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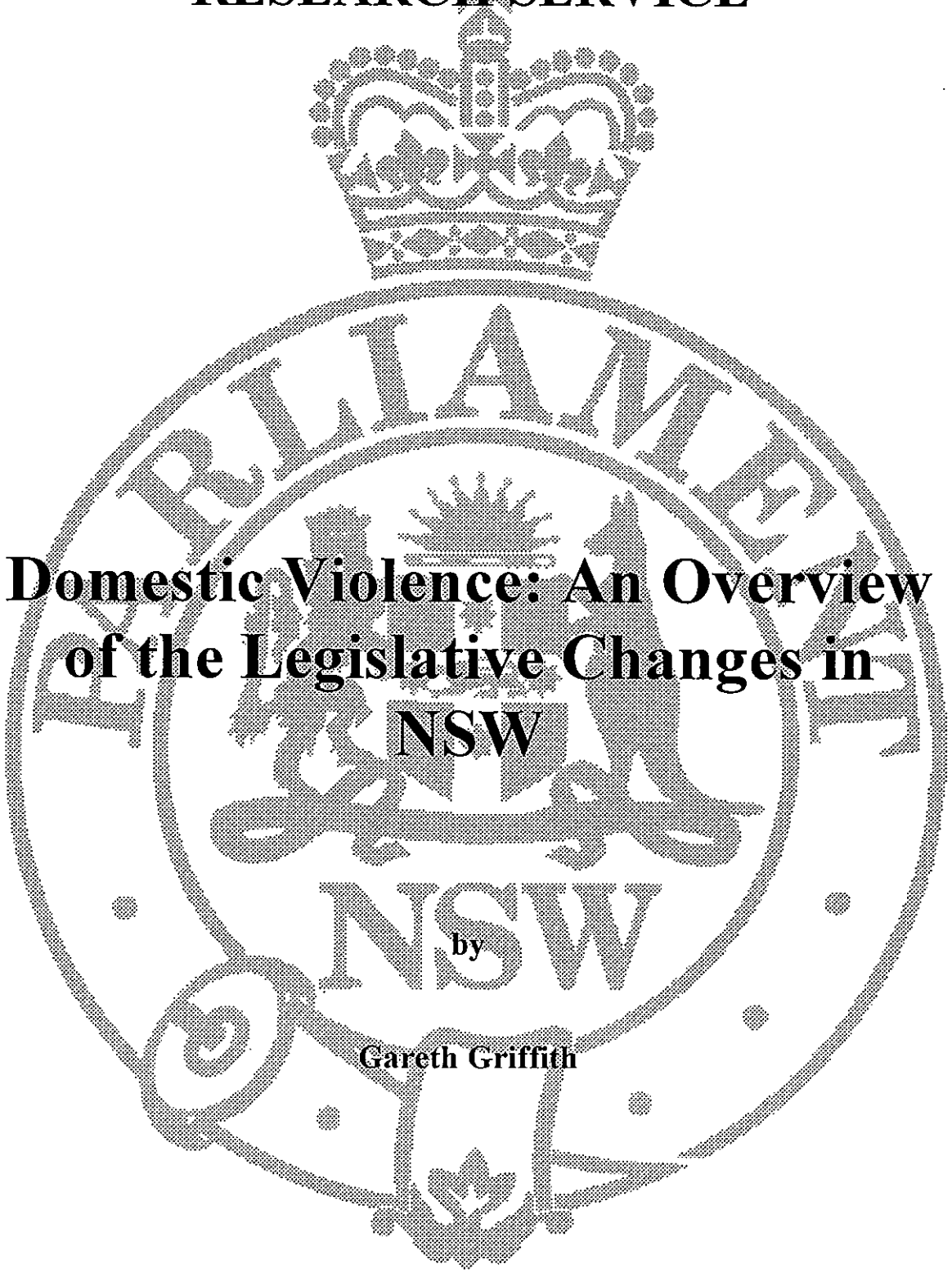

Domestic Violence: An Overview of the Legislative Changes in NSW

by

Gareth Griffith

Briefing Paper No 18/95

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EXECUTIVE SUMMARY

This Briefing Paper presents an overview of the legislative changes which have occurred in NSW in relation to the subject of domestic violence. These are discussed with reference to the recent proposals to reform aspects of the law relating to domestic violence. Some of its main findings are as follows:

- The first express recognition of domestic violence as a distinct problem came in 1982, under the Crimes (Domestic Violence) Amendment Act of that year (page 4).

