

PRESS RELEASE

March 29th, 1993

AN INVITATION TO COMMENT

The Law Reform Commission of Nova Scotia is pleased to announce the release of its Discussion Paper entitled:

VIOLENCE, IN A DOMESTIC CONTEXT

which deals specifically with the legal response to spousal assaults.

The **Discussion Paper**, based on province-wide consultation, identifies fundamental failures in the way in which the legal system in Nova Scotia has responded to violence in a domestic context, most of which is experienced by women. The Commission's **Discussion Paper** sets out suggestions it is considering as to how the legal system can be made more effective for women who have been assaulted by their spouses.

The approach of the Commission to law reform for spousal assault is based on four fundamental principles: first, the most important priority of the legal system at all times should be the protection of assaulted women and their children; second, assaulted women should be treated with sensitivity and respect and provided with support services while going through the legal system; third, the legal response to spousal violence should take into account the various ethnic, racial and linguistic groups that exist in Nova Scotia; and fourth, assaulted women should not have to leave their homes or take legal action, other than asking for assistance, to receive this protection.

The Commission's research and consultation has led it to conclude that the main problems arise in the delivery of legal services, rather than any gap in the law. The **Discussion Paper** takes the view that spousal assault is violent behaviour which should always be treated as a criminal act and that the government has an obligation to ensure that the existing criminal law is fully and effectively enforced to protect women who have suffered from spousal assault. The Executive Director of the Commission commented that:

"The Commissioners felt that rather than create a non-criminal law, it would be more useful to focus on making the existing criminal law which can deal potentially with every form of spousal assault, more effective. The real problems are in enforcement, insufficient resources and education. Our Discussion Paper does, however, encourage the Attorney General, Joel Matheson, to work to ensure changes are made to the federal criminal law to make it more responsive to spousal assault, for example, by including provisions similar to the "stalking laws" in the USA."

In addition to recommending more effective enforcement of the law, the **Discussion Paper** suggests that, rather than passing a new law, several provisions in existing provincial laws dealing with property and custody should be altered to support the right of the woman to remain in her home and to ensure that spousal assault is a consideration in custody and access decisions. It also seeks public comment and advice as to whether health care workers should be required to report spousal assaults, how child protection workers should balance the interests of children and the assaulted mother, and whether a special criminal court should be created.

This **Discussion Paper** from the Law Reform Commission of Nova Scotia, coincides with the release of a Discussion Paper on Domestic Violence prepared by a senior solicitor in the department of the Attorney General which proposes a model for a new non-criminal provincial law. This proposed law provides for various kinds of protective orders from the Supreme Court which can be applied for by people who have suffered from domestic violence.

The Executive Director of the Law Reform Commission comments that:

"It is very much in the public interest to have available these two different approaches to changing the legal system to make it more effective. It will provide people with an opportunity to fully explore and compare different options. I would encourage anyone interested in this issue to review both proposals and respond to the Commission and the Department of the Attorney General. Since we are an independent Commission, our advice to government will continue to be based on our views and on the public responses we receive."

The Law Reform Commission is funded by the Law Foundation of Nova Scotia and the Department of the Attorney General of Nova Scotia.

The Law Reform Commission of Nova Scotia is interested in receiving comments and criticism from individuals affected by these suggestions. Anyone interested in receiving a copy of the Discussion Paper may do so by contacting the Commission's office:

VIOLENCE (Domestic) Project
Law Reform Commission of Nova Scotia
8th Floor, Garrison Place
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* A Summary of the **Discussion Paper** is attached to this PRESS RELEASE and copies of the Summary in Mi'kmaq and French are available with the **Discussion Paper**.

For further information you may contact Dr. M.L. McConnell, Executive Director or A. Jackman, Legal Research Officer.

A DISCUSSION PAPER

VIOLENCE

In a Domestic Context

Law Reform Commission of Nova Scotia
March 1993

The Law Reform Commission of Nova Scotia was established by the Government of Nova Scotia under the *Law Reform Commission Act*, in February 1991.

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VIOLENCE

In a Domestic Context

A DISCUSSION PAPER

Invitation to Comment

Consistent with other projects undertaken by the Law Reform Commission of Nova Scotia, the Commission is releasing this Discussion Paper on Violence in a Domestic Context with the objective of inviting criticism and comment regarding the suggestions and views of the Commission thus far. This Discussion Paper is not a Final Report nor does it represent the final views of the Commission. This Discussion Paper is designed to promote discussion and public participation in the work of the Commission. With this Discussion Paper, the Commission has attempted, as much as possible, to describe the legal system and laws in a way that can be understood by the larger non-legal Nova Scotian community. Criticism and comment from Nova Scotians will assist the Commission in preparing a Final Report to the Attorney General on how the legal system in Nova Scotia can be reformed to deal with the problem of violence against women which occurs in a domestic context. In order to be considered prior to the development of the Final Report, written submissions should be received by June 1st, 1993.

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LAW REFORM COMMISSION OF NOVA SCOTIA

DISCUSSION PAPER ON VIOLENCE IN A DOMESTIC CONTEXT

SUMMARY

It is conservatively estimated that at least one in ten Canadian women are assaulted by their spouses. Although acts of violence between family members is no less a crime than violence which occurs between strangers, society and the legal system have been reluctant to interfere in these situations because of the personal relationship between the people. In this project, the Law Reform Commission of Nova Scotia examines the way in which the legal system in Nova Scotia responds to this form of violence which occurs between people drawn from every segment of society. Although violence can occur between couples of the same sex, the majority of reported cases involve women who have been harmed by their male partner. Spousal assault which is commonly called "wife beating" or "woman abuse" includes physical, sexual, economic, emotional and verbal abuse, as well as threats of violence and property destruction. It may result in a physical, psychological and emotional injury which is sometimes called the "battered woman syndrome". Violence between spouses is criminal behaviour and is covered by a large number of criminal offences under the *Criminal Code* of Canada.

Obviously, changing the law will not by itself end spousal assault. However, the legal system is one part of the solution and it must respond as effectively as possible to ensure that the assaulted person does not suffer further injury. This project has identified two central failures in the legal system:

- 1) The legal system treats violence between spouses differently from other assaults in enforcing the law which would apply;
- 2) When the law is enforced (through court cases and punishment) the legal system fails to take account of the unique problems experienced by the assaulted woman, which are a part of the acts of violence.

The approach of the Commission to law reform for spousal assault is based on four fundamental principles: first, the most important priority of the legal system at all times should be the protection of assaulted women and their children; second, assaulted women should be treated with sensitivity and respect and provided with support services while going through the legal system; third, the legal response to spousal violence should take into account the various ethnic, racial and linguistic groups that exist in Nova Scotia; and fourth, assaulted women should not have to leave their homes or take legal action other than asking for assistance to receive this protection.

In order to identify ways in which the law in Nova Scotia could be changed to better respond to the needs of assaulted women the Commission began this project with extensive informal consultations throughout Nova Scotia with assaulted women, shelter workers, police, Crown Attorneys, legal aid lawyers, judges, probation officers and others. Consultations were also held with women from Black, Mi'kmaq, Acadian and immigrant communities, as well as with an organization representing people with disabilities. This consultation and other research led the Commission to conclude that:

- * Although the criminal law of Canada deals with most of the behaviour which is involved in spousal assault, the legal system does not adequately protect assaulted women. This is because the provisions contained in the *Criminal Code* of Canada that could protect women are not always used as fully as they could be by the people responsible for providing legal services.

- * Even though violence against a spouse is a crime, spousal assault is still sometimes seen as less serious than violence between strangers. This is reflected in the way that some police respond to "domestic dispute" calls and in the way that some Crown Attorneys, other lawyers and judges handle cases involving spousal assault. This is due in part to the fact that historically, violence and violence between spouses was generally accepted by society and the legal system. family
- * Although there are sensitive and informed individuals within the legal system, there are also police officers, Crown Attorneys, lawyers, judges, Family Court intake workers and others who do not understand the effect that years of violence can have on a woman or how difficult it may be for an abused woman to use the legal system. Also, there is not enough understanding of the obstacles that a woman faces when she decides to leave an abusive relationship.
- * The way in which police officers, Crown Attorneys and judges throughout the province respond to cases of spousal assault varies from place to place and person to person. This means that an assaulted woman cannot be certain she will receive the protection she needs if she does call on the legal system.
- * For many assaulted women, the only hope of escaping the violence is to uproot themselves and their children from their homes. Even this does not always end the violence. Many women who have called the police and left their homes continue to be assaulted and intimidated by their spouses.
- * In addition to the difficulties encountered by all women who have been assaulted by their spouses, women who belong to ethnic, racial or linguistic minorities, or people who are in same sex relationships or who have a disability may face additional barriers in turning to the law for help.

This Discussion Paper contains a number of proposed suggestions as to how the law and legal system in Nova Scotia can be reformed to better respond to spousal assault. The suggestions on which the Commission is seeking public comment include the following:

- * Spousal assault should continue to be treated as a violent crime and should be dealt with by effective enforcement of the existing criminal law rather than by a new non-criminal provincial law.
- * The police and Crown Attorneys should always exhaust all procedures in the *Criminal Code* of Canada so that in all cases, assaulted women are provided the most protection that is available.
- * Where the *Criminal Code* does not provide enough protection (for example, in cases of common assault), the Government of Nova Scotia should work with and make recommendations to the federal government to make the necessary changes to the *Criminal Code*.
- * The Government of Nova Scotia administers the criminal law system in Nova Scotia. It has an obligation to ensure that sufficient resources are available to the people responsible for providing legal services to allow them to respond effectively to spousal assault. This can include making spousal assault a priority of the legal system as well as providing the necessary funding for shelters, victim services and counselling programs for men as well as police forces, Crown Attorneys' offices and legal aid clinics.

- * Police, Crown Attorneys, lawyers, judges, victim services workers, probation officers, Family Court intake workers and others within the legal system must be educated about spousal assault.
- * Detailed mandatory guidelines to follow in cases of spousal assault are needed for police, Crown Attorneys and others in the legal system to ensure that the *Criminal Code* is properly enforced by everyone.
- * There should be access to a diversion program involving mandatory counselling for certain assaults where no bodily harm is involved to meet the needs of people who may not wish to make use of the criminal law system.
- * Cases involving spousal assault should be dealt with by the courts as quickly as possible.
- * The *Family Court Act*, which gives the Family Court jurisdiction over peace bond applications and common assaults between a "husband and wife", should be changed so that it applies to all common law couples including same sex couples, regardless of the length of time they have lived together.
- * The *Matrimonial Property Act* should be changed in two ways: first, spousal assault should be considered when granting an interim order for exclusive possession of the matrimonial home; and second, this should be available to all common law couples, including same sex couples as well as those legally married.
- * The *Family Maintenance Act* should be changed so that spousal assault will be considered in custody and access proceedings and settlements.

The Commission is also seeking advice from the public as to whether health care workers should be required to report cases of spousal abuse, how child protection workers should respond where it appears that the needs of the child and an assaulted mother may need to be balanced, and whether it is possible or appropriate that Nova Scotia create a special criminal court to deal with family violence cases.

As part of an on-going province-wide consultation process, the Commission invites comments in response to the views and suggestions of the Commission contained in this Discussion Paper.

