PRESS RELEASE

FROM RHETORIC TO REALITY
ENDING DOMESTIC VIOLENCE IN NOVA SCOTIA

February 20th 1995

The Law Reform Commission of Nova Scotia is pleased to announce the release of its Final Report, *From Rhetoric to Reality, Ending Domestic Violence in Nova Scotia.* The Report examines ways in which the law and legal system in Nova Scotia can be changed to better respond to the problem of domestic violence. The Law Reform Commission, an independent advisory agency supported by the Law Foundation of Nova Scotia and the Department of Justice, has submitted its Report to the Minister of Justice for review by the government of Nova Scotia. The Commission's Report is based on research, consultation and evaluation of work by task forces and studies done in Nova Scotia, nationally and internationally, and responses to the Commission's *Discussion Paper* published last year.
The Executive Director of the Commission, Moira McConnell comments: "The Commissioners were faced with the stark fact that despite innumerable political statements and government policy directives, domestic violence has not been eliminated in Nova Scotia. Since the law in Canada already clearly prohibits harassment, threats, and all forms of physical violence, it is clear that the existing law is not obeyed or respected. If the present law is not effective, is the solution more law or asking why the existing laws are not working? Clearly abusers are not deterred from their criminal behaviour by the words of the law, so will more words on paper, whether as legislation or as a court order alone do more? Is the issue one of resources or something else and where, if at all, is a law reform effort best directed? These are the central questions that the Law Reform Commission grappled with in this project."

The Report states that after a great deal of research and reflection, the Commissioners concluded that while some changes could and should be made to the written laws and to the court structure, the heart of the problem lies in the way the existing law is implemented in cases of domestic violence. The Report points out that even the best designed law will not deter a person from an act if he does not believe there will be any consequences if he disobeys the law. The way in which the law is interpreted by police, lawyers, judges and legal system personnel sends a message to all of society as to what is or is not acceptable behaviour. The Report takes the view that the government has to decide how to ensure that its policy against domestic violence is implemented at all levels and that there is a clear and consistent message that this behaviour is criminal, unacceptable and will be punished.

Dr. McConnell also notes that, "It is very important to understand that many women do not choose to go to the criminal justice system for assistance, even when they are able to escape their spouses and the abusive situation. When they do so, they face almost unsurmountable problems arising from the fact that the crime frequently takes place in a context where children and property are shared with the

person who is seeking to hurt them. Many women encounter ongoing violence in the form of threats and economic harassment through failure to provide maintenance payments on time and other threats to their security because of loss of their homes and incomes through the disruption of their lives. The fact of violence in the family is rarely taken into account by the law in these situations. It is this family context which provides significant problems for women who are in a life-threatening situation. The inability of the law and the legal system to respond to this poses one of the largest threats for women. While it is not possible to guarantee any person safety in our society, the Commissioners are of the opinion that it is the responsibility of the government and its institutions to ensure that, where possible, the system does not create or perpetuate the violence or impose additional burdens on women who have suffered this harm to their human rights. Failure to respond implicates the government, and society in general, as passive participants in this massive violation of the human right to life and freedom from persecution. International standards now recognize domestic violence as a significant violation of women's human rights, akin to torture, and a major barrier to equality. Ultimately, and perhaps surprisingly for a legal research agency, the Commissioners concluded that the social and legal problems involved in domestic violence are not unknown or insoluble. The issue does not require a great deal more study or more laws, but rather response to existing information and enforcement of existing laws."

From Rhetoric to Reality, Ending Domestic Violence in Nova Scotia, which has a Summary in English, French and Mi'kmaq, is freely available from the Law Reform Commission's office by calling (902) 423-2633 or Fax (902) 423-0222 or E-mail at mmcconne@fox.nstn.ns. The Report, as are all the Commission's Reports, is also freely available on the Chebucto Community Freenet (cfns.dal.ca) under the Commission's Homepage in Government and Politics. Disc copies are also available on request.

FINAL REPORT

FROM RHETORIC TO REALITY
ENDING DOMESTIC VIOLENCE IN NOVA SCOTIA

Law Reform Commission of Nova Scotia
February 1995

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

The Commissioners are:

William Charles, Q.C., President
Ronald Culley, Q.C.
Justice John Davison
Jennifer Foster
Dawna Ring
Dawn Russell
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Dr. Moira McConnell is Executive Director to the Commission.

Anne Jackman, LL.B., is Legal Research Officer to the Commission.

The Commission was assisted in its research through various stages of this project by legal consultants D. Ginn, C. Cogswell, J. Shlossberg and M. Preus.

The Commission offices are located at 8th Floor, Garrison Place, 1526 Dresden Row, Halifax, Nova Scotia, B3J 2K2. The telephone number is (902) 423-2633, Fax Number is (902) 423-0222 and the E-Mail Address is mmcconne@fox.nstn.ns.ca. The Commission's research is also accessible through the Community Freenet at http://www.cfn.cs.dal.ca/Law/LRC-Home.html.

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SUMMARY

The Law Reform Commission of Nova Scotia has examined ways in which the law and legal system in Nova Scotia can be reformed to be more effective in combatting domestic violence. The Commission is concerned that, despite numerous studies over the last decade, explicit government policy statements and directives and equally numerous laws this form of violence continues to occur with terrifying regularity. Law is one of the central instruments used by governments to advance social, justice and other policies yet the legal system and law do not appear to be having much impact in eradicating this social problem.

Reports from around the world and other parts of Canada all echo the same conclusion: violence against women by their spouses is a life threatening situation which is not treated seriously by the legal system or by society in general. The common theme that surfaces is a failure to comprehend and respond to domestic violence as a life-threatening situation which should be accorded the highest priority in terms of response and protection. It would not be an understatement to say that for many women, the experience of existing with a violent man is akin to living with a time bomb which will eventually result in death. The fact that many women continue to experience violence after they leave or no longer live with the spouse highlights the extent of the difficulty posed for women. The failure on the part of the entire legal system to appreciate this fact and respond accordingly is the central problem.

International standards now recognize domestic violence as a significant violation of women's human rights akin to torture and as a major barrier to equality. Despite all of this, the situation remains unchanged. Since the law in Canada already clearly prohibits harassments, threats and all forms of physical violence, it appears that the existing law is not obeyed or respected.

Although the legal system itself cannot alter human behaviour and attitudes, the law and the delivery of legal services can encourage or reinforce particular attitudes. The Commission believes that little use is made of the criminal justice system by women experiencing this form of violence and that one of the reasons for not using the law is that it is not seen as responsive to their needs. This is an access to justice concern for women in that the system is clearly not serving the needs of all people equally.

After a great deal of reflection, the Commission has concluded that while some changes could and should be made to the written laws, the heart of the problem lies in the way the existing law is given meaning in society - that is, how it is applied in cases of domestic violence. Even the best designed law will not deter a person from an act if he does not

believe there will be any consequences for disobeying the law. The way in which the law is

interpreted by lawyers, judges and legal system personnel sends a message to all of society as to what is or is not acceptable behaviour. This is probably the most significant role of law governing relations between people in society.

While there is some attempt to provide more responsive laws along with training and education of justice personnel, including judges, the underlying institutional structures are unchanged. In addition, the lack of coordination of resources devoted to dealing with the issue suggests that domestic violence is still not understood to be the large scale problem that it is. To some extent the recent high profile cases, increased media responsibility and various government initiatives aimed at educating people working with women who have been abused have begun to create some of the necessary changes in attitudes. However, this is incremental change which is not sufficient to meet the immediate danger that women are experiencing daily. What is currently needed is a coordinated effort bringing together resources with leadership, focus and the mechanisms necessary to ensure that change occurs more rapidly.

The Commission's final views in light of its earlier research, commentaries it has received on the suggestions set out in its Discussion Paper, as well as consideration of changes in other places are contained in this Report. The conclusions reached by the Commission can be summarized as follows:

* violence against women is a breach of fundamental human rights and is an act of oppression that exists in every country;

* domestic violence imposes a significant cost on all members of society;

* there is a failure in Nova Scotia to give priority to preventing violence against women which is reflected in the lack of resources and effective strategies to achieve these policies;

* the criminal and civil or family law systems are perceived as hostile to all women and women of colour in particular;

* there is a failure at all levels of the legal system to understand and treat domestic violence as a life threatening situation;

* there is a need for the legal system to take account of the fact that violent crimes occur in the family and to make fundamental changes in the court and legal systems to respond to this knowledge;

* family violence is a complex situation which demands interdisciplinary and interdepartmental and governmental and non-governmental responses to be effectively combatted rather than additional laws;

* there is a need to respond to the specific context in each case of domestic violence but this must be combined with accountability for this response to avoid abuses of discretion; and

* the government has the responsibility to take action to harness all its mechanisms and resources to address this widespread social problem and that failure to do so is considered under international standards as an act of discrimination and even persecution by the government.

Most of the responses that the Commission received to its 1993 *Discussion Paper* endorse the need for better and more responsive law enforcement and also for more comprehensive support services to women involved with the family law system who have experienced domestic violence. While recognizing the limits of what law alone can do, most people felt that changes could and should be made to the law and the legal system which would better assist women encountering domestic violence.

After considering research, comments and legal responses elsewhere, the Commission has concluded that while there should be some legislative changes, the central problem is one of failure to effectively enforce existing laws. The fact that these are not effective and that there is little progress being made, points to a lack of focus and awareness rather than any legal barrier which cannot be overcome. Additions or structural changes to the law or justice institutions will not create change if they are not combined with commitment, resources and political leadership directed at eliminating this crime.

The Commission believes that there should be responses in several different directions. First, a proper implementation strategy for the law must reflect the need to carefully structure the exercise of discretion to avoid abuse or failure to fulfil policies. At the same time, in order to truly meet the needs of survivors of domestic violence, and the individual situations, the need for tailor-made or specific responses must be provided for. Altering the existing family law so that domestic violence is taken into account in making these decisions is another area for change to ensure that the legal system itself does not further endanger the woman's safety. Finally, legislation and policies must accept the fact that for the most part this is a gendered crime which reflects the global oppression and persecution of one group by another for reasons related to gender. It is not an individualized problem between two people but a widespread form of oppression which has its roots in the historical treatment of women. It requires resources, education and leadership in order to eradicate it.

The Commission's recommendations include the following:

- It is critical that the Government of Nova Scotia identify the eradication of domestic violence as a priority issue to which it will target action and resources;

- The legal response to domestic violence should include improvements both in the criminal and civil law systems and their delivery;

- The life-threatening nature of domestic violence and the immense social cost and barriers to equality for women must be explicitly recognized in the legal and resources response;

- The law must ensure that, in addition to protection of women, the fact that domestic violence is socially unacceptable must be communicated with clarity and certainty;

- Exercises of discretion in the delivery of legal services in cases of domestic violence must be structured to ensure that the government's policy and the laws prohibiting domestic violence is complied with by the people providing legal services. This can be achieved though a combination of structured decison-making and increased personal and public accountability including:

    * Developing system-wide inter-departmental Protocols for handling domestic violence cases and committing sufficient human, education and technical resources including modern communication systems to allow effective delivery;

    * Adopting as the central principle the protection and security of the woman and any other endangered people as the priority for all decisions;

    * Ensuring that the existing system for monitoring cases is enhanced and that there is personal accountability for individuals involved in implementing the Protocols; and

    * Requiring that an independent agency, such as the Advisory Council on the Status of Women, prepare and publish an annual evaluation of the government's progress in the eradiation of domestic violence.

- The delivery of family law, including the courts, must be more responsive to the problem of domestic violence. Specifically, the Commission recommends that:

    * The Minister of Justice should seek to create a fully resourced unified family court in Nova Scotia. At the same time there must be resources and full consideration devoted to developing less adversarial methods of resolving family law disputes, other than cases of domestic violence, so that the court is a last resort;

    * The majority of the Commission recommends that, rather than a specialized family violence court there should be province wide specially trained inter-disciplinary teams of police and support workers to respond to domestic violence cases;

    * There must be safe and affordable housing as transitional and long term alternatives for women escaping domestic violence; and

    * The *Family Court Act*, the *Matrimonial Property Act*, the *Children and Family Services Act* and the *Family Maintenance Act* should be immediately altered as recommended to respond to domestic violence in the context of family law decisions.

- The provincial Minister of Justice should recommend changes to the *Divorce Act*, the *Unemployment Insurance Act* and the *Criminal Code* to ensure that federal law is reformed to better respond to the problem of domestic violence.

DE LA RHÉTORIQUE A LA RÉALITÉ: ELIMINER LA VIOLENCE ENTRE CONJOINTS EN NOUVELLE-ÉCOSSE

[1]SOMMAIRE

La Commission de réforme du droit de la Nouvelle-Écosse a procédé à l'étude des changements et réformes qui pourraient être apportés aux lois et au système légal de la Nouvelle-Écosse afin de leur permettre de combattre le problème de la violence entre conjoints de façon plus efficace. La Commission est préoccupée par le fait que malgré maintes études entreprises durant la dernière décennie, des directives et politiques gouvernementales explicites, de même que l'existence de nombreuses lois, cette forme de violence se répète avec une régularité terrifiante. La législation est l'instrument central utilisé par les gouvernements afin de promouvoir la justice sociale et autres politiques, néanmoins, le système légal et les lois ne semblent pas avoir une grande influence dans la lutte contre ce problème social.

Les rapports d'études émanant des autres parties du Monde et du reste du Canada, en viennent tous à la même conclusion: la violence perpétrée contre les femmes par leurs conjoints menace leur vie même et n'est pas considérée sérieusement par le système légal en place ou par la société en général. Un thème commun émerge de ces rapports: l'absence de volonté de comprendre et de réagir au problème de la violence entre conjoints auquel la priorité devrait être donnée en ce qui concerne les mesures à prendre et la protection des victimes. Le moins que l'on puisse dire est que pour de nombreuses femmes, leur existence avec un homme violent s'apparente à vivre avec une bombe à retardement qui ne peut que mener à la mort. Le fait que plusieurs femmes continuent à subir la violence même lorsqu'elles ont quitté leur conjoint où ne résident plus avec leur conjoint, met en lumière le dilemme devant lequel ces femmes se trouvent. Le problème central réside en ce que le système légal au complet ne reconnaît pas cette situation et conséquemment, ne remédie pas à la situation.

Les normes internationales reconnaissent maintenant la violence entre conjoints comme une violation importante des droits fondamentaux des femmes au même titre que la torture et comme une barrière majeure à l'accès des femmes à l'égalité. Malgré tout cela, la situation persiste. Puisque les lois canadiennes interdisent déjà le harcèlement, les menaces ainsi que toutes formes de violence physique, il appert que les lois existantes ne sont pas respectées.

Bien que le système légal ne puisse, seul, modifier les attitudes et comportements humains, les lois et les services juridiques disponibles peuvent encourager et renforcer certaines

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

attitudes. La Commission est d'avis que les femmes victimes de cette forme de violence n'ont pas recours au système de justice criminelle parce que, entre autres raisons, ce système n'est pas considéré comme pouvant répondre à leurs besoins. Ceci constitue un problème d'accès à la justice pour les femmes en ce qu'il est évident que le système ne répond pas aux besoins de tous et toutes de façon égalitaire.

Après mûre réflexion, la Commission en est venue à la conclusion que même si des amendements aux lois pourraient et devraient être faits, le problème réside plutôt dans la portée donnée aux lois dans notre société, c'est-à-dire, la façon dont les lois sont appliquées dans les cas de violence entre conjoints. Même la loi la mieux rédigée n'empêchera pas une personne de désobéir à cette loi s'il pense qu'il n'en subira aucune conséquence. La façon dont les lois sont interprétées par les avocats(es), juges et autres intervenants du système judiciaire transmet un message à la société quant à ce qui constitue des comportements acceptables. Ceci illustre probablement le rôle le plus important que joue le droit en régissant les relations entre les individus dans notre société.

Malgré l'existence de tentatives afin de promouvoir des lois qui répondent mieux aux besoins de même que des programmes d'apprentissage et d'éducation des intervenants du milieu judiciaire, y compris les juges, les structures fondamentales à l'intérieur des institutions demeurent inchangées. En outre, le manque de coordination des ressources consacrées à ce problème indique que la violence entre conjoints n'est toujours pas perçue comme un problème aussi étendu qu'il ne l'est en réalité. Les récents cas célèbres, l'accroissement de la responsabilité des médias de même que les diverses initiatives gouvernementales visant à éduquer les intervenants auprès des femmes victimes de violence conjugale, ont commencé dans une certaine mesure à provoquer les changements nécessaires dans les comportements. Néanmoins, ces changements progressifs ne sont pas suffisants pour enrayer les dangers immédiats et quotidiens courus par les femmes. Un effort de coordination est présentement nécessaire pour réunir les ressources, la volonté d'agir, l'intérêt soutenu et les mécanismes essentiels afin de s'assurer que le changement ait lieu plus rapidement.

L'opinion finale de la Commission formée à l'aide de recherches antérieures, des commentaires reçus sur les recommandations faites dans le Document de réflexion, ainsi que des considérations militant en faveur de changements trouvées en d'autres sources, est exposée dans ce Rapport. Les conclusions auxquelles la Commission en est arrivée se résument ainsi:

* la violence contre les femmes est une violation de droits fondamentaux de la personne et constitue un acte d'oppression qui existe dans tous les pays;

* la violence entre conjoints entraîne des coûts importants pour tous les membres de la société;

* la Nouvelle-Écosse ne donne pas priorité à l'élimination de la violence contre

les femmes et cela se traduit par une absence de ressources et de mesures efficaces visant à observer cette politique;

* le système de droit criminel, civil ou de la famille est perçu comme étant hostile aux femmes, particulièrement aux femmes de couleur;

* une lacune existe à tous les niveaux du système légal en ce que la violence entre conjoints n'est pas perçue et traitée comme une situation menaçant la vie;

* il est nécessaire que le système légal prenne en considération le fait que des crimes violents surviennent en milieu familial et que des changements fondamentaux doivent être apportés aux tribunaux et au système légal afin de remédier à ce fait;

* la violence familiale est une situation complexe qui exige que des mesures de nature multidisciplinaire, gouvernementale, non gouvernementale et de coopération entre les ministères soient prises, plutôt que l'adoption de lois supplémentaires, afin de combattre ce problème de façon efficace;

* les mesures doivent être prises en tenant compte du contexte particulier à chaque cas de violence entre conjoints tout en étant soumis aux règles de responsabilité personnelle afin d'éviter les abus dans l'exercice du pouvoir discrétionnaire;

* l'obligation de recourir à tous les mécanismes et ressources pouvant remédier à ce problème social rampant incombe au gouvernement et l'omission de remplir cette obligation est considérée comme un acte de discrimination et même de persécution en vertu des normes internationales.

La plupart des commentaires reçus par la Commission en réponse à son Document de réflexion publié en 1993 souscrivent au besoin d'appliquer les lois de façon à mieux répondre au problème et d'avoir un service plus complet d'aide aux femmes ayant eu recours au système de droit familial et ayant été victimes de violence entre conjoints. Tout en reconnaissant qu'il existe des limites à ce que les lois seules peuvent accomplir, la plupart de gens sont d'avis que des changements pourraient et devraient être apportés aux lois et au système légal afin de mieux aider les femmes confrontées à des problèmes de violence conjugale.

Après avoir considéré des recherches, commentaires et les mesures légales prises ailleurs, la Commission conclut que même si des changements de nature législative doivent être apportés, le problème central réside dans une lacune au niveau de l'application efficace des lois existantes. Le fait que ces lois ne s'avèrent pas efficaces et que peu de progrès semble

avoir été fait, démontre un manque d'intérêt et d'attention plutôt que l'existence de barrières légales ne pouvant être éliminées. Toute addition ou tout changement fondamental aux lois ou aux institutions judiciaires n'entraîneront aucun changement à la situation s'ils ne sont pas accompagnés d'un engagement, de ressources et d'une volonté politique de mettre fin à ce crime.

La Commission est d'avis que des mesures devraient être prises à différents niveaux. En premier lieu, la stratégie de mise en oeuvre des lois doit refléter le besoin de bien encadrer l'exercice du pouvoir discrétionnaire afin d'éviter les abus ou le défaut de respecter les politiques. Simultanément, des mesures particulières ou appropriées à des situations particulières doivent pouvoir être prises afin de répondre véritablement aux besoins des personnes ayant survécu à la violence entre conjoints. Le droit de la famille existant doit aussi être modifié afin de considérer la violence conjugale dans la prise de ce type de décisions dans le but d'éviter que le système légal lui-même ne mette en danger la sécurité des femmes. Finalement, les lois et politiques doivent accepter le fait qu'il s'agit principalement d'un crime relié au sexe des personnes et reflète l'oppression et la persécution à l'échelle mondiale d'un groupe par un autre groupe pour des raisons reliées au sexe des victimes. Il ne s'agit pas d'un problème particulier entre deux personnes mais plutôt d'une forme étendue d'oppression qui a son origine dans le traitement réservé aux femmes historiquement. L'élimination de ce crime nécessite des ressources, une meilleure sensibilisation et de l'initiative.

L'ensemble des recommandations de la Commission inclut notamment celles énumérées ci-dessous:

- Il est crucial que le gouvernement de la Nouvelle-Écosse identifie l'élimination de la violence entre conjoints comme une priorité pour laquelle un plan d'action sera élaboré et des ressources consacrées;

- Les mesures prises afin de combattre la violence entre conjoints devraient inclure des améliorations apportées tant au système de droit criminel qu'au système de droit civil de même qu'à leur application;

- Les mesures de nature légale et celles reliées aux ressources doivent reconnaître de façon explicite que la violence entre conjoints constitue une menace pour la vie, qu'elle implique d'immenses coûts sociaux et qu'elle nuit à l'accès à l'égalité des femmes;

- Les lois doivent, en plus de protéger les femmes, véhiculer clairement et avec conviction l'idée que la violence entre conjoints est socialement inacceptable;

- Le pouvoir discrétionnaire exercé lorsque des services judiciaires sont rendus dans le

cadre de dossiers de violence entre conjoints doit être encadré afin de s'assurer que les personnes rendant ces services respectent les politiques gouvernementales et les lois interdisant la violence entre conjoints. Ceci peut être accompli par le biais d'un pouvoir décisionnel encadré ainsi qu'une responsabilité personnelle et publique accrue, notamment:

* En développant des Protocoles inter-ministériels obligatoires applicables à tous les niveaux du système relativement à la façon de traiter les cas de violence entre conjoints et à l'engagement de ressources humaines, pédagogiques et techniques incluant des systèmes de communication modernes afin de permettre une application efficace;

* En adoptant comme ligne directrice dans toute décision, la protection et la sécurité de la femme et des autres personnes en danger;

* En s'assurant que le système de contrôle en place a été amélioré et que les personnes mettant en oeuvre les Protocoles seront tenues responsables le cas échéant; et

* En exigeant qu'une organisation indépendante, telle le Conseil consultatif du statut de la femme (Advisory Council on the Status of Women), rédige et publie une évaluation annuelle des progrès du gouvernement dans la lutte contre la violence entre conjoints.

. Le droit de la famille dans son application, incluant les tribunaux, doit mieux répondre au problème de la violence entre conjoints. De façon précise, la Commission recommande ce qui suit:

* Le Ministre de la Justice devrait créer un Tribunal unifié de la famille en Nouvelle-Écosse (Unified Family Court in Nova Scotia) disposant des ressources nécessaires. Simultanément, dans les cas de conflits familiaux autres que ceux impliquant de la violence entre conjoints, des méthodes de résolution des conflits moins antagoniques de même que les ressources nécessaires à ces méthodes devraient être considérées, afin que le recours au tribunal n'ait lieu qu'en dernier ressort;

* Plutôt qu'un tribunal spécialisé en violence familiale, des équipes multidisciplinaires de policiers et d'intervenants, à la grandeur de la

province, devraient suivre un entraînement spécialisé afin de traiter les cas de violence entre conjoints;

* Des établissements de transition ou de séjour prolongé sécuritaires et abordables devraient être accessibles aux femmes échappant à des situations de violence entre conjoints; et

* La *Loi sur le tribunal de la famille (Family Court Act)*, la *Loi sur le patrimoine familial (Matrimonial Property Act)*, la *Loi sur la protection des enfants et de la famille (Children and Family Services Act)* et la *Loi sur les obligations alimentaires (Family Maintenance Act)* devraient être amendées immédiatement, tel que recommandé, afin de combattre la violence entre conjoints dans la prise de décisions dans le champs d'application du droit de la famille.

. Le Ministre de la Justice provincial devrait recommander que la *Loi sur le divorce (Divorce Act)*, la *Loi sur l'assurance-chômage (Unemployment Insurance Act)* et le *Code criminel (Criminal Code)* soient modifiées afin que le droit fédéral subisse une réforme permettant de mieux combattre le problème de la violence entre conjoints.

WEJA'TIKEMK KIASPA'TAQN MISOQO KETLEWEY TAN TELI NAQATŁMK EMEQO'TAQN WLA NOPA SKO'SIA.[2]

Law Rifo'rm Kmisn kisi ankatłk ta'n tet teplutaqn aqq wi'katikn teplutaqnl Nopa Sko'sia kisi ila'tuten ta'n mej kisi aji wuli wekasital ta'n tijiw matnmumk emeko'taqn. Kmisn sespete'tk, tlia lo'q pikwelkl palisi'l wla pemiaq mtlnewe'l te'sipoqnkeql, nekmewe'l eta kaplno'lewel klusaqnn, asiste'lsuti'l aqq asma tetuji pikwelkl teplutaqnn, me'j ne'kajiw eyk emeko'taqn, kwetaywek lpa jel tetujiw mele'k. Teplutaqn nekewey kisi nikani eweykasitew kaplno'l wjit apoqnmatkl wtanl, koqaja'taqn aqq ktłkl palisi'l me nekajiw aqq teplutaqnn mu tali wtapsuninukl ta'n tijiw ketui koqaja'toq wla ta'n wtane'l lukwaqna'lukwi'tij.

Klusuaqn msłt tami wsitamu'k aqq se'k Kanata paqtukoa'ql newtey teluekl: wikajl wen emekweyaj mimajuaqn esana'qiktuk eliaq toqo mu ketlamite'lmukl aqq lpa maw wtanl. Teli wsua'tasi'k staqa nike mu wen ketui nemuk aqq mu ketui ika'lsik wen ta'n tijiw eyk emeko'taqn ta'n mimajuaqn esana'qiktuk eliaq toqo tepias mu tmk nekmewey maliaptasin. Ma e'wlek wen tluej pikwelk e'pit tekweiwaj ji'nml emeko'teklitl, telqanik kutay nike eymn matntimk ta'n ma wen wsłtaq. Katu mej eykik e'pitjik siawi we'tuo'tk emeko'taqn tlia lpa naqtłk kisna mu nuku tekweia'ti'tik ji'nml na wla pitiata'toq ta'n teli me'ki esanaqsłpnek wetqatk. Malukłk aqq maliwsua'toq wla ta'n teli esana'q aqq na asma nekewey wta'n lukwaqa'lukwi'tij.

Internasne'l nłkaqnn nike nemitoq emeko'taqn se'k ela'tikl jel mu e'pit ta'n tel juku'aqmij mimajune'l ktlsłk telnmitasikl staqa amaskwiplnuj wen kisna tetpisamut wen. Tlia lo'q wla kistliaql mej nekaiw newte telkmiaq koqoey. Katu Kanatawe'l teplutaqnl ki's mu assite'tmuk wen wji-wtayuksin, wen wji-wtamuksin aqq ta'n teli milamu'k emeko'taqnn, teli ankamkuk etekl teplutaqnn muk ketlamsłtasinukl aqq mekite'tasinukl.

Tlia lo'q nekewey muk kisi ilutmukl ta'n mimajuinu teli ta'sij aqq ta'n tele'k, teplutaqnn aqq ta'n teli wekasik kisi apoqmatew aqq kisi nental ta'n wen teli se'k elita'sij. Kmisn ketlamsłtk mu tepi ewewasninukl krimnl likl sistm ta'n tet e'pit emeko'tasij aqq ta'n koqoey wjit mu ewekasinuk teplutaqn mu teli nmitasinuk nuta'qn. Wla nekmewey nemitsik koqaja'qtaqn wjit e'pitjik mu

[2]Translation provided by Professors Murdena Marshall and Joe B. Marshall, University College of Cape Breton, Sydney, Nova Scotia.

newta ms+t wen teli apoqnmakuk.

Ta'n tijiw menaqa ankite'tmuk, Kmisn teluek tliapa eykl kisi kiwaska'ten teplutaqn, ma kisi wla'siknukl m+ta nike etekl teplutaqn teli nmitasikl mu tali wtapsuninukl tlia mawi klu'lkl kisi wikasikl to'q ma wen naqalukukl nekm tli klams+tasij ma kisi tala'lat tlia list+k teplutaqnn. Teplutaqnn ta'n teli ns+tmi'tij nuji we'kwmua'tijik, nuji ilsutaq+tijik aqq li'kl sistmiktuk etlukutijik kinua'tekej ta'n koqoey welte'tasik kisna mu welte'tasinuk. Wla nekmewey tepias e'tmaten teplutaqn ta'n tijiw mimajuinu'k askayakwi'tij.

Tlia lo'q weji nu'kwalsultijik ika'tunew teplutaqnn mej naji qamastekl aqq kina'muksinew aqq kinu'tmuksinew koqajataqniktuk lukewinu'k, aqq maw nuji-ilsutaq+tijik, katu ta'n mu nemitasinukl kisitaqnn mnaqa kwiaskia'nukl. Me app, awije'jkl nikani ns+tuo'qn elkitasikl maliaptmn wla kistliaq+pnn telapt+k emeko'taqn ne'kayiw mu teli nmitasinuk tlmelki lukwaqninuk.

Katu eykl kejikaike'l ta'n kesi nmitasikl ta'n teplutaqn kisi listasikl aqq teli ketlamite'tmi'tij nuji wasoq+testaq+titjik aqq kapmte'l welte'taqnn telite'tasikl kina'muan mimajuinu'k elukewa'tiji e'piliji ta'nik kisi emeko'tasultijik nekmowk kisi te'tmi'tij pilui ankatasin teplutaqnn. Katu wla ankua'taqn mu tepianuk kisi jikla'tun esana'q wjit ta'n e'pijik kaqmutmi'tij te'sik+sk+k. Ta'n koqoey nike nuta'q na mawuktasin taoq'toql nikani nsuto'qnn koqaji ankaptasin aqq natawi wekasin wen kulaman kisi ketlewaya'ten ketloqo piluwekasikl nq+sayiw.

Kmisn nike telapt+k m+ta nikani ns+tuo'qn kisi nmitoql aqq apaji wi'k+kewut ta'n tijiw tewa'tkitkek *Discussion Paper*, maw wiaqi ankite'tk ta'n tet kisi kiwaskiwikasikl wla Reportituk. Kisutasikl welapt+kl kmisn nike mawjaqtekl nkutay wla:

* Emeykweyuj na e'pit kelt+tat ta'n koqoey ms+t mimajuin ketlewea'luj aqq eyk ms+t tami wen ta'n telpemoqiuj.

* Emejko'taqn na we'tueat ms+t mimajuin.

* Nopa Sko'sia mu etenuk ikanwikasik ta'n mu asite'tmuk emyko'taqn ktls+k nemitasik ta'n tel nuta'ql nikani ns+tuo'qnn aqq ta'n teli tetpaqi wekasiten wla ta'n teli pmiaql.

* Teplutaqne'l ta'n eweykasi'titkl nuji ilsutaq+tijik wjit jiksu'k, kisna me'ki o'pla'taqitjik, kisna tetua'tijik telaptasik mu ketlamite'lma'tiki e'pilij aqq me app e'pijik kijka piluamuksij.

* Ms+t tami elapa'timk tepluaqnn ta'n eweykasikil nike mu nemitu'tik aqq mu telaptmi'tik emeyko'taqn na esana'q.

* Nutaq wjit teplutaqnn ta'n eweykasi'titl mlki ankatmnew me'ki o'pla'taqnn ta'n jiksu'kl weji sapitaql aqq ms+t kiwaskiwikasin kortiktuk aqq maw teplutaqnn ta'n eweykasikl kulaman wuljiks+ten wla kina'matnewey.

* Emeyko'taqn na metuek kisi nenmn toqo etawatmamk wuli kina'muksinew aqq mawi kina'muksinew ta'nik telua'tijik kapmntaq aqq ta'nik mu kapmntaq wuli jiks+tmu'tinew ta'n teli wuli mawuktasitew aqq katu awnaqa ankwitasin teplutaqnn.

* Nutaq wlui jiks+tasin keknue'kl ta'n teliaqs+p te's wen emekweyiuj katu miamuj wiaqa'tasik ta'n wen teli koqajaknutk kulaman wla wuli jiks+tuaqnn ma o'pli wekasikl ta'n koqoey kisi weketen; aqq

* Kaplno'l wesko'tk nekm ketlamite'lsuti kisi mawo'tn ms+t lapoq+taqnn aqq maw nikani ns+tuo'qnn wjit kisi asmikwa'tann wla ta'n utanl lukwaqna'lukwi'tij aqq mukisi maliaptmi'tik na tli ankaptasitew staqa nike to'qpenoqite'taqn aqq lpa je kaplno'liktuk weji wulmajo'tasin.

Suel ms+t wuli jiks+tmnkewe'l ta'n kimsn kisi msnkl wjit *1993 Discussion Paperm* ketmoqjen ta'n teli nuta'q mej naji klu'lkn aqq me'j naji wuli jiks+tmnew ta'nik nuji kla'qi'katijik aqq mej app atlekn apoqmasuti ta'n e'pijik apoqnmujik ta'n weji sapita'jik jiksu'ke'l teplutaqnn ta'n eweykasikl aqq kisi emeyko'tasultijik tlia lo'q kejitumk ta'n tijiw kis tliapoqnmutew pas+k teplutaqnn, suel ms+t wen telapt+kl kiwasikwi'kaqnn lukwasin aqq lwi'kasin teplutaqniktuk aqq ta'n teplutaqnn ewekasikl kisi naji wuli apoqnmuas e'piliji ta'n kisi emeko'tasultijik.