- The new Act did not introduce a new offence of domestic violence but, instead, defined as domestic violence any of a specified range of existing offences, including common assault (page 5).

- The definition of domestic violence offence was amended in 1983 to include persons who had previously been married or who had previously lived together in a de facto relationship. Subsequent amendments in 1987 extended the definition of domestic violence offence to encompass "family violence" in a domestic setting (pages 5-6).

- The 1982 Act changed the law relating to the compellability of spouses by removing, subject to certain exceptions, the former privilege of a legal spouse to give evidence for the prosecution. Section 407AA was inserted in the *Crimes Act* for this purpose (page 7-8).

- Sub-section 407AA(1)(b) continues to make reference to Apprehended Domestic Violence Orders (ADVOs) which have now been replaced by Apprehended Violence Orders (AVOs) (page 8).

- ADVOs were introduced under the 1982 Act, with the insertion of section 547AA in the *Crimes Act* (page 9).

- The ADVO scheme was extended in 1983 to include apprehended harassment or molestation as well as violence (page 9).

- In 1987 a new Part 15A, headed Apprehended Domestic Violence Orders, was inserted in the *Crimes Act*. The scope of ADVOs was extended to encompass "family violence" generally. The six month time limit on ADVOs was removed at the same time (page 10).

- In 1989 the ADVO was replaced by the AVO which apply to all persons who fear personal violence, harassment or molestation (page 11).

- Further amendments to AVOs occurred in 1993, providing among other things for the making of telephone interim orders. Penalties for a breach of an order were also increased (pages 15).

- The criminal offence of stalking or intimidation with intent to cause fear for personal safety was also created in 1993, at which time the offence was restricted to "domestic relationships". Amendments in 1994 extended the offence of stalking beyond situations involving "domestic relationships" (pages 16-17).

- The presumption in favour of bail was removed in 1993 in relation to either domestic violence offences or to a breach of an ADVO (page 18).

- In 1992 the *Firearms Act 1989* was amended to address the particular problems associated with domestic violence (page 19).

1. INTRODUCTION

Domestic violence is a traumatic subject. At its core is the harm inflicted by violent men on women and children. Quantifying the prevalence of domestic violence in this State or elsewhere is a difficult task. In this vein, Julie Stubbs and Diane Powell reported in 1989, "No reliable estimates exist of the actual incidence of domestic violence in Australia".[1] What is beyond question however is that there is too much domestic violence.

The problem of domestic violence has been addressed in legislation and policy in recent years.[2] This Briefing Paper reviews the major changes which have occurred in NSW, focussing especially on the area of statutory reform. In addition, the Briefing Paper looks at the reforms which have been proposed in this area by the in-coming Carr Government. One area of concern in this regard relates to the operation of Apprehended Violence Orders in the context of domestic violence, in particular the reported changes foreshadowed by the Attorney General, the Hon Jeff Shaw MP, to empower police to

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1 J Stubbs and D Powell, *Domestic Violence: Impact of Legal Reform in NSW*, NSW Bureau of Crime Statistics and Research 1989, p 3.

2 In 1991 the NSW Government released a "Statement of Principles" relating to domestic violence, a summary of which was presented in the 1991 *Report of the Joint Select Committee Upon Gun Law Reform* as follows:

- women and children have a right to live safely and free of fear within their own homes;
- domestic violence is a range of abusive behaviours, perpetrated by one partner upon the other to gain and maintain control;
- domestic violence damages the well-being and future life chances of women and children;
- domestic violence occurs across all cultural and socio-economic groups;
- domestic violence is a phenomenon based in and perpetuated by existing societal conditions and social relations which reflect gender inequality and promote male power;
- domestic violence is perpetrated by men in an overwhelming majority of cases (95% of reported cases);
- acts of domestic violence and its consequences are the sole responsibility of the perpetrator;
- domestic assault is a crime;
- the safety and ongoing protection of women and children who have experienced or are experiencing domestic violence are paramount considerations in any response;
- essential to any response are early identification, appropriate intervention and long-term solutions to provide for the well-being and life chances of women and children who have experienced domestic violence.
- language and cultural needs of women of non-English speaking background and Aboriginal women must be considered in any response;
- education and programs to promote gender equality are required to redress community apathy towards and tolerance of domestic violence;
- any response to domestic violence requires a consistent planned approach across all sectors of the community and at all levels of Government;
- all services which respond to domestic violence will adopt policies, procedures, programs and training in accordance with the above principles.