COMMISSION DE RÉFORME DU DROIT DE LA NOUVELLE-ÉCOSSE

DOCUMENT DE RÉFLEXION SUR LA VIOLENCE

FAITE AUX FEMMES

*SOMMAIRE

"Les trois-quarts de nos relations avec le monde qui nous entoure requièrent un élément essentiel: la capacité de communiquer. Mais, lorsqu'une femme est battue, menacée, et que ses émotions sont annihilées, elle ne peut plus parler; elle ne peut plus fonctionner normalement en société. J'avais perdu toute logique, toute capacité de penser et de rationaliser. Dans mon état de "femme battue", je vivais sept jours par semaine, vingt-quatre heures par jour à espérer que je vivrais la prochaine heure. Face à une telle situation et dans un tel état d'esprit, le système tel qu'il existe présentement n'est d'aucun secours. Le seul réflexe qui reste est celui de réagir aux agressions. Toute initiative d'action positive est perdue. Tout ce qu'une femme battue peut faire est de réagir...en espérant que cette réaction lui permettra de survivre. Son monde en est réduit à la seule question: vais-je vivre jusqu'à demain matin?"¹

Les statistiques les plus conservatrices indiquent qu'au Canada, au moins une femme sur dix est agressée par son conjoint. Dans le présent document, la Commission de réforme du droit de la Nouvelle-Écosse se penche sur la façon dont le système légal de la Nouvelle-Écosse traite ce type de violence. La violence faite aux femmes² peut

* Traduit de l'anglais par Me Nathalie Bernard, LL.B (Université Laval), LL.M (Dalhousie University).

¹Voir annexe "E" de Partners for Prevention. Islanders Talk About Family Violence (Rapport du Community Consultation Committee on Family Violence Prevention, présenté à l'Honorable Wayne D. Cheverie, Q.C., Ministre de la Santé et des Services Sociaux, septembre, 1991).

²Dans la version originale anglaise de ce document, la Commission précise qu'elle a choisi d'utiliser l'expression "woman assault" afin de décrire le type de violence faite aux femmes dont elle traite. La Commission a choisi cette expression pour plusieurs raisons. Premièrement, même si la violence existe entre conjoints du même sexe et même contre les hommes, le terme "woman" (femme) démontre le rôle de victime occupée par la femme dans la majorité des cas. Deuxièmement, le terme "woman" (femme), contrairement à "wife" (épouse) est utilisé pour démontrer qu'il n'est pas nécessaire que la femme soit mariée à son agresseur. Elle peut vivre en union libre, être séparée ou divorcée, ou même fréquenter régulièrement son agresseur. Troisièmement, le terme "assault" (voies de fait) sert à mettre l'accent sur le caractère violent

prendre la forme d'abus physique, sexuel, économique, verbal de même que de cruauté mentale. Elle inclut aussi les menaces de violence contre la personne et les biens. Ces diverses manifestations de la violence faite aux femmes constituent des comportements criminels visés par plusieurs infractions criminelles prévues au Code criminel (*Criminal Code of Canada*)

Dans ce document, tel que mentionné précédemment, la Commission de réforme du droit de la Nouvelle-Écosse se penche sur la façon dont le système légal de la Nouvelle-Écosse traite la violence faite aux femmes. De toute évidence, le système légal ne peut à lui seul mettre un terme à la violence faite aux femmes; il s'agit d'un problème complexe qui fait appel à des solutions tout aussi complexes de même qu'aux efforts concertés du gouvernement et de la société. Le système légal se présente néanmoins comme un élément de solution et doit donc, s'efforcer de traiter ce problème de façon efficace.

L'analyse et les recommandations faites par la Commission dans ce document sont basées sur quatre principes fondamentaux: premièrement, la priorité ultime du système légal devrait, en tout temps, être la protection des femmes victimes d'agression et de leurs enfants; deuxièmement, ces femmes victimes d'agression ne devraient pas être forcées de quitter leur demeure en échange de cette protection; troisièmement, une femme victime d'agression devrait être traitée avec compréhension et respect et bénéficier de services de soutien tout au long du processus judiciaire; finalement, la solution légale apportée au problème de la violence faite aux femmes devrait tenir compte des particularités culturelles, raciales et linguistiques.

La Commission a d'abord débuté ce projet d'étude en procédant à de nombreuses entrevues à caractère non officiel, partout en Nouvelle-Écosse, auprès des femmes victimes d'agression, des intervenants(es) oeuvrant dans les centres d'accueil aux victimes, des membres de la force policière, des procureurs(es) de la Couronne, des avocats(es) employés(ées) par l'Aide juridique, des juges, des agents de probation et de nombreuses autres personnes. D'autres entrevues ont eu lieu auprès de femmes appartenant aux communautés noire, Mi'kmaq, acadienne et immigrante, de même qu'auprès d'organisations représentant des personnes souffrant d'handicaps. L'analyse, par la Commission, des résultats obtenus lors de ces entrevues, deux rapports antérieurs portant sur la violence faite aux femmes en Nouvelle-Écosse, de même que divers autres études et sondages ont permis à la Commission d'identifier les principales lacunes du système légal lorsqu'il traite des cas de violence faite aux femmes:

- * Le système judiciaire ne protège pas les femmes victimes d'agression de façon adéquate. Les dispositions du Code criminel (*Criminal Code of Canada*) qui pourraient servir à protéger ces femmes ne sont pas utilisées de façon à atteindre leur maximum d'efficacité.
- * Les mandats de paix sont inefficaces en matière de protection.
- * L'attitude des membres de la force policière, des procureurs(es) de la Couronne et des juges de la Nouvelle-Écosse face aux cas de violence faite aux femmes, n'est pas uniforme.

et criminel de ce comportement.

- * Même si les actes de violence contre un(e) conjoint(e) est un crime, la violence faite aux femmes dans ce contexte est encore perçue comme moins grave que les actes de violence entre personnes ne se connaissant pas. Ceci se reflète dans la façon dont certains membres de la force policière interviennent sur les lieux "d'une dispute conjugale", de même que dans la façon dont certains(es) procureurs(es) de la Couronne, avocats(es) et juges agissent dans les cas de violence faite aux femmes. Cette situation s'explique en partie par le fait que la violence faite aux femmes a longtemps été acceptée et considérée légitime par la société.
- * Pour de nombreuses femmes victimes d'actes de violence de la part de leur conjoint, la seule façon pour elles et leurs enfants de tenter d'échapper à cette violence est de quitter la résidence familiale. Malheureusement, cette solution ne met pas toujours fin à la violence. Un grand nombre de femmes qui ont fait appel à la police et ont quitté la résidence familiale continuent quand même de subir les actes de violence et les menaces de leur conjoint.
- * Alors que le système judiciaire se compose de plusieurs personnes qui sont sensibles et ouvertes au problème de la violence faite aux femmes, certains individus, parmi les membres de la force policière, les avocats(es), les juges et les fonctionnaires du Tribunal de la famille, ne comprennent pas l'effet que de nombreuses années vécues dans un climat de violence peut avoir sur une femme ou combien il est difficile pour une femme victime de violence de se prévaloir du système judiciaire. De plus, peu de gens se rendent compte des obstacles auxquels doit faire face une femme qui décide de mettre fin à une relation où règne la violence.
- * L'aide que peut procurer le système légal s'avère difficile à obtenir pour des femmes appartenant à des minorités culturelles, raciales ou linguistiques ainsi qu'aux femmes lesbiennes ou affectées d'un handicap.

L'étude de ces lacunes a amené la Commission à faire des recommandations sur la façon dont la loi et le système légal devraient être modifiés afin de mieux répondre au problème de la violence faite aux femmes:

- * Le gouvernement de la Nouvelle-Écosse doit s'assurer que le système judiciaire possède les ressources nécessaires afin de traiter de façon efficace les cas de violence faite aux femmes. Ceci signifie notamment qu'il faut faire du problème de la violence faite aux femmes, une priorité du système légal. Cela implique aussi l'allocation de fonds suffisants pour créer et soutenir des centres d'accueil aux victimes, des services d'aide aux victimes, des programmes d'information et de consultation pour les hommes, les corps policiers, les bureaux du procureur(e) de la Couronne et les bureaux d'aide juridique.
- * Une campagne d'éducation concernant le problème de la violence faite aux femmes doit s'adresser spécifiquement aux membres de la force policière, aux procureurs(es) de la Couronne, aux avocats(es), aux juges, aux intervenants(es) des centres d'accueil et d'aide aux victimes, aux agents de probation, aux fonctionnaires du Tribunal de la famille et aux autres intervenants(es) du système judiciaire.

- * Afin de s'assurer que les femmes victimes d'actes de violence bénéficient de la meilleure protection possible, les corps policiers de même que les procureurs(es) de la Couronne devraient s'assurer qu'ils ont épuisé tous les recours prévus au Code criminel (*Criminal Code of Canada*).
- * Dans les cas où le Code criminel (*Criminal Code of Canada*) ne prévoit pas de moyens de protection suffisants (par exemple dans le cas de voies de fait), le gouvernement de la Nouvelle-Écosse devrait coopérer avec le gouvernement fédéral et lui faire des recommandations concernant les changements à faire au Code criminel (*Criminal Code of Canada*).
- * En vue de l'application adéquate des dispositions du Code criminel (*Criminal Code of Canada*), un ensemble de directives détaillées devront être remises aux corps policiers, procureurs(es) de la Couronne et autres intervenants(es) du système judiciaire.
- * Les menaces de violence physique et de mort sont des infractions criminelles. Lorsqu'elles ont lieu, il est plus approprié pour la victime de porter plainte en vertu du Code criminel (*Criminal Code of Canada*) plutôt que de demander la délivrance d'un mandat de paix.
- * Dans les cas de violence autres que la violence physique, une thérapie obligatoire devrait être imposée au conjoint ayant commis un ou des actes de violence comme alternative à l'emprisonnement.
- * Les dossiers de violence faite aux femmes devraient être entendus et jugés d'urgence par les tribunaux.
- * La Loi sur le Tribunal de la famille (*Family Court Act*), laquelle donne juridiction au Tribunal de la famille en matière de mandats de paix et de voies de fait entre époux, devrait être modifiée de façon à ce qu'elle s'applique aux unions libres (couples non unis par les liens du mariage) incluant celles composées de membres du même sexe, sans considération quant à la durée de la cohabitation.
- * Les modifications suivantes devraient être apportées à la Loi sur le patrimoine familial (*Matrimonial Property Act*): premièrement, le tribunal devrait tenir compte des actes de violence faite aux femmes lors d'une demande de possession exclusive de la résidence familiale; deuxièmement, cette modification devrait aussi s'appliquer aux unions libres incluant celles composées de membres du même sexe.
- * Le libellé de la Loi sur l'aide aux enfants et à la famille (*Children and Family Services Act*) devrait être modifié afin d'éviter qu'une femme, victime de violence, soit responsable des conséquences de cette violence sur ses enfants parce qu'elle n'a pas mis un terme à la relation d'où origine la violence.
- * La Loi sur les obligations alimentaires (*Family Maintenance Act*) devrait être modifiée de façon à ce que la violence faite aux femmes soit prise en considération lors de procédures judiciaires et ententes visant la garde des enfants et les droits de visite.

La question d'obliger les médecins et autres professionnels(les) de la santé à divulguer les cas de violence faite aux femmes dont ils (elles) ont connaissance, demeure un point sur lequel la Commission n'a pas encore pris position.

Dans le cadre d'un processus de consultation présentement en cours, la Commission invite le public à lui faire part de tout commentaire concernant les opinions émises et les recommandations faites par la Commission dans le présent document.

LAW RIFORM KMISN WJIT NOPA SKO'SIA

ULA W'KATIKN WESKU'TK ETLI-EMEKWEYUJ WSKWIJINU W'KK

Etlite'tasik kiskuk newte'jit e'pit te's newtiskeksi'tij matntl wkwisikuml. Tlia' na kikjakutultijik matntultijik ansma tetpi-o'pla'taqn stage mimajuinu'k matntijik ta'n mu nenati'kw. Wskwijinu'k aq teplutaqney mu kitu'-lukwagna'la'tikwi teli pkije'k kikjakutultiliji. Law Rifform Kmisnaq nike' wjit Nopa Sko'sia ankaptmi'tij ta'n teplutaqney Nopa Sko'sia teli maliaptik ula telamu'k emekweiwaqn ta'n kejitasik msit tami i'tn. Tlia' na kisi tla'sik tapusijik e'pijik kiswa tapusijik ji'nmuk tognasijik matntinew maweltitew na nemitasik matnkwi'tiji wkwisikumua kiswa wtlpa'tumua. SPOUSAL ASSAULT ta'n ekel telui'tasik "wife beating" kiswa "woman abuse" weskutk e'pit matnuj, alsunut ta'n tele'k miamuj wipemuet, suliewey keltitut, emekweyut aq eulimut weji wktayut aq sewiste'mut wutmo'taqn. Na teli milamu'k emeko'qtaqn wet-jile'k e'pit wtinink aq wtlita'sutimk aq wlo'timk ta'n nuttisk ekel telui'tasik "battered woman syndrome". Tognasijik mimajuinu'k matnti'tij ketloqo sewiska'tu'tij teplutaqn aq ewikasikl wi'katikniktuk teluisik Krimnl Ko't wjit Kanata.