Ta'n tijiw kisi iloqaptasik koqoey petkitasikl klusuaqnn aqq weli liks+tasikl teplutaqnn se'k tle'l, kmisnaq tetlite't mej eykl kisi kwiaska'ten teplutaqnn, ta'n koqoey kji lukwaqna'lukek na ke'sk me'si koqoji tmoqjenmu'k kis etekl teplutaqnn. Ketls+k mu tetpaqi lukwenukl aqq tekle'j ta'n kis tli naji klulk+s, neiasik ta'n tyl nu puktaqite'tmuk aqq ankite'tnmuk staqa nike pilue'l taqim+tqatasikl teplutaqnn ta'n ma kisi asisknmu'nl. Ankua'taqn kisna kisi kiwaskwi'kaqnn wjit teplutaqnn kisna teplutaqno'ko'm ma koqoey kisi kiwaska'tuk mu wiaqi ewekasik wen ta'n teluep tla'teken, nikam ns+tuo'qnn aqq nikanusaq ms+t ketui ks+ka'tutij wla me'ki o'pla'taqn.

Kmisnaq telaptmi'tij nuta'q wuljiks+tmnew. Koqaji lukutikl kiktoqi wjit teplutaqnn tepias kisi apataptmn ta'n tet elnuta'q

pekaji ilamka'taqn kulaman kisi wekasitew wen tli alsumsij kisi wsimuktetew eymeko'taqn kisna mu kisi koqaji wekasiki'l ki's ta'n teli pmiaql. Kiwaski wi'kasik etekl jiksu'ke'l teputaqnn kulaman emeko'taqnn elt nekmewey wiaqite'tasital, ketls+k wla kisuktasikl se'k wjit ketui pilua'tasikl ketlewa'toq teplutaqnn ta'neyekasikl nekmewey mu siawi esanaqituk wjit e'pijik telqatmu'ti'tij. Klapis, teplutaqnewey aqq ta'n teli pmiaql miamuj msa'tu'tij suel wjit ms+t wen teluek wla na pas+k e'pijik me'ki o'pla'lujik katu tepias kisi aptaptasin wsitqamu'k ta'n teli wulmajo'tasink aqq ta'n wen teli ejelita'sij m+ta ta'nik tela'taq+tijik weji tla'taq+tijik m+ta wla ma pas+k e'pijik mu na la newti lukwaqna'lukuk wen, kisna pilue'l app emilitl katu knek elsesa'sik wla ejlita'suaqn aqq knek wejapeksik ta'n e'pijik weji kwitlo'tasultitij. Nutaq me nikani ns+tuo'qnn, kina'matnewey aqq nikanusaq we'kwayin kisi ks+ka'tu'tij kmisnaq kisi welte'tmi'ti'tl wla

* Meki nuta'q Nopa Sko'siawey kapmnt mknmnew ta'n kisi ks+ka'tew emeko'taqn aqq nekmewey tepias nikan pukuwin kulaman kisi ilpukuo'tal nikani ns+tuo'qn aqq ta'n wenik kina'mualtitaq.

* Teplutane'l wuljiks+tuaqn wjit wenik emeko'tasultijik miamuj wiaqten kisi pila'tasikl kitk wjit meki o'pla'taq+titew aqq wjit pas+k mesimtaultimk teplutaqnn ta'n ewekasikl aqq ta'n kis tli ewekasiten.

* Ta'n tetuji esana'q emeko'taqn aqq ta'n teli mawmuni ks+ka'taj wtanl aqq ta'n teli taqm+tq+tek wjit e'pijik mu newte kistlo'tasulti'k miamuj nemitasik teplutaqniktuk aqq miamuj nikani ns+tuo'qn ewikasikl;

* Teplutaqnn miamuj ketleweya'toql nekmewe'l app jel miamuj ikalutjik e'pilij mu ela'laqi esana'q m+ta emeko'taqn aqq wen emeko'tekej mu welte'tasinuk aqq tepias kisi tetpaqi kinua'tuksinew wtanl aqq tepias elt wulns+tmnew aqq ktlamite'taqn ten.

* Ta'n telaptasik ta'n tijiw teplutaqne'l apoqnmasuti'l wjit wen emeko'tasij tepias tli lamko'taqn ta'n ketlewea'tal kaplno'le'l telkmiaql aqq teplutaqnn ta'n mu welte'tmuk emeko'taqnn tepias mawi kma'tunew ta'nik elt ki's etlukutijik teplutaqnel apoqnmasuti'l wla kisi tla'ten, miamuj maw lukutijik ilamko'tasultij nuji kisataq+tijik, aqq mej atelk nutaq koqajaqnutnaqn aqq wiaqi wikasnin;

* Kisi te'tasik ta'n teli wi'katikna'tasikl ta'n ms+t tami welteskl wjit ta'n teli maliaptmnk emeko'taqnewel aqq elsutmn tepiaql mimajuinue'l kma'matewe'l aqq teknikle'l nikani

ns+tuo'qn wiaqtekl pile'l ewekasikl mataqte'kn kulaman aji naqsi msataq e'pijik apoqnmasuti;

* Wikatikna'tumk aqq wesua'tumk mawi espi wikasik kisutasik wjit teli ikaluj aqq ankweiuj e'pit aqq ta'n pas+k wenik esana'q emi'tij tmk maliaptasin ta'n tijiw kisi te'tasik;

* Siawi welte'tmn ta'n nike etek ewekasikl wjit ta'n teli jiko'tasikl kisi kis tliaql tepias kisi naji wula'tasin aqq ten tesk wen ketlewite'lmuksin wjit wenik wejinukwalsultijik kisi wi'katikna'tasikl ewekasinew; aqq

* Nutaq elt ten *agency* ta'n mu wetaqnewasinuk kaplnolek, staqa nike *Advisory on the Status of Women*, nikani maliaptmnew aqq msaqni wi'kmnew tesk ika'q newti punqek aqq ankaptasik ta'n kaplno'l pekisink wjit ta'n teli keska'toq emeko'taqn.

Jiksu'ke'l telputaqnn, tlia eykl korts, miamuj mej naji nq+sayiw wli jiks+tkl ta'n lukwana'lukwi'tij emeko'taqn me app, kmisn welte'kl wla:

* *Minister of Justice* tepias nekm mej kwiluasin aqq wjisaqpeka'tun koqaji nikani ns+tuo'qn ten *United Family Court* Nopa Sko'sia. Tepias elt ten nike nikani ns+tuo'qn aqq tepias ten natuen waju'lukwet pas+k nikanite'tkl asita'ltimkewe'l ta'n tijiw ketui koqaja'tasik jiksu'kl o'plamatimkl kesmnaq etumuk emeko'taqn, kulaman kortiktuk mawi kespi litasuaten;

* Ju mu ten pas+k jiksu'key kort wjit emeko'taqn tepias elt ta'n tel pitaq wla *province* i'mu'tinew mimajuinu'k wesko'tmitij etwi kina'matnewey mawlukuti'tiji nuji kla'qataq+tijik aqq ta'nik nuji apoqnmua'tijik wjit emeko'taqne'we'l;

* Tepias ten wenjiko'ml ta'n mu esanqnukl aqq mu amsamawtinukl aqq ten wjit e'pijik kisi mknmn natkoqoey ta'n knek liapoqnmakutew wjit ta'n teli wsimukt+k emeko'taqn; aqq

* *The Family Court Act, The Matrimonial Property Act, The Children and Family Services Act* aqq *Family Maintenence Act* nutaq ankmaiw kisi kiwaska'tasin ta'n tli maliapt+taq emeko'taqn eyk jikukiktuk aqq teplutaqnn kisutasikl.

* *Provincial Minister of Justice* nekm tepias kisi ikansutmn kiwaskiwi'kaqn wjit *Divorce Act*, *The Unemployment Insurance Act* aqq *Criminal Code* ketleweya'toq Kanataewey teplutaqnn koqojatasin kluaman mej naji wuli maliapt+taq emeko'taqn.

Women's lives are diminished and limited and their inequality reinforced by the violence perpetuated against them and by the fear of the next violence.

> **The limited criminalization of the violence committed against women is a great violation of their basic human rights to equal benefit and protection of the law, to security of the person and sometimes to life.**
>
> *Excerpts from the Final Report of the Canadian Panel on Violence Against Women, 1993, Changing the Landscape: Ending Violence–Achieving Equality, Part V, National Action Plan at 47.*

The collective costs to the community for domestic violence include the systematic destruction of individuals and their families, lost lives, lost productivity and increased health care, criminal justice and social service costs.

Children growing up in violent homes are deeply affected by the violence as it happens and could be the next generation of batterers and victims.

Many communities have made headway in addressing the effects of domestic violence and have devoted energy and resources to stopping this violence. However, the process for breaking the cycle of abuse is lengthy. No single system intervention is enough in itself.

An integrated system has not been adequately funded and structured to assure access to a wide range of services, including those of the law/safety/justice system, human service system, and health care system. These services need to be coordinated and multi-disciplinary in approach and address the needs of victims, batterers, and children from violent homes.

Given the lethal nature of domestic violence and its effect on all within its range, the community has a vested interest in the methods used to stop and prevent future violence. Clear standards of quality are needed so that perpetrator treatment programs receiving public funds or court-ordered referrals can be required to comply with these standards.

While incidents of domestic violence are not caused by perpetrator's use of alcohol and illegal substances, substance abuse may be a contributing factor to domestic violence and the injuries and deaths that result from it...

Much has been learned about effective interventions in domestic violence situations; however, much is not yet known and further study is required to know how to best stop this violence.

> *Excerpts from the Washington Domestic Violence Code stating the intent of the legislators. Wash. Laws 1991, c.301.*

I INTRODUCTION

1. The Domestic Violence Project

The Law Reform Commission of Nova Scotia has examined ways in which the law and legal system in Nova Scotia can be reformed to be more effective in combatting the violence some women experience from their husbands or partners. This form of violence is commonly called "domestic violence" because it usually occurs in the context of people who are or were in a marriage or similarly intimate relationship. The Commission took on this project because it believes domestic violence is a matter which affects all Nova Scotians. The Commission is concerned that despite numerous studies over the least decade, explicit government policy statements and directives and equally numerous laws, this form of violence continues to occur with terrifying regularity.[1] The most recent nationwide study conducted by the Family Violence Initiative Program and Health Canada and Statistics Canada[2] found that:

> Violence against women by their spouses is widespread in Canada. According to the 1993 Violence against Women Survey, 29% of women or 2.7 million who had ever been married or lived common law had been physically or sexually assaulted by their partner at some point during the relationship. Such assaults included only incidents where the violent partner could be

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[1] In 1988, a Directive was issued from the then Solicitor General and Attorney General of Nova Scotia which required that police investigate all spousal assault calls, make arrests where "the situation warrants", and "lay the appropriate charges regardless of the complainant's wishes". In 1991, a study of police and prosecutor compliance with the Directive, indicated that, in fact, the Directive was not followed and that police response to spousal assault was "inconsistent and in some cases inadequate." In 1992, a second joint Directive was issued by the Director of Public Prosecutions to police and prosecutors requiring immediate and effective response to spousal assault cases. In particular it stated that, "[t]he police officer is to lay a charge where there are reasonable grounds to believe that an offence has been committed..." and "[w]here a person bound by a Peace Bond violates a term of the Peace Bond, the police are to treat such violation in the same manner as a breach of a term of bail". The 1992 Directive, while more detailed than the earlier version, still left a great deal of discretion with the people providing these legal services.

[2] The survey took place between February and June 1993; see K. Rodgers, "Wife Assault in Canada" *Canadian Social Trends* (Ottawa: Statistics Canada, 1994) at 3, and K. Rodgers "Wife Assault: The Findings of a National Survey", *Juristat*, March 1994, Vol. 14, No. 9. Cat. 85-002.

> charged under Canada's *Criminal Code.* Of women who had been abused by their spouse, 312,000 had experienced the violence in the year before the survey.

The experience in Nova Scotia is no different from elsewhere in Canada and in fact in the national study, women in Nova Scotia reported the third highest rate of violence in Canada.[3] Law is one of the central instruments used by governments to advance social, justice and other policies and not surprisingly, the law is looked to for a solution to the problem. Yet the legal system and law almost uniformly do not appear to be having much impact in eradicating this social problem. Is it because the law and legal system is not the right instrument or tool to deal with the problem? Is the problem one of resources or one of social and political will? Is it a combination of factors? If law has a role in combating this criminal activity, is there a problem with the way the law is designed or implemented which means it is not effective?

The Final Report of the National Task Force on Violence against Women, after widespread consultation across Canada, concluded that:

> Women survivors of violence are often left unprotected, underserved, marginalized, demeaned and further harmed in their dealings with the legal-judicial system. Women and women's experiences have been starkly absent in the development of both law and legal practice. These silences translate into a system that, more often than not, fails women. Further, racist and prejudiced attitudes and practices put some women at even higher risk. The experiences of women victims of violent crime need to be placed front and centre in the review of the justice system and in making the necessary systemic changes.[4]

Although the legal system itself cannot alter human behaviour and attitudes, the law and the delivery of legal services can encourage or reinforce particular attitudes. The Commission believes that little use is made of the criminal justice system by women experiencing this form of violence because, at least in part, it is not seen as responsive to their needs. This means that in addition to experiencing injury from criminal acts, there is an access to justice concern for women in that the system is not serving the needs of all people.

There have been some steps taken to be more responsive. For example, an interdepartmental initiative, The Family Violence Prevention Initiative, and the creation of a Victims Services Division of the Department of Justice reflect a growing awareness that justice and community service concerns are inter-related. A domestic violence policy was developed through the Family Violence Prevention Initiative which states that its purpose is to:

> Ensure that victims of spousal assault receive efficient, effective and equitable treatment in the justice system by assisting Crown Attorneys with their responsibilities with spousal assault

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[3] *Family Violence in Canada*, Canadian Centre for Justice Statistics, (Ottawa: Statistics Canada, Cat 85-002) 1994 at 5.

[4] *Changing the Landscape: Ending Violence-Achieving Equality* (Ottawa: Minister of Supply and Services, 1993) at 213.

> prosecutions. The Public Prosecution Service recognizes the need for a community based multi-disciplinary response to spousal assault and hopes that this policy will aid in the development of local protocols.

The Crown Attorney's Office of Nova Scotia has also developed a more detailed "policy statement" and Protocols. However, as noted in the Annual Report for 1992-1993 of the Public Prosecution Service,[5] the Spousal Assault Policy developed by the Attorney General Spousal Assault and Child Abuse Committee although approved,

> ... has not been issued to Crown Attorneys. Management Council concluded that current staffing levels would prevent Crown Attorneys from meeting the additional demands of implementing the policy. Council decided it would be preferable to attempt to implement the spirit of the policy without formally issuing it until additional resources were allocated to the Public Prosecution department. The Director of Public Prosecutions has notified the Attorney General in writing of this decision.

As pointed out in written responses to the Commission's 1993 *Discussion Paper:*

> It is discouraging to see the numerous possibilities that are currently possible for the arrest, detention, and conditional release of abusers, and the possible conditions of probation. Because these options are simply not being used. This is not a matter of options not being available to be exercised; rather, it is a matter of ignorance or lack of political will. Police, lawyers and judges are not exercising these options because they are not interested in protecting the safety of women who have been abused.[6]

> Governments across Canada have been begged for two decades to "get tough" on domestic violence. The lack of demonstrable results can only be attributed to the various governments' lack of will to respond in an effective manner.[7]

At the same time, women encountering the family or non-criminal law parts of the justice system find that this too is not responsive to the reality of domestic violence and the problems women experience who must deal with family law issues involving a violent spouse.

The scope of the problem of violence against women is global. The United Nations has declared it to be a form of gender discrimination, a violation of women's human rights and an obstacle to the achievement of social progress and equality. It is notable that one of the countries seeking to have recognition of the significance of the problem and with it

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[5] at 48.

[6] Comments from the Social Action Committee, the Halifax Transition House Association, May 1993.

[7] Comments from the Nova Scotia Advisory Council on the Status of Women, July 1993.

recognition of state responsibility for eradicating this form of oppression in Canada.[8]

In order to carry out this project, the Commission was mindful of the need to consult directly with the people who are most affected by the violence: women. The Commission's research involved consultations throughout Nova Scotia with women who are survivors of the violence, people working with women who have been assaulted, police officers, crown prosecutors, judges, therapists/counsellors, religious leaders, members of the Aboriginal, Acadian and Black communities as well as other organized groups. The people who assisted the Commission in this research are listed at the end of this Report and their time and comments are gratefully acknowledged.

The research and consultation carried out by the Law Reform Commission led it to conclude in its 1993 *Discussion Paper, Violence in a Domestic Context,* that abused women in Nova Scotia suffer from the same problems that have been extensively documented across Canada.[9] The Commission found that the experience of women who have been subjected to domestic violence is that there is a consistent and persistent failure on the part of the legal system to recognize and respond to their needs. The Commission's research led it to

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[8] The United Nations Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 84, 19 I.L.M.33. was adopted in 1979. In December 1993 the UN passed a Declaration Against Violence Against Women U.N. Doc. E/CN.6/WG.2/1992/L.3, Annex I, 1992, which accepted the idea of state responsibility for acts of domestic violence between individuals. Canada had been one of the promoters of this view. For a thorough analysis of the use of international human rights law and rights of women, see Rebecca J. Cook, ed., *Human Rights of Women National and International Perspectives*, (Philadelphia: University of Pennsylvania Press, 1994).

[9] In *Silence in the Court (Battered Women Talk About Their Experience in the Legal System)* the study conducted 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)*, it is reported no action was taken by police in 67% of cases. These findings are consistent with another study, "*Sydney City Police Address Woman Battering.*" In Section 5 (Police: Policy and Procedures Relevant to Woman Battering) various police officers honestly and openly discuss strengths, weaknesses and problems associated with enforcement of the government Directive. These studies and surveys, all of which were conducted in Nova Scotia in the past ten years, are consistent with the findings of the consultations carried out by the Law Reform Commission: the legal system in Nova Scotia does not adequately protect women from domestic violence.

conclude that there must be numerous changes in the delivery of legal services to ensure that the system is more responsive to women who experience domestic violence.

The 1993 *Discussion Paper* set out some preliminary suggestions of the Commission regarding a number of matters including where government reform action should be targeted. In its *Discussion Paper,* the Commission took the view that domestic violence is a crime and that the problem is one of more effective enforcement. Because of underlying structural legal problems, the Commission was of the opinion that it is not useful to focus on adding more non-criminal laws, although some specific changes to existing laws would be beneficial. The Commission was concerned that passing another law might result in change that is more apparent than real if the causes of the current failure of existing laws are not honestly and fully dealt with first. At the time the Commission published its own *Discussion Paper,* a *Discussion Paper* and draft providing non-criminal Domestic Violence Protection Orders in the Supreme Court of Nova Scotia was published by a senior solicitor in the Nova Scotia
Department of Justice. The Department of Justice *Discussion Paper* also concluded that:

> Many victims of spousal assault seem to have little confidence in criminal process. This is particularly so for more disadvantaged and debilitated victims of domestic violence. The structure of criminal process is largely offender oriented, i.e. that is structured to determine criminality and punish offenders. The *Criminal Code*, being offender oriented, offers limited direct remedies for victims of domestic violence. Although firm prosecution will act as a deterrent against future violence, the *Criminal Code* offers few remedies for victims.
>
> The criminal justice system in Nova Scotia has become more victim oriented in recent years with the introduction of specialized programs for victims such as criminal injuries compensation and services for victims of crime. A new Victims' Services Division, which is presently being established by the Department of the Attorney General, will be offering programs for victims of crime including victims of domestic abuse. Victim Services' workers will be available in court to offer assistance, counselling and financial compensation. In addition, money raised by the victim fine surcharge is being used to fund demonstration projects for victims.[10]

The publication of both of these *Discussion Papers* gave people the opportunity to fully consider a range of legal options. From the Commission's perspective, this was useful in that they shared the same overriding concerns. The question was really one of determining whether the main problems in the legal response to domestic violence lies in the law itself or in the people and systems that implement it. Although the Commission has concluded that the real problem is people and the system they work within, many of the ideas and concerns raised are also addressed by the Commission in its approach, however the way to achieve reform or change, differs.

Most of the responses that the Commission received to its *Discussion Paper* endorse the need

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[10] B. Norton, *A Proposal for Domestic Violence Legislation, Discussion Paper,* (Department of Attorney General, Nova Scotia, March 1993) at 2.

for comprehensive services to women who have experienced domestic violence. Domestic violence needs to be treated as a crime but in addition, a broad range of changes to the family law system is also important to fully respond to the family context of the violence. If anything, the discussions regarding domestic violence have highlighted the need to overcome fairly technical problems relating to the fact that the court structure in Nova Scotia provides significant barriers to reforming laws to meet the needs of today.[11]

In the last two years, the government of Nova Scotia has carried out empirical studies on violence against women and has "tracked" in detail the experiences of survivors of domestic violence and other forms of family violence.[12] This, and reports from around the world and other parts of Canada echo the same conclusion: violence against women by their spouses is a life-threatening situation which is not treated seriously by the legal system or by society in general.

While there is some attempt to provide more responsive laws along with training and

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[11] This view had been expressed in 1991 by the Court Structure Task Force of Nova Scotia which recommended a Unified Family Court with full range of support services that could deal with all matters relating to family law such as marriage, divorce, custody, maintenance and property. This recommendation was agreed to by the then Attorney General and the process of restructuring the courts initiated. However, this particular change has still not occurred.

[12] *Nova Scotia Family Violence Tracking Project: The Criminal Justice System Response Results* (Nova Scotia, Department of Justice, 1995), [hereinafter Tracking Project] at 1. The Project had 4 stated objectives:

> (1) To identify, review and analyze all family violence cases reported to participating police and court agencies in Nova Scotia during a specified period of time and where feasible track these cases through the criminal process.
> (2) To enhance the capacity of police forces in Nova Scotia to identify the nature and characteristics of repeat calls for service of family violence cases. Data obtained on collected cases will be analyzed to determine the risk factors associated with chronically abusive relationships and will assist in the development of effective responses and intervention strategies.
> (3) To examine current police information practices and assess the extent to which existing data and information on family violence cases are being used in police decision-making.
> (4) To plan, develop and facilitate the implementation of an automated system for tracking family violence cases and to assist criminal justice agencies with a long-term management of family violence issues.

education of justice personnel, including judges, the underlying institutional structures are unchanged. In addition, the lack of coordination of resources devoted to dealing with the issue suggests that it is still not understood to be the large scale problem that it is. To some extent, the recent high profile cases, increased media responsibility and various government initiatives aimed at educating people working with women who have been abused have created some of the necessary changes in attitudes. However, this is an incremental change which is not sufficient to meet the immediate danger that women are experiencing daily. What is currently needed is a coordinated effort bringing together resources with leadership, focus, and the mechanisms necessary to ensure that change occurs more rapidly.

The Commission's final views in light of its earlier research and commentaries it has received on the suggestions set out in its *Discussion Paper,* as well as consideration of changes in other places, are contained in this Report. The conclusions reached by the Commission can be summarized as follows:

* violence against women is a breach of fundamental human rights and is an act of oppression that exists in every country;

* domestic violence imposes a significant cost on all members of society;

* there is a failure in Nova Scotia to give priority to preventing violence against women which is reflected in the lack of resources and strategies to achieve these policies;

* the criminal and civil or family law system is perceived to be hostile to all women and women of colour in particular;

* there is a failure at all levels of the legal system to understand and treat domestic violence as a life-threatening situation;

* there is a need for the legal system to take account of the fact that violent crimes occur in the family and to make fundamental changes in the court and legal systems to respond to this knowledge;

* family violence is a complex situation which demands interdisciplinary and interdepartmental and governmental and non-governmental responses to be effectively combatted rather than additional laws;

* there is a need to respond to the specific context in each case of domestic violence but this must be combined with accountability to avoid abuses of discretion; and

* the government has the responsibility to take action to harness all its mechanisms and resources to address this widespread social problem and that failure to do so is considered under international standards as an act of discrimination and even persecution by the government.

The proposals for reform developed by the Law Reform Commission are based on the following three principles which must be the foundation for an integrated response to this serious social problem:

1. Domestic violence must be understood as a life-threatening crime and accorded the highest priority of the legal system. The first consideration at all levels must be the safety and protection of assaulted women and their children. This means that the government must develop a means of ensuring that the people responsible for delivery of services in the legal system comply with and support the government's policy and the laws which state that domestic violence is criminal, unacceptable and costly for all members of society. All forces of society should be combined in actively seeking to prevent and punish this violent crime;

2. Assaulted women must be treated with sensitivity and respect and provided with support services while involved with any aspect of the legal system. This means that the family and criminal law systems must respond to the specific needs of the woman whose life, liberty and security is endangered by domestic violence. Failure on the part of any aspect of the legal system to be responsive should be identified as an issue of equal access to justice and dealt with as a serious problem; and

3. The legal response to domestic violence must take into account the various ethnic, racial, linguistic and geographic characteristics of Nova Scotia that impose both additional barriers to equal access to the legal system and further threats to the life, liberty and security for survivors of domestic violence.

It is the Commission's view that while at times the problems with the law may seem insurmountable, particularly in connection with the constitutional division of powers between the federal and provincial governments and its impact on women, the existing legal and institutional framework should still be able to respond more effectively to this serious problem. While there should be some legislative changes, the Commission believes that the central problem is one of failure to effectively enforce existing laws. The fact that these are not effective and that there is little progress being made, points to a lack of focus and awareness rather than any legal barrier which cannot be overcome. Additions or structural

changes to the law or justice institutions will not create change if they are not combined with commitment, resources and political leadership directed at eliminating this crime. The recommendations of the Commission indicate some places in which the law could be changed to make it more useful for current needs. The Commission's recommendations assume that the will of the people and the government in Nova Scotia is that domestic violence is a crime against women which should not be allowed to occur. The main issue then is how to ensure that the system operates in a way that achieves this policy.

The rest of Part I of this Report describes the general legal and social problems dealt with in this Report. The second part of this Report is a synopsis of the research of the Commission. The third and last part of this Report is a recommended strategy for the government of Nova Scotia to achieve its stated policies and interest in ensuring that all people are properly protected by the law.

2. Language

In this project, as with other Reports of the Commission, every effort is made to write about the law in a way that can be understood by people who have not had legal training. There are, however, some words used which have a specific legal meaning or may not be familiar to everyone. In this Report the following words mean:

abuse	technically this is not a legal term but it is often used to describe both physical injuries or assaults and emotional and economic injury.
assault	a physical injury or touching of another person without their agreement. This is a crime in Canada. It includes all forms of sexual assault.
battered woman's syndrome	a term used to describe the psychological experience of women who experience domestic violence. The term has been used in legal cases as a defence to explain why some women are forced to kill their spouses before they themselves are killed. It is a term which has raised concern because it suggests that every woman's experience and response is the same and that it is a medical or psychological disorder. Case law, however, suggests that the defence is not one of diminished responsibility because of mental disorder but instead reflects a broader understanding of the legal defence of self-defence and the response of a reasonable person to a life-threatening situation.

Criminal Code	a federal law regulating all criminal behaviour in Canada.
domestic violence	all forms of violence within a couple who may or may not live together. It can include physical, emotional and economic threats including threats to children, friends, pets, property, stalking, harassment and every other form of violence. Historically, only physical or property violence or threats of violence have been dealt with by the law. Emotional violence or terrorizing in the form of criminal harassment or stalking is increasingly being addressed by the law.
family violence	a term which is usually understood to include domestic violence but which also includes violence to children (child abuse) and elder abuse. It includes the same acts as those listed for domestic violence and like domestic violence is usually characterized by a breach of trust.
judicial interim release	a term used in the *Criminal Code* to refer the decision of a judge to allow a person to be released from custody until a trial. Usually this is done on the basis of conditions and a surety, commonly known as "bail".
post traumatic stress	a term used by people in the health profession to describe the psychological state of people who have experienced some sort of trauma following a crime such as an assault. It is seen by some people as important to understanding the need to ensure that people who have been injured are not further harmed by their court experience (e.g., having to testify and recount the events). At the same time there is concern that it tends to suggest that the survivor of violence is "ill" or psychologically disordered.
peace bond	a court order (technically a "recognizance") under the *Criminal Code,* which orders one person to stay away from another. Acting contrary to this court order can result in a prison term of up to 6 months.

spouse	a person involved in an intimate relationship with another person. It is used here to include marriage, common law including same sex couples and dating relations. It is used instead of "husband" or "wife" because domestic violence is not confined to cases where people are married.
spousal/wife assault/abuse	other phrases used to describe the violence we are dealing with.
victim	in criminal law this is the word used to describe a person who has been the subject of a criminal act. The Commission, while recognizing that domestic violence does indeed constitute a victimization of women, has tried to avoid describing women who are subject to domestic violence as victims which suggests helplessness. Since the Commission is of the view that women are surviving with domestic violence they should be described as survivors rather than victims.

Although violence may be directed against a man by a woman or may occur between couples of the same sex, the majority of reported cases involve women who have been assaulted by their male partner.[13] Given this, throughout this Report, "she" will be used to describe the assaulted person and "he" will be used to describe the assaulter.

3. The Social and Legal Problem

Violence in families is widespread in Nova Scotia and in Canada. A 1994 national statistical report concluded that: "*...using specific criteria and research tools to define and measure family violence, this report shows that violence in the family is a serious social and criminal problem in Canada.*"[14] Family violence is violence within relationships which are based on affection, kinship, dependency or trust. It can include physical, sexual, emotional and psychological abuse, and economic exploitation as well as threats of violence and property destruction. The violence can be against children and elderly relatives as well as within couples. Violence in families is not confined to any one group but occurs in families regardless of culture, ethnic origin, religion, race, financial status, geographic location or education. In the Domestic Violence Project, the Law Reform Commission is focusing specifically on

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[13] Tracking Project, *ibid.* at 113, where 92% of spousal assault cases studied in Nova Scotia over 6 months involved women being harmed by men with whom they either have or have had an intimate relationship.

[14] See note 3 at (i).

violence within marriage. This is also sometimes called "intimate violence" or "wife abuse" largely because it is experienced by women in a marriage or marriage-like relationship with men. The inter-relationship between violence with couples and violence experienced by any children who are part of the family must not be ignored. However, the Commission's Report takes the view that domestic violence against women is a cause for concern in and of itself irrespective of any social interest in protecting children and in ensuring that family violence is not repeated from generation to generation.

Historically, the physical assault of married women by their husbands was a socially acceptable and even legal practice. The physical assault of a woman by her husband was seen as a private matter between a husband and wife. Similarly, violence or assault of children in the family was accepted as a private concern of the family, although the behaviour resembled and would have constituted a crime if committed against a person or child who was not a family member. This view of violence against women and children in the domestic context was based on the notion that these people were the property of the man who had responsibility for their upkeep but also freedom to treat them as he chose. This has changed and there is increasing recognition that violence in the family is not a private matter and that it is a global social problem.[15] The law has changed so that the practice of wife beating is no longer expressly permitted or supported. Nonetheless, this behaviour continues to be condoned by society through a failure to enforce laws or create legal structures to effectively eliminate this unacceptable behaviour. Recently there have been many international, national and provincial studies examining the problem of domestic violence and other areas of inequality for women. For example, Canada has issued guidelines to be followed when women refugee claimants are seeking refuge in Canada for gender-related persecution in their home country (e.g., domestic violence and the failure of the government to take action).[16] This is a recognition that domestic violence and the failure to deal with it is

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[15] The scale of this awareness was documented recently in an excellent resource publication *Stopping the Violence Against Women in Relationships: A Resource Inventory*, 1994 produced for the British Columbia Ministry of Womens Equality, Ministry of Skills Training and Labour and the Centre for Curriculum and Professional Development. The Resource Directory lists over 1,500 print and media resources on this issue available across Canada. This list was developed through interviews with approximately 600 organizations in Canada.

[16] The guidelines, an international first, are not regulations but are intended to provide guidance to officials evaluating claims. Under the *Immigration Act* there are 5 enumerated grounds for refugee status: race; nationality; religion; political opinion; and membership in a social group. The guidelines are intended to provide assistance in making a link between gender and an enumerated ground. See *Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Women Refugee*

a form of gender discrimination. It is also clear that the failure of the legal system to protect a woman who has been assaulted constitutes a failure to provide a basic human right to be safe and free from persecution. These concerns are directed at the situation in other countries, but it is telling that, despite clear and substantial documentation for a decade and a half,[17] there has been no perceptible change in the experience of women in Canada. Additional studies have simply confirmed the known information. The underlying problem of resources being devoted to study with little in the way of real change clearly indicates a significant social policy problem. The problem which confronts society is that, despite extensive evidence of the problems of domestic violence, there is a system-wide resistance to change. The effects of failure to address violence in families is now manifest in the increasing violence and suicide amongst young people in Canada.

It is difficult for many people, including people who are involved in the legal system such as police officers, juries, judges and lawyers, to comprehend the situation of the assaulted woman and her experience. The Supreme Court of Canada, in a case [18] where a woman had been repeatedly assaulted by her spouse and who ultimately was forced to kill him in self-defence said in its decision:

> 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.
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> 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

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Claimants Fearing Gender-Related Persecution, (Immigration and Refugee Board: Ottawa, Canada; March 9, 1993).

[17] The first major empirical study was done by L. MacLeod, *Wife Battering in Canada: The Vicious Circle*, (Ottawa: Canada Advisory Council on the Status of Women, 1980). She suggested that 1 in 10 women living with a man would be abused each year. This figure, initially ridiculed, is now accepted as an under-estimate: more recent figures indicate that approximately 1 in 4 women experience some form of domestic violence. See also the Report of the Standing Committee on Health, Welfare and Social Affairs, *Report on Violence in the Family: Wife Battering* (Ottawa: House of Commons, 1982).

[18] *R.* v. *Lavallee* [1990] 1 S.C.R. 852. In this case the issue before the Court was whether the expert evidence of Ms. Lavallee's psychiatrist regarding battered woman syndrome was admissible into evidence. The Court ruled the testimony was admissible, and indeed necessary, to understand the context within which she had acted.

> 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."
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> 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[19].

The Statistics Canada Survey referred to earlier[20] estimated that as of 1993 there are approximately 10,498,000 women over the age of 18 in Canada. Based on the survey they concluded that one-half of all Canadian women have experienced at least one incident of physical or sexual assault since the age of 16 and 29% of every married woman, including common law, have been subject to physical or sexual abuse. The Survey evaluated results on a province by province basis and found: "Women living in British Columbia and Alberta had the highest lifetime rates of wife assault, and Newfoundland, Prince Edward Island and Quebec were reported as having the lowest rates."[21] The rate in British Columbia was 36%; that in Nova Scotia 32%. The rate of wife assault in Nova Scotia was higher than in Manitoba, Ontario, Saskatchewan, New Brunswick, Newfoundland and Quebec. That is, in 1993 Nova Scotia had the third highest lifetime rate of domestic violence against women over the age of 18.