remove domestic violence offenders from the home and extend the powers of the courts to stipulate strict conditions under which such offenders would be permitted to return. Tougher penalties for men who stalk women have also been foreshadowed.[3]

The Criminal Law Review Division of the NSW Attorney-General's Department is currently undertaking a review of issues regarding Apprehended Violence Orders (AVOs).

The emphasis in this Briefing Paper is on the criminal law responses to domestic violence.[4] It recognises the importance of the wider social framework in which such violence occurs. However it does not set out to offer a detailed explanation or description of the structural, ideological or other features of that framework. These wider issues are canvassed in The Law Reform Commission's 1994 report, *Equality Before the Law: Justice for Women*.[5] Included in that report is a detailed discussion of the approach taken to domestic violence under the "no fault" philosophy of the *Family Law Act 1975* (Cth).[6]

2. LEGISLATIVE CHANGES IN NEW SOUTH WALES

The first express recognition under NSW legislation of domestic violence as a distinct problem came in 1982, following the publication in the previous year of the report of the NSW Task Force on Domestic Violence. Before then only section 547 of the *Crimes Act* afforded some protection by allowing a court to enter a recognizance to "keep the peace" where there was a reasonable apprehension of violence by that person against another. Specific mention was made of a man's "wife or child" in this context. However the effectiveness of that provision has been questioned. For example, Jocelynne Scutt has commented that this is a "binding over" procedure in which a man is "bound over" to keep the peace"; but that in fact a man would not be bound over without first causing actual injury.[7] The further criticism was made that there was no procedure by which a person who breached a recognizance under section 547 could be brought back before the court for punishment except by laying new proceedings for assault or another section 547

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3 "Violent Men To Be Ordered From Home", *The Telegraph Mirror*, 26 April 1995; "End This Abuse of Our Courts", *The Telegraph Mirror*, 26 April 1995.

4 Part of the purpose of this Briefing Paper is to consolidate the work which has been published in the following publications of the Parliamentary Library: *Women's Refuges* by Jaleen Caples; *Crimes (Registration of Interstate Restraint Orders) Amendment Bill 1993*, Bills Digest 1/1993 by Tony Clark; *Crimes (Domestic Violence) Amendment Bill 1993*, Bills Digest 25/1993 by Tony Clark; *Bail (Domestic Violence) Amendment Bill 1993*, Bills Digest 26 /1993 by Tony Clark; and *Crimes (Threats and Stalking) Amendment Bill 1994*, Bills Digest 40/1994 by Vicki Mullen.

5 Another useful source is J Stubbs ed, *Women, Male Violence and the Law*, Sydney 1994.

6 The Law Reform Commission, *Report No 69, Part 1 - Equality Before the Law: Justice for Women*, Canberra 1994, p 172. For further discussion of this matter please refer to the March 1995 issue of the *Australian Journal of Family law*.

7 JN Scutt, *Women and the Law*, Sydney, The Law Book Co Ltd 1990, p 451.

order.[8]

Before looking at the main areas of reform, two other legislative changes from the early 1980s recognising the range of inter-spousal violence can be noted. The *Crimes (Sexual Assault) Amendment Act 1981* removed spousal immunity in marital sexual assault; the *Crimes (Homicide) Amendment Act 1982* acknowledged that the behaviour of the deceased towards the accused over a number of years may have amounted to provocation, thus reducing the emphasis on actions immediately prior to the homicide.

The *Crimes (Domestic Violence) Amendment Act 1982*, which commenced on 18 April 1983, made changes in the following areas: it defined what was meant by a domestic violence offence; specific apprehended domestic violence orders were introduced (ADVOs); spouses were required to give evidence in domestic violence proceedings; it confirmed the right of police to enter private premises to investigate domestic violence complaints when invited; and the Act empowered magistrates to issue radio-telephone warrants to police where entry is denied. The main aspects of these reforms and the subsequent developments in them are discussed in more detail below.