Ketlewe'k na pasik kiwa'ska'tu'n teplutaqn mu tepianukw naqa'tun ta'n telin'ti'tij toqa'majik katu teplutaqney na newte'jk me' ta'n kijka' kisi apoqnmats naqa'tun aq miamuj ewekasik matnmn ankmayiw kulaman ta'n kisi matnut ma' ankui matnat. Ula nike' pra'jekt kisi kinua'tekek ta'n tett mu eli wl-lukwenukw teplutaqney:

1) Mu wijey tel-wekasinukw teplutaqn wjit asaltl stage nike' toqwa'majik matnti'tij aq ktikl asaltl tlueness nike' mu nenati'kw mimajuinu'kw matnti'tij.

2) Ta'n tujiw ewekasik teplutaqn aq mesimut wen mu teplutaqney ankaptmukw menaqa keknue'kl ta'n lukwagna'litl e'pit ta'n kisi matnut ta'n wettaqne'wasikl wjit ta'n kisi tli-emekweyut.

Kmisnaq wtlita'sutiwow ta'n tli-kiwa'ska'tutaqq teplutaqnn wjit e'pit kiswa ji'nm ta'n toqamajik wikma'jl matnij wettaqne'wasik ula newkl pem-wikasikl: amskwesewey, na maw-meltaw teplutaqney tluken ikaluksinew e'pijik aq wnijanua matnuksilij; ta'puewey, mu nuta'nukw e'pijik miamuj ngatmnew wikual we'kayiw mesnmi'tij ikalsuti; si'stewey, Ta'n tujiw kortiktuk ika'q miamuj nespitemtuaten ta'n teli piluakutk aq teli pilui'sit; ne'wewey, e'pijik matnute'wk mu miamuj ngatmnew wikual kiswa mu nuta'n msiketmnew pasik katu klutmnew apoqnmasuti kulaman kisi ikalaten.

Kulaman we'jituten ta'n tli kiwa'sk-wi'kiten teplutaqnn ula Nopa Sko'sia ta'n me' aji wli-apoqnmuaata e'piliji matnuksiliji

Kmisnaq pikweli-lita'suala'tipni mimajuinu'kw Nopa Sko'siaewa stage nike' e'pijik ta'n kisi emekweyujik, lukowinu'k etl-lukutijik ta'n e'pijik eli-wsim'kulti'tij, pli'smenaq, lo'yraq wjit Kraun, lo'yraq wjit Li'kl Eit, jajaq, prope'sn a'ffisraq aq ktikik. Etlewistu'tipni elt e'piliji kan'takkwe'skwaq, l'nu'skwaq, wen'ju'jkwejk aq kaqisi milakutmu'tiliji mimajuinu' aq orknise'snn ta'n apoqnmakwi'titl euli wskwijinu'. Kmisnaq nike' ta'n tel-nmitu'tij ta'n kisi tlewistu'tipni mimajuinu' tapu'kl Nopa Sko'siae'l kisi wi'kasikipnn wi'katiknn ta'n teli emekweyuj e'pijik aq ktikl teplutaqne'l wi'katiknn kisa'lukwi'tip Kmisnaq nmitunew ta'n tett etl-mnaqnaq teplutaqney ta'n teli maliamaj e'piliji emekweyuksiliji:

* Teli-pkije'k ki's krimnl law ula Kanata maliaptik asalt wjit toqa'majik wskwijinu'k teplutaqney mu tetpaqi-ikalaqwi e'piliji ta'n emekweyuksiliji. Ikaltimkewe'l wjit e'pijik ewikasikl Krimnl Ko'tiktuk mu wajui-wekasinukul.

* Tlia' na mo'qi o'pla'taqn wen wikma'jl matnaj me' ekel mu wijey teli-wsua'tasinukw tli-me'ki o'pla'taqnin stage nike' mu nenati'kw matnti'tij. Ula nemitumk ta'n tujiw pli'smenaq teli maliaptmi'tij ta'n tujiw wikumuj wen'ji'kuomk matnuksilij e'pilijl, aq ta'n Kraun Lo'yraq aq ktikik lo'yraq aq jajaq teli-wsua'tu'tij e'pilijl matnuksilij. Ula nike' weji kis-tla'sik mita amskwes asite'tasikip e'pit aq ji'nm matntinew aq wskwijinu'kw aq teplutaqney mu tetuji-talite'tmi'tikup.

* Tlia' teplutaqneyiktuk eykik mimajuinu'kw ta'n wngajite'taqatijik aq kejitu'tij ta'n teliaq, me' ki'kajiw eykik pli'smenaq, lo'yraq, jajaq, lukowinu'kw kortiktuk aq ktikik ta'n mu nestmi'tikw kaqi'sipunqek emekweiwaqn tela'lij e'pit kisna ta'n teli-mtua'lij kisi emekweyut e'pit weketun teplutaqney. Aq elt mu tepi-nsitasinukw ta'n te'sik e'pit enqnjj ta'n tujiw kisita'sij nqalan wkwisikuml.

* Mu wijey teli maliaptmi'tikul pli'smenaq, Kraun Atrniag aq jajaq asaltl weja'tekemk newte' wutan aq ktik. Na na teluemk e'pit kisi matnuj mu ketlewe'nukw wijey tli-ikaluksin lita'suatk teplutaqney.

* Wjit pikwelkik kisi matnute'wk e'pijik tl-na'msitewey ta'n kisi lita'suatmi'tij mu anku'-matnuksinew na wsimuktmnew wikual aq nespanew wnijanua. Jel ekel mu u't tepi-klu'lktukw mita me' weji-wktayakwi'tiji wkwisikumua teli-nqase'k we'ji'kwi'tij.

* E'pijik ta'n piluakutmu'tijik aq pilui'sultijik kisna e'pijik ta'n kesaltulti'tiji ktiki e'piliji kisna euli- wskwijinuultijik jiptuk me' keknue'tal ta'n enqkwi'titl ktu'-lita'suatmi'tij teplutaqn wjit apoqnmasuti.

Ula wi'katikn kisi wikasik ta'n miamuj wsku'tten wiaqi-wikasik ta'n jiptuk teplutaqney Nopa Sko'sia kisi tli kiwa'ska'tuten ta'n me' aji wli apoqnmuata e'piliji matnuksiliji. Kmisnaq kwilmi'tij apoqnmasuti wjit ula pem-wikasikl:

* Miamuj e'pit aq ji'nm ta'n toqa'majik matnti'tij teli wsua'tasik stage mo'qi-o'pla'taqn aq melki maliaptasik teplutaqn ewekasik ta'n ki's etek aq katu piley miamuj l'tasin ta'n mu tali wtapsuninukw.

* Pli'smenaq aq lo'yraq wjit Kraun miamuj weketutaqq ta'n te'sik kisi weketu'tij Krimnl Ko'tiktuk wjit Kanata kulaman e'tasiw e'pit ta'n kisi matnut kisna kisi emekweyut tetapui aq wajui-apoqnmuaten.

* Ta'n tett Krimnl Ko't tlite'tasik mu tepi ikaluenukw stage nike' kamn asalt na kapmnt wjit Nopa Sko'sia miamuj lukwattew aq kinua'tuata Fetrl Kapmnta ta'n tett nuta'q kiwa'sk-wikasin Krimnl Ko't.

* Miamuj wl-wikasitew ta'n pli'smenaq, Kraun Lo'yraq aq ktikik teplutaqney etl-lukutijik ta'n menuaqlujik ansma tl-lukutinew kulaman Krimnl Ko't tetapui ktmoqjenten.

* Kapmnt wjit Nopa Sko'sia maliaptik teplutaqney wjit Nopa Sko'sia wtlukwaqnuow teltek ika'tunew ta'n koqoey nuta'q wjit mimajuinu'k ketmoqjenmi'tij teplutaqn kulaman kisi ml'ki-weketutaqq e'pit kisna ji'nm matnuj. Teluemk na nike'jiptuk ikanpukua'tasin na telamu'k asalt.

* Miamuj pli'smenaq, Kraun Atrniaq, lo'yraq, jajaq aq ktikik etl-ukutijik teplutaqneyiktuk kekinu'tmujik ansma ta'n koqoey "spousal assault".

* Nuta'ten l'pa menaqa wl-wikasin ta'n teluekl wjit pli'smenaq, Kraun Atrniaq aq ktikik kulaman tetpaqi weketuten Krimnl Ko't.

* Family Court Act ta'n iknmatk Family Court mlkikno'ti wjit apiksiktatimkewe'l aq kamn asaltl wjit e'pit aq ji'nm tepqatkik nuta'q kiwa'sk-

wikasin kulaman kisi wiaqsumaten tapusijik e'pijik kisna tapusijik ji'nmuk toqa'majik mu tepjike'nukw ta'n teli pkiji-tqwa'ma'tij.

* Tapu'kl etekl ta'n nuta'q kiwa'sk-wikasin Matrimonial Property Actiktuk: Amskwesewey, e'pit matnut nuta'q wiaqite'tasin ta'n tujiw wesku'tasik ta'n wen klo'ttew aq siawqattew wen'ji'kuom ta'n i' wiki'tip; tapuewey, nuta'q wijey elt tla'luksinew toqnasultite'wk stage nike' tapusijik e'pijik kisna tapusijik ji'nmuk toqnasijik aq e'pit aq ji'nm l'pa tepqatkik.

* Children and Family Services Act nuta'q kiwa'sk-wikasin kulaman ma' tli-ankamkutnukw e'pit kisi emekweyut elsu'tmut wjit ta'n teli emekweyuj ke'sk mu naqtmukw ta'n teli-tqwa'ma'tij.

* Family Maintenance Act nuta'q kiwa'sk-wikasin kulaman e'pit matnuj jiptuk kisi e'wtew wta'mati'tij wnijanua aq ktu'- naskwa'tati'tij wutmo'taqtuow.

Kmisnaq kwilmi'tij apoqnmastuti ketloqo Health Care Workeraq miamuj riportewa'tunew wenl kejia'tij emekweyuksilitl, ta'n tla'taqatitaqg lukowinu'k elukowa'tiji mijua'ji'jk tl-nmitu'tij nuta'n mijua'ji'j aq wkwijl tetpi apoqnmuksinew aq ketloqo nuta'n aq tetapu'ten Nopa Sko'sia ika'tun l'pa tepkise'k kort ta'n maliapt*tew kikjakutulutiliji matntutilij.

Na ula Kmisnaq menueke'tiji wskwijinu'k ankaptmnew ta'n koqoey ewikasik u't wi'katikniktuk aq l'kitmuanew wi'katiknn mu wlaptmi'tikw me' koqoey ewikasik.