In another federal study, the "Women's Safety Project" component of the Canadian Panel On Violence Against Women Task Force it was found that 27% of women have experienced physical assault in an intimate relationship. Of these women, 100% were assaulted by men; 25% had their partner threaten to kill them; 36% feared they would be killed in one of the attacks; and 50% experienced sexual assault in the same relationship.[22] At the same time, domestic violence is a largely unreported crime. In a Statistics Canada survey published in 1994[23] it was found that only 26% of women experiencing domestic violence reported it to

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[19] *Ibid.* at 871-3.

[20] See *Family Violence in Canada,* note 3.

[21] *Ibid.* at 3-5.

[22] The sample for the study was 420 randomly selected women from Toronto, all of whom were between the ages of 18 and 64. See the "Women's Safety Project", Appendix "A" to *Changing the Landscape*, see note 4 at A1-A18.

[23] See note 2, *Canadian Social Trends,* at 6, 7.

the police and 22% never told friends, family or a support agency about the violence. Research has estimated that on average a woman is assaulted 35 times before she will call the police for help.[24] Thirty-eight percent of women murdered in Canada between 1974 and 1992 were killed by their partners and 87% of the incidents occurred in private residences.[25]

Recently in Nova Scotia, a data collection project called the "Tracking Project", evaluated justice system responses to family violence by monitoring calls and their outcomes in 29 police agencies in Nova Scotia.[26] The study "tracked" the calls received by the police over a 6 month period (April-September 1992) from the first call through to their final outcome in the next year. During that period, 1,157 calls of family violence were received which included child and elder abuse as well as spousal abuse. Spousal abuse was involved in 80.3% of calls (929 cases with 92% of these involving abuse of a woman by a man). Of these, there were two murders and two attempted murders. The study notes that these figures are considered under-reporting because in some cases, the reporting procedures were not followed. The overall estimate is 1.5 times higher. The study found that 67% of calls involved women who were abused by their current partner, 3l% by ex-partners and 38% of the cases were adult dating relationships. Of these figures, half of the women did not reside with their abuser. This is perhaps one of the worst aspects of domestic violence - even if a woman is able to leave the situation she is not out of danger, she is still exposed to domestic violence. The types of incidents reported over the period of the study were physical assault (66%), psychological abuse (56%) and threats (40%). In these cases, 691 children were involved and in almost half of the cases (199), the children witnessed the incident. While these figures are troubling they are not unexpected since, as pointed out already, there have been many studies documenting the incidence of domestic violence for more than a decade. This study simply confirms the situation as women understand and experience it.

While there has been a great deal of media and legal discussion of domestic violence in terms of "battered woman's syndrome",[27] it is the Commission's view that this focus is misplaced. The behaviour to be concerned with is not that of the woman who has been harmed, but rather the behaviour of the assaulter and the people who are responsible for ensuring that this violent behaviour ceases. The focus on the woman's state of mind is important in understanding the difficulty that she may have in dealing with the justice

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[24] P. Jaffe, D. Wolfe, and S. K. Wilson, *Children of Battered Women* (Newbury Park, Cal.: Sage Publications, 1990).

[25] M. Wilson and M. Daly "Spousal Homicide", *Juristat* 1994, Vol. 14, no.8, at 4,5.

[26] Tracking Project 1995, see note 12; highlights of data at 113-114.

[27] *R.* v. *Lavallee*, see note 18 and L. Walker, *The Battered Woman Syndrome* (New York: Springs Pub., 1984).

system as it currently operates and in ensuring that her needs and the extent of harm she has suffered are properly assessed and taken into account in punishment and protection. Except for cases where monetary punishment is made available or where the woman has responded directly against her violent spouse and needs to establish a defence or where a victim impact statement is required for sentencing, the woman's state of mind and her injury is not and should not be part of explaining why the legal system fails to respond adequately to this form of violence.

It is important to understand that many women do not choose to go to the criminal justice system for assistance even when they are able to escape their spouses and the abusive situation. When they do so they face almost unsurmountable problems arising from the fact that the crime frequently takes place in a context where children and property are shared with the person who is seeking to hurt them. Many women encounter ongoing violence in the form of threats and economic harassment through failure to provide maintenance payments on time and other threats to their security because of loss of their homes and incomes through the disruption of their lives. The fact of violence is rarely taken into account in these situations. It is this family context which provides significant problems for women who are in a life-threatening situation. The inability of the law and the legal system to respond to this poses one of the largest threats for women. While it is not possible to guarantee any person safety in our society, it is the responsibility of the government and its institutions to ensure that, where possible, the system does not create or perpetuate the violence or impose additional burdens on women who have suffered this harm to their human rights. Failure to respond implicates the government, and society in general, as passive participants in this massive violation of the human right to life and freedom from persecution. A statement of the problem and one step in resolving it as set out by one writer is compelling:

> It is important that men take action to end male violence as well. Violence against women is men's problem, just as racism is whites' problem, though it's women who pay the price of one, people of colour who pay the price of the other, and women of colour who pay the price of both.
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> [T]here is no good reason that change must come slowly and painfully and only after the injury and death of thousands more. Things change when people stop being resigned to things as they are. Things change when people in large numbers get a hold of principle and begin to act as if they believed it.[28]

The Commission has concluded that the social and legal problems involved in domestic violence are not unknown or insoluble. The issue does not require a great deal more study or more laws but, rather, response to the existing information and enforcement of existing laws.

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[28] A. Jones, *Next Time She'll Be Dead: Battering & How to Stop It* (Boston: Beacon Press: 1994) at 237.

II THE LAW AND DOMESTIC VIOLENCE IN NOVA SCOTIA

This second Part of the Report summarizes research the Commission carried out on the experience of women in Nova Scotia with domestic violence and the legal system. It outlines the social and legal context of domestic violence and also contains research on responses which have been developed in other places. Part III of this Report contains the Commission's recommendations.

1. The Social Context of Law and Domestic Violence in Nova Scotia

The Law Reform Commission of Nova Scotia carried out interviews and consulted with numerous people across the province as well as reviewed studies from Nova Scotia, other provinces and territories in Canada and other countries to identify the problems and ways in which reform could occur. These consultations with women and other participants in the legal system are summarized below. For the most part, they focus on the different sectors of the justice system involved in a response to domestic violence. The common theme that surfaces is a failure to comprehend and respond to domestic violence as a life-threatening situation which should be accorded the highest priority in terms of response and protection. It would not be an understatement to say that for many women, the experience of existing with a violent spouse is akin to living with a time bomb.[29] The fact that many women experience violence after they no longer live with the spouse or even if they never resided with the person highlights the terrifying situation facing women. The failure on the part of the entire legal system to appreciate this fact and respond accordingly is the central problem.

Assaulted women in some communities also have double burdens[30] in dealing with domestic

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[29] The accuracy of this metaphor is attested to in a recent court case in Halifax, see "Time Bomb Jailed", S. Gee, *Daily News*, 13 January 1995, reporting a case before Judge MacDougall involving a Halifax man found guilty of trying to control his ex-wife through threats and outbursts. The Judge commented: "In my opinion, (defendant)... you're a ticking time bomb". The abusive spouse had threatened to kill his ex-wife. The abuser was sentenced to jail for 6 months, placed on probation for two years with non-association conditions, prohibited from alcohol and non-prescription drugs and required to obtain substance abuse and mental health counselling.

[30] C. LaPrarie, *Seen But Not Heard: Native People in the Inner City*, Report 3: "Victimization and Family Violence", 1994 at 6, notes that current research in Family Violence has not yet dealt with this area in any detail. The Report comments:

> In Canada, the relationship between violence and social class (as measured by socio-economic status or SES) has not been a

violence. Historically, and to the present, the Black communities of Nova Scotia mistrust the legal system which is understood to be a system systemically biased against people of colour.[31] Further, many Black communities in Nova Scotia are satellite communities and with geographic isolation comes poor policing and a lack of other government-provided community support services. As a result of these two factors, there is a reliance on community resources and most important, the extended family, to resolve disputes and problems. Black women who are assaulted by their spouses must balance these factors. They must face community and family pressure not to turn to a racist, criminal justice system for help.

Mi'kmaq communities also mistrust the legal system: a system which they perceive to be fundamentally racist[32] and exploitive of Aboriginal peoples. Many of the fundamental ideas in the Anglo-Canadian legal system are also foreign to Mi'kmaq culture and traditional ways of dealing with wrongs against the community.[33] Additionally, for some Mi'kmaq people,

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popular avenue to pursue in accounting for the extent and incidence of violence. Conventional wisdom suggests that family violence and especially wife assault "cut across all levels of society" and with little reference to disproportionality. These beliefs are reinforced by large scale telephone surveys on women and the incidence of violence, where differentials in type of violence, degree of severity and the socio-economic location of victims are downplayed in public accounts.

[Report provided courtesy of B. Francis, Translator, Membertou.]

[31] Volume 4 of the Royal Commission on the Donald Marshall Jr. Prosecution, *Discrimination Against Blacks in Nova Scotia: The Criminal Justice System* (A Research Study, 1989).

[32] See Volume 3 of the Royal Commission on the Donald Marshall, Jr., Prosecution, *The Mi'kmaq and Criminal Justice in Nova Scotia,* (A Research Study, 1989).

[33] Examples of the cultural clash between Aboriginal and Euro-Canadian cultures within the criminal justice system are provided in the first Discussion Paper of the Royal Commission on Aboriginal Peoples, *Framing The Issues*. The Royal Commission states at 15:

> Analysis of justice issues presented in hearings echoed the testimony and conclusions of recent inquiries such as the Donald Marshall inquiry in Nova Scotia (1989) and the Aboriginal Justice Inquiry in Manitoba (1991). Presenters cited the culturally inappropriate applications of laws that ignore Aboriginal norms of behaviour and approaches to problem solving:
>
> > Traditionally we utilized teachings rather

English is a second language which is based on a significantly different value system and a different culture. Mi'kmaq women who are assaulted by their spouses must face these

additional issues as well as pressure from within the community not to turn to a racist system for help.[34]

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than punishment. This is straight from our elders, because they caution us, "Why do you send your children to the room when they misbehave? What is in that room that will teach them something? Why do you not sit down and talk to them, counsel them?"

May 20, Port Alberni, B.C., Earl Smith.

The Royal Commission on the Donald Marshall Jr. Prosecution Report dealt with these issues in Volume 3 note 32 and Volume 1 (*Commissioners' Report: Findings And Recommendations)* at 151:

> At the moment, Natives and Blacks clearly do feel aggrieved by their treatment at all levels of the justice system: by police, Crown Prosecutors, defence lawyers, government officials and judges. Blacks and Natives believe that those working in the system-from top to bottom - lack sensitivity in dealing with members of visible minority groups. They believe they have no stake in what they regard as the "White man's justice system".
>
> Not only does that system not reflect the needs of their people Black and Native leaders told us, but it also does not even reflect the simple fact of the *existence* of their people. The number of Natives and Blacks who are police officers, prosecutors, defence lawyers, judges and court workers, for example, is disproportionably and unjustifiably low, while the number of Natives and Blacks who are accused persons is disproportionately high.

[34] In addition to this cultural pressure, there are even more difficulties and less resources for Aboriginal women not living in an Aboriginal Community. A 1994 Study, *Seen But Not Heard: Native People in the Inner City*", see note 30 at vi and 6:

> The inner city native group is distinctive in the amount of violence people are exposed to in their lives, as both children and adults. However, this distinctiveness and disadvantage is not recognized or advanced in research, theory or government social policy. To expect inner city native people (and especially the most marginalized) to compete for scarce resources, or to respond similarly to family violence "solutions" designed for more affluent groups, is to ignore the extent of

Women in the Nova Scotian Acadian community also face unique and additional complicating factors. Most obviously, there is a language barrier as well as difficulties associated with the fact that many of the Acadian communities are located in areas of the province where support services are not as available as they are, for example, in Halifax.

Further, historically and to the present, the Roman Catholic Church plays a large role in the lives of many Nova Scotians, particularly in Mi'kmaq and Acadian Communities. The implications of this influence runs deep, the most significant of which is the fact that the Roman Catholic Church does not recognize divorce. Recently, however, there have been efforts by religious institutions to take a position which characterizes domestic violence as contrary to Christian teachings.[35]

Many other women also face additional barriers which may prevent them from seeking help from the criminal justice system. Disabled women are especially vulnerable and are 1.5 to 10 times more likely to be abused (depending on whether they live in the community or in an institution).[36] A 1985 survey conducted by the DisAbled Women's Network [DAWN]

> their need.
>
> If needs are to be better responded to, different perspectives on what constitutes violence and victimization among people in different social and economic circumstances must be recognized. What is commonly recommended for improving responses to family violence (particularly spouse abuse) may have little relevance for inner city respondents. Threats of, or actual incarceration for those already chronically involved with the criminal justice and correctional systems, may be meaningless...
>
> There are no comparable [to USA] victimization data in Canada but research shows aboriginal people in Canada and especially females, are disproportionately victimized in relation to non-aboriginal Canadians. Homicides for aboriginal Canadians are considerably higher than for non-aboriginal Canadians. In the U.S. as in Canada, community size is related to rate of violent crime -- rural areas and smaller cities have less crime than large cities. However, this may not hold true for reserves as some data suggest. [citations omitted]

[35] See Vivre Sans Peur "Declaration sur la violence faite aux femmes" by the Counsel permanent de la Conference des eveques catholiques du Canada. 13 Juin 1991. Document provided courtesy of M. Jawed, Director of Women's Affairs, L'Association des Acadiennes de la Nouvelle-Ecosse.

[36] "*Family Violence Against Women With Disabilities*", The National Clearing House on Family Violence (Health and Welfare

found that violence and fear of violence is the most critical issue facing disabled women.[37] In 1988, DAWN conducted a survey (to which 245 women responded). Of those who responded, 40% had been raped, abused or otherwise assaulted; 53% of those who had been disabled from birth had been abused; and 10% of those who had been abused sought help from a shelter but only half were accommodated.[38] When reporting a crime, there is also the problem that they may be viewed as "incompetent" witnesses (especially if they require assistance communicating) and they may not be believed. Disabled women also tend to be viewed and treated as children.[39] Disabled women may also be more dependent on spouses for communication, as well as financial, physical and medical support. If a disabled woman seeks help, she risks further violence, institutionalization, and losing her children. Because of her disability she may also be more isolated and may not have access to information or services.[40]

In addition to the fear and isolation which all abused women experience, immigrant and refugee women can also experience language and cultural barriers as well as racism which compounds the isolation. Furthermore, immigrant and refugee women are far from their family and friends. This isolation and fear is compounded by culture shock and the need to adapt to an often strange new culture and country.[41] Lesbian women who experience domestic violence may face homophobia, prejudice, and a legal system that is geared to and recognizes the rights of heterosexual and not same-sex couples (heterosexism). Similarly, gay men face violent homophobia, prejudice and a legal system that does not protect them,

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Canada), February, 1993, at 2 [citing D. Sobey, "Sexual Offenses and Disabled Victims: Research and Practical Implications", *vis-a-vis*, 1988]. The Tracking Project in Nova Scotia, note 12 at 134 found that in the cases monitored, police indicated that of 3% (25 cases) of the women had some form of disability with mobility being the most frequent (2%).

[37] *Ibid.* [citing J. Pelletier, *Report: Women with Disabilities Networking Meeting*, June 20 - 23, 1985].

[38] *Ibid.* [citing J. Riddington, *Beating The Odds: Violence and Women With Disabilities*, March, 1989, at 1-6].

[39] *Ibid.* at 6.

[40] *Ibid.* at 3.

[41] L. Macleod & M. Shin, *Isolated, Afraid and Forgotten: The Service Delivery Needs and Realities of Immigrant and Refugee Women Who Are Battered*, National Clearing House on Family Violence (Health and Welfare Canada, 1990).

or recognize their rights.[42]

Comprehension of the widespread occurrence of domestic violence and the fact that it is a pattern of behaviour which predictably escalates in intensity (possibly until death) rather than a single incident, are fundamental points that are critical to any effective response to the problem. The consequences of this form of violence and the relative lack of awareness about its impact on an assaulted woman and her ability to participate in the criminal justice system, as well as the fact that assaulted women come from such diverse backgrounds, forms the context within which society must seek to find measures to protect women.

2. The Legal System and Domestic Violence In Nova Scotia.

The Commission first conducted research with women who were either survivors of domestic violence or were working with women in violent situations. This took the form of specific consultations throughout the province, attending workshops relating to domestic violence and meeting with people and groups concerned with this issue including people working in the legal system. The Commission also published a *Discussion Paper* setting out some of its suggestions for change and inviting commentary on these. The first objective of the Project was to assess where the problems with the legal system exist. The following summarizes this research which was deliberately chosen to reflect an experiential rather than statistical approach. The fact that the government of Nova Scotia, as well as the Federal government, already had a number of resources employed in collecting statistical data suggested that experiential research would enhance and explain the overall data collected. This assumption has proved correct in that the data collected by the Nova Scotia Tracking Project by the Statistics Canada Studies has confirmed the comments received by the Commission.

The Commission started with the premise that domestic violence is a social problem which exists in Nova Scotia and that there was no added value in doing another study to confirm this. The concern was with determining specifically where some of the problems in the legal system exist and developing some workable and effective responses to begin to address the problem.

When a woman chooses to call upon the legal system for help, she encounters various actors and institutions, including the law itself, depending on which approach she uses. She may seek to obtain a protective court order called a peace bond through the Family Court or the Provincial Court. Alternatively, she may either call the police and seek to have criminal charges laid against her abuser or someone else who is concerned may call on the police to

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[42] *Abuse in Lesbian Relationships, A Handbook of Information & Resources*, (Lesbian Counselling Services, Toronto 1992): See also *Living with a Bully*" Gaezette, Halifax, N.S., March 1993.

intervene[43]. Or she may do both. The following discussion describes the difficulties women report in gaining access to the legal system for assistance. However, it is important to realize that the situation and experience of each woman is different. For example, many will choose to seek help in a shelter or from friends or family and do not wish to call on the law for help because they do not feel safe and indeed, believe involvement with the law may further endanger their lives. The following outlines some of the people and laws that a woman may come into contact with. The outline is divided into "self-help", "the legal system" and "the law", all of which are equally important in ensuring that domestic violence is dealt with effectively. The description of the legal system is set out in the order that many women encounter it: police services, prosecutors, judges, Legal Aid, probation officers and so on. The description of the law deals with both criminal and non-criminal laws that may be involved.

(a) Self-Help

A woman may go to Provincial or Family Court either by herself or with a lawyer to obtain a protective court order called a peace bond. A peace bond is a court order which is granted when a person establishes that she has a reasonable fear for her safety. A peace bond involves a judge ordering or instructing a named person to stay away from the applicant and it may include conditions relating to firearms and locations where the person must not go. The peace bond is a criminal law remedy provided under the *Criminal Code* which specifically makes it available on the basis of a person's "reasonable grounds" for believing her or his person or property is going to be harmed by another.[44] The idea behind this type of court order which, if breached, can be enforced by imprisonment, is that there is no need to actually have a physical injury or damage to obtain an order. There is no finding of guilt. There only needs to be shown a reasonable basis for believing that there will be an injury. This also means that many of the procedures usually involved when someone is charged with a criminal offence are not required, since the fact that a peace bond exists against someone does not in itself result in a criminal record for that person unless he breaches it and is found guilty of the breach. Depending where she is located in the province, the woman may be able to have access to Legal Aid in obtaining the peace bond. In Provincial Court in Halifax, peace bond applications are not covered by government Legal Aid although Dalhousie Legal Aid does provide assistance for applications in Family Court. Further, there may be delays in obtaining the order since the person still has to obtain access

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[43] It is important to note that where a child is at risk there is a legal obligation placed on "Every person who has information" under the *Children and Family Service Act*, S.N.S. 1990 c.5 s.23 to report the situation to the Social Services Agency so that protective action can be taken. Failure to report can result in a fine of up to $2,000 or up to 6 months imprisonment or both (s.23(3)).

[44] Section 810, *Criminal Code of Canada*.

to a court.

While a peace bond or court order may seem like a good solution, the effectiveness of a peace bond or any other court order is dependent on its enforcement. It is, at the end of the day, a piece of paper with its only value residing in the extent to which the person against whom it is directed respects the legal process. If enforcement is not stringent and persistent or if punishment is not severe, then it is not particularly effective as a protective measure. This means that action must be taken when a peace bond is breached since this may be the only protection open to the woman. The breach of a court order is a criminal offence in itself, and in the context of domestic violence, is a dangerous act which should always be treated as a serious criminal act, a fact stated in the 1992 Nova Scotia Policy Directive to the police. However, this does not appear to be the case. Comments received by the Commission included the following:

> In Halifax, Dartmouth, and Bedford, the Crown does not prosecute peace bonds, and we believe the practice elsewhere in the province depends upon the attitude of individual prosecutors more than on anything else. Further, at least in the Halifax area, Nova Scotia Legal Aid does not represent women on peace bond applications in Provincial Court.[45]

> The failures of the current legal system which the Law Reform Commission identified through consultations, ... generally match our experience and understanding of the legal system. However there are a few limitations. For example, peace bonds are ineffective **partly** because of inconsistent enforcement. They are also ineffective because women are unable to get the forms they need to apply for peace bonds because women are told they have insufficient grounds for a peace bonds because women are told to wait and get a peace bond when their case goes to trial–leaving them unprotected in the meantime.[46]

The woman is dependent on the effectiveness of the legal response to breaches of peace

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[45] Written comments from Dalhousie Legal Aid Services, June 2 1993.

[46] Written comments from the Social Action Committee of The Halifax Transition House Association, May 31, 1993. The commentary also notes that there are cases where police officers have refused to enforce peace bonds where the woman does not have a written copy of the document on her person. This was described as an archaic requirement and outrageous in a system where former traffic violations can be immediately accessed by computer. There is no reason why conditions of bonds and restraining orders cannot be easily and automatically available to the police. The fact that matters related to motor vehicles are now computerized does, however, suggest as with the current suggestion that failure to pay maintenance orders be enforced using the motor vehicle department, that perhaps similar sanctions could be equally useful in sanctioning breaches of peace bonds, in addition to criminal sanctions.

bonds or other court orders such as probation or judicial interim release to ensure her safety. Where this response is lacking, then her life is likely to be in even greater danger and the fact that a court order exists is of little use to her.

It is notable that the Nova Scotia Tracking Project found that, although in principle the data could be available, peace bonds were not easily accessible on the police computer database and were rarely known about by officers responding to calls. The peace bond system was evaluated in the Project and considered to be poorly managed by the justice system. In fact, the study concluded that it is surprising that any peace bonds are enforced at all in Nova Scotia because police have very little involvement with them and rarely know of their existence.[47] This means that in a case where the police might have been able to arrest and detain a person for committing an offence, such as breaching the peace bond, they do not do so because they have not obtain this information. The problem is exacerbated by the fact that until recently, there was little integration of records on a system wide computer data base.

(b) Obtaining Help From The Legal System

Although the legal system is described as one system, a central problem encountered by women experiencing domestic violence is that there are essentially two legal systems. One is the criminal justice system which is regulated by federal law and administered by the province. In this system the state or government takes action against individuals for crimes against society. Ideas such as a presumption that a person is innocent until proven guilty in a court along with the importance of protecting personal liberty are central to the criminal justice system. The injured person, or "victim", is a witness for the government's case. The other system is the civil law or private law system which regulates legal issues between individuals. This system increasingly has government involvement as well in the form of laws setting out either standards of behaviour or relationships or providing for government services which include all areas of public policy such as labour, family relationships, commercial practices, health, education and the environment. Family law, which regulates custody, maintenance, matrimonial property, marriage and divorce are part of this system. It should be noted that even within this system there is further division in that some family law matters are regulated by the federal government and some are regulated by the province. For

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[47] For example the Tracking Project, note 12 at 161-62 found that out of the 929 cases evaluated only 8% had a "known" protection order; 76% of the time it was unknown to police whether an order existed or not. Of the 8%, only 14 (2%) were peace bonds. The Project notes that during this same period women sought 74 peace bonds in Family Court and 364 applications were made in Provincial Court. In the cases where it was known that peace bonds existed and had been breached, charges were laid in 5 out of 14 cases. Out of the 72 known non-association orders which included peace bonds, parole, probations, restraint orders and undertakings, charges were laid in 53 cases (5/14 peace bonds).

example, divorce is regulated by the federal government but property is regulated by the province. To a large extent, this system ignores the fact that decisions which are made about the family take place in the context of criminal activity. This means that although her spouse may be trying to injure or murder her, a woman may still share property with him or be dependent on him for maintenance of any children they may have and she may have to provide him with opportunities for access to the children or be in breach of a court order herself.

Whether she resorts to self-help in the sense of seeking a protective court order such as a peace bond or is forced to seek direct intervention from the legal system by calling the police when an incident occurs, it is clear that the woman is still forced to rely on the legal system to assist her. The fact that family law rulings may actually have the effect of undermining any protection she may have, highlights the need for a system-wide response to the problem of domestic violence. Irrespective of which form of legal response a woman chooses or is forced to use, the same people will be involved in delivery of the justice system services.[48] The following sections describe some of the different groups of people a woman will encounter if she seeks help from the legal system to protect her from domestic violence.

(i) Police Services

The first contact that many assaulted women have with the criminal justice system is the police and even before the police officer, the police dispatcher. Most of the comments made about police response, as well as much of the focus of the meetings held with police officers, involved two topics: police attitudes and the willingness of police to lay charges for acts of domestic violence.

The one generalization that can be made is that there is no consistency in police attitudes toward women who have been assaulted, the appropriate level of police intervention in domestic violence matters, or other related issues such as the role of shelters or transition housing. It is clear, both from meetings with police officers and from comments made during other consultations, that some police officers are very sensitive to the issue of domestic violence and are completely supportive of women who have been assaulted, as well as of those, such as shelter workers, who work with the assaulted women. Similarly, some police officers are very willing on answering a domestic violence call to provide the woman with information on available support services within the community and to provide help such as driving the woman and her children to a shelter or later returning with her to get

[48] For example, even if the government chooses to adopt non-criminal domestic violence legislation, the personnel servicing the system including judges, courts, officers and lawyers will remain the same.

personal belongings from her home. Unfortunately, not all police response is this positive. Many instances were given of police responses that seem to reflect either a lack of awareness about the dynamics of abusive relationships or, even worse, a condescending attitude toward women who are assaulted. These attitudes can mean that the woman does not receive adequate protection if the extent of the danger she is in is not appreciated and the response to her situation is not appropriate. In fact, she may be in greater danger because of the ineffectual intervention for having involved the police at all.

More specifically, according to both assaulted women and to those who work with them, some police officers are less willing to respond to a call from a woman who had called police before and then remained in or returned to the abusive relationship. One police officer stated during consultation, "I guess if she keeps going back, she must like it". Another suggested that, with limited police resources, the police may just decide to "let them battle it out". If the police do respond, belittling comments such as "Oh, you're at it again, are you?", are sometimes made to the woman. Even when a woman is calling the police for the first time, the response is not always helpful. In one instance, when a young woman who had been beaten by her boyfriend called the police, one of the first questions asked of her was, "Whose fault was it?" This and other demeaning comments made by the officer made her decide not to pursue having charges laid.

Finally and perhaps most problematic, is the fact that criminal threats are not understood or responded to properly in terms of their consequences in a situation of domestic violence. In many cases the threat has either been preceded by a violent act or will be followed by a violent act. The fact that a threat is a criminal act and must be treated as seriously as if in fact, the threat was the act itself, is not generally understood.[49] There is no such thing as an

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[49] The Tracking Project, note 12 at 113, found that calls in which the sole complaint was a threat, lowered the dispatch rate from 87% overall to 76% and often resulted in advice being given over the phone rather than having a car dispatched. Of the 929 cases, 370 (40%) involved threats once police arrived on the scene although the dispatch had only identified threats in 19% of the calls, The Project found, at 164-65, that in many of the cases where threats were involved, firearms were present in the home (40/56 incidents). The study found that of the 370 threat cases 65% had a history of threats in the past and 56% had been subject to past physical abuse. 70% of the cases where the woman had been threatened in the past resulted in the current physical assault (that is, the incident in which the police were called). This indicated to the researchers that abusers do carry out their threats and that past behaviour is a good indicator of the future. Of the 370 incidents involving threats only 21% of the abusers were charged with the criminal offence of uttering threats (s.264.1 *Criminal Code*) . The Project also found in the cases examined that the conviction rate for threat charges was amongst the lowest for

"idle threat" in a case of domestic violence. The nature of mental violence and intimidation that can result from the combination of threat and the likelihood that it will lead to action is starting to be recognized in the context of the criminal harassment law. The threat of harm is equally intimidating and as dangerous as stalking in the impact it can have on the person's life and liberty.[50]

In a number of communities there appeared to be an excellent relationship and open communication between the police and transition houses. However, this was not the case everywhere. Where the relationship is not good, this may have an effect on police response to domestic violence calls. For instance, on one occasion, a police officer told a woman who called for help, "Your problem is [name of shelter], not your husband". In other instances, police officers have not respected the need for confidentiality and have revealed to an abusive husband that his wife is staying at the local transition house. In one such case, when a transition house worker complained to the R.C.M.P. detachment in question, the officer in charge threatened to report her to the Solicitor General.

A number of police officers emphasized that responding to domestic violence calls can be very dangerous for police. Transition house staff told of one case where the police refused to respond to a domestic violence call during the night because they felt that the man was too dangerous. Although the police did respond in the morning, the woman had been left all night in an isolated rural area with a dangerous man.

In terms of the willingness or unwillingness of police to lay charges in domestic violence cases it appears that there is also great inconsistency in this area. Whether or not a charge is laid in a particular situation may depend on which officer answers the call. This is in spite of the fact that there is a clear directive from the government on this issue, as well as research on domestic violence that indicates quite clearly that it is not a single incident crime. The existing power of the police officer to remove the abusive man from the scene and keep him in custody overnight to go before a justice before he can be released (if he is released on judicial interim release) is not used. Currently the police can arrest where an officer believes it is necessary to do so to prevent another criminal offence. In the case of domestic violence it is more than probable that another offence including threats or breach of a peace bond or other actions will occur.

The fact that charges are not always laid by police officers was a concern expressed many times during consultations. The Executive Director of one shelter stated that the practice of the police in that area was still to ask the woman if she would like to lay charges. In some

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any offence as only about one third or 35% resulted in a conviction.

[50] However, there appears to be some recognition of this point: See "Time Bomb Jailed", note 29 and some practitioners and judges are dealing seriously with threats.

instances, the woman is asked this in front of the man. A shelter worker in another area said that it is still left up to the woman to lay charges and that in some cases the police may not even document her telephone call. Both shelter workers and assaulted women stated that the violence has to be severe before some police officers will lay charges. For instance, one woman who had been assaulted said that the police refused to take her statement saying, "Women like you usually drop the charges", and advised her that she could lay the charges herself, if she still wanted to "after a good night's sleep". Shelter workers told of two other cases where charges were not laid, even though in one case the woman's nose was broken and in another there were choking marks on the woman's neck. In another case where the police did not lay charges, they simply told the man to take a walk and told the woman, "This is something the two of you will have to work out".

A related concern noted by a shelter worker was that if the police are willing to lay charges, they seem to feel that this must be done right away and are not willing to do so later. Shelter workers indicated that assaulted women may be too distressed immediately following an assault to give a statement, but might be able to do so a few days later if she has received support from family, friends, or shelter workers. Assaulted women and shelter workers also expressed the concern that, even where a charge is laid, it is often only for assault although the extent of the injuries would suggest that a more serious charge should be laid. Further, where charges are laid, it is rare for the man to be arrested and kept in jail even overnight.

A number of police officers expressed the frustration with the charging directives from the then Attorney General and Solicitor General saying that they removed the discretion from the officer answering the call and that only the officer can determine whether it is appropriate to lay a charge. One officer suggested that a call may be "unfounded" if, after investigation, it is found that the woman was as much to blame. Another officer questioned whether arrest was appropriate in spousal assault cases because of its effect on the family structure. Quite a few officers were concerned because the directive instructed them to lay charges against a woman's wishes. One officer stated that in the past, an assaulted woman would have had to pay a deposit to the police before charges were laid. If the charges were later dropped at her request, she forfeited the deposit. The officer seemed to feel that a return to that system would be appropriate. In general, there was a sense of frustration and lack of awareness as to why a woman might return to her abusive spouse or choose not to go through with a criminal trial. This largely stems from a failure on the part of the people providing services to appreciate the validity of the woman's belief that in seeking to escape from violence she is placing herself at even greater risk of harm or death. The underlying problem is often made worse by the fact that in many cases other forms of evidence for a charge such as photographs, clothing, witnesses, statements, medical reports and so on are not always collected as a means of establishing the crime without relying solely on the woman's testimony. This places her under even more pressure from the abuser.[51]

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[51] The Tracking Project, note 12 at 143 and 181 found that police rarely gathered evidence apart from victim testimony. Medical evidence was obtained in only 3% of cases despite the fact

(ii) Crown Attorneys

As was the case with the police, it was clear from the consultation process that there are some Crown Attorneys who take the prosecution of domestic violence cases very seriously and who treat assaulted women with understanding and sensitivity. However, this is not the case with all Crown Attorneys. In fact, several Crown Attorneys commented that they were tired of hearing about the need to be sensitized to domestic violence cases as they felt that all Crowns were already sensitized. There were, however, reports from women of cases where, for example, one woman said that when she broke into tears on the witness stand and asked to be allowed to stop for a moment and have a glass of water, the Crown Attorney told her they did not have time for that. More common situations were often related to workload and resource issues or a lack of victim support services. For instance, the woman may not meet the Crown Attorney until shortly before going to court, thus leaving her intimidated and emotionally unprepared to testify. The fact that often the case is handled by more than one person adds to the problem in that the women often do not have their role in the criminal justice system explained and feel that the Crown Attorney is "their lawyer". The result is that many women feel they are not well served and are bewildered as to why, if this is "her case", she is not treated with more significance or given more control and information about decisions that are being made in the case. While this is a common experience for many people who are victimized by a crime, the lack of information and support in the context of life-threatening violence from a person who may know one intimately, exacerbates and contributes further to the injury the woman has sustained.