3. DEFINING A DOMESTIC VIOLENCE OFFENCE

As Stubbs and Powell explain, the 1982 Act did not introduce a new offence of domestic violence.[9] Instead, it defined as domestic violence any of a specified range of existing offences, including common assault, "committed upon a person at a time when the person who commits the offence and the person upon whom the offence is committed are married to each other or, although not married to each other, are living together as husband and wife on a bona fide domestic basis". The **attempt** to commit such an offence was also defined as domestic violence. The *Crimes (Domestic Violence) Amendment Act 1983* broadened the definition of domestic violence to include persons who had previously been married or who had previously lived together in a de facto relationship. The definitional aspect of the legislation was again amended under the *Crimes (Personal and Family Violence) Amendment Act 1987*, this time for the purpose of extending the operation of what were then called Apprehended Domestic Violence Orders, and again under the *Crimes (Apprehended Violence Amendment Act 1989*. Following the 1989 amendments, "domestic violence offence" is defined under section 4(1) of the *Crimes Act* to mean "a personal violence offence" committed against:

(a) a person who is or has been married to the person who commits the offence; or

(b) a person who is living with or has lived with the person who commits the offence as his wife or husband, as the case may be, on a bona fide domestic basis although not married to him or her, as the case may be; or

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[8] R Landsdowne, "Domestic Violence legislation in New South Wales", (1985) 8 *UNSW Law Journal* 80-102, p 82.

[9] J Stubbs and D Powell, op cit, p 6.

(c) a person who is living with or has lived ordinarily in the same household as the person who commits the offence (otherwise than merely as a tenant or boarder); or

(d) a person who is or has been a relative (within the meaning of subsection (6)) of the person who commits the offence; or

(e) a person who has or has had an intimate personal relationship with the person who commits the offence.

The term "personal violence offence" is defined separately by reference to such existing offences as common assault and manslaughter.

Section 4(6) then provides that for the purposes of the definition of "domestic violence offence", a relative is:

(a) a father, mother, grandfather, grandmother, step-father, step-mother, father-in-law or daughter-in-law; or

(b) a son, daughter, grandson. grand-daughter, step-son, step-daughter, son-in-law or daughter-in-law; or

(c) a brother, sister, half-brother, half-sister, brother-in-law or sister-in-law; or

(d) an uncle, aunt, uncle-in-law or aunt-in-law; or

(e) a nephew or niece; or

(f) a cousin,

and includes in the case of de-facto partners, a person who would be such a relative if the de-facto partners were married.

Basically, therefore, the definition of a domestic violence offence under the *Crimes Act* has expanded over the years to encompass "family violence" within a domestic setting. These changes were in part a response to the finding of the NSW Violence Against Women and Children Law Reform Task Force that family violence was not limited to violence between spouses.[10]

A second point is that there is still no new offence of domestic violence. Instead, domestic violence is defined in relation to an existing range of offences which are now grouped under the heading of "personal violence" offences. At one level the practical legal effect of this approach may not be immediately apparent. Before 1983 a common assault, for example, could not be characterised in addition as a domestic violence

[10] NSW Government Violence Against Women and Children Law Reform Task Force, *Consultation Paper*, July 1987, p 80.

offence. After 1983, however, a common assault, in which a man assaulted his wife, could have been characterised as a domestic violence offence, while at present a common assault in which a son assaults his father could be characterised in the same way. But in neither of these cases is a new element or level of sentencing severity added to the offence of common assault itself. Instead, part of what these reforms achieve is to remind law enforcement agencies that an assault committed in a domestic context is indeed a criminal offence. In particular, they act to remind police officers and the courts alike that violence in a domestic setting is a breach of public order and should therefore be dealt with under the criminal law. Thus, the legislative changes emphasise the point for practical as well as symbolic purposes that domestic violence, though occurring in what has traditionally been seen as a private sphere, is in fact a public matter. Indeed the stated aims of the original legislation was to make the police and courts more effective in dealing with domestic violence and to deal with domestic violence *as an assault*. In its 1985 report the NSW Domestic Violence Committee commented:

> The New South Wales reforms establish that an offence of assault committed within the confines of the family should be regarded as seriously as an assault between strangers in a public place. The reforms are thus located within the criminal law, encouraging criminal charges to be laid by police where offences have been committed and consequently carrying criminal sanctions when convictions result.[11]

In keeping with this approach, police instructions were changed to direct police to lay charges of assault or other offences in domestic violence cases, rather than relying solely on the victim.