TEPLUTAQNEY-----Legal System

I. Introduction

"Three-quarters of dealing with the world is being able to communicate with the world and when you are being beaten and threatened and when you are emotionally just stamped erased, you cannot talk, you cannot function. My logic, my ability to process thoughts, to follow a thought was non-existent. I was living – as a battered woman, I was living seven days a week, 24 hours a day, trying to live to the next hour. And you cannot deal with this system the way it is when you are in that state of mind.... You're reacting all the time. There's no–there's–you–there's no action, you lose all your ability to make action. All you are doing is reacting all the time. And what you–you're trying to react in the right way to survive. Your whole world is reduced to will I wake up tomorrow morning".¹

"The gravity, indeed, the tragedy of domestic violence can hardly be overstated. Greater media attention to this phenomenon in recent years has revealed both its prevalence and its horrific impact on women from all walks of life. Far from protecting women from it, the law historically sanctioned the abuse of women within marriage as an aspect of the husband's ownership of his wife and his "right" to chastise her. One need only recall the centuries old law that a man is entitled to beat his wife with a stick "no thicker than his thumb". Laws do not spring out of a social vacuum. The notion that a man has a right to "discipline" his wife is deeply rooted in the history of our society. The woman's duty was to serve her husband and to stay in the marriage at all costs "till death do us part" and to accept as her due any "punishment" that was meted out for failing to please her husband. One consequence of this attitude was that "wife battering" was rarely spoken of, rarely reported, rarely prosecuted, and even more rarely punished. Long after society abandoned its formal approval of spousal abuse tolerance of it continued and continues in some circles to this day."²

(i) Violence in the Family

¹See Appendix "E" to *Partners for Prevention. Islanders Talk About Family Violence* (Report of the Community Consultation Committee on Family Violence Prevention to the Honourable Wayne D. Cheverie, Q.C., Minister of Health and Social Services, September, 1991).

² Statement by the Supreme Court of Canada in *R. v Lavallee* [1990] 1 S.C.R. 852 at 872. In this 1990 case a battered woman was charged with the murder of her male partner. She argued that she had acted in self-defence. The issue before the Supreme Court of Canada was whether the expert evidence of Ms. Lavallee's psychiatrist regarding "battered woman syndrome" could be used to explain her behaviour. The Court ruled that this evidence could be admitted in her defence and that it was necessary information to help the Court to understand the context within which she had acted.

Violence between family members is a common experience for many families in Nova Scotia and Canada. Family violence can include physical, sexual, emotional, psychological, and economic abuse as well as threats of violence and property destruction. The violence can be against children, against elderly relatives and between couples. Violence in families is not confined to any one group but occurs in families regardless of culture, ethnic origin, religion, race, wealth, geographic location or education. Acts of violence between family members are no less violent and wrong than violence which occurs between strangers. However our society and legal system has been reluctant to interfere because of the relationship between the people involved. Often people who have witnessed violence as children or who have been violated will later in life repeat this behaviour or suffer other difficulties because of the experience. Violence in families, much of which is not dealt with directly by our society, adds to the overall level of violence and anger experienced in society, as well as placing demands on our health, social service, and criminal justice resources. This means that, although we may rarely witness the violence that exists in families from all parts of society, it has an effect on all of us.

(ii) *Spousal Assault*

The focus of the Law Reform Commission of Nova Scotia in this project is a very specific one, that of violence between couples or spouses. In this project, and throughout this Discussion Paper, the phrase "spousal assault" is used to describe the violence we are dealing with. The word "assault" is used to emphasize the violent and criminal nature of the behaviour. It also reflects the Commission's opinion that this behaviour is, and should continue to be, treated as a serious criminal offence. The word "spousal" is used to indicate that the two people are or have been involved in an intimate relationship, but they are not necessarily married to each other. Although violence may occur between couples of the same sex, the majority of reported cases involve women who have been assaulted by their male partner. Given this, throughout the Discussion Paper, "she" will be used to describe the assaulted person and "he" will be used to describe the assaulter. This form of violence is commonly described as "wife battering" or "woman abuse" and it results in a form of physical, emotional and psychological harm called the "battered woman syndrome" which is more than an assault on the person, it also includes impairing the woman's ability to protect herself and leave the relationship.

(iii) *Objective and Principles of the Project*

Spousal assault, as with all forms or types of assault, is criminal behaviour and is dealt with by a variety of criminal offences and provisions under the *Criminal Code (the Code)*. Keeping this in mind, the objective of the Commission in undertaking this project is to seek ways through our existing laws and law reform which will protect assaulted women. The approach of the Commission then is based on four fundamental principles: first, the most important priority of the legal system at all times should be the protection of assaulted women and their children; second, assaulted women should be treated with sensitivity and respect and provided with support services while going through the legal system; third, the legal response to spousal assault should take into account the various ethnic, racial, and linguistic groups that exist in Nova Scotia; and fourth, assaulted women should not have to leave their homes or take legal action other than asking for assistance to receive this protection.

(iv) ***The Problem***

It is conservatively estimated that 1 in 10 women are assaulted by their spouse.³ At the same time this is a largely unreported crime. In a national survey published in 1985 it was found that less than half of the women who had been assaulted reported it to the police.⁴ This suggests that if all women who were assaulted by their spouses called it would at least

double the demand on the legal system. Further, research has established that on average, a woman is assaulted by her spouse 30 times before she will call the police for help.⁵ This means that there are many spousal assaults on a daily basis which are never reported at all.

One of the main reasons that many spousal assaults go unreported is that the assaulted woman may believe that the law and the legal services available cannot or will not protect her nor provide any real assistance to her. Calling the police and leaving her home does not necessarily diminish the violence. In fact, the violence or threat of violence may actually increase when an assaulted woman leaves or if the abuser suspects she is planning to leave. In addition, the assaulted woman may fear that she will risk losing access to her children if she leaves. She may be economically dependent or she may not speak the language sufficiently well to explain her situation or she may feel that she will have no support from society or her family members if she calls the police.

It is difficult for many people, including people who are involved in the legal system such as police officers, juries, judges and lawyers, to understand the assaulted woman and her experience. The Supreme Court of Canada, in a case where a woman had been repeatedly assaulted by her spouse and killed him in self-defense, commented that:

The average member of the public (or of the jury) can be forgiven for asking: Why would a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalization? We would expect the woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself? We need help to understand it and help is available from trained professionals.⁶

In response to this one expert has commented:

"The spouse gets beaten so badly – so badly – that he or she loses the motivation to act and becomes helpless and becomes powerless. And it's also been shown sometimes, you know, in – not that you

³Standing Committee on Health, Welfare and Social Affairs. Report on Violence in the family: Wife battering. Ottawa: House of Commons, 1982. Standing Senate Committee on Social Development. Report on family violence in Ontario. Toronto: Queen's Park, 1983.

⁴The War Against Women (Report of the Standing Committee on Health and Welfare, Social Affairs, Seniors and the Status of Women) June 1991, at page 5.

⁵See footnote 4 at page 6.

⁶See footnote 2 at page 871.

can compare animals to human beings, but in laboratories, what you do if you shock an animal, after a while it can't respond to a threat of its life. It becomes just helpless and lies there in an amotivational state, if you will, where it feels there's no power and there's no energy to do anything.

So in a sense it happens in human beings as well. It's almost like a concentration camp, if you will. You get paralysed with fear".⁷

Women in Canada who have survived spousal assault describe their experience in the same way.

"After you've been beaten, humiliated, put down, shamed and in absolute terror for years, you're not a person any more, you're a zombie. It's like I died. I didn't even cry anymore."⁸

"The fear of violence is something terrible. Physically, it's terrible; mentally, it's terrible. However, the stigma and the fear of coming out and the lack of resources are worse than the beatings themselves."⁹

"To show a policeman a bruise on your arm or a burn on your hand, it doesn't seem like much but if it took 15 minutes of torturing before that happened, that can do an awful number on your head."¹⁰

These comments graphically illustrate the difficulty an assaulted woman may have both in seeking and obtaining effective protection for herself from the legal system. The violence she has experienced when combined with the general social and legal response to her situation means that she may have very little possibility of removing herself from the harmful environment or relationship.

(v) The Law Reform Project

In this project the Law Reform Commission of Nova Scotia carried out informal consultations throughout Nova Scotia with assaulted women, shelter counsellors, police, Crown Attorneys, judges, legal aid lawyers, probation officers and others who work with assaulted women. Consultations were also held with women from Black, Mi'kmaq, Acadian and immigrant communities as well as with an organization representing people with disabilities. The Commission felt it was important to consult with assaulted women and other relevant people as a way of determining the real issues and needs which should be examined for the project. The consulting process is a continuous one which now involves broader public consultations in response to this Discussion Paper. The Commission also reviewed social science studies that have been done on this problem in Canada and elsewhere. Finally, the Commission has carried out extensive legal research regarding the law and practices that exist in Nova Scotia and elsewhere to respond to spousal assault.

⁷Dr. Shane, expert witness in *Lavallee* case, see footnote 2 at page 884.

⁸Philippe, Shirley and Bonnie Hutchinson *Breaking the Pattern: How Alberta Communities Can Help Assaulted Women and Their Families* at page 30.

⁹*MacLeans* (November 11, 1991) "Women In Fear" at page 32.

¹⁰See footnote 3 at page 4.

This consultation and research process identified some fundamental failures in the way that the legal system presently responds to spousal assault and led the Commission to conclude that:

- * Although the criminal law of Canada deals with most of the behaviour which is involved in spousal assault, the legal system does not adequately protect assaulted women. Provisions contained in the *Criminal Code* that could protect women are not always used to their full potential.
- * Peace bonds are ineffective in terms of protecting the assaulted woman because of inconsistent practices on the part of the police and Crown Attorneys in the province in terms of dealing with enforcement and violations.
- * Although there are sensitive and informed individuals within the legal system, there are also police officers, lawyers, judges, Family Court intake workers and others who do not understand the effect that years of violence can have on a woman or how difficult it may be for an abused woman to use the legal system. Also, there is not enough understanding of the obstacles that a woman faces when she decides to leave an abusive relationship.
- * Even though violence against a spouse is a crime, spousal assault is still sometimes seen as less serious than violence between strangers. This is reflected in the way that some police respond to "domestic dispute" calls and in the way that some Crown Attorneys, other lawyers and judges handle cases involving spousal assault. This is due in part to the fact that historically, family violence and violence between spouses was generally accepted by society and the legal system.
- * The way in which many police officers, Crown Attorneys and judges throughout the province respond to cases of spousal assault varies from place to place and person to person. This

means that an assaulted woman cannot be certain she will receive the protection she needs if she does call on the system.

- * For many assaulted women, the only hope of escaping the violence is to uproot themselves and their children from their home. Even this does not always end the violence. Many women who have called the police and left their homes continue to be assaulted and intimidated by their spouses.
- * In addition to the difficulties encountered by all women who have been assaulted by their spouses, women who belong to ethnic, racial or linguistic minorities, or people who are in same sex relationships or have a disability, may face additional barriers in turning to the law for help.

II. Suggestions for Reform

The following list and brief discussion sets out the issues which the Commission has identified so far in the project. While reviewing these issues, three points must be kept in mind. First, the objective of the project is to

make recommendations to the government of Nova Scotia that will protect assaulted women from further assaults by their spouses. Second, the Constitution of Canada, which divides legal authority over different matters between the provinces and the federal government, is an important factor in considering law reform. Under the Constitution the federal government has exclusive jurisdiction over the "Criminal Law" of Canada, while the provincial government has exclusive jurisdiction over "the Administration of Justice in the Province".¹³ This means that although spousal assault is a crime and therefore a matter for the federal government, the delivery of legal services enforcing the criminal law is a matter for the provincial government. The Law Reform Commission of Nova Scotia is a provincial institution which has as its main task, making recommendations regarding the legal exercise of provincial power. Third, this is a Discussion Paper which is intended to provide the people of Nova Scotia with the chance to respond to the ideas and suggestions set out here, before the Law Reform Commission makes its Final Report and recommendations to the government.

1. What is the most effective way to respond to problems in the legal system in its treatment of spousal assault?

In Canada criminal behaviour is regulated by a federal law, the *Criminal Code* of Canada. Criminal behaviour involves acts which are unacceptable in our society and which the State will take action against on behalf of all society. All assaults are crimes of violence against society as a whole as well as being acts of violence against individuals. While it is recognized that many of the values in our criminal law do not reflect the beliefs of all Canadians but only of a particular cultural group, it remains the law in force for all people in Canada. To classify an act as a crime is itself a significant statement of social and moral values and explains why government resources in the form of lawyers, courts, police, and prisons are used to enforce it.