On this issue there was concern expressed by a person working as a therapist with women, that women who were involved in the criminal trial process often felt excluded from the decision-making about their cases and that their safety and fear for their lives was not taken into account. The fact that they were often not consulted about timing or witnesses, even though they were probably the most expert person available regarding the other person's violence, meant that women felt a further loss of control over their lives. The failure of the adversarial process to take into account the emotional injuries sustained by people who have been assaulted, also means that court appearances and having to testify and to be exposed to

the former spouse is itself harmful to the woman. All of which means that the process is seen as a source of potential harm, rather than a process offering safety or help.

It appears from the consultation process that some cases are not prosecuted as vigorously as they could be. The most blatant example recounted during consultations involved a case where a woman was stabbed by her husband. The police laid charges but the Crown did not

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that medical attention was required in about 15% of cases. Photographs were used in 10% of cases. Furthermore, there were cases where photos and medical reports were available to the Crown and were not used. Rarely were cases presented without the woman's testimony.

want to prosecute, saying the stabbing might have been unintentional. The shelter staff persuaded the Crown to proceed, but by this time the woman had decided that the legal system was unlikely to provide her with any remedy, and had left the province. A number of assaulted women said that the Crown often agreed to a reduced charge without consulting the woman. Not only were these women intensely frustrated with their lack of involvement in the proceedings, but they were also angry that they had not had an opportunity to make the Crown Attorney fully aware of the dangerousness of the accused.

Most of the Crown Attorneys spoke, with varying degrees of frustration about the "reluctant witness". That is, the assaulted woman who, by the time the matter comes to trial, states that she does not want to testify against the accused. Some Crown Attorneys seemed very sensitive to the reasons why a woman might not want to or is unable to testify. Assaulted women noted these reasons could include: intimidation by the man; a desire to reconcile; the fear that reliving the experience in the courtroom will be painful; a sense that the criminal law system is unlikely to provide her with any meaningful remedy; a lack of understanding of the system; a lack of consultation or cooperation from the Crown; or fear of revenge from the accused. Other Crown Attorneys appeared less aware of the possible reasons why a woman might be reluctant to proceed, and, according to one shelter worker, appeared to blame the woman for her reluctance. As with police practices in gathering evidence, there also appears, for reasons often related to lack of time, lack of coordination with the police, and lack of properly resourced records, little effort made to establish charges without relying solely on the assaulted woman's testimony. The fact that prior history and peace bond information is not necessarily on computer and that the Crown Attorney offices are often not computerized means that Crown Attorneys do not have all the information needed to assess the situation fully. It appears that often the appropriate conditions for release or conditions in sentencing such as counselling for abusive men and non-association conditions are not requested.[52]

(iii) Defence Lawyers

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[52] For example, the Tracking Project, note 12 at 189-90, also identified confusion as to appropriate counselling and therapy for abusers and noted that often substance abuse treatment and a psychiatric examination was sought, neither of which is necessarily appropriate for abusive men. In connection with pre-trial release (at 167), two thirds of all abusers charged in the Project were free to contact the woman they had assaulted although the post-charge period has been documented as the most dangerous period of time for women experiencing domestic violence.

It was suggested a number of times that defence lawyers in domestic violence cases use delaying tactics. According to assaulted women, this has the effect of giving the accused additional time to intimidate the woman to the point where she realizes that it is unsafe to testify. Even where there is no overt intimidation, the delay may place additional emotional burdens on the woman. There were also a number of complaints that the abusive spouse's lawyer (whether in the context of criminal charges or in custody and access disputes) may try to force a shelter to provide information as to the woman's whereabouts. Some assaulted women stated that they had been distressed by brutal cross-examination by defence lawyers. The problem is even worse, however, when the man chooses to defend himself, as the woman is then cross-examined by her abuser.

(iv) The Court Structure

In discussing the court system it is important to understand that women deal with two different court systems. The criminal court system and the civil/family court system. This fact, which largely arises from historical and constitutional reasons, is probably one of the most significant problems for women in Nova Scotia and Canada who are experiencing domestic violence. This is made worse for women in Nova Scotia by the fact that the family law court system is itself made up of two levels of courts dealing with different but sometimes overlapping family matters. The lack of complete family law jurisdiction in any one court can provide many problems for women. In many provinces the family law system has been "unified" so that there is a unified family court which can deal comprehensively with most non-criminal family law matters.[53]

A number of people spoke of the need to have a simpler family court system such as a unified family court so that assaulted women would not have to go to different courts to

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[53] There is a wide range of services offered by the unified jurisdictions because the court deals with all matters comprehensively. There is also a pilot project in Manitoba where family violence is dealt with in a special criminal court which deals only with this kind of criminal law problem. There is some consideration being given to this in Nova Scotia and indeed it was a recommendation of the Court Structure Task Force that a unified family court be created in Nova Scotia which could also deal with criminal cases of domestic violence. There is, however, some concern about whether the recommendation on criminal jurisdiction is workable because the two areas of law approach matters quite differently. For example, in the criminal case the woman will be witness for the prosecution and it is not usually "her" case nor is the prosecutor "her" lawyer. In family law matters, it is "her" case and if she has a lawyer, it will be "her" lawyer.

sever their legal relationship with their spouses.[54] For many women the complexity of the system means that unless she can afford a lawyer and is able to deal with delays in the system, the legal system is not at all useful and in many cases is yet another tool or weapon that an abusive spouse can use to continue his harassment and intimidation through maintenance hearings and custody and access disputes. This is because these decisions and the laws under which they are made do not currently recognize the fact of domestic violence and the fact that the two parties are in a situation where it is not possible or appropriate for them to deal equally with each other. That is, one of the two parties before the court is a violent person who is likely to injure and may murder the other person as well as causing danger to any children and damage to property. The family law and court room experience for many women offers their abusive spouses another opportunity for violence and abuse.

In the context of criminal law, the court experience is equally problematic. Currently a peace bond or protective order is available in family court or provincial court. The Family Court in Nova Scotia also has authority to deal with some cases of inter-family assault under the *Criminal Code,* but it cannot directly deal with most criminal cases.[55] Although the Family Court cannot deal with matrimonial property, occupancy rights and property division issues,[56] it can issue peace bonds with orders to stay away from particular locations and persons, thereby having the same effect as an interim possession order, assuming that the

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[54] Saskatchewan Unified Family Court deals with issuing non-criminal Victims of Domestic Violence Orders. However, there is no punishment in the *Act* for breach of these. For example, if the woman is married and seeking a divorce she can seek comprehensive determinations on custody, maintenance and property pursuant to the *Divorce Act* in Supreme Court. For many women, married or not, court orders are often obtained regarding maintenance and child custody before a divorce is sought. These types of Orders must be sought in Family Court since the Supreme Court does not have jurisdiction to deal with custody and maintenance unless divorce proceedings have commenced.

[55] *Family Court Act* R.S.N.S. c.159, s.7(3) which authorizes the Court to deal with s.266, *Criminal Code* offences.

[56] *Reference re Family Relations Act of British Columbia* (1982) 131 D.L.R. (3rd) 257 (SCC) adopted by *Rudderham v. Rudderham* (1988) 85 N.S.R.(2d) 267 (NSSC Ap.Div.) where it was concluded that a section of the *Family Maintenance Act* (s.7) which enabled the Family Court to make orders regarding occupation of the matrimonial home pursuant to a spousal maintenance decision was *ultra vires* the Family Court. The *Matrimonial Property Act* allows exclusive possession orders of other than leasehold property on the basis of the best interests of the child where the couple is married with children.

court order/peace bond is enforced. However, the fact that peace bonds and other court orders are often not in the police computer database or checked to see if there is a breach, renders them of little use.

Several assaulted women and shelter workers said that it is easier for women to go through Family Court than Provincial criminal court. The Family Court is perceived to be more supportive of their situation for peace bonds and for assault charges. With respect to cases of assault that could go before a Family Court, there appears to be inconsistencies between different parts of the province as to which of the cases actually do go to Family Court. One Crown Attorney stated that a case may sometimes be "shuffled back and forth" between the family and the provincial criminal courts. According to one Legal Aid lawyer, there is very little communication between the family and criminal courts. If a woman lays a charge of spousal assault herself, in some places, a court worker will help her fill out the appropriate forms and have them served on the husband. In other places, this is left up to the assaulted woman. Obviously, this affects the actual access that abused women have to legal remedies. The physical facilities in the courthouse are also relevant. For example, having to wait in the same waiting room as her abusive spouse before a case is intimidating and dangerous for a woman. This is similar to the experience in Family Court where a woman might have to appear repeatedly to seek enforcement of unpaid maintenance thereby exposing herself to further intimidation and harassment.[57]

It was repeatedly expressed by women that delays caused by an overloaded court system are a major problem. One assaulted woman said that the longer the period between the laying of a charge and the trial, the longer the accused has to "work on the victim" to pressure her to abandon the case. As noted earlier in the discussion regarding police and Crown Attorneys, this situation is made worse because her evidence may be the only evidence being presented at trial. A woman will be in a situation of increased danger during this time, unless the man is kept in custody, which is not usually the case. While most people stressed the need to deal with domestic violence cases expeditiously, one doctor who counsels victims of violence noted that, in some cases, a woman may feel rushed into court before she is ready. However, in the particular case being discussed, it seemed that the problems from the woman's point of view related not just to timing but also to the Crown Attorney's handling of the case.

(v) Judges

The comments regarding the judging of domestic violence cases made in the course of the

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[57] The government has recently brought forward legislation reflecting, in general, recommendations of the Law Reform Commission in its Final Report *Enforcement of Maintenance Obligations* which suggested a more automatic system which will not require women to enforce court orders for maintenance when breached.

consultation process fell into two main categories: the attitudes of judges towards domestic violence and sentencing patterns for domestic violence offenses.

It was stated that while increasingly there are judges who treat domestic violence cases seriously and appropriately, there is a feeling (expressed not only by assaulted women and shelter workers, but also by Crown Attorneys, police and probation officers) that some judges have very little understanding of domestic violence. A number of women who went through the criminal court process described the judge as uncaring. One Crown Attorney said that judges do not want their time taken up by domestic violence as they see these cases as being "beneath them". Another Crown Attorney stated that when a woman does not want to testify, the judge will "yell at both the man and the victim". A number of assaulted women felt that the judges in their cases had made inappropriate comments, which revealed a bias against women. Several examples were given where judges did not reprimand an accused who made rude or intimidating comments to the assaulted woman in the courtroom.

Comments made with regard to sentencing for domestic violence offences suggests that there is a feeling amongst assaulted women and shelter workers that some judges may be beginning to treat domestic violence more seriously.[58] However, there was still a sense that sentencing is very inconsistent and that, on a whole, the sentences are too lenient.[59] Concerns regarding the leniency of sentences were expressed by assaulted women, shelter workers, police, Crown Attorneys and probation workers. Many women stated that very few jail terms are given where the husband is convicted of assault unless it is aggravated assault. Some women also recommended that a court order requiring attendance at counselling for abusive behaviour should be part of all sentences for spousal assault. Concern was expressed over the fact that such counselling is not always available, and even if it is, judges may not

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[58] Two recent cases in Nova Scotia highlight the differences in approaches to offences which involved a "stalking" or criminal harassment offence under the *Criminal Code*. In one case the stalker was given a term of 20 months in jail because as the judge commented; "The victim had to endure 12 weeks of harassment" and it was important to send a message that the "psychological violence of stalking women would not be tolerated." In another case involving stalking of a former dating partner, the accused was found guilty and received a suspended sentence and probation for 3 years. According to the newspaper report of the trial (*Daily News*, December 15, 1994) the Judge concluded that the accused appeared to be "an exemplary person" except for being "obsessed" with the victim. See also, "Time Bomb", note 29 ".

[59] The Tracking Project, note 12 at 200, found in the cases it evaluated that sentences of those who were incarcerated were very light, the most frequent being 30 days. Because of overcrowding and other reasons for releases, the time actually served averaged 6 days.

be aware of it, may not use it or may use an inappropriate treatment as a sentencing option.

(vi) Probation Officers

There is also concern regarding the effectiveness of probation practices by both assaulted women and by probation officers. It seemed to be generally recognized by probation officers themselves and by others, that probation officers handle so many files that they cannot devote much time to any one file. Some probation officers contact the spouse and encourage her to report any breach of a probation order; others do not. Even those who do, acknowledge the underlying fact that the offender may threaten the woman to prevent the woman from reporting any further violence. When women report breaches of probation, the response of probation officers and police seems to vary. There are few charges of breach of probation for renewed spousal abuse.[60] One probation officer pointed out that even if the matter did go to court, the process would take months, thus providing no real protection for the woman. Further, even if the matter went to court, there is also no certainty that there would be greater punishment imposed. One police officer told of a situation where a woman was injured during a spousal assault. The man was convicted and placed on probation. While on probation, he assaulted and injured the woman again. The judge simply extended the period of probation.

(vii) Victim Services

There seems to be almost unanimous agreement that until recently, the lack of victim support services[61] has created real difficulties for women who have turned to the criminal justice system. It is hoped that the victim services programmes increasingly being supported by the provincial government will answer some of these difficulties. It is very important, however, that in addition to government services, there be support for non-governmental support services such as counselling and shelters, as many people may need assistance and support but may not go to the legal system for help.

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[60] In the cases evaluated by the Tracking Project, note 12 at 194, it was found that at least 20% of offenders began to stalk, harass and otherwise abuse the woman again, but only half were charged with a violation of their probation. And, at 189, out of 162 offenders on probation, 34 had no conditions of supervision imposed on them as a condition of sentencing.

[61] It should be noted that although no formal victim services have been in place in the courts until recently, some individuals have tried to provide these services. For instance, some Crown Attorneys and court officials in Nova Scotia have, despite heavy workloads, spent extra time with women. Shelters and other non-governmental organizations have often helped prepare a woman for court and supported her during her court appearance.

A number of the concerns expressed by assaulted women and others about the criminal justice system were related to the issue of keeping assaulted women informed during and after the court process. As noted above in connection with police and Crown Attorneys in a criminal case, the woman is a witness in the trial and will not be in the court during the trial. This situation is often not made clear to women who see it as "their case" and wonder why they are not consulted by "their lawyer". The case feels out of their control - which is, in fact, true. However, this is often not made clear to women who are involved. In one case, the woman was not notified of the court date. Because she was not there to testify at the trial, the assault charge was dropped. Assaulted women are sometimes not notified if, on the rare occasion, Crown decides not to call them as witnesses. They also may not be told why the decision was made. If an assaulted woman is not present throughout the whole proceedings, she may not be told of the outcome of the case or the sentence. If the offender is sentenced to jail, one common complaint is that the woman is not notified when he is to be released.[62] Women stated that this makes it very difficult to protect themselves. It was noted that sometimes women are not given copies of undertakings signed by their husbands on release from custody nor are they given copies of peace bonds. Assaulted women stated that this makes it difficult to know exactly what conditions have been attached in order to have the undertaking or peace bond enforced.

In order to try to address some of these issues, the provincial Department of Justice has developed a Victims' Services Division the objective of which is to offer services to victims of crime in Nova Scotia. Services are offered from five regional offices: Halifax, New Glasgow, Sydney, Kentville, and Yarmouth. The Victims' Services Division offers three types of services: the Victims' Services Funding Program; the Regional Victims' Services Program and the Criminal Injuries Compensation Program. The Funding Program provides "project funding to community based organizations to help them to develop programs and services for victims of crime".[63] The Regional Program offers criminal justice based services directly to victims of crime, such as liaising with police, Crown Attorneys, and corrections workers, as well as court orientation; providing general and case specific information, referral services, and assistance with victim impact statements and criminal injuries compensation applications.[64] The compensation program replaces a previous administrative board with a government operated system. This program reflects the fact that although a criminal may be punished by going to jail, often the person harmed by him is not compensated for her or his pain or losses. Under this Program, for example, where a woman has received counselling to deal with the trauma of abuse, she will receive compensation for

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[62] The Tracking Project, note 12 at 170, found in the cases studied, 60% of women were notified of the court decision.

[63] See "*Overview of Victim Services Division*" (Nova Scotia Department of Justice July 1992). This program has been in place since January, 1991.

[64] *Ibid.*

injuries incurred as a result of this crime and will also receive counselling service awards which will be paid directly to the counsellors.[65]

It is under the auspices of this Division that the Family Violence Tracking Project was developed as a joint Federal-Provincial initiative.[66] The Project "tracked" elder, wife and child abuse from its entry point call through the criminal justice system. Its objective was to create a pilot for an on-going automated tracking system for family violence cases within the justice system. This will provide a mechanism to increase accountability at all levels and is also a way to identify and resolve structural and practical problems.

In 1992 the Family Violence Prevention Initiative was created by the government of Nova Scotia to "coordinate and strengthen the work of government departments and community organizations in the area of family violence".[67] The Initiative has a staff and a coordinator and operates interdepartmentally, reporting to a Committee of Deputy Ministers.[68] Specifically, the Family Violence Prevention Initiative is involved in identification of areas in need of services, communication and education and referrals regarding resources for family violence, training of personnel for intervention and sensitivity as well as developing procedures and guidelines for various activities intervention.

(viii) Legal Aid

Many women who leave a violent relationship are not able to hire a private lawyer to deal

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[65] This award replaces the "pain and suffering" awards under the old regime. See *Compensation For Victims of Crime Act*, R.S.N.S. 1989, c.83, as am. S.N.S. 1992, c.36, and *Victims' Rights and Services Act*, R.S.N.S. 1989, c.14, as am., S.N.S. 1992, c.36.

[66] The Tracking Project, note 12 at 1-3, included an Advisory Committee made up of representatives from the Solicitor General of Canada, the Provincial Departments of Community Services and Justice, the police (R.C.M.P. and municipal police and the Chief of Police Association), community groups including the Transition House Association, and the Public Prosecution Service. There is also an additional "tracking" study examining cases of spousal homicide in Nova Scotia involving many of the same groups which is expected to report soon.

[67] *Initiatives*, Family Violence Prevention Initiative, Newsletter No.1. (Halifax: Nova Scotia Family Violence Prevention Initiative, 1992) at 2.

[68] The Committee represents the Departments of Health, Community Services, Education, Justice and the Women's Directorate and Priorities and Planning; *ibid*. at 2.

with issues such as custody, access and maintenance. Therefore, any assessment of how the legal system serves women who have been abused must include a review of Legal Aid services.

Although there were some negative comments about individual Legal Aid lawyers who were seen as unsympathetic and disrespectful towards women who had been assaulted, other Legal Aid lawyers[69] were seen as sensitive to issues of violence and willing, wherever possible, to rearrange schedules to deal with emergencies. Concern was expressed, however, about the fact that if a woman's file is assigned to a lawyer who she finds rude and unhelpful, she is not easily able to transfer to another lawyer as she could with a private lawyer.

Legal Aid lawyers also see themselves as having a caseload which prevents them from giving domestic violence the attention it needs. According to one Legal Aid lawyer, the urgent matters will be attended to, but there is no time to develop a relationship with clients as there would be in private practice. There were many examples of women waiting a month or longer for a first appointment, or of women meeting their lawyers for the first time shortly before a court appearance, or of a file being transferred from one lawyer to another at the last moment. Certainly there is the perception among assaulted women, and those who work with them, that a woman who can afford her own lawyer will have her case dealt with far more quickly and will be better served by the legal system than a woman who relies on the government funded system. The perception was also expressed that the woman herself will be accorded greater respect in the courtroom, both by the judge and by opposing counsel, if she can afford her own lawyer.

c. The Law and Domestic Violence

At the beginning of this Report and later in the section dealing with courts, there was a discussion about the legal system and the two legal systems that women encounter in connection with domestic violence. This division exists for two reasons. First, the law historically has divided issues into "public" and "private" law. Criminal law has been viewed as public and family law as private. In general this means that in criminal matters the State is a party or the prosecutor and the person who is harmed is a witness. The person who is charged is a defendant, who under criminal law is entitled to be presumed innocent until proven guilty, usually beyond a reasonable doubt. The public interest here is a fair trial and punishment of people committing offences against society.

This contrasts with family law matters, where the two parties are in court, usually represented by lawyers and the State has no particular role in the case which is seen as one involving issues between two individuals. The law has not dealt with the fact that family law

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[69] For example, one comment made to the Commission noted that Dalhousie Legal Aid staff were found to be very supportive of the situation of women.

problems can occur against the backdrop of violence and crime.

The second reason for the division in the law and the legal system is that the *Constitution of Canada* divides power of authority and responsibility for lawmaking between the federal and provincial governments. Under section 91(27) of the *Constitution Act, 1867,*[70] the federal government has exclusive power to develop criminal law or to decide if behaviour is criminal and to determine criminal procedure.[71] Section 92(14) gives the provincial governments exclusive responsibility for the administration of justice in the province. This gives the province responsibility for the enforcement of criminal law. Section 92(15) also gives provinces the power to impose fines, penalties, or imprisonment to enforce laws they have the authority to make. Under section 92(13) the provincial governments have exclusive jurisdiction over property and civil rights in the province; that is, the power to legislate in relation to family law related matters such as matrimonial property, child and spousal support, and custody.[72] However, marriage and divorce are federal (s.91(26)) while the solemnization of marriage is provincial (s.92(12)). All of these divisions make reform difficult and the system incomprehensible to most people.

As already discussed, there are various responses possible for the woman who has experienced violence or fears violence from her spouse. She may either call the police and seek assistance from the criminal law where the offence is one that fits under a prohibited conduct. She may, if she can leave her residence, also seek legal protection in the Family or Provincial Courts or from a Justice of the Peace in the form of a court order requiring that her spouse stay away from her (peace bond). She may also go to Family or Supreme Court herself and seek assistance in the form of court orders regarding custody of children and home where a marital relationship is ending.

Where violence occurs in intimate relationships, both criminal law and family law issues may be involved. Issues surrounding control, the protection and custody of children and economic violence are all related to and as important as any physical assault that the woman may have experienced. The laws in Canada and Nova Scotia still reflect a view that crimes are actions that occur between strangers and do not occur between family members. This means that the description of the criminal acts and their punishments often ignore the overall context of family violence. For example, the fact that the two people may own property together and have children together and that she may be dependent on him for financial

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[70] U. K., 30 & 31 Victoria, c.3.

[71] See the *Criminal Code of Canada*.

[72] See *Matrimonial Property Act*, R.S.N.S. 1989, c.275; *Family Maintenance Act*, R.S.N.S. 1989, c.160 and *Children and Family Services Act*, S.N.S. 1990, c.5. It should be noted, however, that the federal government has exclusive jurisdiction over divorce where issues of custody and access, as well as maintenance, arise.

support are significant problems which are ignored in both systems of law. An almost classic example of the problem is the case of an order giving the abuser access to see his children, in effect specifically setting up a court sanctioned opportunity for further violence towards the woman, either directly or through threats to children.[73] If considered in this light, the problem becomes more obvious. It is important to realize that the law often expects that a woman can negotiate and make a custody and access arrangement or financial assistance to support the children or their home or otherwise interact with a person who may wish to kill her. The fact that these issues are ignored in our system is part of the overall inequality women experience in the legal system.

(i) Criminal Law Remedies

Solutions such as requiring women to go to court to apply for court orders assume that the woman can leave the house, has access to the telephone, has money to pay a lawyer for help and that she will feel confident that a piece of paper such as a court order, which may take time to be issued, will protect her from violence. If there is no enforcement or respect for the law then this will not assist her greatly. Nevertheless, many women do seek assistance through peace bonds which may not be seen as quite so drastic as going through a court trial, and, unless threats are treated seriously by the police as a cause for intervention, they are the only real option short of becoming a refugee or resorting to self-defence. For this reason, peace bonds will be discussed before considering other laws which may apply.

1. Peace bonds

It appears from the consultation process that peace bonds,[74] technically called a "recognizance", are used fairly frequently in domestic violence cases. In some cases, this may be the woman's choice. In other cases they may be used because the police have not charged the person or the Crown does not wish to prosecute and the assaulted woman has no other option and is forced to proceed with a peace bond application on her own. During consultations, there were a few positive comments about peace bonds (although never from assaulted women). For instance, one police officer felt that peace bonds worked well when there had only been threats of violence, as opposed to actual physical violence, and one Crown Attorney felt that the peace bond provisions provided a sort of diversion program within the *Criminal Code.*

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[73] For example, even with the limited time frame used by the Tracking Project, note 12 at 343, it was found that 24% of women experienced violence during access and in 14% of cases the abuse included threats to children.

[74] These are, in fact, a criminal law remedy but under the *Criminal Code*, s.810, they can be issued by a provincial court including a Family Court.

On the whole, however, most of the comments about peace bonds were negative. Peace bonds were often described as "not worth the paper they are written on". Except for one shelter which said that the municipal police force in its area arrested for breach of the terms of the peace bond, it was felt by assaulted women and shelter workers that peace bonds provided almost no protection. As noted earlier, the Tracking Project concluded that the system of record keeping and communicating information about peace bonds was so poorly managed that it was surprising that they were enforced at all.[75] There seem to be few arrests and fewer prosecutions for breach of a peace bond, because of the lack of police information about its existence and because the seriousness of a breach of a peace bond is not fully understood. Even if a charge of breach is laid, it takes so long to get to court that it provides no real protection. Peace bonds were also criticized because the onus is on the woman; the police cannot swear the information to obtain the peace bond. Further, the process for obtaining a peace bond is bureaucratic and confusing. In one case it took 4 attempts over 5 months for an assaulted woman to get her spouse into court to sign the peace bond. Breach of a peace bond is a crime punishable by up to six months in prison.[76]

There have been changes to the *Criminal Code* dealing with peace bonds in the case of danger to young people[77] to make them accessible without the survivor or the threatened person having to go to court themselves to obtain an order. However these changes have not been made for peace bonds in the case of domestic violence. There is, however, a new crime punishable by five years in jail called "criminal harassment" (stalking) so that many behaviours which previously may have been ignored or not considered criminal are now treated as such.[78] The main problem with peace bonds is that in the context of life-threatening violence such as domestic violence, a breach of the Order may seem to the legal system to be a minor incident while it is, in fact, part of a life-threatening series of events.

2. Immediate Protection: Arrests and Charges

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[75] Note 12 at 160-61 and at 209.

[76] Section 7(3) of the *Family Court Act* R.S.N.S. 1989, c.159. gives Family Court concurrent jurisdiction with Provincial (criminal) Court over peace bond applications and violations, as well as breach of probation and common assaults that occur between a "husband and wife". A" husband and wife" is defined in the Act as a man and wife, whether legally married or not, who have been living as husband and wife for 12 months. It should be noted that proceedings under these provisions in a Family Court are essentially criminal proceedings over which the Family Court (a provincial court) has been given concurrent jurisdiction (with Provincial Court) by the Minister of Justice for Nova Scotia.

[77] *Criminal Code*, s.810.1.

[78] *Criminal Code*, s.264, 3(a).

The primary legal remedy available to deal with domestic violence in Canada and Nova Scotia is the use of criminal punishment under the *Criminal Code* of Canada.

Under the existing criminal law it is easily possible to arrest and detain, at least overnight, men who have assaulted or threatened spouses with violence. While there are some technicalities regarding the basis for detention which require that the arrested person's right to liberty be respected by the legal system, there is clearly the potential for holding a person overnight at a minimum to protect the assaulted woman. The central issue for the police is choosing to exercise discretion on the basis of a full understanding of the nature of domestic violence, including the well-documented fact that it is not a single incident crime. While the legislation could be rewritten by the Federal Government to direct more clearly this exercise of discretion in cases of domestic violence, the existing provisions could also do this if used properly and on the basis of an informed undertaking which puts protection of the woman as the priority. The point here is that in cases of domestic violence, it is predictable that a further offence either in the form of a threat or physical harm will occur if the violent person is not arrested.

It will be recalled that police in Nova Scotia are required under a government Directive to charge assaulters, where there are reasonable grounds to believe an offence has been committed in domestic violence cases. However, in many cases it appears that police do not use their powers for threats or breaches of peace bonds which would allow them to arrest and detain the assaulter in prison to ensure as much as possible the protection of the woman.

The following is a list of sections of the *Criminal Code* and their punishment classification. All of these sections can allow an officer to arrest and detain a person. All can result in a criminal record. A hybrid offence is simply an offence which can be dealt with more or less seriously - that is, punishable as either a summary conviction or as an indictable offence.

Offence

Assault (s.266) (Hybrid)
Assault with a weapon or causing bodily harm (s.267) (Indictable)
Aggravated assault (s.268) (Indictable)
Unlawfully causing bodily harm (s. 269) (Indictable)
Pointing a firearm (s.86(l)) (Hybrid)
Causing bodily harm with intent (s.244) (Indictable)
Attempted murder (s.239) (Indictable)
Sexual assault (s.271) (Hybrid)
Sexual assault with a weapon or causing bodily harm (s.272) (Indictable)
Aggravated sexual assault (s.273) (Indictable)
Intimidation (s.423) (Summary)
Uttering threats (s.264.1) (Indictable/Hybrid)
Criminal harassment (Stalking) (s.264) (Hybrid)
Harassing or indecent telephone calls (s.372(2)(3)) (Summary)

Trespassing at night (s.177) (Summary)
Forcible confinement (s.279(2)) (Indictable)
Mischief (wilful damage) (s.430 (1)) (Hybrid)
Obstructing justice (s.139(2)) (Indictable)
Breach of recognizance (s.811) (Summary)
Failure to comply with a probation order (s.740) (Summary)
Preventing and arresting breach of peace (s.30), (s.32)
Arrest for violation of conditions of judicial interim release

The *Criminal Code* provisions regarding arrest are not easily understood because they are written with numerous conditions, and as currently written, reflect society's interest in liberty and the right to be proven guilty before being imprisoned. The way the arrest provisions are written tend to suggest that the police officer should generally exercise discretion in favour of not arresting unless he or she has specified concerns. Under s.495, a police officer can arrest a person without a warrant where he or she finds the person committing a crime or he or she believes on reasonable grounds an indictable offence was or is about to be committed. Where the offence is one which is punishable as an indictable or a summary conviction, the police officer is told not to arrest if he or she believes on reasonable grounds it is in the public interest. The public interest is defined to include matters such as preventing the continuation of the offence or the committing of another offence. The officer may determine that it is necessary to arrest in these cases. While the langauge of this section seems complicated, if one takes, as an example, the case of a death or bodily harm threat (s.264.1(1)(a)) which is an indictable offence, the police officer may arrest and detain a person without a warrant if the threat is reported. To take another example, if the police officer is aware that a peace bond exists and a person is found in breach of it (e.g., by being near the person) then the officer can also arrest for this offence, which is a summary conviction offence and, in fact, he or she should arrest, since in cases of domestic violence the breach of the peace bond is reasonably and likely to be followed by another criminal offence such as a threat or harassment, assault, or murder. In short, there would be very few cases of domestic violence where an officer could not properly exercise his or her discretion and detain a person in custody, at least overnight. In addition, under s.495 (3), where the officer arrests, he or she is deemed to be acting lawfully unless it is shown that he or she was acting unreasonable.

Once arrested the accused can be detained until he appears before a judge. As with the sections dealing with arrest, the *Criminal Code* favours liberty and release of the arrested person unless there are some reasons why he should not be released with or without conditions until trial. This reflects the underlying values of liberty and the entitlement of a person to be presumed innocent until he or she has been found guilty of an offence by trial. Under s.497 and s.498 of the *Criminal Code* the police are directed to release a person from custody as soon as practicable, subject to a concern for public interest in matters such as preventing the committing of another offence. Where the person is not immediately released by the peace officer or officer-in charge, he can be kept in custody for a short period until taken before a judge who can determine whether the person should be released with or

without conditions and sureties (bail) until trial. This procedure is called judicial interim release. Under the section of the *Criminal Code* dealing with this procedure, s.515, the justice or judge is instructed to release the person unless the Crown Attorney shows why he should not be released. If the judge releases the accused person he or she may impose a range of conditions on the release, including abstaining from communication with a witness or any persons. Under s.515 (4.1) and s.515(4.2) where the person is charged with an offence involving violence or threats or attempt at violence or criminal harassment, then the judge is required to consider imposing conditions prohibiting possession of firearms and explosives and prohibiting communication or contact with any witness or going to any named place.

Judicial interim release is a point, as with arrest, where the awareness and understanding of the person exercising discretion (in this case, the justice and the prosecutor) is critical to the way the authority is used and whether it is exercised in a helpful way in cases of domestic violence. Unlike arrest, however, the *Criminal Code* does attempt to structure the discretion of judges to some extent by expressly requiring that he or she consider specific conditions in some cases such as violence, threats of violence and stalking. Breach of a condition is, as with all other court orders, at the end of the day simply an Order, and will be respected only to the extent that its breach is punished. Under s.524 of the *Criminal Code* the accused can be arrested for breach of the conditions and can be kept in custody.

3. Punishment

The *Criminal Code* sets out the range of prison sentences that are available for the offences noted above.[79] Final decisions on sentencing are the result of the judge's view on the matter as well as other factors including sentencing guidelines from other cases, reports from the lawyers and, also, where there is discretion and the choices made by the police in laying the charge. As can be seen from the list of offences, many actions can be viewed as more or less serious, allowing for some consideration of the context. One issue is that historically, behaviour in the family context has been treated differently and less seriously than cases of violence between strangers. Recently there has been a move in some jurisdictions on the part of the Court of Appeal to set out guidelines for sentencing in domestic violence cases.[80] In

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[79] The maximum sentences for the above offences would range up to life imprisonment for murder or attempted murder. Within this potential maximum sentencing scheme the key issue to be addressed is judicial discretion. Under s.717 of the *Criminal Code* the sentence imposed for an offence is at the sole discretion of the court which convicts the offender, subject to the "limitations prescribed in the enactment" and sentencing guidelines pronounced by a supervising court.

[80] B. Daisley, "Alta. C.A. reaffirms spouse assault sentencing rules", *Lawyers Weekly*, (14:26 November 11th, 1994) at 23.

1992[81] and again in 1994[82], the Alberta Court of Appeal announced it was "getting tough with wife assaulters" and took the view that the fact that the assault occurred in the context of a spousal relationship should be treated as an aggravating factor because "when a man assaults his wife or other female partner, his violence toward her can be accurately characterized as a breach of the position of trust which he occupies". The Court also took the view that deterrence and denunciation are more important than preservation of the family unit.