A further practical implication was that in defining certain offences as "domestic violence offences" the legislation prompted the courts to consider the appropriateness of making ADVOs in these circumstances. Undoubtedly, this was a significant advance. The irony in a sense is that, despite the rhetoric concerning the criminalisation of domestic violence, the legislation's key advance was, in the words of Robyn Landsdowne, "a new form of protective order to be obtained in civil proceedings and which carries no criminal stigma except on breach".[12]

It is also the case that the designation of an offence as a "domestic violence offence" has important practical ramifications under the *Bail Act 1978*. This is discussed below at pages 18-19.

4. COMPELLABILITY OF SPOUSES

Section 407AA was inserted into the *Crimes Act* in 1982. It required spouses to give evidence in domestic violence proceedings, thus removing the former privilege of a legal spouse to refuse to give evidence for the prosecution. Certain exemptions from the rule of

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[11] Report of the NSW Domestic Violence Committee, September 1985, p 6.

[12] R Landsdowne, op cit, p 92.

compellability were provided for under the new statutory regime, namely, where the court is satisfied that the application not to give evidence is made "freely and independently of threat or any other improper influence" but having regard to, among other things, "the seriousness of the domestic violence offence". The exemptions extended to de facto spouses. In 1985, under the *Crimes (Child Assault) Amendment Act*, the exemptions were altered so the court was directed to only set aside the presumption of compellability where the offence "is of a minor nature", or where "it is relatively unimportant to the case to establish the facts in relation to which it appears that the husband or wife is to be asked to give evidence or there is other evidence available to establish those facts". Up to that point it had been observed that magistrates had commonly granted exemptions for reasons not set out in the legislation, such as that parties had made up.[13] The effect of the amendment was to limit the scope of the court's discretion in these matters.

In recommending that spouses become compellable witnesses the NSW Task Force's aims were to: (a) encourage police and to produce greater certainty in legal response to domestic violence; and (b) relieve the woman from having to make a choice about whether or not to give evidence, and to limit the scope of possible intimidation.[14] Robyn Landsdowne reported in 1985 that "Police commonly argue that the reason they have been reluctant to act as informant in domestic violence cases is that the woman who, of course, is their chief witness will often decline to give evidence or indicate that she does not wish to continue the proceedings".[15]

The 1985 Act also made the spouse of an accused person compellable to give evidence in cases of both sexual and physical assault of a child. As the then Premier, Hon NK Wran MP, explained in the Second Reading Speech, "This extends the 1983 amendment, which made spouses compellable witnesses in cases of domestic violence".[16]

Section 407AA applied originally to proceedings for breach of an ADVO under section 547AA; it now applies to breaches of orders under Part 15A of the *Crimes Act*. Interestingly, and seemingly anachronistically, the reference is still to Apprehended Domestic Violence Orders, which are no longer operative under Part 15A.[17]

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[13] N Seddon, *Domestic Violence in Australia*, 2nd ed, Sydney, The Federation Press, 1993, p 51. See also R Landsdowne, op cit, p 82.

[14] NSW Task Force on Domestic Violence, 1981, p 56.

[15] R Landsdowne, op cit, p 84. Landsdowne questions whether this is an adequate explanation of why many women do not wish to continue with proceedings.

[16] NSWPD, 12 November 1985, p 9325.

[17] Whether the outdated reference to ADVOs in sub-section 407AA(1)(b) would render the sub-section inoperative is a moot point. The term "ADVO" is still used under section 9A(3) of the *Bail Act 1978* where it is defined to mean an AVO under Part 15A of the *Crimes Act* where the protected person has a specified relationship with the defendant.

Section 407AA would not be altered by the NSW Evidence Bill 1995.[18]

5. APPREHENDED *DOMESTIC* VIOLENCE ORDERS[19]

The original scheme: Again, the starting point is the *Crimes (Domestic Violence) Amendment Act 1982*. That Act inserted section 547AA into the *Crimes Act*. The section was headed "Apprehended Domestic Violence Orders" (ADVOs). In its original form, the section established a procedure whereby a person who reasonably feared violence from their lawful or de facto spouse could obtain an ADVO, imposing restrictions on that spouse's conduct for up to 6 months. Proceedings under section 547AA were not criminal proceedings as such and the onus of proof was on the balance of probabilities only. However, a person who had been personally served with an ADVO and who knowingly breached the order was guilty of committing a criminal offence, the penalty for which was imprisonment for 6 months. This overcame the crucial limitation noted above in relation to section 547 of the *Crimes Act*.