The main law available in Canada and Nova Scotia to deal with spousal assault is the criminal law which is found in the *Criminal Code*.¹⁴ There is no single section or offence which is called spousal assault. A variety of *Criminal Code* sections apply depending on the facts of each case:

¹³See section 91(27) and 92(14) of the *Constitution Act*, 1867, (U.K.) 30 & 31 Vict., c.3.

¹⁴Individuals may also bring a civil action for assault and sue for damages. However, in light of the violence involved and the immediate threat of danger, this does not seem to be a significant avenue of assistance in terms of protection for the assaulted woman.

- (1) Assault (s.266);**
- (2) Assault with a Weapon or Causing Bodily Harm (s.267);**
- (3) Aggravated Assault (s.268);**
- (4) Pointing a Firearm (s.86(l));**
- (5) Causing Bodily Harm with Intent (s.244);**
- (6) Attempted Murder (s.239);**
- (7) Sexual Assault (s.271);**
- (8) Sexual Assault with a Weapon or Causing Bodily Harm (s.272);**
- (9) Aggravated Sexual Assault (s.273);**
- (10) Intimidation (s.423);**
- (11) Uttering Threats (s.264.1);**
- (12) Harassing or Indecent Telephone Calls (s.372(2)(3));**
- (13) Trespassing at Night (s.177);**
- (14) Forcible Confinement (s.279(2));**
- (15) Mischief (Wilful Damage) (s.430(1));**
- (16) Obstructing Justice (s.139(2));**
- (17) Recognizance (s.810);**
- (18) Breach of Recognizance (s.811);**
- (19) Failure to Comply with a Probation Order (s.740);**
- (20) Preventing Breach of Peace (s.30);**
- (21) Arrest for Breach of Peace (s.31).**

The main concern of the Commission in this project is to ensure that assaulted women are protected immediately and in the longer term from further assaults by their spouses. In reviewing the numerous sections in the *Criminal Code* which could apply to spousal assault, the Commission found that there is already substantial protection which could be provided to assaulted women. In terms of immediate protection the police can lay charges, arrest and hold the assaulter in jail.¹⁵ This removes the assaulter from the home and gives the assaulted woman the choice of remaining in her home or going to some other safe place. The police can hold the accused until he appears before a judge. At this time a judge can keep the accused in jail until the trial or release him with certain conditions such as:

- * the accused shall abstain from all contact whether direct or indirect with the victim and/or witnesses;
- * the accused shall not be permitted at or near the residence of the victim and/or children, or the victims place of employment;

¹⁵See sections 495 and 497 and 498 of the *Code*. The powers of arrest and detention (in terms of the tests to be met) vary with the classification of the offence as a summary, hybrid or indictable offence.

- * the accused shall not follow the victim and/or her children from place to place and in any event shall not be within 200 yards of the victim;
- * the accused shall not use or carry any firearm or weapon;
- * the accused shall abstain from possession and use of alcohol and drugs.¹⁶

Where an accused person has been released by a judge on the conditions set out above and these conditions are violated, then the accused can be arrested and held in jail.¹⁷ Further, an accused person who "dissuades or attempts to dissuade a person by threats, bribes or other corrupt means from giving evidence" could be charged with an additional offence that of obstructing justice.¹⁸ This could again result in the accused being held in jail until his trial, or at least, it would reflect unfavourably on him at the time of sentencing and would be an additional criminal charge he would have to answer to.

The sentencing sections of the *Criminal Code* also offer protection for an assaulted woman whose spouse is found guilty. The judge can :

- * impose a jail sentence¹⁹
and/or
- * impose a period of probation on him with conditions such as:
 - provide support for his spouse or any other dependants whom he is liable to support;
 - abstain from the possession or consumption of alcohol or drugs;
 - abstain from owning, possessing or carrying a weapon;
 - notify the court of any change of address, employment or occupation;
 - shall not contact the victim whether directly or indirectly;
 - shall not go at or near the victim's residence or place of employment;
 - shall not follow the victim from place to place and in any event shall not be within 200 yards of the victim.²⁰

These conditions apply for the full period of the probation. In addition the judge can order that the assaulter be prohibited from possessing a firearm for up to 5 or 10 years.²¹

¹⁶See section 503 and 515 of the *Code*.

¹⁷See section 145(3) as well as sections 520 and 521 of the *Code*.

¹⁸See section 139(2)(3)(A) of the *Code*.

¹⁹The periods of time for a jail term varies.

²⁰See section 737 of the Code.

²¹See section 100 of the Code.

Even though there are many laws available to provide protection, these laws are no help if they are not used fully and properly by the people responsible for providing the services or if there are not sufficient resources available to allow people to properly provide their services. Additional laws are of no use if they are not delivered effectively, and in fact they may be harmful in that they provide the illusion that help is available when in reality it is not.

The issue for the Law Reform Commission to examine is the extent to which the responsible people in the legal system apply the existing law and available legal services to cases of spousal assault. The Law Reform Commission used four different sources to examine this issue:

- The results of an informal province wide consultation process involving consultation with assaulted women, shelter workers, legal aid lawyers, police, Crown Attorneys and judges completed by the researchers for this project;²²
 - A victim needs and services research project conducted in 1991;²³
 - A survey of police and Crown Attorney practice conducted in 1990;²⁴

²²These consultations suggest that assaulted women perceive some problems with police response in spousal assault cases. First, in some cases, police do not take the initiative in pressing charges and often impose responsibility on the assaulted woman to make this decision; second, in some cases, police ask the woman if she wants charges laid with the assaulting man present; third, in some cases, serious physical harm is required before charges will be laid and even then the charge may only be that of common assault, rather than a more appropriate charge such as assault causing bodily harm; and fourth, there is a great deal of variation from officer to officer and force to force in regards to charging policies as well as attitude.

²³In 1988, a Directive was issued jointly by the Solicitor General and Attorney General regarding "spousal assault" which directed police to investigate all "spousal assault" calls, make arrests where "the situation warrants", and "lay the appropriate charges regardless of the complainant's wishes". In 1991, as part of a research project for the Attorney General's Office, (*Summary Report: Nova Scotia Crime Victims Needs and Services Research Project*), Dr. Christopher Murphy examined the issue of whether the police and Crown Attorneys in Nova Scotia followed this Directive. Dr. Murphy's findings suggest the police generally did not follow this Directive. His study also suggests the police response varies from case to case on the basis of the department involved, the police officers' perception, the dispatcher's perception identity of the caller, the woman's "personal credibility" and willingness of the woman (not officer) to lay charges.

Overall, Dr. Murphy concluded police response to spousal assault was "inconsistent and in some cases inadequate". In his evaluation of the practices of Crown Attorneys, Dr. Murphy found there was "reported variation in Crown policies and standard of service" as well as Crown dissatisfaction with and lack of adherence to the Directive.

²⁴In 1990, a graduate law student, B. Norton carried out a study evaluating the same Directive as part of his Master's thesis entitled "Domestic Violence: Law and its Administration" 1990 Dalhousie Law School (unpublished LL.M. Thesis). He completed a random sampling of 200 R.C.M.P. and municipal police officers to which 120 responded. The survey revealed that 42.5% of the officers that responded stated they complied with the Directive most of the time, 26.7% always, 21.7% sometimes, and 3.3% never. In evaluating the 25 responses out of the 51 surveys sent to Crown Attorneys in Nova Scotia, it was noted that:

"The data received indicated that they tend to follow the directive in making a decision to lay charges but occasionally exercise some discretion when a victim does not wish charges to be laid. Once charges are laid and the case approaches trial prosecutors are much more apt to exercise discretion when a victim/witness directly asks that charges not proceed.

Also of interest was the extent that prosecutors, in the face of the Attorney General's mandatory directive, recognize a victim's

- Two earlier Nova Scotian surveys of assaulted women.²⁵

Analysis of these sources establishes that women who are assaulted by their spouses are not, in fact, provided with the protections that the criminal law currently could offer. It appears that both police and Crown Attorneys differ greatly from place to place and person to person, in the way they respond to spousal assault complaints and cases. There is inconsistency in the laying of charges by the police in terms of both whether charges are laid and the severity of charges laid. Further, both the police and Crown Attorneys frequently do not make full use of the *Criminal Code* to protect the assaulted woman in terms of arrest, detention (holding the assaulter in jail), severity of charges laid and conditions to protect the woman before and after the trial. An equally important finding which underlies all other findings is that some Crown Attorneys and police officers are educated and sensitive to assaulted women and the relevant issues while some are not.

The most fundamental issue to be decided is whether the best means to deal with these failures in the delivery of the criminal law to assaulted women in Nova Scotia is through proper and full use of the existing *Criminal Code* provisions, or by creating a specialized provincial law which does not treat spousal assault as a crime, or whether both options are necessary. The Commission is of the opinion that the most effective response is to ensure proper enforcement of the *Criminal Code*. There are 5 reasons for this:

1. The physical assault of one spouse by another is by its very nature a criminal matter and should be dealt with by the most severe legal mechanism of our society: the criminal law. The characterization of spousal assault as assault should not change because the victim is almost always a woman nor because the assault occurs in an intimate or domestic context.
2. If a provincial (and therefore non-criminal) law was developed it would "soften" the message of the government and justice system regarding spousal assault. While there are provincial laws which protect specially vulnerable people such as children and the elderly from some forms of assault,²⁶ this approach is not appropriate for assaulted women. The assaulted woman's vulnerability arises from the violence she has experienced as well as lack of protection from the law and not from any incapacity on her part.
3. A provincial law simply would not add anything to the existing legal remedies, but would merely add another law to the collection of laws which at present are not being used fully. For example, at present, an assaulted woman can already obtain help from Family Court by way of peace bonds

wish not to proceed with a prosecution. The survey results indicate that the majority of Crown prosecutors would compel non-appearance of a victim-witness by requesting a bench warrant. Once the victim is in attendance, however, only 64% agree that prosecutors should proceed in cases where the victim does not wish this."

²⁵In *Silence in the Court (Battered Women Talk About Their Experience in the Legal System)* the study (based in Pictou, New Glasgow and Guysborough), indicated that police were laying charges in 26% of cases and a large percentage of women did not even attempt to contact police. In *Speaking Out (Voices of Battered Women in Cape Breton)*, the action taken by police show that police were arresting in 17.6% cases; issuing warnings in 14.8% cases and taking no action in 67.6% cases.

²⁶For example, the *Children and Family Services Act* and the *Adult Protection Act*.

and common assault charges²⁷ which provides assaulted women with a less formal, less adversarial and family-oriented forum to obtain some legal response. Further, a peace bond application, whether in provincial criminal or family court, provides women with a prevention-oriented remedy.²⁸

4. A provincial law would place a large burden on the assaulted woman that criminal law does not place on her. The assaulted woman would make an application herself. As well, she would probably have to hire a lawyer to pursue her claim. In criminal proceedings, under the *Criminal Code* once a woman lays a complaint with police, the police take over the application and the Crown Attorney prosecutes the case through the system.
5. Given that the Federal government has exclusive jurisdiction over criminal law, a provincial law which deals with spousal assault, would probably be found to be unconstitutional.²⁹

The Commission suggests:

The most effective way to respond to the failures in the way in which the criminal justice system responds to cases of spousal assault is through proper enforcement of the full range of remedies available in the *Criminal Code*.

2. **If proper enforcement of the *Criminal Code* is the most effective way to improve the operation of the justice system in cases of spousal assault, how should this be accomplished?**

In Nova Scotia the Attorney General and Solicitor General offices of the provincial government have attempted to deal with spousal assault through the use of joint Directives to both the Police and Crown Attorneys. This joint Directive is intended to guide police and Crown Attorneys in spousal assault cases. On March 30, 1992, the Attorney General and

the Solicitor General issued one such joint directive. The relevant parts of the Directive for our discussion are as follows:

The Police are to:

²⁷See suggestion number 4 and the surrounding discussion.