Under s.735 of the *Criminal Code*, a victim impact statement (describing "the harm done to, or loss suffered by, the victim arising from the commission of the offence") may be considered by the court in sentencing an offender. Aside from directing a prison term, s.737 of the *Criminal Code* provides that a court, in sentencing an offender, (having regard to the age and character of the accused, the nature of the offence and the circumstances surrounding its commission) can order probation in one of the following situations:

> (i) where the offence does not have a minimum punishment it can suspend sentence and order probation;
>
> (ii) order probation for a maximum of 2 years in addition to a fine or imprisonment; or
>
> (iii) order probation when not in confinement where a sentence is served intermittently.

Importantly, however, under s.737, probation orders can include the following conditions:

> (2) The following conditions shall be deemed to be prescribed in a probation order, namely, that the accused shall keep the peace and be of good behaviour and shall appear before the court when required to do so by the court, and, in addition, the court may prescribe as conditions in a probation order that the accused shall do any one or more of the following things as specified in the order, namely,
>
> (a) report to and be under the supervision of a probation officer or other person designated by the court;
>
> (b) provide for the support of his spouse or any other dependants whom he is liable to support;
>
> (c) abstain from the consumption of alcohol either absolutely or on such terms as the court may specify;
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> (d) abstain from owning, possessing or carrying a weapon;

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[81] *R. v. Brown* (1992) 13 C.R. (4th) 346.

[82] *R. v. Ollenberger* (1994) 29 C.R. (4th) 166.

(e) make restitution or reparation to any person aggrieved or injured by the commission of the offence for the actual loss or damage sustained by that person as a result thereof;

(f) remain within the jurisdiction of the court and notify the court or the probation officer or other person designated under paragraph (a) of any change in his address or his employment or occupation;

(g) make reasonable efforts to find and maintain suitable employment; and

(h) comply with such other reasonable conditions as the court considers desirable for securing the good conduct of the accused and for preventing a repetition by him of the same offence or the commission of other offenses.

This section is relevant for domestic violence in that where probation is ordered, a judge has discretion to order conditions that will protect the woman (subsections (b), (c), (d), (e)) if he or she so chooses. Further, subsection (h) gives a judge the discretion to order mandatory counselling.

Under s.736 of the *Criminal Code*, where the judge decides it is "in the best interests of the accused and is not contrary to the public interest", she or he may discharge the offender conditionally (or absolutely). If a conditional discharge is ordered, a judge also has the discretion to impose conditions to protect the woman and to require the offender to seek counselling. Similarly, under s.100 of the *Criminal Code*, a judge has the discretion when sentencing the offender, to make an order prohibiting possession of firearms. An offender who is convicted or discharged (conditionally or absolute) may also be subject to an order prohibiting the possession of firearms.

There are also other sentencing sections of the *Criminal Code* which have some implications for assaulted women. Under section 727.9 a judge, while imposing sentence on or discharging an offender, is required ("shall") order the offender to pay a victim fine surcharge. Where the offender can establish that he or his dependants would suffer undue hardship, the order is not mandatory. The surcharge goes to providing such assistance to victims of crime and under the provincial program,[83] a court may order the offender to pay

[83] The Victim Fine Surcharge is legislated provincially under section 7 of the *Victims' Rights and Services Act*, R.S.N.S. 1989, c.14, as amended by S.N.S. 1992, c.36. Under s.9 of the *Act*, the surcharge in Nova Scotia is used to fund: (a) the promotion and delivery of victim services; (b) research into victim services; (c) distribution of information respecting victim services, needs and concerns; and (d) any other purpose the Governor-in-Council considers necessary for carrying out the purposes and promoting the rights set out in the *Act*. However, under s.10 of the *Act*, the surcharge is not used to pay compensation directly to victims.

money to the victim for property damage.[84]

(ii) Civil/Family Law

It was noted above that the law treats criminal acts as separate from family issues. Provincial law regulates most aspects of family law except divorce and related property decisions.

The provincial authority to deal with domestic violence stems from its authority over the administration of justice and over property and civil rights. There are very few provincial laws that apply to domestic violence explicitly. This is because violence is viewed as a crime against society. However, there are numerous provincial laws that apply to the family context in which the violence occurred, including the *Matrimonial Property, Family Maintenance* and *Family Court Acts*. These laws and their interpretation by the court do not take into account violence between spouses as an aspect of the law. It is necessary to change these laws to ensure that the issue of violence between spouses is not left out of the picture but is clearly considered in property, child custody and maintenance decisions. Again, the main concern should be the safety of the woman and her children and protection from further violence or threat of violence.

Assaulted women and shelter workers expressed many concerns throughout the consultation process that relate to a variety of family law matters. For example, one concern expressed was that if a woman left an abusive husband and took the children with her, she could be charged with kidnapping under the *Criminal Code.*[85] In one case, a woman was charged with kidnapping when she left the province with her children to escape a violent relationship. The charge was eventually dropped, but not until the children were returned to the husband for some time and the woman was brought back in custody.

In another case, a woman who took her children with her to the shelter was threatened by a police officer with a charge of kidnapping. After intervention by the shelter workers, the

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[84] Section 727 guides the exercise of discretion under s.725. Under proposed legislation not yet in place, the victim will also be able to recover for bodily harm sustained, pecuniary losses including loss of income, or support; R.S.N. 1985, c.23 (4th supp.), s.6; 1992, c.1, s.58 (1), Sch. 1, item 13.

[85] Section 283 states:

(1) Everyone who, being the parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, takes, entices away, conceals, detains, receives or harbours that person, in relation to whom no custody order has been made by a court anywhere in Canada, with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that person, of the possession of that person, is guilty of :

(a) an indictable offence and is liable to imprisonment for a term not exceeding ten years;

(b) an offence punishable on summary conviction; or

(c) No proceedings may be commenced under subsection (1) without the consent of the Attorney General or counsel instructed by him for that purpose.

charge was not laid. Many assaulted women and shelter workers stated that a lot of women stay in abusive relationships out of fear of losing their children.

Several problems and concerns were referred to in the areas of custody and access. First, it was stated that it can take some time to get interim custody settled. Assaulted women frequently expressed the fear that if they let their children go outside, even to go to school, the abusive spouse would take them away from her. One shelter worker suggested that in cases of spousal assault it should be possible to get an interim custody order within 24 hours of the separation.

The other concerns expressed during consultations relate to the attitudes of judges in deciding custody. In particular, it was felt that in assessing parenting skills, women and men are often judged according to very different standards. For example, the fact that a mother drinks socially or has friends of the opposite sex may be seen as relevant to her ability to parent, whereas this usually is not the case for the father. There is a sense that simply expressing a desire to have custody is enough to make the courts view the man as a good father. A related concern expressed was that a man who abuses his wife is often not seen as an abusive parent unless he also physically abuses the children. Concern was also expressed that some judges appear to take a very negative view of shelters, and feel that a mother who is staying in a shelter should not have custody of the children.

Problems also arise in connection to the issue of access to children. Many assaulted women and shelter workers emphasized the fact that access can provide an opportunity for an abusive man to harass or assault the woman.[86] The suggestion was made that where there has been violence in a relationship and the court allows access, it should be the court's responsibility to provide some means for the child to be picked up and dropped off, without placing the woman in danger. A related concern is that where the court orders supervised access, it is still left up to the woman to enforce it. Even if the woman's physical safety is not in jeopardy, access provisions can still be used to harass, particularly where there has been a history of violence. One child care worker who works with children of violent relationships noted that access orders are often worded vaguely; for instance, allowing "reasonable access on reasonable notice". While this may work in some relationships where there has been no violence, a woman who has been assaulted may be intimidated into accepting "reasonable" as meaning whatever the man demands. The child care worker suggested that judges should recognize the dynamics that exist in abusive relationships and take this into account in framing access orders.

One concern that was mentioned a number of times is that apparently some lawyers acting for husbands try to pressure shelter workers into revealing the whereabouts of the women and children and into forcing women staying at the shelter to allow the father to see the

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[86] As noted earlier, the Tracking Project, note 12 at 343 found that in 24% of the cases studied women experienced violence during access.

children before custody and access matters have been settled. It is felt by shelter workers that giving in to either of these pressures would place women and their children in great danger.

One parent can also use the court system itself to harass the other parent. One woman who left an abusive relationship and who has custody of the children stated that over a number of years, her ex-husband brought her into court repeatedly on allegations that she was denying access. Although each time the allegations have been found to be groundless, the courts apparently have not responded to the abuse of process by, for instance, requiring the husband to pay costs to the wife whenever he brings a groundless application before the courts.

Finally, assaulted women and shelter workers also expressed concern over s.22 of the *Children and Family Services Act*[87] which places an onus on an abused parent to escape from an abusive situation in order to protect her children. This provision was criticized during consultations for removing the responsibility from the father to stop the abuse and for placing the responsibility on the assaulted woman. Many women also find, particularly if they have dependent children, that they experience emotional and economic harassment and violence from spouses who refuse to pay maintenance and force the woman to go to court to obtain an order. This happens repeatedly and provides significant problems for women because it endangers their economic security and forces them to either go to court unrepresented to face their violent spouse or expend money on a lawyer. It also forces an on-going relationship and contact in a dangerous situation. Assaulted women and shelter workers repeatedly stated that the lack of sufficient resources for shelters throughout Nova Scotia as well as safe, affordable housing, creates a situation whereby many assaulted women who want to leave abusive situations have nowhere to go.[88]

(d) Summary of the Social and Legal Context of Domestic Violence in Nova Scotia

All of the concerns canvassed in the consultation process point directly to failure of the legal system to place a priority on protection of all assaulted women and their children. There is a history of poor education, and a lack of sensitivity and action despite government policy directives. Failure to respond fully to threats, failures in the information system and

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[87] S.N.S. 1990, c.5.

[88] In January 1994, the Northwest Territories government addressed the problems experienced by abused women who live in public housing and cannot leave a violent situation. Changes were made which allows a woman to leave and rent elsewhere and no longer hold her responsible for any of her husband's damages or unpaid rent; see B. MacDonald, "New Public Housing Policy in NWT", (1994) 12 *vis-a-vis* at 7 and 9.

inconsistent exercises of discretion in charging and in the use of arrest and detention powers to protect women from violent spouses have the effect of denying the full protection of the legal system to assaulted women. The greatest problem for women lies in the failure of the government to comprehend and respond to domestic violence as a serious problem. That will require fundamental changes to institutional structures and resources to eradicate it. One of the more important problems, and one of the more difficult to alter, is to change the legal system so that violence in a family can be dealt with by the law as a crime with a comprehensive and integrated legal response. The reluctance to proceed with domestic violence cases, the failure to prosecute with vigour, and lack of concern for or understanding of the danger to assaulted women on the part of some Crown Attorneys, also has the effect of denying protection for assaulted women. Delaying tactics utilized by defence lawyers and condoned by the legal system create a very dangerous situation for assaulted women. The caseload of probation workers, inconsistent practices, and lengthy delays to get probation violations into court, the difficulty involved in obtaining a peace bond, and the lack of punishment or consequences of violations are essentially a failure on the part of the legal system to protect assaulted women. The confusion surrounding the remedies that are available in different courts creates a situation where women are not being protected by the legal system at a time when they need immediate response. The lack of communication from people in the legal system with the assaulted woman regarding the offender's date of release, conditions of release, undertakings or probation, is, in essence, a failure to protect assaulted women at a most crucial time. Fear of losing their children, extremely poor resources at shelters, and lack of safe affordable housing keeps many women in abusive situations and from going to the legal system for help. This is a problem of equal access to justice which is the responsibility of the government.

Assaulted women's comments on their experience reflect the opinions of experts and numerous task forces regarding the difficulty of reaching out for help:

> 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.[89]

> 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.[90]

International, national and federal land provincial studies have established that domestic

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

[90] "Women in Fear" (*MacLeans*, December 1991) at 32.

violence exists, that it is, in most cases, a gendered crime and that the justice system has not proved to be effective in responding to the problem. Further, the system, in its failures, can further endanger the lives of women in this situation.

3. Responses and Initiatives Developed in Other Places

The following section provides a brief discussion of solutions developed in other places in Canada, the United States and overseas. It is useful to examine these solutions to benefit from their experiences. However, it is important to remember that, particularly in places outside Canada, the legal framework differs from that in Canada and some of the solutions are not possible in the current Canadian legal structure which divides responsibility between the federal and provincial governments for criminal law and its implementation.

(a) United Kingdom, Australia and New Zealand

In the United Kingdom there are two statutes which deal with domestic violence. Both of these statutes apply to marital breakdown with remedies for spousal assault as part of the overall statute. The *Domestic Violence and Matrimonial Proceedings Act*[91] applies to unmarried heterosexual cohabiters. The *Act* provides for orders of exclusive possession or occupancy as well as orders precluding violence and molestation.[92] The *Domestic Violence and Magistrates Courts Act*[93] is available to a legally married couple and provides for an order for exclusive possession or occupancy as well as orders prohibiting violence or threats.

In Australia, several states have specific provisions dealing with spousal assault as part of criminal law. Criminal law in Australia, unlike Canada, is regulated by the state governments. The provisions are available to any person and provide both criminal sanctions and civil remedies. Some Australian statutes apply to defined parties (for example, spouse).[94] The remedies provided in these statutes include:

1. Restraining orders (which may be specifically or generally worded in the statutes);

2. Orders regarding the turning over of property, occupancy and access;

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[91] 1976 (U.K.) c.50.

[92] E. Schollenburg and B. Gibbons, "Domestic Violence Protection Orders: A Comparative Review", (1992) 10 *Canadian Journal of Family Law* 191 at 197 and 204-205.

[93] 1978 (U.K.) c.22.

[94] See note 92 at 197-198.

3. Non-violence orders; and

4. Non-molestation orders which can protect both the applicant as well as the applicant's children.[95]

However, it is important to understand that despite the availability of criminal orders and domestic violence orders, the violence has not ceased. A recent comment on the situation in Australia noted that:

> Many women in the dominant culture find the police and criminal justice system insensitive and ineffective in dealing with male violence. However, Aboriginal and Torres Strait Islander women have been served particularly poorly by the criminal justice system.[96]

The authors also carried out an evaluation of the impact of the system on Aboriginal women in the context of the impact of colonization on their communities. Aboriginal women are caught in a double bind in that, although violence and homicide rates are high, the women are torn between loyalty to the community and the fact that their interests may be distinct from those of the men in their society with respect to protection from domestic violence. Racism against Aboriginal people and specifically the combination of racism and sexism encountered by Aboriginal women in Australia has ensured that the justice system is essentially inaccessible to them.

New Zealand has a *Domestic Protection Act*[97] which was passed in 1982 after much debate. It was passed as a family law *Act* which sought to provide specific remedies for domestic violence because the existing criminal law remedies were inadequate and inappropriate for domestic violence.[98] The *Act* provides remedies for men or women who were or had been living together in the same household. It gives the court jurisdiction to make non-violence,

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[95] *Ibid.* at 204.

[96] See study carried out in Australia by J. Stubbs and S. Egger, The Effectiveness of Domestic Violence Protection Orders in Australian Jurisdictions", *National Committee on Violence Against Women,* Office of the Status of Women, AGPS Canberra and various other reports. Paper presented at Columbia University by J. Stubbs and J. Tolmie, Faculty of Law, University of Sydney, "Women Out of Context: Battered Women's Syndrome and the Australian Experience" 1993, to be published in *Canadian Journal of Women and the Law.*

[97] *Domestic Protection Act 1982.*

[98] The following information has been taken from P. Tapp, D. Geddes and N. Taylor "Protecting the Family"; *Family Law Policy in New Zealand,* M. Henaghan and B. Atkin, eds. (Oxford University Press 1992) at 183-191.

non-molestation, occupancy and tenancy orders and to recommend that either party attend counselling. It is important to note that while police can arrest, detain and keep a person in custody for 24 hours ("a cooling off period") for breach of the order, the breach is not itself a criminal offence. People concerned about civil liberties have been satisfied with the fact that the person is to receive notice of the order and is given the right to make a phone call while in detention. Equally, there is opposition to this *Act* by people who felt that breach of the order should be a criminal offence. When passed, the *Act* was seen as a way to avoid the problems in the criminal law process which prevented people from using the courts. Evaluation of the *Act* and its effectiveness suggests, that this has not had the desired effect. According to recent commentary on the law in New Zealand:

> The 'reality' that the *Act* has to deal with is that domestic violence is now and will continue to be the highest single category of violence reported to the police. In 1988, 1,675 married women and 1,076 women living in *de facto* relationships, applied for protection from partners. The number of non-violence orders increased by 66% from 1984 to 1986...[It was] submitted that, stated briefly, the policy concerns of the legislators for the *Domestic Protection Act* were to try to preserve the family unit as a basic unit in society, to ameliorate the social and person cost of domestic violence and to protect property rights. The practice of the *Act* illustrates that these concerns are not always compatible.[99]

Critics suggest that the problem in New Zealand has arisen from the fact that the Family Courts have emphasized maintenance of the family unit and relationships which make it difficult for women to obtain protection orders. The problem appeared to be due to judicial discretion and in the refusal to confirm the interim emergency protection orders. The refusal has been described as:

> The rejection of the criminal law response to domestic violence has led to an emphasis on domestic violence as a family relationship problem or at times, a personal problem of the man because of alcohol or substance abuse.[100]

One of the results of the criticism was that in March 1987, a report of the Ministerial Committee of Inquiry into Violence concluded that the concept of family privacy had the effect of legitimizing violent behaviour and there is no indication of social disapproval. A Domestic Dispute Policy was developed in 1987 which was essentially a zero tolerance policy mandating arrest in all cases where a court order has been breached or where the woman was in danger. She also was not be required to give evidence to support the charge unless there was no other evidence. In addition, police officers were required to provide referrals to support services. Despite this Policy, a recent Report suggests, that this has not

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[99] *Ibid.* at 191.

[100] *Ibid.* at 194.

resulted in any change.[101] The main point of criticism is that, despite policies and directives the judicial attitude continued in many cases to characterize the problem as one of family dysfunction and that the violence women experienced was minimalized and trivialized. It has been suggested that the New Zealand experience highlights the importance of the judiciary in ensuring an effective delivery of the justice system:

> Judicial attitudes convey powerful messages to victims and abusers alike. They portray the justice system's commitment to stopping domestic violence. It is, therefore essential that judges convey unequivocal messages that the existence of violence in a relationship is, in fact, a real problem.[102]

While examining these initiatives relative to the issue to be addressed by the Commission, an overall caveat must be borne in mind. The United Kingdom, New Zealand and Australia all have distinctly different constitutional frameworks than Canada. This caveat also applies to the following discussion of American initiatives. Nonetheless it is clear, particularly in light of the New Zealand experience, that the same criminal law versus civil law concerns exist as do many of the same institutional and attitudinal barriers to change.

(b) United States

The system of laws (codes) in the United States relating to domestic violence are probably the most well-developed and comprehensive, although the degree of violence experienced has not necessarily decreased with the enactment of these laws. As noted above, the United States legal system differs from the Canadian but given the proximity and similarities of the United States, its laws and practices are of interest. All States in the United States have a number of domestic violence laws or codes in place.[103] These codes, all of which are state

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[101] *Domestic Violence and the Justice System: A Study of Breaches of Protection Orders* (Victims Task Force, 1992). The published report was significantly edited and some of the names of judges and the words of victims describing their experiences were deleted. See R. Busch, "Was Mrs. Masina Really Lost?'": An Analysis of New Zealand Judges' Attitudes towards Domestic Violence" presented at Columbia University, 1993.

[102] Busch, *ibid.* It should be noted that a pilot project based on a "power control model" which saw the violence as an issue of power and control and responded to it on a team basis was set up in 1991 in Hamilton, New Zealand. It was reported as working well.

[103] Schollenburg and Gibbons, note 91 at 197-215. The statutes in most states had provision for relief similar to the law in Illinois which provides for: Prohibition of Abuse, Neglect, or Exploitation; Grant of Exclusive Possession of Residence; Additional Prohibitions, e.g., prohibit respondent from petitioner's school, place of employment; Counselling; Temporary

legislation, deal with civil protection orders, custody orders, social service codes, evidence codes and arrest and enforcement codes. The last two of these relate to the criminal law system in the United States. The rest of the orders, while in some cases enforceable by arrest, are not criminal law codes. Since the United States has one of the most comprehensive systems of non-criminal laws or codes dealing with domestic violence it is useful to consider that system in more detail, particularly because the range of orders and enforcement mechanisms in the United States are often creative and take into account the validity of the woman's situation in their design. In a comprehensive study in 1992, *State Codes on Domestic Violence*, all of these codes and their treatment of domestic violence were evaluated for the National Council of Juvenile and Family Court Judges.[104]

It is notable, however, that even in the United States where the laws are very comprehensive and programmes are more available, the final comments in the Study of State Codes states:

> [I]n most states, code expansion has been uneven; producing for example, extensive protection order codes, but little related to criminal justice response and only preliminary direction to courts on custody and civil damages in the context of domestic violence. Most codes do not provide the justice system with an infrastructure essential for effective implementation.[105]

Probably one of the most effective responses (and the one most cited by women as effective) in the United States, is the Domestic Abuse Intervention Project Duluth, Minnesota (DAIP) created in 1980, which for the most part, focuses on arrest, counselling and integration, and community-wide co-operation.

> [A] system of coordinated criminal justice intervention in domestic abuse cases, a system involving police, prosecutors, civil and criminal court judges, and probation officers. The DAIP also runs batterers' reeducation groups and a center for supervised child visitation and parenting education. It works in close cooperation with battered women's shelters, with the Women's Coalition, which provides support groups and services and legal advocacy for battered women, and with the Women's Transitional Housing Program, which provides short and long-term low - and no-rent housing and child care and facilitates job training. The goal of every segment of this coordinated effort is to make women and children safe and offenders accountable for their crimes. In twelve years of the Domestic Abuse Intervention Project, one in twenty men living in the Duluth metropolitan area (populations 250,000) has been ordered by civil or criminal courts

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Legal Custody, Visitation; Removal or Concealment of Child; Order to Appeal; Physical Care of Child; Possession of Personal Property; Protection of Property; Order for Payment for Support; Order for Payment of Losses; Order for Injunctive Relief; or Prohibition of Entry.

[104] B. Hart, "State Codes on Domestic Violence" (1992) 43 *Juvenile and Family Court Journal* at 1. The discussion in this section of the Law Reform Commission Report reproduces and summarizes the results of this Study.

[105] *Ibid.* at 81.

> to attend the batterers' reeducation program, designed and conducted by profeminist women and men. This program doesn't seem to have decreased the number of violent men going through the system–deprived of one victim, many a batterer turns on the charm to recruit another, then is arrested again for assaulting his second, third, or fourth target–but the program has provided safety for thousands of women and children. Eighty percent of women who have used the program report five years later than they are free of violence, and most no longer live with the man who assaulted them. Duluth also maintains, year after year, an exceptionally low rate of domestic homicide.[106]

(i) Civil Protection Order Codes

All states have civil protection order codes. Most define "eligible" victims as "family and household members". Some include common law, dating or other intimate relationships. One state also protects high risk adults with disabilities. All codes permit the survivor to apply for the orders and in many states to apply on behalf of children. Most codes do not require that the person have vacated the home or have proceeded with a divorce but some do. Most codes prohibit abusive conduct which is domestic and violates criminal law. Some expressly state the nature of the behaviour and include a range of actions including, in some cases, emotional distress such as creating a disturbance at the petitioner's place of employment and other stalking behaviours. In two-thirds of states the application process is expedited with special forms and clerical assistance provided and in many cases they can be obtained *ex parte* and on the same day as the petition. Some codes provide for confidentiality of information or do not require information regarding the petitioner's name and address. Translation is also provided in some states. In some cases, there is a filing fee and in others there is no fee for this order. Most of the codes require that the pleadings, process and order be filed on the defendant and some codes also require that these be filed with the law enforcement office. Most orders prohibit the defendant from future acts of violence (49/51 States), grant exclusive possession of the home to the survivors (50/51 states) and award temporary custody to the non-abusive parent. In half of the states, orders may be made for attorney fees or costs. One code (Washington) also authorizes the court to order electronic monitoring of the defendant. The length or duration of the order varies from state to state running between one and three years and in most cases, the orders can be extended. These codes can be enforced through arrest in 19 states and in 23 states there can be a warrantless arrest if breach is suspected. Some codes require imprisonment for the breach while others require a violent act before there can be imprisonment. The sentences are usually for 6 months to one year with fines of approximately $1,000. The problem of double jeopardy is explicitly addressed by state codes since there is concern that if the defendant is found guilty under the code, he can be charged under another code for the same activity. Some of the main forms of relief provided in the state codes include the following:

- restraining order;
- exclusive use of a residence or eviction of a perpetrator from the victim's house;

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[106] A. Jones, note 28 at 214.

- custody or visitation authorized;
- payment of child or spousal support;
- attorney fees or costs;
- ophthalmology compensation; and
- non-contact provision.

(ii) Custody Codes

Thirty-two states and the District of Columbia have custody codes requiring that domestic violence be taken into account in designing custody and visitation awards. Most of this legislation has been created since 1989. Many of the codes, in particular the newer ones, provide a rebuttable presumption against an award of sole or joint custody to a parent who has perpetrated physical or sexual abuse against the other parent or children. Visitation and access are often only allowed in a supervised situation and after counselling has been received. In this case, there are also requirements of injunctions against domestic violence included in all divorce, separation, visitation orders or judgements where family violence has been identified. The code in one case clearly specifies that self-defence does not constitute an act of family violence. In Louisiana, the code mandates that sole custody is to be awarded to the parent less likely to continue the family violence. All costs related to the orders can be ordered to be paid by the perpetrator including witness and expert fees. The *Louisiana Code* is also exemplary in that it specifically addresses the issue of whether mediation is to be used and specifies that the court may not compel mediation where that partner or any of the children have been abused by one parent or spouse. The Study by the National Council of Juvenile and Family Court Judges recommends that the *Louisiana Code* be regarded as the model for a state codes on this matter.

(iii) Civil Damages

Many of the States provide for financial compensation for out-of-pocket losses including medical costs, moving expenses, relocation costs, counselling, loss of earnings and other costs. In addition, there is provision for punitive damages. Damages are also provided for in some of the custodial orders where someone interferes with the order. Where there has been a breach of fiduciary duty to disclose assets to the other spouse, some statutes provided for 100% of the asset at issue to be paid to the other person. Some codes also provide compensation for a breach of telephone privacy.

(iv) Social and Health Services Codes

Most states have provisions for support protection and advocacy services for survivors of domestic violence. In addition, many states provide for prevention services. These support services are in the form of crisis intervention, counselling and advocacy. In most places, the demands for these services are greater than the resources available. Many of the codes include non-disclosure or confidentiality, although many often require agencies to collect data to provide for reporting and monitoring of domestic violence programs. Some states

have batterer intervention and counselling services included as post-conviction services. Thirty states require counselling as an aspect of a protection order. Some states also have in place medial intervention codes and school curriculum codes, housing assistance codes and community education and employment codes. For example, in the State of Maine, a survivor of violence who has had to leave her job can receive unemployment insurance benefits if she can show that she has made reasonable efforts to preserve her employment but that leaving was necessary for her safety. The results of batterer intervention counselling are uncertain and it appeared to the researcher that recidivism is as likely with counselling as without. The violence was more likely to alter if the punishment was clear and certain and social messages that domestic violence is wrong were consistent.

(v) Arrest and Law Enforcement Codes

Forty-seven states authorize or mandate warrantless "probable cause" arrests for crimes, including domestic violence. Eighteen states mandate law enforcement officers to effect warrantless arrest for breaches of protection orders. Many codes also require communication of rights to women regarding legal remedies and shelter and emergency transportation and assistance. In fact, it has been noted that one of the important roles of the police officer in a domestic violence case is that of providing information since it may be the first time the woman has had the options communicated to her. In addition, many codes also require that arresting officers ensure that the woman receives medical assistance should she need it.

Twenty-eight states require officers to make incidents reports whether or not an arrest is made and in one case, there is a requirement that these reports be kept for 5 years.

(vi) Evidence Codes

Most states have a provision admitting expert evidence and the beliefs and experience of "battered women" to support a legal claim or a defence in a criminal case. For the most part, however, the success of this defence has turned upon the individual decision of the courts.

(vii) The Duty to Protect Children

Forty-eight states have child abuse codes and thirty-five of these include failure to protect as abuse, eight of these identify this as a crime. However, in some states there is an affirmative defence provided for survivors of violence who have been unable to carry out their duty to protect or remove the child from the abusive situation. In general, however, the legislation has not done this but recommendations for reform usually suggest that they should include this defence for women who are unable to carry out this obligation.

(viii) Summary of the USA Experience

In summary then, even with a wide range of civil or non-criminal remedies, domestic

violence remains a problem. Even though the division of power in the United States differs, many of the issues relating to the way the two systems of justice operate (the emphasis on civil liberties in the criminal justice system and the protection offered women in the civil system) are the same as in Canada. The concerns expressed in the Study of United States' codes review suggests that the civil law remedies are important but not significant unless there is equal emphasis given to the problem through the penal or criminal law system. The need to have a system oriented to protection and prohibition is apparent. Where only one exists, then the nature of each approach means that there will be a gap in the system.

(c) Canada

While many provinces have a more unified family court system, all deal with the same problem of criminal and non-criminal law systems and the constitutional boundaries to provincial authority. In a number of places there has been an attempt to develop pilot projects for interdisciplinary "teams" to focus resources on the problem of domestic violence. Four different approaches, Ontario, New Brunswick, Manitoba and Saskatchewan, are examined in this section.

(i) Ontario

In London, Ontario a model has been developed to respond to domestic violence which is similar to the Duluth, Minnesota DAIP model discussed above. The model consists of a policy of police laying charges in all cases where charges are warranted, as well as a "Family Consultant Service". The charging policy stems from a directive from the Federal, then Provincial, Solicitor General in 1982 that police, not women, were to lay charges in all domestic violence cases where "facts and circumstances warrant this action".[107]

The Family Consultant Service provides a social worker on a call crisis intervention team. The team has an office in police headquarters and is provided with an unmarked car and police radio.[108] The team intervenes in cases of family violence, suicide attempts, dilemmas associated with different disabilities, family conflicts, children in trouble with the law, neglectful or abusive situations, and notification of a sudden death in the family. The team has three crisis intervention roles: it mediates among family members; it acts as a liaison with police; and it provides short-term assistance and refers people to the appropriate agencies or services.[109] The use of this team represents an attempt to bridge the gap between

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[107] Jaffe *et al*, "The Impact of Police Charges in Incidents of Wife Abuse", (1986) 1 *Journal of Family Violence* 37 at 38.

[108] See brochure of the Family Consultant Service of the London Police Force on file with Law Reform Commission.

[109] See an Excerpt from the *London Police Force Annual Report* (1990) on file with the Law Reform Commission. In this excerpt

the police force and various community agencies and is considered "a successful integration of the social role of the police force with traditional law enforcement and crime prevention roles".[110]

One of the most interesting aspects of the London model has been the numerous evaluation studies that have been completed on the model. The focus of the studies has been whether police-laid charges have actually increased and whether victims were more satisfied with the charging policy.

In 1985, four researchers undertook a study on the London Police charging policy published as *The Impact of Police Charges in Incidents of Wife Abuse*[111] This study found that between 1979 and 1983 the number of police charges rose (2% to 67%) and the number of victim-laid charges were drastically reduced. The study found that policy charges acted as a strong deterrent in the majority of cases, yet violence was not eliminated entirely.[112] The researchers also questioned victims regarding their perceptions of the charging policy. The people interviewed felt they received more support from the police, felt less to blame, and felt that the police and the courts played a significant role in reducing violence. However, the survivors felt they needed more advocacy support and there was some dissatisfaction with the Crown.[113] In a later study in 1991, it was concluded that overall, there was a radical improvement in attitudes about police responsiveness as a result of the policy.[114]

This follow-up study also found that the number of police-laid charges increased even more and that the police were now more supportive and positive about the charging policy.[115] In

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there is also a breakdown of types of calls received over the years.

[110] Excerpt from *London Police Department Annual Report* (1990).

[111] P. Jaffe, D. Wolfe, A. Telford, G. Austin (1986) l *Journal of Family Violence* 37; see also C.A. Burris and P. Jaffe, "Wife Abuse As A Crime: The Impact of Police Laying Charges" (1983) *Canadian Journal of Criminology* 309.

[112] Jaffe (1986) *Ibid.* at 43.

[113] Jaffe (1986) *Ibid.* at 47.

[114] London Family Court Clinic Inc., *Wife Assault as a Crime: The Perspectives of Victims and Police Officers On A Charging Policy in London, Ontario* from 1980-1990 (June 1991) at 2.

[115] In terms of the arresting policy, it is interesting to note that the police officers interviewed felt that corroborating evidence, the survivors willingness to testify, and injuries were

terms of victim satisfaction, the study noted that 74% of the people interviewed felt the police responded quickly, 65% were satisfied with the advice they received, and 80% stated they would call the police again.[116] Overall, there was a higher level of satisfaction with the court process. There was, however, some concern about the length of the process. The study found that in the majority of cases, there was a "significant reduction in the level of violence"[117] experienced after charges were laid and that the frequency of calls to police after a target incident increased: "This would suggest that victims do not hesitate to contact police repeatedly despite their (knowledge that charges will in all probability be laid".[118]

(ii) New Brunswick

In New Brunswick, there are three provincial initiatives which relate to domestic violence spousal assault. The Provincial Crown Attorney's Manual places priority on the prosecution of child sexual abuse cases, spousal assault cases and sexual assault cases.[119] The Attorney General's office has instituted the New Brunswick Family Violence Statistical Information System, which is very similar to the Nova Scotia Tracking Project.[120] The objectives of the system are to: enhance current programs for the immediate safety of victims; develop standards, protocols and training for professions; establish a public awareness/education program; and to develop statistical information on family violence incidents involving the criminal justice system.

Finally, and perhaps most important, New Brunswick has developed comprehensive interdepartmental "Woman Abuse Protocols". These Protocols are designed to guide the intervention of social workers, mental health workers, public health workers, emergency department personnel, the justice system, income assistance workers and school personnel in cases of alleged or suspected woman abuse. The role of these Protocols is to eliminate the potential for discretionary and uneven provision of legal services in cases of domestic violence.

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the most important factors in deciding arrest. However, the junior officers focused more on the second factors.