Extending the scheme: The operation of section 547AA was extended under the *Crimes (Domestic Violence) Amendment Act 1983* to include persons who had previously been married or who had previously lived together in a de facto relationship, thus recognising the fact that many cases of domestic violence occur between couples that have ceased cohabiting or after the marriage is over. As noted, the definition of "domestic violence offence" was amended to the same effect. Also, the basis for seeking an ADVO was extended to include apprehended harassment or molestation as well as violence. Landsdowne explains:

> This was to cover cases of persistent and extreme harassment such as telephone calls, letters, damage to property and constant surveillance which, whilst not amounting to violence, may be even more distressing and debilitating for the victim. The court was also empowered to impose a fine on breach of a domestic violence order in addition to imprisonment and the legislation was amended to make it clear that on appeal from the domestic violence order, bail conditions could be imposed on the defendant.[20]

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[18] Clause 19, Evidence Bill 1995.

[19] The best account of the operation of what are now called Apprehended Violence Orders is found in an article written by Suzanne Leal and Steve Robson, published in the December 1994 issue of the *NSW Law Society Journal*, entitled "The what, where, when and how of AVOs: a step by step guide". The article presents the law in force prior to the *Crimes (Threats and Stalking) Amendment Act 1994*. Some of the issues raised in that article are discussed below, following an overview of the development of the legislation in this area.

[20] R Landsdowne, op cit, p 85.

The creation of Part 15A: The *Crimes (Personal and Family Violence) Act 1987*, the *Bail (Personal and Family Violence) Act 1987*[21] and the *Crimes (Apprehended Violence) Act 1989* further amended laws and procedures relating to ADVOs. In 1987 section 547AA was omitted and a new Part XVA, headed Apprehended Domestic Violence Orders, was inserted in the *Crimes Act*. As noted, the Act extended the range of relationships which can be defined as domestic violence to include people living or who have lived in the same household as the offender (except tenants or boarders), any relative of the offender, or anyone who has or has had an intimate relationship with the offender. The term "relative" was defined for this purpose under section 562A of the new Part XVA. These changes were consistent with the recommendation of the Violence Against Women and Children Law Reform Task Force that "the issue of common residence is fundamental to an offence that is identified as 'domestic violence'".[22] The six-month time limit on ADVOs was removed on the grounds that this was not long enough to "remove the threat of the assaults" in many domestic situations.[23] Magistrates were now permitted to set whatever time-limit appeared appropriate in the case for as long as is necessary to ensure the protection of the "aggrieved person".[24] Magistrates were also empowered to make interim orders in appropriate cases, without the necessity to give notice to the defendant.[25] In these circumstances, the court was to summons the defendant to appear as soon as possible at a further hearing, at which time the court could confirm, revoke or vary the order. Further, the 1987 amendments clarified, without otherwise limiting the scope of ADVOs, the prohibitions or restrictions a court could impose on the offender (section 562D). The legislation recognised the rights of the complainant to withdraw or adjust the order (section 562F), and clarified the appropriate procedures to be taken against those people who contravened an ADVO, breach of which was classified as an offence, arrestable without warrant under section 562I and section 562J.[26]

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[21] This is considered separately under the heading, "Domestic violence and the Bail Act 1978".

[22] NSW Government Violence Against Women and Children Law Reform Task Force, p 81.

[23] NSWPD, 29 October 1987, p 15464.

[24] Since 1989 the phrase "protected person" has been used. Since the *Crimes (Domestic Violence) Amendment Act 1993* the legislation has provided that, "If the court fails to specify a period in the order, the order remains in force for a period of 6 months" (section 562E(3)).

[25] Interim court orders are currently provided for under section 562BB, sub-section (2) of which states that an interim order may be made whether or not: (a) the defendant is present at the proceedings; or (b) the defendant has ben given notice of the proceedings.

[26] D Brown et al, *Criminal Laws: Material and Commentary on Criminal Law and Process of New South Wales*, Sydney 1990, p 879.