²⁸A recognizance (peace bond) pursuant to section 810 of the *Code* can be obtained without a criminal charge, however, the breach of the recognizance, pursuant to section 811, is a criminal offence.

²⁹See *Westendorp v The Queen*, [1983] 15 C.R. 43 where the Supreme Court of Canada struck down a municipal by-law which prohibited a person from remaining on the street or approaching someone for the purpose of prostitution. The court reasoned the Statute was an attempt to "control" or "punish" prostitution: a criminal matter.

1. "respond to and fully investigate all complaints of spousal assault";
2. arrest the assailant if there is reason to believe there will be a repetition or continuation of the offence (or if other grounds for arrest are present);
3. "lay a charge where there are reasonable grounds to believe that an offence has been committed, regardless of the wishes of the victim/complainant";
4. treat a violation of a peace bond "in the same manner as a breach of a term of bail".

With respect to Crown Attorneys, the Directive states:

1. Crown Attorneys will prosecute a spousal assault charge whenever they are satisfied that sufficient evidence exists regardless of the victim's/complainant's wishes unless public interest considerations dictate otherwise. The request of a victim/complainant to stop a prosecution because the victim/complainant and the accused have reconciled or are in the process of reconciling is not, in itself, sufficient basis upon which to stop a prosecution.
2. The withdrawal of charges is the responsibility of the Crown Attorney.

It is the view of the Commission that although the Directive appears to be clear and seems to provide general principles for delivery of effective legal services, the Directive does leave a great deal of discretion to the enforcement person and, with it, possible differences in practice.³⁰

As was noted, the main problems identified in the legal system are first, uneven practices in spousal assault cases across the province by both police and Crown, and second, a failure of both the Crown and police to use all the *Criminal Code* provisions that are available to protect assaulted women. Both of these problems involve a failure to deliver the services of the justice system to a specific group of offences and victims. The failure is, in part, the result of a lack of education and information about spousal assault. The issue then is deciding on the best means to inform and educate so as to avoid unevenness in the provision of services. The Commission has concluded that the best means are through Protocols, which are step by step procedures for people to follow in dealing with specific situations.³¹ The key features of these Protocols would be that:

- They would be inter-departmental and would apply to intervention in spousal assault cases by police, Crown Attorneys, social services, victim services and health officials;

³⁰In the last year, the Crown Attorneys office of Nova Scotia has developed a more detailed (than Directives) "Policy Statement" which to date has not been implemented.

³¹Protocols have been drafted for use in New Brunswick. These interdepartmental protocols, entitled "Woman Abuse Protocols", are partially but not completely developed.

- The Protocols would be detailed in terms of each official's role in the intervention.

Two examples of such Protocols drafted by the Law Reform Commission, are found at the end of this Discussion Paper.

The Commission suggests:

The best way to make the legal system more effective in enforcing the *Criminal Code* in cases of spousal assault is by developing comprehensive mandatory interdepartmental Protocols similar to the two found at the end of this Discussion Paper to be used by people involved in legal services.

3. Should the Attorney General of Nova Scotia request that there be changes made to the *Criminal Code* to enable the police and others in the justice system to respond more effectively to spousal assault cases?

Although the provincial government does not have constitutional authority to change the criminal law of Canada, the Attorney General is consulted and represents the views of Nova Scotians with respect to federal laws. The suggestions in this Discussion Paper are based on existing offences and practices under the *Criminal Code* but this does not mean that the criminal law which exists is designed to deal with spousal assault. The arrest, detention and even the offence sections have several flaws which make them less effective than they could be in dealing with the violent crime of spousal assault. Given this, the Attorney General should recommend to the Federal government that:

- i) There should be a specific offence which deals with "stalking" behaviour (for example, persistently following a person or going to places where the person will be) which is now treated as a crime in several states in the United States;
- ii) The police powers of arrest and detention should be broadened in cases of spousal assault so that the police have more discretion to arrest and detain in order to protect the assaulted woman;
- iii) The bail sections should be changed so they will be more effective in terms of protection of the assaulted woman in cases of spousal assault;
- iv) The sentencing sections should be changed to offer more options and ones that are specific to sentencing in spousal assault cases.

The Commission suggests:

The Attorney General of Nova Scotia should seek to make changes to the *Criminal Code* to ensure that our criminal law is reformed to better deal with cases of spousal assault.

4. **Should there be a diversion program involving mandatory counselling set up for certain first time and minor common (less serious) assaults to meet the needs of women who may not wish to make use of the criminal law services?**

Through the consultation process and pre-existing reports on the justice system in Nova Scotia it has been established that many members of Black and Mi'kmaq communities of Nova Scotia mistrust the criminal justice system which they see as racist, and in the case of the Mi'kmaq communities, opposed to their fundamental beliefs and values. For these reasons, as well as reasons of language and geographical isolation, many assaulted women in these communities do not or cannot make use of the criminal justice system. In addition to this, women of many cultural backgrounds do not want to punish their spouse criminally and wish to attempt to reconcile through family counselling. The Commission suggests that these perspectives should be clearly recognized in the criminal justice system. At the same time the fact that the criminal law and the *Charter of Rights and Freedoms* are laws for all people in Canada means that to some extent the procedures and protections in both must be considered. There is no process under existing law where a person can be detained or otherwise have their liberty affected by the state other than through legal arrest. However, a community based diversion program could be established for minor (no bodily harm), first time (no prior convictions nor discharges), common assaults where the offender requests and the Crown in consultation with the assaulted woman consents. The focus of the diversion program would be on treatment and counselling for the offender and, if requested, for the affected family unit. This might meet in part some of the needs of a wide variety of groups of Nova Scotians.

The Commission suggests:

There should be a diversion program involving mandatory counselling set up for certain first time and minor spousal assaults to recognize the needs of assaulted women who may not wish to use the existing process and punishments that are available under the criminal law.

5. **Is there a need for the government to give priority to violence against women so that there are sufficient resources to enable the legal system to respond properly?**

The Government of Nova Scotia administers the criminal law system in Nova Scotia. It has an obligation to ensure that sufficient resources are available to the people responsible for providing legal services to allow them to respond effectively to spousal assault. This can include making spousal assault a priority of the legal system, ensuring the education and sensitization of police, Crown Attorneys, lawyers, judges, victim service workers, probation officers, Family Court intake workers and others within the legal system regarding spousal assault, and providing the necessary funding for shelters, victim services³² and counselling programs for men as well as police forces, Crown Attorney offices and legal aid clinics.

Violence against women must be made a priority of the justice system and there must be a corresponding resource allocation to the justice system so the people responsible for providing legal services can respond effectively to spousal assault.

6. Should the Attorney General of Nova Scotia establish a specialized criminal court to deal with spousal assault?

In 1990, the provincial government of Manitoba implemented a specialized, provincial criminal court, that hears only family violence cases. This includes spousal assault and child sexual abuse, as well as elder and child abuse. Within this court structure, there are specialized Crown Attorneys who prosecute only these cases. There is also a victim service entitled the "Women's Advocacy Program". There is, as well, a "Family Violence Unit" within Probation Services which provides individual assessments, counselling and long term intensive treatment for offenders. This specialized court sits only in Winnipeg and involves 5 full time Crown Attorneys and 20 judges who also sit in non-specialized provincial courts. (There are approximately 30-40 provincial court judges in Winnipeg).

A recent study of the court suggests that this court system results in a more efficient legal process (in terms of time frame of the case from beginning to end). The study further suggests the process provides a more sensitive legal service for victims. The court also has had a carryover effect in that both police charging and conviction rates have gone up.

³²A common theme that emerges from the surveys and studies which focus on the assaulted woman, as well as the project's consultations, has been concern for the plight of the victim who chooses to use the criminal justice system. This issue has resulted in some response from the government. The recently established Victim Services Division of the Attorney General's Office is specifically designed to offer "one stop comprehensive services to victims of crime in Nova Scotia." This service is oriented towards assisting people through the criminal justice system which traditionally has not offered the assaulted woman compensation or assistance of any sort. These victim services are intended to provide some recognition of their needs. Under the program as currently designed, no formal counselling or therapy is offered, but where it is felt counselling is necessary (prior to a criminal injuries application) individual victims will be referred to counselling services. The information provided on the criminal justice system will be as case specific as possible (court dates, stage at in process, etc.). Victims will also receive preparation for testifying on a non-evidentiary basis. Referrals to the Regional Services will come from police, Crown, transition houses and other community based organizations. The Compensation Program essentially replaces a Board process with an administrative process. Victims will be referred to this service and assisted with the application by a Victim Services Officer. Under the Program, victims will receive compensation for direct costs and will receive "counselling service awards."

The three issues for the Commission to decide and upon which the Commission is presently undecided and seeks input, is first, whether a specialized criminal court is feasible in Nova Scotia, given its much smaller population base and much smaller number of both Crown Attorneys and judges, as compared to Manitoba, in particular Winnipeg. Second, given the necessary resource allocation, will a specialized criminal court provide any benefit that the other suggestions of the Commission cannot provide? Third, are there any negative consequences to having such a court?

An issue on which the Commission is at this time undecided and makes no suggestion is whether or not the Attorney General of Nova Scotia should establish a specialized criminal court to deal with spousal assault.

- 7. Should the *Family Court Act*,³³ which gives the Family Court jurisdiction over peace bond applications and common assaults between a "husband and wife" be changed so that it applies to all common law, including same sex couples?**

During the consultation process, some women expressed the view that it was more comfortable to proceed with assault charges and peace bond applications in a family rather than provincial (criminal) court. This option is available through the *Family Court Act* which gives Family Court concurrent jurisdiction with provincial court over peace bond applications and violations, as well as breach of probation and common assaults which occur between "husband and wife". However, "husband and wife" is defined in the *Act* as a man and woman, whether legally married or not, who have been living as husband and wife for 12 months. This option, and the definition, should be changed so that it is available to all common law couples including same sex couples, regardless of the length of time they have lived together.

The Commission suggests:

The definition of husband and wife contained in the *Family Court Act* should be changed to include same sex couples and couples who live in a spousal relationship regardless of the length of time involved.

- 8. Should the *Matrimonial Property Act*³⁴ be changed so that first, spousal assault is included as a consideration for an order for exclusive possession of the matrimonial home, and second, this option be available to common law, including same sex couples?**

³³R.S.N.S. 1989, c.159, s.7(3).

³⁴R.S.N.S. 1989, c.275, s.11.

A key aspect of a woman attempting to leave an abusive relationship is the limited choices she has for housing. At present, under the *Matrimonial Property Act*, a legally married heterosexual spouse can apply for an order granting her exclusive possession of the matrimonial home on the grounds that no other accommodation is available and it is in the best interests of a child (where a child is involved). Spousal assault is not mentioned as a consideration. The Commission believes that spousal assault should be added to the *Act* as a consideration. The Commission further believes that this option should be available to more

assaulted women. That is, an order for exclusive possession should be available to common law, including same sex, couples.

The Commission suggests:

***The Matrimonial Property Act* should be changed in two ways: first, spousal assault should be considered when granting an interim order for exclusive possession of the matrimonial home; and second, this should be available to all common law couples, including same sex couples.**

9. Should the *Children and Family Services Act*³⁵ be amended so that there is a legal responsibility on an abusing parent to stop the abuse?

Section 22(2)(i) of the *Children and Family Services Act* states that a child is in "substantial risk" (and will be taken into custody by Children's Welfare Services) where:

- (i) the child has suffered physical or emotional harm caused by being exposed to repeated domestic violence by or towards a parent or guardian of the child, and the child's parent or guardian fails or refuses to obtain services or treatment to remedy or alleviate the violence; (emphasis added)

This section has been criticized by assaulted women and people who work with assaulted women because the wording of the section (the part underlined above) suggests that where a woman is being abused and does not report it, she could lose her children to Children's Welfare Services if the abuse is subsequently reported or discovered. The problem is that this could increase the chances of women staying in abusive situations out of fear of losing their children. The Commission suggests the wording of the section should be changed in two ways. First, the section should place a burden on the abuser to stop. Second, it should be clear that an abused parent will not lose custody of her children because she did not report the fact she was being abused. At the same

³⁵S.N.S. 1990, c.5.

time it is recognized that for many women the stresses caused by the violence may mean that needs of her children, which she may not be able to meet, must also be considered. People involved in the protection of children have an obligation to look after the best interest of the children. It may be appropriate to develop a Protocol to assist workers in evaluating the situation. The Commission is seeking advice as to how to best balance the interests of women and children in these cases.

