence of the behaviour in the future. The marriage, which would otherwise have foundered on such perilous rocks, might be saved.'<sup>296</sup>

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<sup>295</sup> Lerman LG 'Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women' *Harvard Women's Law Journal* 7 Spring 1984 57 at 67.

<sup>296</sup> Scott-Macnab *op cit* n8 at 722.

It is submitted that whereas mediation might be a useful method in resolving domestic violence disputes it should not be seen as a “saviour of marriage”. At the end of the day it would be the parties to the marriage making the final decisions on how to resolve the dispute and if need be, a divorce might be one of the solutions. The use of mediation in domestic disputes should not replace any legal enforcement available to the abused party but rather, should act as an aid to legal enforcement where parties are not ready to take such harsh steps. Mediation could also work side by side with legal enforcement if regulated.

The decisions that parties come to are usually drafted in a mediation agreement that both parties agree to abide by. The problem is that this agreement is not an enforceable one and thus mediation may be regarded as inadequate. In South Africa our law is not developed yet on enforcing such agreements and it is time that mediation does become an integral part of our law when dealing with domestic violence.

### **3.4 Guidelines For Mediators In Domestic Violence Disputes**

When a couple experiencing domestic violence attend mediation sessions the main focus of these sessions should be to end the violence. The mediator should not place any pressure on the parties in reaching an agreement but rather attempt to understand the extent of the violence and determine what would be the best workable outcome for the

parties themselves. A vital issue would be the abused party's safety rather than monetary or property issues. 'In addition, mediators must discard the objective of reconciling disputing parties in cases in which violence has occurred, unless the *victim* wants to maintain the relationship. Often the goal of stopping violence is entirely at odds with the goal of reconciliation; to promote reconciliation may simultaneously perpetrate violence.'<sup>297</sup>

### 3.4.1 The Screening Process

It is suggested that the couples should be screened before the actual mediation process. This screening process is conducted to determine substance of the case and whether mediation would be a suitable option and how the mediation session should be structured.<sup>298</sup> The mediation program may not be suitable if, after one session, an agreement is made that is unenforceable and does not cater adequately to the parties' needs. 'If on the other hand, mediation occurs after criminal charges are filed, and charges are deferred only as long as the abuser complies with the agreement, and compliance is carefully monitored, the program might be better equipped to handle some abuse cases. In other words, the appropriateness of domestic violence mediation depends not on what the remedy is called but on whether it is likely to offer effective protection.'<sup>299</sup>

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<sup>297</sup> Lerman G *op cit* 100.

<sup>298</sup> See Fuller J and Lyons RM 'Mediation Guidelines' 1997 33:847 *Williamette Law Review* 905 at 925.

<sup>299</sup> Lerman G *op cit* 101.

As part of the screening process the mediator should talk to each party individually about the level of abuse in the relationship.<sup>300</sup> The questions should be detailed in order to surface information of not only the recent episodes of abuse but as well as the history of abuse, the frequency, severity and what actions were taken against it.

From the outset the couple should understand the process of mediation and the consequences thereof. The possibility of a mediation agreement may be discussed and the enforceability of the agreement should be disclosed to the parties. In addition to explaining the mediation process the mediator should also discuss other options available to the parties to help them through these violent times. It is then up to the parties as to whether they would prefer to continue with mediation or if they would opt for an alternative method suitable to their needs.<sup>301</sup> The victim, however, is not obliged to restrict herself to just one method. She may, whilst attending a mediation session, also seek an interdict against her abuser which will lead to the prosecution of any crime committed.

### **3.4.2 The Mediation Hearing**

All actions, apart from mediation, taken by the abused party should be discussed in the session. The abused party should not be shunned for tainting the goals of mediation.

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<sup>300</sup> See Fuller J and Lyons RM *op cit* 924.

<sup>301</sup> *Ibid.*

Mediation should not be used as a medium by the abusive spouse to persuade the victim to abandon criminal proceedings against him.

Caucuses should be held before the joint meeting.<sup>302</sup> Here, the abused party is more likely to be open about the abuse and confident enough to relay the episodes of abuse.

She may feel less threatened as she is not as yet confronting her abuser. The abusive party on the other hand may not be open to these individual meetings as he is unable to monitor or intimidate his partner.

‘During a private meeting with the abuser, mediators may hear a distorted account of the violence; the abuser may try to persuade the mediator that the victim’s conduct was the cause of the violence. If the mediator appears to approve this explanation of the violence, he or she may undermine the effectiveness of any subsequent agreement.’<sup>303</sup>

The mediator should enquire about the violence in the relationship and encourage both parties to talk about the abuse.<sup>304</sup> Different perspectives of the violence would initially come through. It is necessary to obtain details as to the type of abuse, the frequency, severity, what triggers abusive behaviour and what can be done to stop the violence. ‘The

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<sup>302</sup> *Ibid* 926.

<sup>303</sup> Lerman G *op cit* 104.

<sup>304</sup> See Lerman G *op cit* 104.

discussion should explore who is responsible for the violence; the mediator should be clear that violent acts are the responsibility of the actor, not the victim.<sup>305</sup>

It might be necessary for the abuser to receive counseling before the mediation hearing. Counseling might help in allowing the abuser to accept responsibility for his actions and help prevent further abuse to the victim.

### 3.2.3 The Mediation Agreement

A mediation agreement should not be a forced one just to end proceedings. There are going to be some instances whereby party's do not take responsibility for their actions and as a result cannot reach an agreement.<sup>306</sup> If parties do sign an agreement under these circumstances then it would be highly unlikely that they would take such agreement seriously and abide by it. The violence would continue. The mediation hearing should thus end without such agreement. The victim in such a case may be open to other methods of seeking protection from the abuse.