[116] *Ibid.* at 2.

[117] *Ibid.* at 2 to 3.

[118] *Ibid.* at 3.

[119] Interview with a member of the Saint John Crown Prosecutors Office February 1992.

[120] However, in New Brunswick the project is one step ahead as the pilot study is complete and the information network is being set up.

The most significant Protocol regarding on police intervention is the following:

> Woman assault should be treated as any other criminal matter and therefore the onus is on the police and Crown, not the victim, to initiate the criminal process. In all cases where a charge is warranted on the evidence, the police will lay a charge. At this point, police mediation for reconciliation of the parties is not appropriate.

The most significant Protocol with respect to the Crown Prosecutor's role in an intervention is that the Crown is to authorize all charges against any citizen, and:

> Normally where the evidence is available, a prosecution should be commenced or continued notwithstanding that a complainant later expresses a wish that no further action be taken. This is especially so if the offence is of some gravity or there is suspicion that the change of heart is motivated by fear. However, there may be some legitimate cases where it is not contrary to the public interest to comply with the complainant's wishes.

Crown Prosecutors are also instructed that:

> A peace bond is only appropriate in situations where there is fear of personal injury or damage to property. Unless it is of a minor nature, an assault should not be dealt with under this section. This provision was intended as a means of preventing an assault from happening, not as a means of punishing an assault which has already occurred.

and that:

> In cases of woman assault, Crown prosecutors should seek sentences comparable to those sought in cases where the parties are not related.

There are also Protocols on Victim Services. For example, the Victim Services Coordinator is instructed to assist the victim in preparing a victim impact statement where it is used, and:

> In cases of woman abuse, upon direct request or referral, in areas where Victim Programs are in operation, the Victim Services Coordinator will:
>
> - Establish contact with the victim prior to the court appearance to determine the level of direct involvement required to assist the abused woman's participation in the court process.
> - Provide relevant information concerning the victim's rights and responsibilities as a court witness.
> - Arrange for the victim to attend a Witness Information Presentation prior to the first court appearance.
> - Where appropriate, arrange for a personal interview in order to respond to specific needs and questions of the abused woman.
> - Ensure that the necessary court support for the victim is in place prior to required court appearances.

- Make appropriate referrals to community agencies as required, to ensure that the victim receives support and services prior to and throughout the court process.

- Liaise with the Police and the Crown Prosecutors, as required, to ensure that the victim is continuously informed of the progress of the case.

- Advise the victim of the outcome of the court proceedings.

The Saint John Police Department has an interdisciplinary approach to domestic violence cases and has created a specialized police team, the Family Protection Unit, which deals with all sexual assault, child abuse, and spousal assault cases that come to the attention of the department. Once a case has been brought to the attention of the Department, the investigation and processing of the case goes through the Unit. The Family Protection Unit at the time of researching the Report, consisted of three police officers and the following people:

1. Victim Services Coordinator;
2. Three social workers;
3. R.C.M.P. Officers (who service outlying areas);
4. A mental health counsellor;
5. A youth probation officer;
6. The Parole and Probation Officers of offenders; and
7. The Probation Officer who does pre-sentence reports.

Coordination and sharing of information takes place at meetings held weekly (police and social workers) and monthly (everybody else). Within this framework, the most important relationship is between the police and the Victim Services Coordinator. References to the Victim Services Coordinator are made immediately by the police.

In New Brunswick there is also an additional non-criminal remedy in the form of a Restraining Order under the New Brunswick *Family Services Act*[121]. However, according to Protocols, this is a very limited remedy. The Protocols state as follows:

> Restraining Orders:
>
> *The Family Services Act* has a provision for obtaining what is commonly called a "restraining order". This is a civil law remedy, not a criminal law matter.
>
> A person can apply to a Court of Queen's Bench Family Division for a restraining order if (1) the parties are separated but still married and (2) the other spouse has been molesting, annoying, harassing or interfering with the applicant or any children in her lawful custody.
>
> A charge or a recognizance under the *Criminal Code* is the appropriate method of proceeding when there is fear of bodily harm. The conduct complained of for a restraining order is of a less serious nature than fear of personal injury.

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[121] S.N.B. 1983, c.13 as amended.

It is not an offence to breach a restraining order. This type of order is enforceable by civil contempt procedure with the involvement of a private lawyer, not a Crown prosecutor. The only circumstances where a Crown prosecutor will be involved in obtaining restraining orders is if the original application is a request for support and the offending spouse is consenting to the granting of the restraining order.

A non-association condition can be obtained as a condition of probation or a condition of a peace bond in proceedings under the *Criminal Code*. These types of conditions are enforceable by a criminal charge if there is a violation.

(iii) Manitoba

In 1990, the government of Manitoba created as a pilot project, a Family Violence Court in Winnipeg. This Court deals with first appearances, remands, guilty pleas, trials and sentencing for spousal, elder and child abuse cases.[122] The court is a criminal court which an accused may choose to use as part of his right to choose a mode of trial under the *Criminal Code.* The Province also has a unified family court which deals with all family law matters other than violence. The specialized Family Violence Court was designed and implemented to deal with five problems associated with the arrest and prosecution of spousal assault cases experienced by most jurisdictions:

(i) Capricious police charging practices;
(ii) Failure of Crown to proceed because of frustration with the victim;
(iii) Victim feeling re-victimized by the court-process;
(iv) Inappropriate sentences; and
(v) Little or no treatment ordered or available for abusers.[123]

The Family Violence Court structure or system consists of the following:

1. A Court Implementation Committee;[124]

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[122] J. Ursell, "The Family Violence Court of Winnipeg" (1992) 34 *Manitoba Law Journal* 100 at 100. See also An Outline of the Delivery of Family Law in Canada, research collected for the Law Reform Commission of Nova Scotia in 1994 from provincial government departments.

[123] Public talk by J. Ursell, Principal Investigator, Family Violence Court Implementation Committee, Dalhousie Law School, February 15th, 1993.

[124] The Court Implementation Committee consists of representation from the Provincial Judges Court, Department of Justice, Women's Directorate and Department of Family Services. The Mandate of the Committee is to: (i) ensure the smooth operation of

2. Five full-time specialized Crown Attorneys;[125]
3. A victim's service entitled the "Women's Advocacy Program";[126]
4. A "Family Violence Unit" of Probation Services;[127]
5. Research Team;[128]
6. Support Staff Person;[129] and
7. Twenty "part-time" Judges.[130]

The Court sits for a total of 52 hours per week.[131]

Initially, several benefits of the Family Violence Court system were observed by the researchers associated with the court. First, the problem of a backlog of spousal assault cases was eliminated. In fact, the average time for the cases from entry to exit was 3 months with 92% of the cases being completed in less than 18 months. This provided the assaulted woman and her family less time in crisis and less time during which she was vulnerable to

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the specialized court; (ii) ensure that the court is understood and accessible to the community at large and the specific community of service providers; (iii) monitor the impact of the court on other system components, as well as to identify the appropriate Ministries points of mounting pressure; (iv) facilitate the adoption or adaptation of the Family Violence Court model to communities outside of Winnipeg and to other jurisdictions; see Ursell, note 122 at 101-102.

[125] *Ibid.*

[126] *Ibid.*

[127] This unit provides individual assessments, counselling and long term intensive treatment for offenders; *ibid.*

[128] The Research Team consists of a director and research assistant, *ibid.* at 103.

[129] The support staff person fulfils the crucial role of assisting the Crown Attorneys and research team to coordinate the files and flow of information within the system; *ibid.*

[130] There are approximately 40 Provincial Court judges in Winnipeg. Of these approximately 20 sit on the Family Violence Court as part of their duties; *ibid.*

[131] The court originally was scheduled for 28 hours per week. This had to be increased due to a heavy demand; *ibid.*

pressure from the accused to recant.[132] There has been a carryover effect for the rest of the legal system in that both charging and conviction rates have gone up.[133] Family sentencing patterns have changed dramatically and are more stringent than was the case previously.[134] In Winnipeg's Family Violence Court the most common sentences are probation (85% of which is supervised probation); suspended sentence; and incarceration.

The court mandated counselling for the offender is frequently used (83% of probation sentences and 67% of all cases involve counselling).[135]

Another benefit of the Family Violence Court relates to the service provided to the victim. A number of qualitative observations have been made by researchers. The specialization of personnel and process allows for response to the needs, wishes and vulnerabilities of the assaulted woman; there is a recognition that the first is probably not the last time court personnel will see an assaulted woman, therefore she should receive the best service possible so she will return if she needs to (in essence there is a less adversarial relationship between the Crown and the assaulted woman); the definition of success has been redefined in Specialized Court from conviction rates to taking every case as far as possible tempered with the needs of the assaulted woman; court decorum is very different in Specialized Court in that it is informed by the philosophy that you do not have to neglect respect for the victim in order to fully recognize the rights of the accused; spousal assault cases went from being perceived by Crown Attorneys as "grunt work" to being viewed as difficult but invaluable, complex and specialized work.[136] Subsequent to this initial review, the court has begun to suffer a backlog because of an increased case load which is a cause for concern. In addition, there have been concerns that it services only the urban population of Manitoba.

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[132] Ursell, note 122.

[133] Ursell, *ibid.*

[134] A study on "domestic assault" cases in Manitoba in 1987 indicated that the most common sentences used were (1) conditional discharge; (2) suspended sentence; and (3) probation. Incarceration of the offender was rare. See J. Ursell, "Ensuring Systemic Change in the Criminal Justice System: The Examination of Wife Abuse Policies in Manitoba" in A. Esaw, ed., (1991) *Manitoba Law Annual* 1989-90 at 206.

[135] Ursell, note 122 at 120–122. For a detailed analysis of the sentencing patterns of the Family Violence Court see *A Comparative Study Of Sentencing In The Specialized And General Criminal Courts In Winnipeg* completed by E.J. Ursell, Sept. 1992, Criminology Research Center, Department of Sociology, University of Manitoba.

[136] *Ibid.*

(iv) Saskatchewan

In 1994, the province of Saskatchewan developed a law, *The Victims of Domestic Violence Act*",[137] which is expected to become law early in 1995, dealing with domestic violence. It sets up an emergency intervenor protection system whereby an "Emergency Intervention Order" can be issued over the phone by specially trained Justices of the Peace.[138] The order which is enforceable by the police, can order a person to leave a place or authorize the police to physically remove the person from a house where a Justice of the Peace determines that domestic violence has occurred and that, because of the seriousness or urgency, the order cannot wait for a judge to make the determination. The model is essentially one of adult protection and emergency intervention and does not involve findings of criminal responsibility. The Order is not effective unless the person against whom it is issued receives notice of it. Under the *Act*, the Justice of the Peace forwards the Emergency Order with his or her notes to the judge for review in three days. If satisfied, the judge can confirm the order unless the abusive spouse can show why the order should not apply. The Judge may also have a hearing on application, and issue an order called a "Victim's Assistance Order" which has a wide range of remedies dealing with exclusive possession of a residence, restraining the person from entering places, requiring that the person pay victim compensation for losses, and various other conditions, much as seen in the United States' codes. Applications for these court orders can be made by the woman or by someone on her behalf and the hearing can be held privately with a ban on publication of information. Although a Victim's Assistance Order can give possession of property or leasehold, it expressly does not affect title to property and in the case of rental property, it forbids a landlord from evicting a victim solely on the basis that the victim's name is not on the lease. The *Act* also allows for a warrant to be issued to enter property and remove a person.

This legislation is also of interest in that, although it provides for a wide range of court orders affecting property and family matters, there is no punishment provision if someone ignores the order. However, the result of breaching such an order would, in fact, be an act of contempt of court and arguably punishable as criminal contempt (although New Brunswick has taken the view these are civil contempt orders). If prosecuted as criminal contempt, it could result in a prison sentence of up to two years. The legislation has been positively received by women's groups, although there have been concerns expressed as to whether women's lives may be in even greater risk if her spouse is served with this order and the policing services are not improved. For example, in rural areas, the policing services are less

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[137] Bill No.30, 1994 Saskatchewan, March 8th, 1994. There are also comprehensive regulations which have been developed for this *Act*, The Victims of Domestic Violence Regulations, R.R.S. c.V-6.02, Reg., Nov. 1994.

[138] The Province has hired a number of new Justices of the Peace who have had some involvement in issues of family violence previously (e.g., support workers).

accessible which means that the orders might not be helpful. Since the legislation is not gender specific, there is also some concern that it might be used by spouses to further harass women.[139]

It is important to understand that this legislation has been developed in the context of a long established family law and victim service strategy. It has been developed along with an expansion of the unified family court system in Saskatchewan to enhance overall availability and support resources. The province has adopted a court-based integrated alternative dispute resolution model for delivery of family law, using mediation, counselling and support as a means of responding to family law needs. The Province has also designated a number of its Supreme Court judges to act as judges of the Family Law Division to promote specialization in this area. In parts of the province where the court does not sit regularly, a Provincial court has concurrent jurisdiction in many family law matters. The Family Law Division of the Supreme Court is the division which will deal with the *Victims of Domestic Violence Act* and orders under it although any contempt charges would be dealt with separately from the orders. It is important to note that since the woman is still having to rely on a court order for protection, the province is also developing a training and education program for police officers to ensure that the orders are enforced and respected.

(v) Other Provincial Responses

The approaches in Ontario, New Brunswick, Manitoba and Saskatchewan all reflect differing strategies adopted by provinces to respond to domestic violence. The Ontario and New Brunswick models focus more on the enforcement and police responses while Manitoba and Saskatchewan tend to focus more on the courts and law-based charges. In all areas, however, there is an attempt to create system-wide responses with increased support services for women. These jurisdictions have also increased their support, counselling and other family law services. The other jurisdictions in Canada have not specifically addressed domestic violence although many provinces[140] have created other family law responses. In

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[139] F. Davis, "*New Act Allows Abused Women to Stay In Their Homes" vis-a-vis*, National Newsletter on Family Violence, Canadian Council on Social Development, Fall 1994 at 5.

[140] There are, however, many community based initiatives being developed. For example, in Nova Scotia, the Lunenburg County Interagency Committee on Family Violence has as its goal, the marshalling of resources in the County in the hope of reducing family violence. The Committee is actively seeking to create a integrated domestic violence program modelled on a United States experience (Norfolk County/Quincy) which focused on pre-court police intervention and support system outreach as well as tracking reports and comprehensive training and education.

some cases, this has focused on court restructuring, while in others, the focus (and resources) have been used instead to try to provide alternatives to the court system such as counselling, mediation and maintenance enforcement systems.[141]

In most jurisdictions, criminal law matters, such as peace bonds and assaults are dealt with by the criminal courts in Newfoundland.[142] Nova Scotia[143] is unusual in that the family courts have jurisdiction under the provincial legislation to deal with some *Criminal Code* matters (e.g., peace bonds and assaults). Most provinces have provincial laws providing for restraining orders which can require that the abuser not enter the home. These are often in connection with child custody and family maintenance legislation or non-molestation orders.[144]

4. Summary of Responses Elsewhere

It is important when examining other responses to domestic violence to understand the global significance of the problem. It is an established fact that women experience domestic violence throughout the world.[145] While there are approaches being developed, it is a problem which has by no means been resolved anywhere. For example, a commentator reflecting on the experience in the United States concludes that:

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[141] For example, in six Canadian jurisdictions, family law is a "unified" jurisdiction where one court has the authority to deal with all family law disputes. The models vary in some provinces such as Prince Edward Island where it is simply a division of the Supreme Court while in others, there may be a specific family law court although they are often only in one or two locations, e.g., Hamilton, Ontario "pilot" Unified Family Court. In other provinces, the jurisdictional division between Provincial and Supreme Court remains but resources have been put into pre-court or alternatives to court, such as the "pilot" family justice centres in British Columbia, or more effective maintenance enforcement systems, to reduce the need for court services.

[142] *Unified Family Court Act*, R.S.N. 1990, c.U-3 at 3, s.6(6).

[143] *Family Court Act*, R.S.N.S. 1989, c.159, s.7(3).

[144] *The Family Maintenance Act*, C.C.S.M., c. F20, s.10(1).

[145] In a collection of reports from 70 countries, nearly every contributor cites the widespread acceptance of woman-beating as a problem in the country; *Sisterhood is Global: The International Women's Movement Anthology*; see Robin Morgan, ed., (Middlesex: Penguin Books, 2984) [cited in S. Sherwin, *No Longer Patient: Feminist Ethics and Health Care* (Philadelphia: Temple University Press, 1992) at 17].

> To be effective, any criminal justice program must begin with a policy of arresting offenders and handing out serious consequences. Police must recognize assault as assault, a crime committed by a perpetrator against a victim. (They must get over the notion that a "domestic disturbance" is a "marital problem" of a "violent couple.") Given limited resources, police policy makers must reorder their arrest priorities, recognizing that domestic battery, the leading cause of injury to women, is far more serious, violent, dangerous, and costly to the victim and to the public than the petty thefts, car thefts, burglaries, and minor drug use offenses that typically engage the police. Police officers should be empowered and *required* to make warrantless arrests or probable cause in domestic assaults and to hold offenders overnight for arraignment; they should be shielded from civil liability for wrongful arrest in such cases. In sizable communities, police should computerize and review records of domestic calls so that they can easily identify repeat offenders. In responding to every domestic disturbance call, police should be required to give the woman (*not* in the man's presence) printed information about her rights and appropriate community services. Police should carry this information in the languages of all major ethnic groups in their community."
>
> On their own initiative, prosecutors should prosecute men arrested for domestic assault. Although criminal justice personnel at all levels should consider the victim's wishes, it is their job, not hers, to arrest, prosecute, and punish the criminal. Salaried women's advocates (and translators if necessary) should be present in every prosecutor's office and every court to advise battered women of their rights and help them negotiate the system.[146]

According to the then Federal Minister of Justice for Canada, when welcoming the United Nation Declaration on the Elimination of Violence Against Women: "Violence against women remains one of the most pervasive and serious manifestations of human rights abuses."[147]

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[146] Jones, note 28 at 215.

[147] Barbara MacDougall, then Federal Minister for Justice, March 25, 1993, News Release No.72, Government of Canada.

III RHETORIC INTO REALITY: PROPOSED REFORMS IN NOVA SCOTIA

A. Overview of Principles and Approaches to Reform

There have been innumerable political statements, government policy directives and there are numerous criminal laws which could be used to eradicate domestic violence but domestic violence is not disappearing, and, if anything, is increasing in Nova Scotia.[148] This raises the stark question: why is there no reduction in the violence which women are experiencing?

International standards now recognize domestic violence as a significant violation of women's human rights akin to torture, and a major barrier to equality. Despite all of this, the situation the world over remains unchanged. Since the law in Canada already clearly prohibits harassment, threats, and all forms of physical violence, it is clear that the existing law is not obeyed or respected. Will more law or better laws really make a difference? If the present law is not effective, is the solution more laws or asking why the existing laws are not working? Clearly abusers are not deterred from their criminal behaviour by the words of the law, so will more words on paper, whether as legislation or as a court order alone do more? Is the issue one of resources or something else and where, if at all, is a law reform effort best directed? These are the central questions that the Law Reform Commission grappled with in this project. The Commission decided it was important to examine why the existing law, which in general appeared as though it should be effective, is not working. Is the law not properly designed to deal with domestic violence or is the problem one of how the law is applied and used? After a great deal of research and reflection, the Commission has concluded that while some changes could and should be made to the written laws and to the court structure, the heart of the problem lies in the way the existing law is implemented in cases of domestic violence. Even the best designed law will not deter a person from an act if he does not believe there will be any consequences if he disobeys the law. The way in which the law is interpreted by police, lawyers, judges and legal system personnel sends a message to all of society as to what is or is not acceptable behaviour. This is probably the most significant role of law governing relations between people in society.

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[148] Recent figures in Nova Scotia show an increase this year over the same nine months in 1993 (457 to 517 cases) although this could be attributed to increased charging. See P. Hays, "Toughen laws or Family Abuse - Top Mountie" (*Daily News*, 2 November 1994 at 9) reporting comments of RCMP Chief Superintendent Burchill. However, it must be remembered that these charges are the "tip of the iceberg", the incidence of unreported beatings and injuries of women by their spouses is many times larger than this figure.

In its 1993 *Discussion Paper,* the Law Reform Commission took the view that domestic violence is a crime and should never be regarded as less than a criminal act. To use a metaphor, while additional laws might provide more strings to the legal instrument, if the real problem is the person playing the instrument and the way they are reading the music, then the extra strings are meaningless and do not really address the underlying problem of discord. The Commission is also concerned that a provincial law dealing with domestic violence would somehow suggest that this behaviour is not a crime. Since the province does not have constitutional authority to make criminal laws, the Commission believes that, even worse, the promise of change might well be illusory in that if the underlying reasons the current laws are not effective is not addressed, the fact that a new law exists might simply create a myth that something had been done.

This does not mean that there should be no legal action taken. Although law will not in and of itself make change, law is one of the ways in which social values are communicated and entrenched in society. To start to create social change, domestic violence must be dealt with as a significant crime, the media must be more responsible and the public more educated. Wherever possible, governments, judiciary and other people in positions of power should be displaying leadership and sponsorship of this agenda. In order to make change there must be priority placed on eliminating domestic violence. Currently, lack of coordination, fragmented and archaic institutional divisions and arrangements, lack of resources, and poor utilization of technological advances are central problems which the government can address. The alterations required to some of the legal arrangements will take some time to overcome as they are embedded in our language and in the Canadian *Constitution*. However, interdepartmental coordination within government, increased and focused resources, and some legal changes will start the process and begin to make progress in addressing the problem. This Report suggests some changes that can be made by the government of Nova Scotia using existing laws and agencies. Some of these changes can be made immediately and some are longer term changes which will eventually result in the eradication of this social evil.

In the *Discussion Paper* it was suggested that the federal government be urged to make changes to the criminal law to make it better able to describe the distinctive patterns of the crime of domestic violence. A new offence called "criminal harassment" or "anti-stalking" was passed in the last year.[149] While there is still concern about the way judges are now interpreting and applying this law using stereotypes about the nature of obsession and romantic pursuit, the criminal law is gradually becoming more responsive to behaviours frequently experienced in situations of domestic violence.[150] The Commission believes that

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[149] R.S.C. c.C-46, s.264 as amended. R.S. 1985, c.27 (1st Supp.), s.37; 1993 c.45, s.2.

[150] See for example, *R.* v. *Gowing*, April 22, 1994 (Ontario Provincial Court), where the judge cited general deterrence as the basis for the sentence. A man was given a sentence of 10 days in

the court system and the laws and practices relating to police response, evidence and sentencing need to be more properly attuned to the truth of women's fears of violence from their spouses. The difficulty of protecting the safety and lives of women within the legal system arises from the values our Canadian society has placed on liberty and the right to be presumed innocent until proven guilty. These constitutional rights are found in the *Charter of Rights* and underlie the criminal law system. These legal ideas often seem to present obstacles to justice and appear unfair or wrong and contrary to common sense. For example, it might seem sensible to "lock up" someone who has harmed another person until they are tried in a court. At the same time, however, we would not want to allow the police untrammelled power to lock up any person alleged to have committed an offence until trial. The fact that trials often cannot take place for a long time creates a problem as well as the fact that prisons are already overcrowded and costly. Many would say that prison and punishment will not resolve the problem in the long term but will only make it worse. Since there is a limited range of punishment that can be imposed on a person, in the end the law, prison and counselling can only do so much to protect women from violent spouses. The fundamental problem of the social acceptability of violence against women, which is the underlying explanation for domestic violence, must be altered.

The recommendations set out in this section are based on the Commissioners' determination that the response to domestic violence in Nova Scotia should reflect the following fundamental principles:

1. Domestic violence must be understood as a life-threatening gender based crime which affects all of society. It must be accorded the highest priority of the legal system. The first consideration at all levels must be the safety and protection of assaulted women and their children. This means that the government must develop a means of ensuring that the people within the legal system comply with and support the government's policies. It also means that all forces of government must be engaged in an active effort to prevent this

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jail for an offence under Criminal harassment and a further fine of $300 for breaching the peace bond that the woman had obtained to protect herself. It should be noted that the judiciary is starting to respond to the message of this legislation. For example, in a recent stalking case, Judge Kennedy of Nova Scotia, imposed a 20 month jail term on a man for stalking a woman for 3 months. The judge in imposing the sentence is reported as commenting that he was sending a message that the "psychological violence" of stalking would not be tolerated. "In many ways, that type of violence is more serious than (physical) violence, it does not go away. It exist between offenses. It is pervasive.": K. Shiers, "Stalker Gets 20-month Term", *(The Chronicle Herald,* 21 December 1994).

violent crime against society;

2. Assaulted women are in a life-threatening situation and should be treated with sensitivity and respect and provided with support services while going through the legal system. This means that the legal system must take into account the specific needs of the woman who chooses to make use of the justice system. Failures to achieve this must be dealt with as a serious problem;

3. The legal response to domestic violence should take into account the various ethnic, racial, linguistic and geographic situations that exist in Nova Scotia. Legal solutions must be comprehensive enough to meet the needs of the specific situation, while at the same time uniformity of law and service must be achieved as a guarantee of safety for all women.

Section B of this part of the Report sets out in detail the recommendations of the Commission to resolve these issues. At this point it is, however, helpful to briefly outline the overall strategy and recommendations of the Commission. After considering research, comments and responses from elsewhere, the Commission has concluded that there should be responses in several different directions to create immediate and long-term changes. First, a proper implementation strategy for the law must reflect the need to carefully structure the exercise of discretion by the legal service to avoid abuse or failure to fulfil policies. At the same time, in order to meet the needs of survivors of domestic violence, responses need to be sensitive to the particular case. Altering the existing family law so that domestic violence is taken into account in making these decisions, is another area for change to ensure that the legal system itself does not further endanger the woman's safety. Finally, legislation and policies must accept the fact that for the most part this is a gendered crime which reflects the global oppression and persecution of one group by another for reasons related to gender. The evidence of the level and extent of violence and the uniformity of women's experience suggest that domestic violence is a pervasive form of gender persecution which the state must take responsibility for. It is not an individualized problem between two people but a widespread form of oppression which has its roots in the historical treatment of women. It requires resources, education and leadership in order to eradicate it.

Structuring Discretion, Creating Accountability and Leadership

The Commission's research has suggested that where there is policy to be followed, in order to prevent its spirit from being undermined by lack of education or discriminatory attitudes, the government must issue Directives and Protocols to reduce the opportunity for uneven application of laws and policy. The government has already adopted this approach, albeit not successfully, with its Directives on responses in cases of domestic violence. It is recommended that the Directives be complemented by Protocols for all levels of service

delivery. A Protocol essentially sets out the steps a person must take in responding to a situation. It provides guidance as to how discretion is to be exercised and how balances are to be struck in cases of doubt. For example, it can state in cases of domestic violence that any doubt should be resolved in favour of protecting the woman. More important, it also provides a standard for measuring the behaviour or response of people who are required to follow the Protocol or explain why they did not. This means that dispatchers, police, prosecutors and other government legal personnel will be instructed as to how to deal with a domestic violence call. This will have the result of ensuring some consistency in delivery of services across the Province. It is an approach which may also be adopted by judges in connection with the conditions imposed under peace bonds, interim judicial release, bail, probation and sentencing guidelines. Judicial discretion can be guided by the *Criminal Code* or by the Appeal Court. This approach requires development of Protocols as well as ensuring that the people who are asked to implement the Protocols and policy have sufficient resources to do so. As noted earlier in this Report, it is a shameful situation when government agencies develop a policy for handling prosecutions for spousal assault and the Director of Public Prosecutions is forced to report to the Minister that this policy will not be implemented because the services that have been agreed to cannot be delivered.[151] The Protocols should be reviewed by all affected people including women to ensure that they are workable and that all staff are familiar with them. Failure to follow Protocols and the responses on domestic violence calls must be noted for the purpose of reviews and reporting at year end.

While it is important to eliminate the opportunity for unfair application of the law or delivery of legal services in a way which reflects gender discrimination, research and experience in the United States has lead to the conclusion that case by case remedies are also needed. As noted in a recent Study evaluating the effectiveness of State Codes:[152]

> Protection order codes have proven to be tools that can significantly facilitate the achievement of the goals of safety and autonomy for abused women and children and the goals of constraint and deterrence of abusing men. The utility of the protection order depends both on the specificity of the relief ordered and the enforcement practices of the police and the courts. For orders to be effective they must be comprehensive; crafted to the particular safety needs of the victim in each case. Providing precise conditions of relief makes the offender aware of the specific behaviour prohibited. *"A high degree of specificity also makes it easier for police officers and other judges to determine later whether the (perpetrator) has violated the order.*"
> [footnotes omitted].

Although not expressly stated in these terms, this is also the theme of the proposal developed by a senior solicitor with the Department of Justice in Nova Scotia where the need to "provide remedies that are truly reflective of the needs of domestic violence victims" was

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[151] See text accompanying note 5.

[152] *State Codes on Domestic Violence:* note 104 at 23-24.

the stated objective of the proposal.[153] In other words, each case is individual and the specific needs of the woman will differ from case to case. This means that there must be a broad range of responses available in any case which can be used with sensitivity and in light of the security demands of the particular situation. The problem of structuring discretion to adequately provide for the needs of each case, while at the same time providing for uniformity is an age-old problem in administrative law-making. Where there is room for discretion there will always be the possibility that someone will not exercise it in the spirit in which it was intended. Where the discretion resides with an independent judiciary or police officers or prosecutors, the problem is difficult to identify and deal with. Equally, a zero tolerance policy which is applied with no real consideration for the specific issues in each case will be equally useless to women and will promote further disrespect of the law if arrest and charging policies and court orders do not respond to the complexity of each situation. For many women, the zero tolerance policy ends up providing an opportunity for racism and other forms of hatred to be perpetuated on members of their community. After some reflection on this problem, the Commission concluded that there are ways in which the joint goals of discretion and specificity can be met which will have an overall educative effect and will work to the benefit of women, and will not require a great deal of additional resources.

Canada currently has an obligation to report in detail to an international Committee on its progress in the area of domestic violence. There is in place in Nova Scotia Victims' Services, a division of the Department of Justice, which has among its tasks that of servicing and monitoring the needs and experiences of victims of crime. This office should have an expanded and clear responsibility for coordinating in conjunction with the Interdepartmental Family Violence Prevention Initiative, the legal service delivery in the criminal and family law areas in domestic violence. This will require more interdepartmental coordination and cooperation but should be both possible and desirable. Indeed, the interdependence of social and justice issues is increasingly being recognized by the government. Resources should be allocated accordingly between the departments concerned. As discussed in more detail later in Section 2, this will enable greater personal and public accountability.

Aside from internal governmental restructuring and reporting, however, there is currently an unused opportunity for stronger protection. Concern about balancing discretion and specificity can be met through a requirement from the Legislature that there be an independent annual report to the government and people of Nova Scotia on progress on domestic violence. This report should be prepared by an independent advocacy agency such as the Advisory Council on the Status of Women which is the provincial watchdog on issues relating to the achievement of equality for women. In preparing this independent annual report, the agency will essentially have the role of auditor or monitor and should be empowered by the government to review and document all aspects of the overall delivery of services, including judicial services, in cooperation with the Family Violence Prevention Initiative and the Victims' Services Division. This report must be public and should be a

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[153] Norton, note 10 at 2.

priority each year. The government should require that there be official responses indicating action to be taken in the next year to areas where failures are identified.

Restructuring Family Law Delivery

The division between family and criminal law and the division between the two court systems has largely been identified as a fundamental legal structural problem. This is not one that can be remedied easily since each court has different practices, standards of evidence and protections. As noted earlier, the liberty and due process interests of the criminal law system are central to criminal justice, while family law and the legal system operate on an individual basis and seek individual solutions. Since the differences are also to a large extent entrenched in the Canadian *Constitution,* it is unlikely it will be altered significantly in the near future. However, the way women experience this problem is not as abstract or academic as the discussion suggests. For most women the problem is that the different court systems deal with family matters on a piecemeal basis and that family law decisions do not take into account domestic violence in the arrangements it provides. Altering these laws and

structures will increase the safety of women and also avoid providing further opportunities for economic and emotional harassment and intimidation.

There are several options to fix this problem. One, as suggested by the solicitor for the Department of Justice, is to create a new provincial (non-criminal) protection oriented law dealing with domestic violence. This proposal suggested that all court protection orders would be available through the Supreme Court, rather than Family Court. These orders would deal with a range of family related matters such as exclusive possession of the home, spousal and child maintenance and so on, on an interim basis. While agreeing for the need of as many options as possible, the Commission is concerned about this approach because the Family Court system is seen as more approachable by women and is also the place where decisions about custody and maintenance are dealt with. The Supreme Court is perceived by many to be less accessible and more costly for the woman. The Commission is also concerned about the constitutionality of a provincial law which is enforced with severe prison sentences beyond those for similar behaviour in the *Criminal Code*. In addition, as already discussed, the Commission believes that most of the remedies are currently available but are not being used. For example, a peace bond or judicial interim release Order with a condition attached requiring that the person stay away from a certain location such as a home, if properly enforced has, from the point of view of the woman's needs, the same result as an interim order for exclusive possession of a matrimonial home. The real concern in either case for the woman will be whether the court order has any effect at all in terms of deterring her abuser.

Another option to have the legal system deal more effectively with domestic violence, involves creating a separate division of the Supreme Court dealing only with family crime cases. This might result in a more responsive criminal law system, at least in the place the

court was located, but it too does not necessarily mean that family matters could be looked after. Comments received by the Commission on this issue suggested that this option might be inappropriate for Nova Scotia especially given the population level and resource base. Instead, it was suggested that the existing system should be made to work properly rather than creating new courts. Further such a court might be of use to women in a metropolitan area but would not necessarily assist women in rural areas. The approach that seemed most well suited to the demographic situation in Nova Scotia is that used in Saint John, New Brunswick. That is, there should be specialized teams combining police and one or more support workers and, if available, a prosecutor, in the various regions of Nova Scotia. People on these teams should receive additional training in dealing with domestic violence and should be given sufficient staffing and resources to respond appropriately. While these could be specially designated people with expertise, the Commission suggests that if these positions were rotating, this would increase the overall awareness and expertise level in the delivery of the legal system.