The Commission suggests:

The *Children and Family Services Act* should place a duty on an abusing parent to stop the abuse. The *Act* should also state that an abused parent will not lose custody of her children simply because she did not report the fact that she was being abused. The Commission is seeking public comment on the best way to ensure that the interests of children of an assaulted spouse are also protected.

10. Should spousal assault be a consideration in custody and access proceedings and settlements?

At present, spousal assault is only indirectly considered as a factor in deciding custody and access matters. At the same time, fear of losing custody is one reason why a woman may stay in an abusive relationship. It is the opinion of the Commission that spousal assault should be a factor to be balanced in deciding issues of custody and access. Presently the *Family Maintenance Act*³⁶ states that the welfare of the child is the paramount consideration in custody and access proceedings. Another subsection should be added, stating that where there is evidence of spousal assault there is a presumption that awarding custody to the abusive spouse would not be in the child's best interests. The onus would then be on the abusive spouse to prove to the court he will no longer harm the child.

Access to children of the relationship should be dealt with in a similar fashion. The concern here is that even after a relationship has ended, the abusive spouse may still use access as an opportunity to continue the intimidation, control and violence towards the former spouse. Situations described during consultations included the father assaulting, or threatening to assault the mother, while picking up or dropping off the children, as well as the father exercising the right of access in such a way as to disrupt the lives of the mother and children. The *Family Maintenance Act* should be amended to deal with this. There should be a section stating that where there is evidence that during their relationship the parent being granted access abused the parent having custody, it is inappropriate to grant the abusive spouse "reasonable access on reasonable notice" as this provides opportunities for continued control. Instead the court must include in the order an arrangement for pick-up and drop-off of the children, as well as an access schedule.

³⁶R.S.N.S. 1989, c. 160, s. 18(5).

The Commission suggests:

The *Family Maintenance Act* should be changed so that spousal assault is a factor in custody and access proceedings and settlements.

11. Should medical doctors and other health professionals be required to report suspected cases of spousal assault?

At present, in Nova Scotia there are provisions for reporting of both child abuse (*Children and Family Services Act*) and elder abuse (*Adult Protection Act*). The danger of required reporting of suspected cases of woman abuse is that the assaulted spouse would be even less able to break the silence if she knew that anyone she turned to for support, counselling or medical attention, would be required to report the abuse. This could also increase an assaulted woman's isolation and sense of loss of control over her own life. On the other hand however, in some situations, a woman may be unable to report the abuse for a variety of reasons, including situations where a woman is severely beaten and brought to a hospital. In some life threatening situations women simply need help.

An issue on which the Commission at this time makes no suggestion but seeks public comment is whether or not there should be a requirement that medical doctors and other health professionals report suspected cases of spousal assault.

III. Conclusion

It is obvious that the causes of and solutions to spousal assault are complex and require many different kinds of changes. Changes to the law cannot address many of the causes but the legal system should not add to the problem and the law should be shaped as closely as possible to respond effectively to the needs of society. Since spousal assault is a complex issue it requires a variety of responses from society. For example, during the consultation process leading to this Discussion Paper it has become clear that for many people the legal system is irrelevant to their situation because, for various reasons such as race, culture, religion or language, resort to the legal system itself creates problems. The challenge of this project has been to consider these issues and seek solutions which can meet the needs of all Nova Scotians, at least to the extent that the law is able to provide any assistance.

The primary question for law reform is whether there should be a law passed by the provincial government to deal specifically with the problem of spousal assault in Nova Scotia. While this may not seem to pose a policy question, the fact that the province does not have power under the Constitution of Canada to pass criminal laws means that any law that is passed must deal with spousal assault on a non-criminal basis. It is important to understand that the behaviour being regulated in spousal assault cases is a violent assault by one person on another. The issue is how to provide regulation of this behaviour that takes into account the unique behaviour patterns and effects of violence in cases of spousal assault.

This project has identified two central failures in the legal system:

- 1) The legal system treats violence between spouses differently from other assaults in enforcing the law which would apply;
- 2) When the law is enforced (through court cases and punishment), the legal system fails to take into account the unique behaviour patterns and problems experienced by the assaulted woman, which are part of the acts of violence.

The consultation and research carried out by this project suggests there are three central policy concerns which should govern legal responses:

1. There is a need to understand the nature of violence in the family and the fact that it can be experienced by any person in our society and has an effect on all of us. That is, violence between spouses can result in learned and repeated patterns of behaviour by male and female children. Although spousal violence is mainly experienced by women, every person in society is in some way or other vulnerable to acts of violence and should be concerned about spousal assault.
2. Many of the difficulties women experience with the legal process arise out of the specific psychological response to the violence which is described in legal cases as the "battered woman syndrome". It may result in an injury which some medical practitioners call "Post Traumatic Stress Disorder" which makes it even more difficult for the woman to deal with the court system. The legal system must respond effectively and appropriately to this medical problem which further hinders the ability of the assaulted woman to act defensively and protect herself.
3. There is a need to evaluate the hidden messages in the legal responses which increase the difficulties that the assaulted woman encounters in seeking to protect herself. For example, it is frequently the person who has been harmed who must take action to bring legal results and must uproot themselves from their homes and communities. This problem is even greater for people who are from diverse linguistic, ethnic, or racial groups.

Based on the research and the analysis set out in this Discussion Paper, the Law Reform Commission has come to the following conclusions. However, these conclusions are tentative only and will be reconsidered in light of comments and criticism received in response to this Discussion Paper.

- * **The most effective way to respond to the failures in the way in which the criminal justice system responds to cases of spousal assault is through proper enforcement of the full range of remedies available in the *Criminal Code*.**
- * **The best way to make the legal system more effective in enforcing the *Criminal Code* in cases of spousal assault is by developing comprehensive mandatory interdepartmental Protocols similar to the two found at the end of this Discussion Paper to be used by people involved in legal services.**
- * **The Attorney General of Nova Scotia should seek to make changes to the *Criminal Code* to ensure that our criminal law is reformed to better deal with cases of spousal assault.**
- * **There should be a diversion program involving mandatory counselling set up for certain first time and minor spousal assaults to recognize the needs of assaulted women who may not wish to use the existing process and punishments that are available under the criminal law.**
- * **Violence against women must be made a priority of the justice system and there must be a corresponding resource allocation to the justice system so the people responsible for providing legal services can respond effectively to spousal assault.**
- * **The definition of husband and wife contained in the *Family Court Act* should be changed to include same sex couples and couples who live in a spousal relationship regardless of the length of time involved.**
- * ***The Matrimonial Property Act* should be changed in two ways: first, spousal assault should be considered when granting an interim order for exclusive possession of the matrimonial home; and second, this should be available to all common law couples, including same sex couples.**

- * **The *Family Maintenance Act* should be changed so that spousal assault is a factor in custody and access proceedings and settlements.**
- * **The *Children and Family Services Act* should place a duty on an abusing parent to stop the abuse. The *Act* should also state that an abused parent will not lose custody of her children simply because she did not report the fact that she was being abused.**

The Commission is also seeking advice from the public as to whether health care workers should be required to report cases of spousal abuse, how child protection workers should respond where it appears that the needs of the child and an assaulted mother may need to be balanced, and whether it is possible or appropriate that Nova Scotia create a special criminal court to deal with family violence cases.

D R A F T

POLICE AND CROWN ATTORNEY SPOUSAL ASSAULT PROTOCOLS

The following draft protocols for police and Crown Attorneys have been developed to illustrate the format and content of potential protocols for spousal assault cases as they proceed through the criminal justice system. These protocols are not in final form. They are intended for discussion purposes only.

While reviewing the protocols, the following points should be noted. First, a full set of protocols would apply to more agencies than the police and Crown Attorneys but would also apply to health workers (such as doctors and nurses), Victim Services and Community Services. Second, the protocols in relation to the police and Crown Attorneys would be more comprehensive than is suggested in our draft. Third, a full set of protocols would include a variety of contextual and educational materials touching on, for example, statistics regarding the widespread occurrence of spousal assault and social science literature regarding the cyclical nature and consequences of spousal assault.

It should be noted that in the development of these draft protocols, reference was made to first, the "Woman Abuse Protocols" of New Brunswick, and second, the "Draft Spousal Assault Policy" of the Public Prosecution Service of Nova Scotia. In particular, the Crown Attorney Protocols are based largely on the Policy Statement which has not yet been implemented.

POLICE PROTOCOLS

I Introduction

The *Criminal Code* gives police discretion over the charges laid, arrest and detention. When this discretion is exercised in cases of spousal assault, the following considerations are relevant:

1. A police officer's primary duty is to protect and serve the public.
2. Spousal assault occurs as a widespread phenomenon in Canadian society;
 - it is conservatively estimated that one in 10 women are assaulted by their spouse;
 - on average, a woman is assaulted by her spouse 30 times before she calls the police;
 - a woman remains in danger even after she has separated from the assaulter;
 - charges and arrest in cases of spousal assault reduce the occurrences of assault in the future;
 - "domestic dispute" calls are on a national level the second most requested police service;
 - spousal assault can occur between same sex couples and should be treated no differently.
3. An assault, threat or property damage which occurs in a domestic context is just as serious a criminal act as one which occurs in any other context.
4. An assault, threat or property damage which occurs in a domestic context is not a private matter between two individuals. It is a violent criminal act against the state.
5. Once a decision to charge has been made, the arrest and detention provisions of the *Criminal Code* must be followed, with the highest priority being protection of the assaulted woman.

6. The assaulted woman and children should not have to be uprooted from their home in order to receive protection from the state.

II Receiving a Spousal Assault Call

With spousal assault calls, the dispatcher plays a key role in protecting the woman immediately and in the long-term. The dispatcher has first contact with the situation and has the first opportunity to elicit crucial information in terms of both potential charges to be laid and protection of the victim. Upon receiving a spousal assault call, the dispatcher should first attempt to obtain the following information regarding the situation:

- extent of injuries;
- whether medical assistance is required and if so, what type is required;
- whether any weapons are involved and if so, what type;
- whether there are any weapons in the premises;
- whether there has been any violence in the past;
- if there has been any violence in the past whether weapons were used;
- identity of caller, where calling from and reason for calling;
- where in the home the parties are located;
- any details as to the assault;
- identity of the assaulter;
- background noises that could provide information regarding the incident (threats, screams, gunshots, breaking of glass or furniture, etc.).

Following this, once a car has been dispatched, the dispatcher should immediately check all police information retrieval systems to determine previous calls to that address, incidents, or charges or whether there is a peace bond or probation order in place against the assaulter. This information should immediately be forwarded to the officers dispatched to the scene.

Where requested, the dispatcher shall provide a caller with referral information.

III Laying of Charges

The police officer is to lay a charge where there are reasonable grounds to believe that an offence has been committed. The particular charge to be laid should always be the most severe one that applies in the situation. For example, if there is any bodily harm such as bruising or blood, the man should be charged with assault causing bodily harm (s.267). If any instrument is used, such as a stick, wooden spoon, or cigarette, the man should be charged with aggravated assault (s.268) or assault with a weapon (s.267). If any threat is made such as, "if you leave this house, I'll kill you", he should be charged with uttering threats to cause death or serious bodily harm (s.264.1).

If the police are informed of previous offences, these should be investigated. If there is evidence of multiple previous offences, the man should be charged with these offences as well.