If an agreement is reached, it should be solely the decision of the parties themselves as they would have to abide by the terms of the contract. The terms should be discussed in

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<sup>305</sup> *Ibid.*

<sup>306</sup> *Ibid* 106.

detail and the mediator should be certain that both parties are aware of what is expected of them in the relationship.

The terms of the agreement should be structured so as to protect the victim from further abuse. The wording should be clear. '... the victim should not agree to avoid behaviour which the abuser identifies as the cause of his violence. This implies that the violence is a shared responsibility, and secures the victim's safety only in exchange for her obedience.'<sup>307</sup>

In addition to discussing the conditions against violence, other aspects of the relationship such as property, custody and visitation rights should also be included in the agreement.

Terms to the agreement should not be based on empty promises. To ensure that both parties adhere to the terms, the consequences of the breach of such terms should also be listed in the agreement. For instance, depending on whose responsible, the party, who has breached the agreement may have to leave the home. The victim may sort criminal proceedings in order to protect herself if the abuse continues and the abuser should be aware of that. 'A mediated agreement which approximates results that could be achieved through the criminal justice system brings the mediation process a step closer to the more effective remedies developed within the law enforcement model.'<sup>308</sup>

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<sup>307</sup> *Ibid.*

<sup>308</sup> *Ibid* at 108.

To ensure enforceability of the mediation agreement the parties should periodically report back to the mediator as to their progress. If there are problems they can be dealt with as soon as they occur. Reporting back would also be useful in determining the effectiveness of the mediation used in the domestic violent dispute and whether there should be a variation to the mediation agreement.

### **3.5 Conclusion**

Domestic violence is not a topic that victims would freely talk about. In fact those who are not affected by it discard it as a 'private' matter and prefer to ignore the problem. As a result, those that are affected are stigmatised if they spoke about the abuse. South Africa has come a long way in trying to assist these victims by implementing legislation such as the Domestic Violence Act 116 of 1998.

Although we have legal protection to resort to, not all victims are ready to be put through the criminal justice system. They want workable solutions.

As stated earlier, mediation should not be used as a means to replace legal criminal protection. In fact it could work side by side with criminal proceedings. There is immense criticism as to the use of mediation in domestic violence matters. These criticisms do not go unfounded. However, South Africa has little or no experience when dealing with



mediation in a domestic violent setting. We should take heed to the criticisms of using mediation in this area of law but not rule out the use of mediation entirely.

There is a lot of groundwork to be covered in this area and extensive research should be done to determine how mediation can be used as an effective method for domestic violent disputes. Our legislation does not cater for it and we should not stop there. Perhaps it is time to investigate this method of alternate dispute resolution in the family violence setting further. A workable guideline is needed that would aid mediators and parties to a dispute. The mediation agreement should allow for some sort of enforceability to ensure legitimacy of the contract and that the parties abide by the terms of the agreement.

The problematic issues of using mediation in family violence needs to be addressed. The use of mediation is growing, workable concept that needs to be taken one step further in South Africa and victims of abuse should be allowed to turn to mediation as an option to stop or prevent further abuse.

## **CONCLUSION**

The abuse of women In South Africa is still prevalent despite the fact the existence of Acts such as the Prevention of Family Violence Act of 1993 and the later Domestic Violence Act of 1998. The Government has made some initiative legislatively, however it is the application of the Domestic Violence Act that needs some investigation.

The 1998 Act, even though well drafted, requires an adequate application of the Act by members in the criminal justice system. The Act, if not properly enforced, would be seen as a frivolous document drafted by lawmakers without proper thought to the victim's situation rather than a legitimate aid to the cause.

Therefore, there should be some amount of professionalism and understanding by the members of the criminal justice system from the social workers and police to the presiding officers in their handling of cases of a domestic violence nature. It is submitted that the government should empower a body to ensure the smooth running of the Act and that victims of abuse or organisations protecting victims have some recourse to air the complaints should they come across any party who is not adhering to the Act. This will thus ensure that there are checks and balances in place and that all members of the criminal justice system give their full co-operation to help domestic violence victims.

Thought should be given to using mediation as a means to help in domestic violence

situations. After being screened, the mediator should engage what the source of the violence is and suggest ways in which to combat it. Mediation would also be useful in discussing custody and access issues regarding the children.

The Act does not mention the use of mediation and perhaps, this aspect should have been dealt with by the drafters. This is not to say that mediation should be compulsory but rather allow the presiding officer the discretion to direct that the complainant and respondent attend mediation hearings.

The legislature alone is not going to reduce the number of domestic violence incidences. People's mind set regarding this sort of violence also need to be changed. Domestic violence is no longer just a private matter which should stay solely between the abuser and the victim. On the contrary, the violence not only affects the victim but the people that she comes into contact with as well. For example, her children may be emotionally affected by the violence in the home or her constant excuses for her bruises or staying home after a violent incident may affect her productivity at work.

Further to this, the myths which provide excuses for abusers need to be dismissed. These misconceptions, such as: 'the abuser was drunk at the time of the abusive incident', should not be tolerated. People need to be informed of these misconceptions and what the hidden reality behind it is. It is suggested that more workshops be held to keep people informed of the nature of this violence and how to look out for it and protect oneself from it. NGO's

who have counselors available could hold workshops in community centres as well as in schools and businesses. People who have information about this crime will then be able to make informed decisions as to the action they wish to take to help themselves or others in this type of situation.

Domestic violence will continue as it has done through time until drastic measures are taken to combat this type of abuse. Abused women should no longer suffer in silence and the message should be conveyed loudly and clearly to the abuser that domestic violence will no longer be tolerated.

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