A third option, and the one which the Commission endorses, is that the government continue its efforts to create a unified family court which can deal with all areas of family law. It is important, however, in proceeding with this court re-structuring that the provincial government recognize the importance of providing adequate resources for resolving family disputes such as support services for mediation, alternate dispute resolution and counselling before going to court.[154]

All of these important changes for dealing with problems in the delivery of family law overall. In order to address the problem of domestic violence changes to the court structure and support services must be coupled with immediate changes to existing family laws in Nova Scotia so that violence is taken into account in custody and access, as well as in matrimonial property decisions. These changes, discussed more fully in the recommendations below, could be made before the unified family court is in operation and are discussed more fully in the recommendations below.

A final question relating to delivery of family law through a unified family court is whether such a court should have criminal law jurisdiction in family matters. In 1991, the Court Structure Task Force in Nova Scotia concluded that it should. However, the majority of the Commission is concerned that this is not appropriate because it may suggest these offences are not a "real crime" and the criminal law system itself is not consistent with the

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[154] It is significant to note that with the proposed appointment of six to eight judges in Ontario to the expanded unified family court, the province will be committing the funds saved from the salaries of the judges (who would then be paid federally) to mediation and other critical support services for the unified family court; see C. Schmitz, "Feds Waiting for Province to Submit Formal Proposal: Judges to be Appointed Soon to Expanded Ontario U.F.C." *(The Lawyers Weekly* 25 November 1994) at 32.

relationship orientation of family law which does not particularly focus on the guilt or punishment. In addition, these are consistent with the view of a recent Canadian Bar Association Report which was also concerned about family violence issues being dealt with in a unified family court:

> On balance, it seems to us that placing criminal jurisdiction for spousal assault or child abuse in the unified family court is not justified given the orientation of the court to mediation and conciliation and further that is may suggest, inappropriately, that such conduct is not really criminal.[155]

Domestic Violence and Changes to the Criminal Law

The changes to family law and to implementation of criminal law described above does not mean that the criminal law itself should be ignored or is not in need of some alteration. The Commission suggests that there should also be changes to the criminal law to ensure that domestic violence as a gendered crime is properly and fully taken into account in the criminal law. Since criminal law is a federal matter, there is a need to ensure that the province does everything within its constitutional responsibility for administration of justice to ensure that the delivery of the criminal justice system meets the challenges of domestic violence as well as advocating changes to the federal government.
Currently, the criminal law does not, for the most part, recognize gender but rather describes behaviour of one person towards another that will be punished. Issues such as age or other power and trust relationships are starting to be expressly recognized in the description of the behaviour. It is clear that, although there are some occurrences in other contexts, domestic violence within couples is, for the most part, a gendered crime, that is, it is violence by a man against a woman. As such, the specific needs of the woman and the nature of domestic violence as a specific type of criminal activity must be dealt with. In particular, some of the provisions where discretion resides regarding arrest and detention should be altered to ensure it is exercised in a way appropriate to the offence of domestic violence, that is, it is not a single incident crime. Police and judicial discretion should be structured to ensure that the policy direction regarding domestic violence is clear and that protection of the woman from life-threatening behaviour is given priority. There should also be a specific crime of domestic violence with a penalty similar to that of torture.

This review of criminal law should also include the need to consider custodial orders and also situations appropriate for diversion programmes and counselling. However, the most difficult point is to strike a balance between the possibility of endangering the woman's life by putting responsibility for choices and decisions on her while at the same time ensuring that her needs are heard and considered and that her protection and safety are taken into account. This approach is consistent with the general trend in the law which is to develop sentencing which considers victim impact statements. It is appreciated that most of these are not easy objectives, however, the Commission believes that what is needed is specific

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[155] Canadian Bar Association Task Force Report, *Court Reform in Canada* (Canadian Bar Association: Ottawa, 1991) at 127.

coordination, commitment and focusing on the task to be carried out.

B. Detailed Recommendations for Law and Legal System Reform

The Commission's research, which was discussed in Part II of the Report, suggests that there are several steps to reform. The problem has been determined to be one of social attitude as reflected in the way the law is applied and structured. Changes to both law and attitude are related because law can be used to assist in changing attitudes. The Commission's recommendations are intended to achieve the following objectives:

1. The criminal and family law system, in responding to domestic violence, must reflect the experience of women to meet the needs of women. This must include the resources necessary to properly achieve effective enforcement of the law and to ensure that the legal system itself does not become a weapon used by abusers in their acts of violence;

2. There is a critical need to revise and restructure the family law system so that it is simpler and has sufficient resources to properly address the harassment and economic injury experienced by women in abusive relationships.

3. Any areas in which discretion is to be exercised must be reviewed to ensure that it does not result in discriminatory delivery of legal services. There must be public and personal accountability to ensure that the government's policies and laws against domestic violence are upheld.

1. The most effective legal response to domestic violence is to ensure that both the criminal and civil law systems are equally focused on eliminating domestic violence.

It has been pointed out that the *Constitution* of Canada and the division of authority between the provincial and federal governments is a major and probably, at least in the near future, an unchangeable legal impediment to reform. Even if these divisions did not exist, it is significant that experience in other places show that where there is a criminal and a non-criminal system of law, even if it is within the authority of one government, the two systems do not necessarily fit together. This is because the criminal law and the *Constitution* enshrine certain ideas such as liberty and innocence until proven guilty in a fair trial. This means that the interests of safety and protection for members of society often give way to the interest of individual liberty. This also means that the operation of the laws such as the right to keep people in custody and the need for a trial before a prison term is imposed, compromises the safety and security of women and children. The civil or family law responses are useful in

that they can be designed creatively to provide a full range of protection. However, court orders or legal rulings are all dependent on enforcement and sanctions for their breach. Where this does not occur, then the system is not effective in providing safety for women either.

What is needed is a system which operates fully and effectively in both arenas. The two legal systems, in the context of domestic violence, are interdependent. The criminal law will not achieve its goal of deterrence to abusers if women will not report the crime or seek assistance, and women, by and large, will not do so until the protection offered is useful to their particular situation since the risk of involvement with the criminal justice system may cost them their lives.

In its *Discussion Paper* the Commission took the view that domestic violence is a crime and should never be regarded as less. It was concerned that providing civil law or non-criminal protection orders might "soften" the view of the offence and the police response levels. Further, the Commission was concerned that if these civil remedies were created without other changes to enforcement practices and other laws on custody and maintenance and property, then irrespective of the breadth or creativity of court orders, they would not serve to protect the life or safety of women if the enforcement system and sanctions were not applied in an equally enhanced way.

As noted already, the Commission received comments in response to its *Discussion Paper* indicating that people agree that enforcement in the criminal justice system must be improved, but that better immediate protection and a simpler system for family law which recognizes problems of housing, custody and maintenance must also be developed. The underlying theme of most commentary is that the legal system, including delivery of all its aspects, must take into account the fact that domestic violence is a crime against women which is life-threatening and which occurs in the context of a family unit. Accordingly, the Commission has concluded, based on research and these experiences, that an effective response requires a coordinated targeted approach to social and justice policy implementation.

Changes must occur in the criminal law delivery system and all court institutions as well as in the civil law/family law system. The Commission has also concluded that the problem, for the most part, is a vast social problem relating to oppression and discrimination against women and that there is a responsibility on the part of the government to make all changes possible to encourage and create the climate for social change. The law, and law reform, has an important leadership role in communicating values. However, the overwhelming numbers and the complexity of the problem place an even greater onus on the government to take every step possible to ensure that all conditions possible for change are occurring.

Although the recommendations which follow set out some specific areas where changes should be made, it is the view of the Commission that even those that are described as immediate are really "long term" in the sense that unless the government chooses to place

priority and to focus all its energies on resolving the problem, the changes will not occur.

This means that the first and central recommendation of the Commission is that the government of Nova Scotia bring all its energy and resources to addressing this extremely serious life-threatening problem which is encountered by so many women in Nova Scotia. Currently, the fact that there has been little progress despite a great deal of study sends a message to society and abusers that the issue is not a matter of serious social concern to those in positions of power who have the ability to create social change.

The Commission recommends that:

1. **It is critical that the government of Nova Scotia make the eradication of domestic violence a priority to which it will target action and resources;**

2. **The legal response to domestic violence should include improvements both in the criminal and the civil law systems and their delivery;**

3. **The life-threatening nature of domestic violence, its immense social cost and the barrier it creates to equality for women must be explicitly recognized in the legal and resources response;**

4. **The law must ensure that, in addition to protection of women, the fact that domestic violence is socially unacceptable must be communicated with clarity and certainty.**

2. Exercises of discretion in the delivery of legal services in cases of domestic violence must be structured to ensure that the government's policy and the laws prohibiting domestic violence are complied with by the people providing legal services. This can be achieved through a combination of structured decision-making and increased personal and public accountability.

A law is only as effective as its implementation. Research indicates that although there is a clear policy Directive to the police regarding the appropriate response to domestic violence, the actual response varies significantly from officer to officer and place to place. The reason for this varies. In some cases it may be disagreement with Directives or the policy, while in other cases it may be discriminatory attitudes. Sometimes it is simply a lack of resources to fulfil the policy directions. For example, there is no corresponding support services to ensure full service to the assaulted woman, a fact which undermines the police Directive to charge and prosecute. At the same time, research indicates that one of the characteristics of domestic violence is that it occurs in a complex situation. This means that the range of responses required to truly respond to a case needs to be broad and applied carefully in light

of the particular demands of the situation. This means that there must be some discretion in decision-making by various actors. The issue is how both of the concerns of structuring discretion and creating specificity in responses can be achieved.

The Commission believes they can be achieved using two different mechanisms: system-wide Protocols and increased personal and public accountability.

(a) Structuring Discretion with Protocols

There must be system-wide Protocols developed, that is, step by step "guides" codifying for each participant in the legal process, starting with police dispatchers as to the range of options and the proper responses to be made to any calls regarding domestic violence including threats of violence and harassment. As noted already, some of these have been developed by Committees working on the issue of violence in Nova Scotia. However, they have not been implemented because there are not enough resources allocated to deliver the level of service required by the Protocols.

There must be sufficient resources in terms of personnel and technological systems to properly carry out their duties. The Protocols must also be combined with education of personnel delivering the services regarding their roles as law enforcers and as resource people for survivors of domestic violence. Part of the Protocol must include accurate information about violence in Nova Scotia. These Protocols should be developed by the Family Violence Prevention Initiative, and their implementation must be monitored.

The Protocols should have as the guiding principle the fact that domestic violence is a life-threatening crime and that all personnel must have as their priority protection of the woman and any children or other endangered person.

The court process itself and women's experience with Crown Attorneys have been noted as a barrier to access for women. Women may experience further harm if they are forced to testify in criminal cases. The fact that they are often the "star" witness will place their lives in danger, particularly if the spouse is not in custody. Consequently, every effort should be made to go to trial using evidence other than that of the woman. This requires direction to the police and prosecutors to ensure all possible evidence (eg. photographs, fingerprints, medical reports, clothing and so on) is gathered and full statements taken at the time of call and that all records of earlier or related incidents are obtained. Where a woman is giving evidence she should be able to choose to do so by a videotape of her testimony and then be present for cross-examination. Some of these approaches are currently being considered in other jurisdictions to assist vulnerable witnesses from exposure and further harm from their abusers.

The experience in the United States with its numerous civil protection codes or laws dealing

with custody, support, protection and property has been that these can provide the most flexible responses to the case by case needs of women. The main point is to take violence into account in decisions. In each case, there will be differences which will require specific solutions. The greater the range of options available, the easier it will be to tailor a legal response to meet the needs of the case. In all cases, responses must be designed and implemented on the basis that the protection and security of the woman and any children or other endangered people is a priority. However, the one shortfall that has been experienced in countries with comprehensive civil codes is that at the end of the day, the legal order is simply that, an order of a court. If it is not combined with responsive and active enforcement of the order as well as serious sanctions for the violent behaviour through the judgment of the person in criminal court, domestic violence will remain a continuing problem. It is essential that court orders be available for prevention but they must be coupled with effective enforcement and immediate action when an incident occurs. Many of the necessary orders are already available in the legal system in Nova Scotia but they are not being accessed easily by women and are not being enforced.

Perhaps even more so than the police or any other participants in the system, the highest responsibility should be placed where there is the most discretion - the judiciary in the courts dealing with family and with criminal matters. Ultimately, it is the judges who are evaluating the cases and determining what the court orders should include and what the penalties will be when they are enforced. Judges are the people who have the responsibility for interpreting the law's message to society and to wrongdoers. For this reason, judicial awareness and commitment to eliminating domestic violence is critical to the success of any strategy.[156] The comments of the Alberta Court of Appeal in a 1994 decision[157] affirming its

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[156]A particularly disturbing case from the United States illustrates the need to assess how domestic violence cases are dealt with by the judiciary. In *Quagliani* v. *Quagliani* (No. FV-02-2218-91A) a domestic violence complaint was filed by a woman against her husband and an "exclusionary order" was filed by the Municipal Court forbidding him from returning to the matrimonial home. When the husband later violated the order he was arrested and charged with false imprisonment and harassment but he appealed the restraining order. The judge hearing the case refused to continue the exclusionary order previously issued and instead issued an order which allowed the husband to move back into the house but with a prohibition from harassing or abusing her further. The husband later beat her to death with a baseball bat in front of their son. Although Ms. Quagliani did everything she could have done within the system and in spite of the fact that the police and Crown responded promptly and appropriately (in short, the system, up until Court, did everything possible) she died because the Superior Court Judge granted an in-house restraining order when it was inappropriate to do so. For a discussion of this case see L. Memoli & G. Plotino, "Enforcement or Pretence: The Courts and the

sentencing guidelines for domestic violence are noteworthy:

> "In the case of *R.* v. *Brown*, for the first time, this court set out guidelines for sentencing for domestic assaults. These guidelines stressed the importance of general deterrence and denunciation. *R.* v. *Brown* was decided in 1992. It is clear from the cases which have since come before this court on appeal that it is not always followed. Unfortunately, this means that the courts of this province are sending out conflicting messages on the subject of domestic violence.
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> The message which this court wishes to sent out, however, is that domestic violence is a serious problem, and that it will not be tolerated by this court. We are prepared to do everything without our power to help society to deal with this social problem. The only way we can do this is to impose sentences on those convicted of domestic assaults which will deter them and others from committing such offences. Those sentences must also denounce domestic violence and express the condemnation of such conduct by society.
>
> Until there has been consistent sentencing in accordance with the guidelines, in *R.* v. *Brown* over a considerable period of time, we will not be able to assess the effectiveness of sentences which stress general deterrence and denunciation. In the meantime, we must use this kind of sentencing as the only way in which we can assist society to combat domestic violence, and in the hope that it will be effective."

However, as with elected leaders, these are changes which are not easy because they require a critical evaluation of oneself and others in a society which has inherited and lives with many ideas which are not fair. Judges are required to show leadership in making changes to benefit those less fortunate in society. This is not easy since judges are human and have their own life experiences and social upbringing and histories which they are expected to shed when making decisions. This is a large demand that society places upon the judiciary and it too requires education and resources, and leadership in the judiciary.

(b) Creating Accountability

Accountability is the key to structuring discretion to allow for case by case consideration of needs and yet avoid abuses of this discretion. There should be two kinds of accountability:

Personal accountability - people involved in delivering legal services must be accountable for carrying out or failing to properly carry out the Protocols and policies. This will require a tracking or monitoring project on a continuing basis. Clients should have the opportunity to provide commentary on services and raise concerns. There already exists a pilot system for tracking cases in the Victims' Services Division of the Department of Justice. The work of this Division should be facilitated through computer linkages to all sectors. This Division of government can also monitor and provide information on support services and assist in the matter of support for survivors. This is a way to make sure that domestic violence and effective response to it becomes a matter of personal importance and commitment for all

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Domestic Violence Act" (1993) 15 *Women's Rights Law Reporter* 39.

[157] *R.* v. *Ollenberger*, note 82 at 181.

personnel responsible for delivering legal service to the public.

Public accountability - Canada currently reports to an international monitor and committee on its progress on domestic violence. A similar requirement should exist in Nova Scotia. There should be an annual report to government on progress on ending domestic violence. The Agency providing this public report and audit of the systems and programs of government including the judiciary and media reporting should have the authority to access data and comprehensively evaluate progress from year to year. This would, in effect, be a "watchdog" of Nova Scotia's progress in this area. This report should be the responsibility of an independent agency which currently has as its mandate the advancement of equality for women, such as the Advisory Council on the Status of Women, because violence has been identified as the biggest barrier to equality of women.

This self-evaluation by the government of its progress, along with allocation of sufficient resources and explicit directions, will be a significant step in moving the battle against domestic violence from rhetoric to reality. Widespread social and legal reform places great personal and public responsibility on the political leaders in any country or jurisdiction to critically assess their programs and commitment to change. Creating meaningful change in areas of human rights often calls for hard personal decisions and a great deal of self-evaluation, honesty and bravery. Changes to achieve a fairer society are considered threatening to some people and cause difficulties. In Nova Scotia, the government has chosen to take steps that were considered necessary when the overall objectives have been considered sufficiently worthwhile. It has been encouraging to the Law Reform Commission to see that in this past year, despite economic constraint, the government is taking steps to put in place a system which should go a long way to assisting women who are encountering economic harassment in the form of non-payment of maintenance obligations. This itself will assist women who have abusive spouses and will reduce the ability of abusive men to use the legal system to express their anger and violence towards their spouses and children.

The Commission recommends that the government of Nova Scotia:

1. **Develop system-wide inter-departmental Protocols for handling domestic violence cases;**

2. **Adopt as the central principle of the Protocols the protection and security of the woman and any other endangered people as the priority for all decisions;**

3. **Commit sufficient human, education and technical resources including modern communication systems to allow the Protocols to be effectively delivered;**

4. **Ensure that the existing system for monitoring cases of domestic violence is enhanced and that there is personal accountability for individuals involved in implementing the Protocols;**

5. **Require that an independent agency, such as the Advisory Council on the Status of Women, prepare and publish an annual evaluation of the government's progress in the eradiation of domestic violence;**

6. **The Supreme Court judiciary should develop clear sentencing guidelines to ensure that judicial discretion is exercised consistently throughout Nova Scotia in cases of domestic violence.**

3. The delivery of family law, including the courts, must be more responsive to the problem of domestic violence. In particular, the government must carry out its commitment to create a unified family court to deal with all matters relating to family law. This must be coupled with resources and a full consideration of alternative family justice services so that the adversarial processes of the law and the courts are the last resort in cases of family dispute.

In terms of some specific recommendations on how to "fix" family law and how the courts can be restructured to respond to domestic violence, the Commission was faced with the classical Gordian Knot - a seemingly insoluble legal tangle flowing from divided legal systems, divided constitutional systems and divided court systems. The result for the consumer of the legal system is delay, expense and dissatisfaction. In a province which is

undergoing tremendous institutional restructuring, it would seem a simple exercise to untangle this. But to date it has been a slow process and perhaps because of the constitutional issues, a seemingly impossible exercise.

The Commission, in reviewing its research and comments it received, found that there is a perception that Family Court is a more user friendly system and more accessible. Although emergency chambers applications are probably easier to obtain and more useful, the Supreme Court is not perceived to be as accessible. Again, this may be because Family Court tends to deal with most family matters unless there is a divorce in process. Also the Family Court buildings, at least in Halifax, are less intimidating and formal and the hearings are not generally open to members of the public. There is, however, also a concern that the family court model is premised on a social work model of family relationships which, as in the case of New Zealand, may mean that the judicial and court perspectives on reconciliation and the view that the violence is the result of particular dynamic between the two individuals ("the two-to tango" perception) may mean that the life-threatening nature of this crime is not fully addressed if violence is to be dealt with in a family court.

Family Court judges currently have authority to deal with some criminal law matters such as peace bonds and, at least in the legislation, can also try criminal cases of assault between family members. The one order that Family Courts cannot make is one that is of importance to many women - an order affecting the ownership of matrimonial property; that is, Family Court judges cannot make an order allowing the woman to have possession of the matrimonial house or property. They can, however, issue a peace bond with conditions which would require that person stay away from a specified location. Because court orders and police responses currently are not a deterrence to abusers, when a woman experiences domestic violence, she is the one that essentially has to become a refugee, suffering loss of housing, personal property and dislocation of herself and any children. Orders for exclusive possession of the matrimonial home are available through the Supreme Court where the couple is married and the property is matrimonial property. Since many people are not in this situation or may not be contemplating a division of property, this is a problem, particularly if a long term order is required. In addition, the woman may be economically dependent on the man to pay the mortgage. He can simply respond by not paying the mortgage thereby depriving her of the home as well. There is a need for more emergency and second stage "transition housing" in all communities so that women suffer the least disruption if they are forced to flee for their lives.

Many women are not interested in being involved with the criminal justice system because they do not see that it operates to their advantage or because they do not believe in the criminal law system or because they see it as a racist system. Their main concern is protection for themselves and establishing a new and safe life. Many women encounter ongoing violence and harassment because they must continue to deal with their violent spouses in custody arrangements or because of maintenance payments. This means that in many areas of their lives, they will have to continue to deal with the person who has injured them and who may well kill them. The state has an obligation to seek to avoid, as much as

possible, creating or supporting situations in which the woman is exposed to this further violence. The recent decision of the government to provide for a more automatic system of maintenance enforcement through an official rather than the court system will assist in one area. The laws and court system must also be changed however, in other areas to respond to domestic violence.

After considering these points, the Commission has some recommendations to try at least loosen part of this knot. To fully cut the knot, as in mythology, will require a firm hand and the sword or scissors of government to cut through. This requires clear decisions and a focus on action rather than simply tugging or pulling at the situation.

The 1991 *Report of the Court Structure Task Force* recommended that a unified family court be developed which would have criminal law jurisdiction to deal with family violence and that consideration should be given to expanding the jurisdiction of the Court to include other criminal offences involving family members.[158] The Law Reform Commission has previously endorsed the view that there should be a unified family court in Nova Scotia.[159] The recommendation of the Task Force was also adopted in principle by the government of Nova Scotia. There is currently an interdepartmental committee through the Department of Justice seeking ways to create this court with a unified jurisdiction. The advantage of unified family court, such as they have in many other provinces, would be that all family law matters including matrimonial property can then be dealt with in one place and comprehensive orders dealing with property matters can be created.[160] Subject to the Commission's comments in the next paragraph on the importance of providing non-adversarial alternatives for resolving family conflicts, this appears to be a useful step which will benefit women encountering domestic violence by reducing delays and costs arising from having to deal with two different courts.

The Commissioners, after reviewing the matter at length, have decided to take this opportunity to comment more broadly on family law reform. It is the view of the Commissioners that while a single legal system is desirable when family matters go to court, it is even more important that there be resources and full consideration given to developing alternative non-legal methods of resolving family disputes. A unified family court should be a place of last resort when all else fails. The pilot project in British Columbia using Family Justice Centres and the expanded Family Law Division with extended services which

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[158] See *Report of the Nova Scotia Court Structure Task Force (1991)* at 103.

[159] See Law Reform Commission of Nova Scotia Final Report *Enforcement of Maintenance Obligations* 1992 at 21.

[160] The models differ from province to province, however, 6 provinces have courts which deal with family law as unified jurisdiction.

include non-adversarial and other support services in Saskatchewan, were both considered as examples that might well be appropriate models for Nova Scotia.[161] The British Columbia Centres provide information, counselling and mediation and seek to assist people in resolving their own conflicts. They were established because it was found that in many cases involvement with the legal system did not resolve and, in fact, often increased the problems people experienced in connection with divorce or separation.

There is a remaining issue which relates to the second part of the Court Structure Task Force recommendation. If a unified jurisdiction court is created, should it be the court which deals with criminal cases in family matters?

Some commentators feel that this is appropriate since the Family Court already deals with these matters in connection with prevention orders (peace bonds) and on occasion, some assaults. Others feel, however, that the process by which a person is found guilty under the criminal law are quite different from the family court approach and that to mix the two processes together would not have a useful result, in terms of protecting women. Since the Family Court also deals with juvenile justice issues, a related point is whether crimes involving young offenders should be dealt with in family or criminal court. While the Task Force Report clearly acknowledged the policy problems involving an adversarial process in a Court which is more usually oriented to resolution of disputes, it felt that on balance, criminal matters should be dealt with in Family Court, particularly since peace bonds were already being dealt with by this Court. There are, however, some issues regarding the long term effect of distinguishing between violence in the family and violence in the rest of society. For example, if a sexual assault occurs between a husband and wife, is it to be dealt with as other sexual assaults or differently? Much of our current law has been directed to bringing matters which have been treated as "private" into the public for equal treatment to avoid abuses of power. It may be that dealing with the matter in Family Court is a step backwards in the long term even if the short term benefit is a more sensitive court immediately available to women. Finally, a question might also be raised as to why changes are not made to the current court system to make it more responsive rather than "marginalizing" family violence.

There is an additional option to consider involving the creation of a Supreme Court division dealing specifically with domestic violence. As was noted earlier, Winnipeg, Manitoba has a specialized criminal court that deals exclusively with family violence. Should a similar court be created in Nova Scotia? The first question is whether a specialized criminal court would

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[161] See *The Family Justice Reform Project: A Project to Develop Comprehensive Proposals for the Reform of Family Justice Services in British Columbia* (Ministry of Attorney General, March 1994) at 3. See also D. Scott, Family Law Director, *Overview of Family Law Division and Court-Based Sources*, 1994 and discussion earlier in the Report dealing with Saskatchewan's response to domestic violence.

provide any benefit that the other suggestions of the Commission cannot provide. The benefits of the Family Violence Court in Winnipeg are: the initial backlog of domestic violence cases was eliminated (with the average time-frame from start to finish being 3 months); the charging and conviction rates have increased; the sentences have become more stringent and counselling is frequently used; and a more sensitive service is provided to assaulted women. It should be noted that Nova Scotia has a smaller population base than Manitoba, and in particular, Winnipeg. As was noted above, the Manitoba Family Violence Court involves five full-time and twenty part-time Crown Attorneys; fifty-two hours of court time each week; a research team, a support staff person, victim services staff and the Family Violence Unit of Probation Services. In Nova Scotia, it is doubtful that the population base could afford such an increase in legal services, particularly if they were mainly serving one town. All of these benefits are equally possible if the criminal justice system is working well. The problem with having a specialized criminal court is that instead of making changes in the current criminal and legal system to serve women equally, a new court would be created which would provide better service to some women who go to the criminal justice system but would not generally assist women throughout the province. On balance, the majority of the Commission feels the more useful option would be to ensure throughout the existing system that there are appropriate support systems and sufficient staff who have been educated to assist in cases of domestic violence. There is a dissenting opinion at the end of this Report expressing the view that there should be a specialized family violence court. In particular, the training of interdisciplinary domestic violence response teams would be more efficient and would be a service that could be provided throughout the province rather than just in the metropolitan area, an area in which there are already more resources available to survivors than anywhere also in the province.

Finally, there is increasing interest in mediation of family law disputes as an alternative to the legal system. This may be an appropriate approach in some cases, however, experiences elsewhere suggest that mediation should not be used in cases where there is domestic violence. This is because the woman may not be in a position to negotiate or to express fear about her situation. It requires a great deal of sensitivity on the part of mediators to determine if this is so. The courts should not agree to mediation or order mediation where there is any indication of domestic violence. Equally, in the *Enforcement of Maintenance Obligations Act,* the court should be alert to domestic violence concerns and prohibit "opting out" of the government system where domestic violence is suspected.

The Commission recommends that:

1. **The Minister of Justice should seek to create a unified family court in Nova Scotia with appropriate resources. At the same time, there must be resources and full consideration devoted to developing less adversarial methods of resolving family law disputes so that the court is a last resort.**

2. **The majority of the Commission recommends that a unified family court should not have greater criminal jurisdiction than it already has, that is, ordering and enforcing peace bonds.**

3. **The majority of the Commission recommends that rather than a specialized separate Family Violence Court, the existing system should be improved to ensure that legal services are delivered equally and fairly to everyone.**

4. **There should be province-wide specially trained interdisciplinary teams of police and government and non-government support workers to respond to domestic violence cases.**

5. **No court-ordered or sanctioned mediation of family law issues should be permitted where domestic violence is suspected.**

4. A number of changes are required to make existing family laws recognize the range of current "family" relationships and the existence of domestic violence.

(a) The law governing the availability of peace bonds in Family Court should be changed to include all people who may be in spousal relationships.

Often women help themselves by applying for "peace bonds", that is, court orders which are available on the basis of a reasonable apprehension of injury. These are currently available under the *Family Court Act* which gives Family Courts in Nova Scotia concurrent jurisdiction with provincial (criminal) court over peace bond applications and violations as well as breach of probation and criminal assaults which occur between "husband and wife" or "parent and child". However, "husband and wife" is defined in the *Act* as a man and woman, whether legally married or not, who have been living together as husband and wife for 12 months. During the consultation process, some women expressed the view that it was more comfortable to proceed with assault charges and peace bond applications in Family Court rather than Provincial (criminal) Court. The Commission believes it would be helpful if the definition under the *Family Court Act* was 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 recommends:

The definition of husband and wife contained in the *Family Court Act* should be changed to include same sex couples and couples who are in a spousal relationship regardless of the length of time involved to allow more people to apply for peace bonds in family court.

(b) The law should be changed to take into account domestic violence in long-term awards of exclusive possession of matrimonial property. As a matter of immediate priority safe housing must be available throughout the province for women and families escaping domestic violence.

One of the most significant problems faced by women is that they are often forced to leave their homes to escape violence. This is a matter of personal security and is affected by the extent to which the police are able to offer sufficient surveillance of any particular residence. However, it is also a legal problem in that the division in the court system means that orders for possession of a residence are available only for "matrimonial property" in Supreme Court. Further, the orders do not deal with leasehold or rental residences, nor do they deal with the requirement that mortgages continue to require payment. In addition, the women in seeking protection may not be doing so in connection with a divorce or a division of matrimonial assets. The issue then is how to provide for possession of the residence to protect the woman's personal and economic security in the long term. The Commission has already indicated that for short term or immediate legal protection, conditions attached to peace bonds or interim judicial release (bail) orders will achieve this result, if enforced.[162]

At present, under the *Matrimonial Property Act*,[163] 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 or that it is in the best interests of a child (where a child is involved). Domestic violence is not mentioned as a basis for such an order. There is a division of opinion as to how to deal with the problem of exclusive possession through changes to the *Matrimonial Property Act.* The concern here is that currently the law has developed so that property is not divided on the basis of fault in the termination of a relationship. Concern was expressed in some of the comments received that to put in place a

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[162] As noted above, note 137, in the discussion of other provincial responses, the Victim's Assistance Orders in Saskatchewan would give exclusive possession to property or a leasehold.

[163] R.S.N.S., 1989, c.275, s.11.

punitive component to matrimonial property division would reinstate some notion of fault in division of property, a step which was seen as not helpful to women in the long term.

The Commission believes that domestic violence should be added to the *Act* as a matter for judicial 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 and same sex couples and not just those who are legally married. It should allow the court to make orders governing leaseholds as well. However, these are legal solutions. The more immediate and real problem of housing and the needs of survivors of domestic violence must be met in other ways. There should be safe houses in every community . This is so women do not have to significantly disrupt their lives to find a place to live. In addition, there must be more affordable housing for women who are in a period of transition and whose economic situation may be unstable. This should be part of an overall planning process because a woman who also has children has multiple problems in leaving an abusive spouse since she will have the responsibility of ensuring that their shelter and necessities are taken care of.

In some provinces and territories there is now special provision for public housing. Problems in obtaining affordable housing exist, particularly where property owners do not want to rent to women because of concerns about violent partners, or where the woman may not have access to funds after leaving her partner to allow her a secure place to live. It must be understood that much as our refugee guidelines now recognize that domestic violence and gendered violence is a basis for establishing a refugee status for women coming from other countries, so too in Nova Scotia we have domestic violence refugees. These are women who are fleeing for their lives and are forced, because of the violence they are experiencing, to leave behind many ties and face starting a new life. The difference is that because she is geographically located in the same place as her persecutor, she is not free of the fear of violence. She has not escaped and therefore has this extra burden during a period of transition which will make it difficult for her to establish herself again. Her persecutor may force her to leave her job which adds another problem.

The Commission recommends that:

1. **There must be safe and affordable housing as transitional and long term alternatives for women escaping domestic violence;**

2. **The *Matrimonial Property Act* should be changed in two ways: first, domestic violence should be considered when granting an order for exclusive possession of the matrimonial home; and second, orders for exclusive possession of a shared residence should be available to all common law couples, including same-sex couples. The *Act* should also include leasehold interests and provide authority to make orders regarding those interests.**

(c) The *Children and Family Services Act* should be altered to clarify that failure to remove a child from an abusive situation is not a basis for apprehending a woman's children.

One of the more difficult policy issues in the context of domestic violence[164] is how best to protect children. Section 22(2)(i) of the *Children and Family Services Act* states that a child is in "substantial risk" and in need of protective services, for example:

> (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.

This section has been criticized by assaulted women and people who work with them because the wording of the section suggests that where a woman is being abused and does not report it, she could lose her children to Children's Services if the abuse is subsequently reported or discovered. This is a problem that also exists in the United States codes. It was pointed out in the research summary that a few American States provide an "affirmative defence" for women in situations they cannot leave. The problem with sections such as the provision in the *Children and Family Services Act* is that it can have the opposite effect to the one intended; that is, it may increase the chances of women staying in abusive situations out of fear of losing their children. At the same time, it is recognized that for many women the stresses caused by the violence may mean that the needs of her children, which she may not be able to meet, must also be considered. People involved in the protection of children have a double concern here in that they have an obligation to look after the best interest of the children. The Commission suggests that the wording of the section should be changed so that the section places a burden on the abuser to stop the behaviour rather than leaving the section open to the interpretation that it is the responsibility of the abused woman to take action. It should be clear that an abused parent will not lose custody of her children solely because she did not report the fact she was being abused. The Commission is, however, also of the view that there is still a need to recognize the responsibility of protection agencies to intervene to protect a child where circumstances require it.

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[164] S.N.S. 1990, c.5.

The Commission recommends that:

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 solely because she did not report the fact that she was being abused. However this does not alter the responsibility of the child protection authorities to intervene and protect a child where circumstances require it.

(d) Child custody and access decisions should expressly take into account domestic violence.

At present, domestic violence is not expressly considered as a factor in deciding child custody and access matters. At the same time, fear of losing custody is one reason that a woman may stay in an abusive relationship. It is the recommendation of the Commission that domestic violence should be an important and determinative factor in deciding issues of custody and access. Presently, the *Family Maintenance Act*[165] 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 domestic violence there is a presumption that awarding custody to the abusive spouse would not be in the child's best interests. Further, there should be a presumption that where domestic violence exists, joint custody is not in the interest of the child and may endanger the child's mother.