Any form of violence is a criminal act against the state, therefore charges should be laid irrespective of the wishes of the victim. The officer should inform both the accused and the victim that only the Crown Attorney can withdraw the charge. Under no circumstances should the victim be asked if she wants charges laid.

IV Arrest and Detention

A police officer can arrest for the following indictable offences **if** the officer sees the offence being committed, **or if** the officer has reasonable and probable grounds to believe the offence has been committed **or** is about to be committed. This would apply to the following *Criminal Code* sections:

- Assault (weapon or bodily harm) (s.267)
- Aggravated Assault (s.268)
- Unlawfully Causing Bodily Harm (s.269)
- Causing Bodily Harm with Intent (s.244)
- Uttering Threats (to cause death or serious bodily harm to a person)

(s.264.1)

- Attempted Murder (s.239)
- Sexual Assault (weapon or bodily harm) (s.272)
- Aggravated Sexual Assault (s.273)
- Forcible Confinement (s.279(2))
- Obstructing Justice (s.139(2))

Once arrested for an indictable offence, the accused can be detained until he appears before a judge (within 24 hours) if the arresting officer or office-in-charge is not satisfied the person should be released either conditionally (recognizance) or unconditionally. The importance of detaining the accused until he can appear before a judge lies in the fact that only a judge can impose conditions of release on the accused (pending trial) that protect the victim.

The police should ascertain from the victim first, whether she has been assaulted by the accused before, and second, any threats the accused has made against the victim and/or her children. If any of the above exist, the police would have the grounds for and should first, arrest the accused, second, detain the accused until he appears before the judge, and third, obtain sufficient information regarding the previous acts and/or threats to enable the Crown Attorney to request detention or bail with conditions.

Under the *Criminal Code* a police officer has the discretion to arrest for summary, hybrid and indictable offences contained in section 553 where the officer finds the offence being committed **and** has reasonable grounds to believe that, first, arrest is necessary to prevent the continuation or repetition of the offence or to prevent the commission of another offence, **or** second, to ensure the accused will attend court. This would apply to the following *Criminal Code* sections:

- Assault (common) (s.266)
- Pointing a Firearm (s. 86.1)
- Harassing or Indecent Phone calls (s.372(2) and (3))
- Mischief (s.430.1)
- Breach of Recognizance (s.811)
- Failure to Comply with a Probation Order (s.740)
- Intimidation (s.423)
- Uttering Threats (not to cause death or serious bodily harm to a person) (s.264.1)
- Trespassing at Night (s.177)

Once arrested for a summary, hybrid or indictable offence contained in section 553, the accused can be detained by both the arresting officer and officer in charge until he appears before a judge (within 24 hours) in order to prevent the continuation, repetition or commission of an offence. As with the indictable offences, the police whenever possible should arrest and detain the accused until he can appear before a judge.

V Judicial Interim Release

The arresting officer and officer in charge of the accused while he is detained, have information that is crucial as to whether or not the accused will be detained pending trial or whether he will be released conditionally or unconditionally. In all police reports dealing with spousal assault cases, the following information should be noted for the Crown:

- (a) Nature of the threat or assault;
- (b) Specific evidence of bodily harm;
- (c) Information indicating whether weapons were present or used;
- (d) Information indicating a history of violence or threats by the accused against the victim;
- (e) Information indicating that children were present during the alleged offence;
- (f) Information indicating a history of violence or threats by the accused against others;
- (g) Fears of the victim;

- (h) Information indicating that alcohol or drugs were involved.

VI Statements

When taking a statement from a victim/complainant in a spousal assault case, the officer taking the statement shall inform the victim/complainant that she should provide a clear, precise and detailed statement as possible and that she will be cross-examined on the statement if the matter proceeds to trial (accused pleads not guilty). When taking a statement, the officer shall be as detailed as possible. For example, if the victim/complainant says "Then he hit me", the officer should inquire whether it was with a fist or open hand, or with an instrument, etc.

VII Referrals To Other Agencies

Once decisions have been made in regard to charges, arrest and detention, the role of the police does not stop. The police should inform the victim of ways she can protect herself (such as changing her locks and the like). The police should then make the complainant aware of the services available to her. First, the complainant should be made aware of womens' shelters in the area and the services they provide; second, the complainant should be given the option of going to the shelter, or some other place she would feel safe. If a woman decides to stay in her home, this decision should be respected; third, the complainant should be made aware of any counselling services that are available in the area. Fourth, the complainant should be referred by card to the nearest Victim Services Office of the Attorney General's office; fifth, in addition, to this the police should advise the complainant of seeking legal advice in regards to the relationship breakdown.

CROWN ATTORNEY PROTOCOLS

I Introduction

Crown Attorneys play a key role in enforcing spousal assault as a criminal act against the state. The Crown must ensure victims of spousal assault receive the same protection from the legal system as that which is provided to other victims of violent crimes. The Crown's overriding consideration at all times must be to seek the greatest protection for assaulted women and children as their lives are often in danger during this period. The priority of the Crown Attorney at all times shall be the protection of the assaulted woman and not the probability of conviction.

1. Spousal assault occurs as a widespread phenomenon in Canadian society:
 - it is conservatively estimated that one in 10 women are assaulted by their spouse;
 - on average, a woman is assaulted by her spouse 30 times before she calls the police;
 - a woman remains in danger even after she has separated from the assaulter;
 - charges and arrest in cases of spousal assault reduce the occurrences of assault in the future;
 - "domestic dispute" calls are on a national level the second most requested police service;
 - spousal assault can occur between same sex couples and should be treated no differently.
2. An assault, threat or property damage which occurs in a domestic context is just as serious a criminal act as one which occurs in any other context.
3. An assault, threat or property damage which occurs in a domestic context is not a private matter between two individuals. It is a violent criminal act against the state.

4. The detention, judicial interim release and sentencing provisions of the *Criminal Code* must be followed, with the highest priority being protection of the assaulted woman.
5. The assaulted woman and children should not have to be uprooted from their home in order to receive protection from the state.

II Review of Charges Laid

The Crown Attorney shall:

- (a) Consult with the police to ensure charges laid in every situation are commensurate with the gravity of the conduct;
- (b) Consult with the police to ensure charges are laid for all possible previous and subsequent offences;
- (c) Proceed with an additional offence of obstructing justice, (s.139(2)(3)) where, after initial charges are laid, the accused threatens/bribes the victim to dissuade her from giving evidence;
- (d) Where there is an option always proceed by indictment.

III Detention and Judicial Interim Release with Conditions

Under section 515 of the *Criminal Code*, a judge can order the accused to be detained while awaiting trial. The Crown must show cause why detention of the accused is warranted on either the primary ground that detention is necessary to ensure attendance in court, or failing that, on the secondary ground that "detention is necessary for the protection or safety of the public, having regard to all the circumstances including any substantial likelihood the accused will, if he is released from custody, commit a criminal offence or interfere with the administration of justice".

A woman is often in more danger of being further assaulted by the accused after she has called the police. Therefore, if there has been previous assaults and/or threats at any time such as "if you leave, I'll beat the ---- out of you, or I'll kill the kids", etc., the Crown Attorney should request the court to order the accused to remain in custody until trial for the protection of the women and/or her children.

If the accused has attempted, at any time, to threaten, bribe or use other corrupt means to dissuade the women from testifying or requesting the Crown to withdraw the charges for this or any previous offence, the Crown Attorney should request the court to order the accused committed until trial as there is a substantial likelihood the accused will attempt to interfere with the administration of justice.

Pursuant to s.515 of the *Criminal Code*, the judge may release the accused on the following conditions:

- abstain from communications with the woman he assaulted as well as other witnesses (s.515(4)(d));
- "other such reasonable conditions specified in the order as the justice considers desirable" (s.515(4)(e)).

If an assaulter is arrested but released or not arrested but given an appearance notice, conditions such as above cannot be imposed until the person appears before the court to formally answer the charge.

The Crown Attorney shall request the court to order sufficient conditions to ensure the protection of the victim and children, including, for example:

- (a) The accused shall abstain from all contact whether direct or indirect with the victim and/or witnesses;
- (b) The accused shall not be permitted at or near the residence of the victim and/or children, or the victims place of employment;
- (c) The accused shall not follow the victim and/or her children from place to place and in any event shall not be within 100 yards of the victim;
- (d) The accused shall not use or carry any firearm or weapon;
- (e) The accused shall abstain from possession and use of alcohol and drugs;
- (f) if access to the children is ordered by another court, the accused shall make any access arrangements through Victim Services.

The Crown Attorneys should consider the following when dealing with detention and judicial interim release:

- (a) Nature of the threat or assault;
- (b) Specific evidence of bodily harm;
- (c) Information indicating whether weapons were present or used;
- (d) Information indicating a history of violence or threats by the accused against the victim;
- (e) Information indicating that children were present during the alleged offence;
- (f) Information indicating a history of violence or threats by the accused against others;
- (g) Fears of the victim;
- (h) Information indicating that alcohol or drugs were involved.

Where the accused is released on bail by the court at arraignment, the Crown Attorney shall ensure the victim is immediately contacted and advised that the accused has been released as well as any conditions of his release. A copy of the release order shall be provided to the victim as soon as possible.

IV Trial

The Crown Attorney shall vigorously prosecute charges resulting from spousal assault including making all reasonable efforts to obtain an early court date and arguing against adjournments when appropriate.

The Crown Attorney shall ensure the victim has been advised of Victim Services available to assist the victim throughout the process; but this does not absolve the Crown Attorney of his/her responsibility to the victim. The Crown Attorney must assure the victim is advised and consulted through the process.

In all cases, the Crown Attorney should explain the offence of "obstructing justice" to the victim and should inform the victim to contact police immediately if it occurs.

The Crown Attorney must be sensitive and adopt a procedure which is cognisant of the victim's real fear for safety if she testifies and the difficulties associated with expressing and reliving the trauma when testifying.

Where a victim refuses to testify, even after all available support has been offered, contempt proceedings should only be proceeded with against the victim in very rare and exceptional cases. Where a victim will not testify, the Crown Attorney should consider whether there is enough other evidence to justify continuing with the charge.

V Sentencing

Crown Attorneys should request a stronger sentence than that which is requested for similar types of assaults between strangers. Spousal assault, as distinguished from stranger assault, always involves a breach of trust as an aggravating factor.

The impact of the assault on the victim is a relevant and important sentencing consideration. Given this, the Crown Attorneys should consider, in consultation with the victim, whether a Victim Impact Statement (pursuant to section 735(1.1) of the *Code*) should be filed with the court.

Prior to speaking to sentence, the Crown Attorney shall advise the victim of the Crown Attorney's proposed recommendation.

Where the Crown Attorney is seeking a term of incarceration, the Crown Attorney should consider asking the sentencing judge to endorse the Warrant of Committal with a recommendation that the offender receive treatment while incarcerated.

Where the Crown Attorney is seeking a term of incarceration of less than two years, the Crown Attorney shall consider recommending that a period of probation with appropriate conditions be imposed in addition to the period of incarceration. Under section 737(2) of the *Criminal Code* appropriate conditions could include:

- provide for the support of his spouse or any other dependants whom he is liable to support (subsection b);
- abstain from the possession or consumption of alcohol (subsection c);
- abstain from owning, possessing or carrying a weapon (subsection d);
- notify the court of any change in address, employment or occupation (subsection f);

- abstain from contacting the victim (directly or indirectly) as well as going to or near the victim's place of employment (subsection h).

Where the Crown Attorney is not seeking a term of incarceration, the Crown Attorney should consider recommending a period of probation with appropriate conditions. (See above).

After the sentencing hearing, the Crown Attorney shall ensure that the victim is contacted immediately to be advised of the sentence, in particular, where the offender has not been incarcerated. Where a term of probation is imposed, the Crown Attorney shall ensure that a copy of the order is forwarded to the victim immediately.

After the sentencing hearing, the Crown Attorney shall ensure the police have notice of the sentencing disposition as well as copies of all relevant documents.