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 circumvent this. There should be a section stating that where there is evidence that during their relationship the parent being granted access abused the custodial parent, it is inappropriate to grant the abusive spouse "reasonable access on reasonable notice" as this provides opportunities for continued control. Instead the court should include in the order an arrangement for safe pick-up and drop-off and supervision of the children, as well as an access schedule.

The provincial Minister of Justice should advocate to the federal Department of Justice for similar amendments to the access and custody provisions where decisions are made in connection with the *Divorce Act*.

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[165] R.S.N.S. 1989, c.160, s.18(5).

The Commission recommends that:

1. **The *Family Maintenance Act* should be changed so that domestic violence is a determinative factor in custody and access decisions and settlements.**

2. **There should be a presumption that it is not in the best interest of the child that an abusive spouse have joint custody or unsupervised access to the child.**

3. **The provincial Minister of Justice should advocate to the federal Department of Justice for similar amendments to the access and custody provisions of the *Divorce Act.***

5. Health care workers and other people working in a support role with survivors of domestic violence should not be required to report suspected domestic violence cases.

At present in Nova Scotia there are requirements for reporting child abuse[166] and elder abuse.[167] The rationale for mandatory reporting under the *Children and Family Services Act* is that children in dangerous and violent situations are incapable of protecting themselves due to factors such as age, physical size, and mental capacity. Similarly, the rationale for reporting abuse under the *Adult Protection Act* is that some elderly people, due to factors such as age, physical strength or mental capacity are incapable of protecting themselves. In its *Discussion Paper* the Law Reform Commission sought public comment on the issue of whether or not spousal abuse should be reported as well. It appeared to the Commission that there were two approaches to the question. One approach would argue that a woman who has encountered domestic violence is a victim of circumstance and all members of society where possible, have an obligation to intervene and save her, even if she does not agree. Essentially, this approach understands that returning to a situation of violence is akin to suicide for the woman and it is wrong to stand aside and let a person stay in a destructive situation. The other approach values the woman's right to autonomy and privacy and argues that a woman who is surviving domestic violence is not incompetent or a victim but rather is making choices in light of her estimation of her situation and what she wishes to do. This means that while there may be a duty to assist and support her to ensure that she is aware of all possible choices she can make, ultimately they are her choices.

The Draft law prepared by the solicitor for the Department of Justice proposed that there be mandatory reporting of cases of spousal assault. This requirement would apply to transition

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[166] *Children and Family Services Act*, S.N.S. 1990, c.5, ss.23-24.

[167] *Adult Protection Act*, R.S.N.S. 1989, c.2, s.16.

house workers as well and would be punishable by a fine or imprisonment. The Law Reform Commission received numerous comments from the public on this point. The responses did not support mandatory reporting for a number of reasons. For example, a family physician who is actively involved in treating women in violent situations commented that mandatory reporting would "destroy the confidentiality and trust of the doctor-patient relationship and add to her isolation". In addition, there was concern that assaulted women would lose a vital source of help as mandatory reporting could cause doctor's visits to drop off. Comments from transition house workers and residents unequivocally took the view that the assaulted woman knows best how to survive in the relationship. Intervention in the form of mandatory reporting could place the woman in an even more dangerous and life-threatening situation.

All of this, however, does not mean to suggest that medical doctors and health care and other support workers have no role to play in the intervention of domestic violence cases and protection of assaulted women. It has been estimated that 60% to 80% of assaulted women seek professional medical help.[168] Health care workers are the one group who see a large portion of assaulted women. At the same time, the profession has largely failed to diagnose and treat a wide variety of injuries and symptoms as domestic violence. Recent health care literature deals with this problem and proposes appropriate intervention for doctors. These models suggest more sensitive and informed diagnosis, support and advice. For example, between 1991 and 1993 the Colchester Regional Hospital in Nova Scotia carried out an 18-month training and intervention program. This project, which involved both community and hospital personnel, was intended to "develop an integrated hospital/community approach to intervention and treatment of abused women living in Colchester and East Hants counties."[169] The intervention program was based on intervention as empowerment and recommended Protocols for all health personnel who come in contact with abused women. The Final Report noted that:

> As of January 1992, all accredited U.S. hospitals must have Woman Abuse Protocol and Training in place.[170]

After a great deal of debate, the Commission felt that, on balance, the vulnerable person model does not apply to assaulted women. The harm suffered by the woman is not due to incapacity on her part; she is a competent adult. The harm suffered is the result of a violent assault by a man, coupled with inappropriate responses from the legal system which fails to protect her. The model proposed for empowerment-oriented intervention practice in offices, hospitals and clinics is found in many places including *Woman Abuse: A Handbook for*

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[168] M. Wilcoxen, *Assaulted Women: A Handbook for Health Care Professionals*, (Toronto: Support Services For Assaulted Women, 1981) at 1.

[169] *Final Report, Woman Abuse: Colchester Regional Hospital Training and Intervention Program*, (June 1993) at 4.

[170] *Ibid.* at 5.

Physicians, produced by the Medical Society of Nova Scotia's Community Health Committee.[171] It involves specifically looking for domestic violence, informing assaulted women of their rights and the resources available to them to get help.[172] *The Handbook* in Nova Scotia contains the following principles for physicians in responding to domestic violence:

> The patient may deny abuse. You should not feel frustrated at the seeming failure of your intervention. Meaningful help begins with expressing care and concern.....Validate her experience. Your support and respect for her situation and safety may be the first indication to her that the abuse is serious and is NOT HER FAULT. SUPPORT HER IN MAKING DECISIONS. Current clinical thinking encourages doctors to help women to take charge of effecting changes in their circumstances rather than preempting control. Intervention should be aimed, not at making decisions for her, but facilitating her ability to think through alternatives and seek an acceptable course of action for herself.

It is the position of the Law Reform Commission that this type of intervention which focuses on care, respect, and support is the most appropriate intervention and assistance which health care and other support workers can provide to assaulted women. The Commission believes that this approach also takes into account the reality of the danger the woman is experiencing and the inability of the legal system to offer adequate protection.

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[171] Published in 1991, written by Dr. A. Houston. One model designed for the emergency room proposes a seven part method of intervention. This requires identifying the cause of the injury; diagnosing and treating the injuries; evaluating the emotional status of the woman; determining what risks exist for her as well as her children; determining if there is a need to provide legal information; and developing a follow-plan which includes documenting the findings and recommendations in the assaulted woman's medical records. S. McLeer, "Spousal Abuse" in *The Handbook of Marital Therapy*, P. Sholovar, ed. (Jamaica, New York: Spectrum Publishers, 1981) [cited in McLeer, S., Anwar, R.,"The Role of the Emergency Physician in the Prevention of Domestic Violence" (1987) 16 *Annals of Emergency Medicine* at 1155-1161].

[172] R. Jones, "Domestic Violence: Let Our Voices Be Heard" (1993) 81 *Obstetrics and Gynaecology* at 1-4.

The Commission recommends that:

There should not be mandatory reporting of domestic violence cases until the legal system is sufficiently developed to be able to guarantee the safety of women whose life may be endangered by unexpected police action or responses. Even in that case there should not be a requirement that support workers report domestic violence unless the woman agrees.

6. The Minister of Justice for Nova Scotia should advocate changes to the *Criminal Code* and other Federal laws to make them more responsive to domestic violence.

(a) Women who leave work because of fear of violence should be able to claim Unemployment Insurance Benefits.

The administration and availability of the Unemployment Insurance Benefits is a federal matter. Recent changes to the rules have made it increasingly difficult for people to leave employment. Where a woman is subject to domestic violence she may be forced to stay in one location because she cannot afford to leave her job or alternatively, if her violent spouse knows where she works, she may be in danger at work. This creates a dilemma for women who wish to escape their spouses. It is recommended that the provincial Minister of Justice recommend an amendment to the federal law to allow a woman to claim unemployment insurance if she establishes that she left a job because she was in a situation of domestic violence.

The Commission recommends that:

The Minister of Justice for Nova Scotia recommend that the *Unemployment Insurance Act* be amended to allow a woman to leave her employment and obtain benefits if she has been subjected to domestic violence and has left her job to escape harassment from her spouse.

(b) Changes required to the criminal law and justice system.

The criminal justice system is a mix of federal government actions through the criminal law

and provincial action in administration of the system enforcing the criminal law. The Law Reform Commission's research suggests that there is already, in principle, a great deal of protection in the existing criminal law (the *Criminal Code*) for assaulted women. The central problems or failures identified are related to the application of the law to assaulted women by the personnel within the legal system. The Commission's main recommendations discussed already are that there should be Protocols developed for each sector of the legal and support system to structure discretion and also that their implementation must be given substance by the allocation of economic, human and technological resources. External accountability and audits are a means of ensuring that this occurs. The detailed Protocols and training programs should be developed and delivered by the Nova Scotia Family Violence Prevention Initiative. This existing interdepartmental initiative is the appropriate agency, particularly if combined with the victims' support initiatives in the Department of Justice. There are numerous Protocols in use in many States in the United States and in British Columbia for all levels of intervention personnel. In general, all adopt the approach that protection and safety of the woman is a paramount concern and operate on the basis of empowerment through intervention. The role of legal services personnel is to provide the necessary enforcement on behalf of society and to act in an informative and supportive role. The missing ingredient in Nova Scotia is full government support by designating domestic violence as a priority for initiatives. It is the Commission's view that, with the proposed legal changes to the enforcement of maintenance obligations and the family court system, along with other justice-oriented changes, it is the optimal time for a concentrated government effort to tackle this problem of domestic violence.

Although the Commission has determined that the real problem with the criminal law is that it is not delivered properly in order to be effective in achieving compliance, this does not mean that changes cannot be made to make it more responsive and easier to implement. Acts of violence committed by one person on another are, by their 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 the behaviours involved in domestic violence as a crime should not change because the assault occurs in an intimate or domestic context. It is not a woman's problem but a problem for men and society in general which prevents the advancement of society and equality and leads to further violence in future generations. Under the existing constitutional structure of Canada, if the province of Nova Scotia responds to domestic violence as suggested with a protection-oriented law, then it cannot be as a "criminal matter." The law will have to deal with domestic violence as "property or civil rights in the province." This approach is consistent with the view of international law that domestic violence is a violation of human rights. However, criminal law is needed to ensure that the violent behaviour, which is anti-social and life-threatening, is judged by society to be a crime against society as well as the individual.

Even though the province does not have the constitutional jurisdiction to legislate in the area of criminal law, the Minister of Justice for Nova Scotia has an important voice in federal provincial relationships and has the responsibility to represent the views of Nova Scotia with respect to federal laws, including criminal law. This means that the Minister of Justice has

the opportunity to recommend changes to the criminal law that will better protect assaulted women.

The changes to the criminal law that should be sought are ones that would respond specifically to some of the issues identified in the research. For the most part, these relate to directing police intervention and custodial action where domestic violence occurs. More importantly, however, what is required is a clear message that if court orders are currently the only real protection that the woman can have, given that *Charter of Rights* and the criminal law process dictate the position that a person is innocent until proven guilty, then a breach of that court order is to be treated as a serious crime and subject to immediate sanction whether or not it is coupled with additional violence.

The obsessive and escalating "multi-media" violence patterns of the abuser must be specifically recognized and addressed in the criminal law when it responds to this behaviour. For example, the fact that the acts of violence are often experienced over a period of time and may be a combination of actions rather than one single physical act must be understood and accommodated. In addition, the obsessive nature of the abuser and the likelihood that he will harm the woman once she has reported him or sought to escape must inform all actions including the laws governing custody, arrest and sentencing.

Some specific changes to the *Criminal Code* that should be pursued by the Minister of Justice for Nova Scotia are:

(i) Punishing breaches of peace bonds or any other court orders for protection

Breaches of court orders giving protection to the woman should be treated and responded to as seriously as any act of physical violence which may accompany the breach. It must be understood that because of the civil liberties that are entrenched in the criminal law and our *Constitution*, a court order or peace bond may be the only source of protection that the woman has. The effectiveness of a court order in those circumstances is inescapably bound up with the punishment for its breach. Currently, breach of a peace bond is a summary conviction offence. A breach should be treated as a hybrid offence and subject to more stringent sanctions.[173] More important, in the provision dealing with peace bonds (recognizance, s.810) should be changed to allow an application to be brought by one person on behalf of another. In addition, this section, and indeed the *Code* itself, should have its

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[173] For example, it is interesting that an anti-molestation order in the family court in Newfoundland is enforceable by increasing fines and/or jail terms of 3-4 months and $1,000 fine increasing with subsequent offenses to a fine of up to $10,000 and two years in prison. This restraining order includes protection of the custodial applicant or children; The *Children's Law Act*, S.N. 1988, c.61.

language changed to make it gender neutral rather than designating the applicant as "he" on behalf of himself or his spouse. This sends a confusing message where it is used to protect a woman from her spouse. These two changes have already been made with respect to crimes against children (s.810.1) and this should also be the case for domestic violence[174]. The range of conditions made under a peace bond should be broadened. For example, s.810 should no longer contain discretion with regard to a prohibition on firearms. This should be an automatic for any peace bond irrespective of the circumstances. Much as the case with criminal harassment and judicial interim release (bail) provisions, conditions requiring the person to stay away from a residence or place of work should also be automatic.

(ii) Arrest and detention

The police powers of arrest and detention should be specifically structured in cases of domestic violence so that the police discretion to arrest and detain abusers is exercised in manner which responds to the nature of domestic violence and protects the woman. In Part II of this Report, the police powers of arrest and detention, as set out in ss.495, 498 and 515 of the *Criminal Code*, were discussed. It was noted that the distinguishing characteristic of offenses in the *Code*, in terms of the power to arrest and detain suspects, was the classification of offenses as summary, indictable or hybrid and the direction "not to arrest". The grounds for arrest and detention for spousal assault should be changed so that the police are directed to resolve most domestic violence calls by arresting the suspect, removing him from the home and detaining him until he can appear before a justice to be either detained pending trial or conditionally released. The judicial interim release provisions should also be altered to deal specifically with domestic violence. If the person is conditionally released, then, as is the case now with criminal harassment (s.264 - stalking laws) the justice is required to consider attaching conditions such as regulating where the accused can go, prohibiting him from contact with a specific person or prohibiting firearms. Where there is no doubt that the person is likely to commit an offence, as a recent suggestion dealing with custody of dangerous offenders who may harm children, the justice should be directed to resolve the matter in favour of protection in the case of domestic violence. Every effort to expedite the trial should also be made.

(iii) Domestic violence as a crime of torture

The use of the *Criminal Code* provision dealing with torture should be reviewed and used in connection with some domestic violence cases. This is consistent with international and Canadian standards which regard state sanctioned (by not acting to prevent it) domestic

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[174] *Criminal Code*, s.810.1(1) allows "any person who fears on reasonable grounds that another person will commit an offence under ... in respect of one or more persons who are under the age of fourteen, may lay an information". A breach of this order is a summary conviction offence under s.811. It is notable that this provision is written in gender neutral language.

violence as a basis for a refugee claim of persecution. At a minimum, an offence, which is comparable in severity for punishments and breadth of definition should be developed. Under s.269.1 the crime of torture is an indictable offence subject to 14 years imprisonment. An act of torture is defined in the *Criminal Code* as:

s.269.1(2) **torture** means any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; (a) for a purpose including ... (iii) intimidation or coercing the person or a third person, or (b) for any reason based on discrimination of any kind.

Currently s. 269.1 is not available for use in domestic violence because it is limited in its application to persons or officials acting with acquiescence or under orders from an official.

(iv) Sentencing

Aside from guidelines developed by Courts of Appeal to ensure consistence, the sentencing sections of the *Criminal Code* should be changed to be more responsive to domestic violence and its context. One of the main issues is whether there should be alternatives to imprisonment. Many women do not want to see their spouses go to prison. This can be for a number of reasons. Some people do not believe that prison, will, in fact, alleviate the long term problem and if anything, it will make the person more violent. This is the view of some people in the Aboriginal communities who believe that alternative methods of dealing with injurious acts should be developed to resolve the problems in the longer term. This model, which places a value on healing of the abuser and the abused and reconciling the abuser with his community is useful and may well be appropriate in some circumstances.

At the same time, however, it is important that the violent behaviour of the person be characterized quite clearly as criminal and wrong. While the reason a person is violent may be dealt with during counselling, the choice of violence as a means of dealing with problems is a decision for which the person must be held accountable. To do otherwise will invalidate the injury felt by the person or people they have harmed. Experience in counselling suggests that while counselling may be effective in some cases, it is more likely to be effective when coupled with strong sanctions or likelihood of imprisonment. Recidivism rates have not been significantly different for people in counselling and people in prison. The Study of U.S. State Codes described the funding structures and practices for batterer intervention programs in the U.S.A., some of which are post-charge and some of which are post-conviction. There was a range of results, some showing reduced violence, others showing increased psychological abuse after counselling. The author comments:

> Program effectiveness may be related more to the context of the intervention program in a particular community than to the activity of the treatment program. Men who batter may be best deterred from further violence if they believe that the penalties for recidivism are both certain and severe. When an abuser is confronted on all sides, from his partner, the police, the courts, his pastor, his employer, his parents, his buddies and the batterer intervention service providers and co-participants, that violence is wrong and must be stopped, he is more likely to terminate than if messages are mixed and consequences uncertain. Research has not yet adequately identified the

> impact of a fully coordinated domestic violence intervention system on the change process of batterers.[175] [footnotes omitted]

The commentary received by the Commission from Project New Start,[176] a Nova Scotia service which provides counselling and treatment for physically abusive men, also emphasized that "violence in a domestic context needs to be addressed in a larger community and social level as well as with a committed coordinated response of education and action [with] multi-disciplinary coordinated community efforts". The majority of the Commission believes that counselling must be available as a part of sentencing. Alternative sentencing, including counselling, should only be available with the consent of the woman. In order to avoid placing undue pressure on her, it should still be a matter on which the judge and prosecution should seek expert evidence and make an overall assessment of the best resolution in the case. Even where a term of imprisonment is imposed, there should be a mandatory batterer counselling for the abuser. There is a dissenting opinion at the end of this Report which takes the view that batterer counselling has not been shown to be effective, and that resources necessary to better protect women should not be diverted to provide counselling and non-custodial treatment programs.

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[175] Hart, note 104 at 58. See also A. Harrell, *Evaluation of Court-Ordered Treatment for Domestic Violence Offenders*, Final Report, State Justice Institute, 1991.

[176] May 31, 1993.

The Commission recommends that the Minister of Justice for Nova Scotia advocate changes to the *Criminal Code* to ensure that criminal law is reformed to respond more usefully to the crime of domestic violence. These changes should include:

1. **The *Criminal Code* should be gender neutral and peace bonds should be available at the request of a person on behalf of another person;**

2. **Breach of peace bonds should be a hybrid offence with mandatory conditions prohibiting contact with the woman and possession of firearms in cases of domestic violence.**

3. **Police officers should be directed to exercise their powers of arrest and detention in cases of domestic violence to remove and detain the abuser until released with conditions or until trial. This can be achieved provincially through system-wide Protocols. In addition, the *Criminal Code* provision governing arrest and detention and judicial interim release should be altered to ensure that where the domestic violence has occurred, the police, prosecution and justices and judges are directed to arrest and detain the abuser in custody unless he obtains an interim judicial release. Justices giving release orders must be required to consider conditions prohibiting contact with the woman and possession of firearms and other conditions appropriate to the particular case including mandatory reporting. Breaches of these conditions must result in detention until trial.**

4. **The criminal offence of torture should be reviewed to make it available for use in domestic violence cases or alternatively a new crime of domestic violence should be created with similarly severe sanctions.**

5. **The majority of the Commission recommends that the sentencing provisions of the *Criminal Code* should be altered to require mandatory counselling specifically designed for abusive men in addition to any prison sentence. Alternatives to prison only should be allowed on a post-conviction basis and only where the woman has consented and the prosecutor, judge and the expert evidence conclude that it is appropriate;**

6. **Evidence giving practices should be reviewed to ensure that wherever possible, the woman should not have to testify if the crime can be established without her evidence. If the woman chooses to do so she should be able to testify behind a screen or through the use of video equipment, subject to the right of the defendant to cross-examine her.**

IV SUMMARY OF RECOMMENDATIONS

In conclusion, the Commission believes that progress in elimination of domestic violence will come through a combination of efforts and strategies to ensure policy compliance by the legal system, personnel and some changes to the laws to make them more useful to women who are assaulted. Specifically the Commission recommends the following:

1. It is critical that the government of Nova Scotia make the eradication of domestic violence a priority to which it will target action and resources;

2. The legal response to domestic violence should include improvements both in the criminal and the civil law systems and their delivery;

3. The life-threatening nature of domestic violence, its immense social cost and the barrier to equality for women must be explicitly recognized in the legal and resources response;

4. The law must ensure that, in addition to protection of women, the fact that domestic violence is socially unacceptable must be communicated with clarity and certainty.

5. Develop system-wide inter-departmental Protocols for handling domestic violence cases;

6. Adopt as the central principle of the Protocols the protection and security of the woman and any other endangered people as the priority for all decisions;

7. Commit sufficient human, education and technical resources including modern communication systems to allow the Protocols to be effectively delivered;

8. Ensure that the existing system for monitoring cases of domestic violence is enhanced and that there is personal accountability for individuals involved in implementing the Protocols;

9. Require that an independent agency, such as the Advisory Council on the Status of Women, prepare and publish an annual evaluation of the government's progress in the eradiation of domestic violence.

10. The Supreme Court judiciary should develop clear sentencing guidelines to ensure that judicial discretion is exercised consistently throughout Nova Scotia in cases of domestic violence.

11. The Minister of Justice for Nova Scotia should seek to create a unified family court in Nova Scotia with appropriate resources. At the same time, there must be resources and full consideration devoted to developing less adversarial methods of resolving

family law disputes so that the court is a last resort.

12. The majority of the Commission recommends that a unified family court should not have greater criminal jurisdiction than it already has, that is, ordering and enforcing peace bonds.

13. The majority of the Commission recommends that rather than a specialized separate Family Violence Court, the existing system should be improved to ensure that legal services are delivered equally and fairly to everyone.

14. There should be province-wide specially trained interdisciplinary teams of police and government and non-government support workers to respond to domestic violence cases.

15. No court-ordered or sanctioned mediation of family law issues should be permitted where domestic violence is suspected.

16. The definition of husband and wife contained in the *Family Court Act* should be changed to include same sex couples and couples who are in a spousal relationship regardless of the length of time involved to allow more people to apply for peace bonds in family court.

17. There must be safe and affordable housing as transitional and long term alternatives for women escaping domestic violence;

18. The *Matrimonial Property Act* should be changed in two ways: first, domestic violence should be considered when granting an order for exclusive possession of the matrimonial home; and second, orders for exclusive possession of a shared residence should be available to all common law couples, including same-sex couples. The *Act* should also include leasehold interests and provide authority to make orders regarding those interests.

19. *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 solely because she did not report the fact that she was being abused. However, this does not alter the responsibility of the child protection authorities to intervene and protect a child where circumstances require it.

20. The *Family Maintenance Act* should be changed so that domestic violence is a determinative factor in custody and access decisions and settlements.

21. There should be a presumption that it is not in the best interest of the child that an abusive spouse have joint custody or unsupervised access to the child.

22. The provincial Minister of Justice should advocate to the federal Department of Justice for similar amendments to the access and custody provisions of the *Divorce Act.*

23. There should not be mandatory reporting of domestic violence cases until the legal system is sufficiently developed to be able to guarantee the safety of women whose life may be endangered by unexpected police action or responses. Even in that case there should not be a requirement that support workers report domestic violence unless the woman agrees.

24. The Minister of Justice recommend that the *Unemployment Insurance Act* be amended to allow a woman to leave her employment and obtain benefits if she has been subjected to domestic violence and has left her job to escape harassment from her spouse.

25. The Minister of Justice for Nova Scotia advocate changes to the *Criminal Code* to ensure that criminal law is reformed to respond more usefully to the crime of domestic violence. These changes should include the recommendations set out below in paragraphs 26-31.

26. The *Criminal Code* should be gender neutral and peace bonds should be available at the request of a person on behalf of another person;

27. Breach of peace bonds should be a hybrid offence with mandatory conditions prohibiting contact with the woman and possession of firearms in cases of domestic violence.

28. Police officers should be directed to exercise their powers of arrest and detention in cases of domestic violence to remove and detain the abuser until released with conditions or until trial. This can be achieved provincially through system-wide Protocols. In addition, the *Criminal Code* provision governing arrest and detention and judicial interim release should be altered to ensure that where the domestic violence has occurred, the police, prosecution and justices and judges are directed to arrest and detain the abuser in custody unless he obtains an interim judicial release. Justices giving release orders must be required to consider conditions prohibiting contact with the woman and possession of firearms and other conditions appropriate to the particular case including mandatory reporting. Breaches of these conditions must result in detention until trial.

29. The criminal offence of torture should be reviewed to make it available for use in domestic violence cases or alternatively a new crime of domestic violence should be created with similarly severe sanctions.

30. The majority of the Commission recommends that the sentencing provisions of the *Criminal Code* should be altered to require mandatory counselling specifically designed for abusive men in addition to any prison sentence. Alternatives to prison should only be allowed on a post-conviction basis and only where the woman has consented and the prosecutor, judge and the expert evidence conclude that it is appropriate;

31. Evidence giving practices should be reviewed to ensure that wherever possible, the woman should not have to testify if the crime can be established without her evidence. If the woman chooses to do so she should be able to testify behind a screen or through the use of video equipment, subject to the right of the defendant to cross-examine her.

Dissenting Opinion and Commentary of Commissioner Dawna Ring

> Men abuse women because they can. Because they want to. Because it works in their interests. Because it helps them maintain power and control. Studies have consistently proved that abusers are normal men. Abuse is not a therapeutic issue, it is a crime.[177]

To date our society has done an abysmal job of protecting women and their children from violence in their home. Women may not seek or obtain help from the legal/justice system because:

> ....if she sought protection, her abuser would kill her; or because when she called for help, the police didn't show up, or came and did nothing; or because when she called the police, they took her child from her arms, giving interim custody to her abuser; or because when she tried to get a peace bond, she was refused because there warrant "reasonable and probable grounds"--and Legal Aid wouldn't represent her in a show cause hearing; or because she didn't have a written copy of her peace bond on her and the police refused to enforce it; or because when she went to trial, her abuser got unconditional probation.[178]

Zero tolerance of wife abuse must be demanded from the law and every level of administration of the legal system. Throughout the system, the number one priority must be the protection of the women.

I agree with the general thrust of this Report and the bulk of the recommendations. There are some that I disagree with and others I wish to expand upon. For ease, I have chosen the terminology of "husband" and "wife", although equal protection must be given to domestic violence in any relationship whether the couple are married, living in a common law relationship or of the same sex.

Unified Family Court

I disagree with the majority of the Commissioners' recommendation that a *Unified Family Court should not have greater criminal jurisdiction than it already has; that is, ordering and enforcing peace bonds.*

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[177] Comments from the Social Action Committee, Halifax Transition House Association, May 1993.

[178] *Ibid.*

In order to properly protect women and their children, it is critical and essential that **one Court deal with every aspect of domestic violence**, including all criminal matters from attempted murder charges to bail hearings; all family matters including housing, custody and access; and all civil matters including damages for personal injuries and loss of wages. Women must be able to tell their evidence to one judge and get results. Each appearance in Court is a reliving of the trauma and an opportunity for her husband to continue his abuse.

Specific Judges should be designated in each region of the province to deal with domestic violence. These Judges could be either current Family Court Judges federally appointed to give them jurisdiction over all matters or Justices of the Supreme Court. The key is the Judge must be able to deal with all matters.

The need for the structure of a single Court to deal with all aspects of domestic violence should not be aborted because some Judges may be too conciliatory or utilize mediation, alternate dispute resolution and counselling in other family matters. This is an issue of appointing the proper Judges. Judges should know when these mechanisms are appropriate and when they are not. If the proper Judges are chosen, they will know that a conciliatory approach, mediation, alternate dispute resolutions and counselling are completely inappropriate in domestic violence cases.

These mechanisms are inappropriate because every time the woman is forced to participate with or interact with her abuser, she is subjected to further abuse, control and manipulation. She may experience a reliving of the trauma she was subjected to. It is not the couple who have the problem. It is the man who has a problem. He is solely responsible for the problem and for changing his behaviour.

Specialized prosecutors/family law advocates in domestic violence should be designated for each region of the Province. The Province has specialized prosecutors for a variety of offences including white collar crime. Existing prosecutors may be utilized to the extent that they possess the necessary qualifications. If additional hiring is necessary, funding should be provided.

At the present time, our society pays for prosecutors to deal with one-dollar theft from stores. Violent crimes, in particular violent crimes towards women and children should be given number one priority for prosecutorial resources. If necessary, commercial businesses should have to incur their own costs for prosecuting petty theft. At present, women must hire lawyers while stores are represented by the state.

Having specialized prosecutors in family violence would not prevent women from later hiring separate counsel for the family and civil matters. These specialized prosecutors should be capable of dealing with all of these matters, for every client at the initial court appearances and in particular for the release and bail hearings, but should also be able to proceed to conclusion on all matters for those women who would qualify for legal aid lawyers.

In the larger centres the Domestic Violent Court should sit for longer hours. I would encourage the adoption of the Manitoba Family Violence Court hearing hours of fifty-two (52) per week.

Specialized police and preferably a Victim Response Team, should be designated for each area of the Province.

Sentencing

Men in our society will stop abusing women when they can no longer get away with it. They will only get the message that they can no longer get away with it when they receive stiff jail sentences for their actions. **The stiffest jail sentences should be provided to men who abuse women and children in their home.**

I do not agree with jails. I would prefer a legal system designed on the aboriginal model of healing. I believe the aboriginal people should have self-government and a separate justice system, which incorporates their culture, values and beliefs.

However, those of us within our society who are Euro-descendants do not have such a legal system. Our system imprisons people who do the worst crimes against society. The length of the prison term varies according to society's abhorrence to the crime. People assess society's view of the behaviour by the length of the prison sentence.

Until there is a complete change to the entire legal/justice system, the only way violent men will understand their violence against women and children is wrong is by giving them severe prison sentences. To do otherwise is to support and, therefore, perpetuate violent men's attitudes that this type of violent behaviour is not criminal.

Arrest and Detention

Men who abuse their wives should be kept in jail until trial.

Men must be physically restrained from being able to attack their wives and children. Women remain in great danger and are still exposed to domestic violence even after they have attempted to leave their abusive spouse and have contacted the legal/justice system for help. In addition to all of the very disturbing studies on the prevalence of domestic violence in Canada, the recent Tracking Project in Nova Scotia found that half of the women assaulted were no longer residing with their abuser. Due to the great danger women are in, men should always be arrested and kept in jail until their trial.

In most cases, this is presently possible under the existing arrest provisions of the *Criminal Code*, Section 495. Even for the less serious criminal offences arrests without a warrant and detention are possible "to prevent the continuation or repetition of the offence or the

commission of another offence". Men who threaten to kill their wives usually follow through with some form of violence, and in some cases, death. These threats must be taken seriously by Judges as reasonable grounds to believe a further offence will occur if the man is released. Too many studies, including the Nova Scotia Tracking Project, have documented the repetitive and accelerating nature of domestic violence and the vulnerability of women after they leave the relationship.[179]

Mandatory Counselling

I do not agree with the majority of the Commissioners that the sentencing provisions should be changed to require mandatory counselling. Counselling has proven to be ineffective. At times the abuse increases. It merely takes on a different form such as verbal, psychological, and/or financial. Studies have cautioned against the use of treatment as a diversion from prosecution. I concur with the submissions of the Halifax Transition House Association that to continue to promote mandatory counselling for abusers when there is no evidence that it works is to practice a dangerous, sometimes fatal deception. Survivors may stay with their abusers because they are seeking treatment. The Courts may be more lenient because the individual is working on it. Offering an ineffective alternative in the guise of something that works, is not helpful.

Our limited resources should not be put into mandatory counselling. The funds would be better utilized for a Victim Response Team, Family Violence Unit, enforcing all restraining orders, etc.

Men who want counselling should seek it out. They should have succeeded in it before having access to their children. Society should not rely on it, divert prosecution for it, nor should it be a funding priority for the state.

Firearms

Court Orders should include provisions curbing ownership and use of firearms. Men who abuse their wives should not be permitted to be licensed for a firearm, own a firearm or use a firearm. Any firearms they own should be seized when they are arrested and sold when they are found guilty.

Judges

Within the legal system, Judges have the greatest power to curb domestic violence and at present, many are the major obstacle. Many Judges have not taken the evidence seriously enough and have not enforced the laws. The appallingly short sentences in cases involving

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[179] Comments received by the Commission from a Nova Scotia practitioner in response to the 1993 Discussion Paper.

violence against women and children give society the message that the behaviour is not that bad. They have not been rigorous in maintaining abusers in jail, and providing stiff sentences for their actions.

It is imperative only those Judges who are prepared to recognize domestic violence as a serious crime in society should be appointed at any level of the judiciary. Their attitudes towards domestic violence and women, including their utilization of pornography, etc., must be assessed for each judicial appointment. For any re-appointments to a higher Court, the decisions of those previous Judges should be reviewed critically.

Judges who condone or make excuses for violence against women and children, or who make sexist or derogatory remarks towards women and children should be removed from the bench.

Accountability

I support the accountability discussion and recommendations in this report. However, to ensure those within the legal/justice system are accountable for their role in domestic violence, **employee discipline procedures and termination of employment should be invoked if protocols are not followed and the laws are not enforced in domestic violence situations.**

Provincial Legislation

Although it is absolutely critical that domestic violence be seen as a crime, treated as a crime and sentenced as a crime, there is a place for better provincial legislation. In particular, emergency interim orders should be available immediately from the Courts for custody of the children, exclusive possession of the home, without cumbersome documentation or delay and should be capable of being issued by a judge by telephone when necessary.

This is very important for the protection of women on the evening they call the police. As women are often more vulnerable after contacting police or leaving their husbands, women and their children require immediate protection. This protection should be available to her in her own home. Immediate Interim Orders would assist this.

Commissioner Dawna Ring, Halifax, 1995