From ADVOs to AVOs: The scheme changed again, this time more radically, in 1989 when the *Crimes (Apprehended Violence) Amendment Act* extended apprehended violence orders to all persons who fear either personal violence or conduct amounting to harassment or molestation, irrespective of whether there is a domestic relationship at issue. This was achieved by replacing the ADVO with an Apprehended Violence Order (AVO) under a new section 562B of the *Crimes Act*. The then Attorney-General, Mr Dowd, commented in the Second Reading Speech:

> I emphasize that whilst now all persons who apprehend violence, harassment or molestation from any other person may seek apprehended violence orders, the bill in no way derogates from the rights and protections originally afforded to only those persons in defined domestic relationships.[27]

All the same, these reforms did not meet with universal approval. In particular, women's groups, while supporting the wider availability of protective orders, argued for the retention of a separate category of order for victims of domestic violence.[28] The reforms were in fact against the recommendations of the 1987 Task Force, which considered it more appropriate to amend section 547 of the *Crimes Act* "to provide more effective security for persons subjected to threats and harassment who have not shared the same household as their assailant/harasser...".[29] In response, Mr Dowd said, "I consider that it is not desirable to extend section 547 by inserting similar provisions and creating a scheme similar to that which is found in part XVA. This would result in there being two almost identical parts in the Crimes Act 1900: one that would apply only to persons who have a domestic relationship and one that would apply irrespective of the existence of such a relationship".[30]

Under the 1989 Act a court could, on complaint, make an AVO if it is satisfied "on the balance of probabilities that a person has reasonable grounds to fear and in fact fears" the commission of a personal violence offence against the person, or conduct amounting to harassment or molestation. The phrase "conduct which may amount to harassment or molestation of the person" in section 562B was defined to include conduct that does not involve actual or threatened violence to the person, or it consists only of actual or threatened damage to the property of the person. The Second Reading Speech referred in this context to "where threats are painted on a person's house", or to the killing of a person's cat.[31] Under the scheme, AVOs could also be made for the protection of a child or a person with an intellectual disability, in circumstances where such persons are

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[27] NSWPD, 3 May 1989, p 7319.

[28] D Brown et al, op cit, p 879.

[29] NSW Government Violence Against Women and Children law Reform Task Force, op cit, p 81.

[30] NSWPD, 3 May 1989, p 7318.

[31] *NSWPD*, 3 May 1989, p 7319.

unaware of the threat to his or her safety.

AVOs under scrutiny:[32] This extension of AVOs beyond domestic violence relationships has come under scrutiny in recent months. For example, whilst not advocating amendment to the legislation, Pauline Wright commented in the October 1994 issue of the *NSW Law Society Journal* that the test in relation to section 562B is "largely subjective" and that an allegation, that a person has reasonable grounds to fear and in fact does fear violence or harassment, is easily made, "whether or not it could be substantiated if put to the test in a defended hearing". Wright goes on to say that ADVOs were introduced to provide a protective mechanism for women who feared violence from their husbands in a domestic setting. In particular, the ADVO sought to prevent future acts of violence. Wright notes:

> Part 15A was drafted in such a way as to make it possible for a complainant to obtain restraining orders against a person even though that person had not actually committed an unlawful act....The drafting of the apprehended violence provisions was necessarily subjective to allow for the actual state of mind of the fearful woman to be taken into account. The beauty of the legislation, its very subjectivity, has, however, meant that it is open to abuse.[33]

Wright's particular concern was that an increasing number of complaints are "trifling" or motivated by a dispute which does not involve a genuine apprehension of violence or harassment. She says this is particularly common in family law custody disputes where one party seeks to paint a picture of the other as a violent and therefore unsuitable parent. Her argument is that "the defendant should be encouraged to put the complainant to the test where he or she believes the complaint is unfounded".[34]

The issue was taken up by the *Telegraph Mirror* in April 1995, based on a 1994 report, Apprehended Violence Statistics, compiled by the NSW Department of Courts Administration. The *Telegraph Mirror* article argued, among other things, that AVO matters are now "the biggest user of court time in NSW with 32,500 going through the legal system last year. The first statistical analysis of the AVO system shows about 30 per

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[32] For an analysis of the operation of ADVOs please refer to the 1989 research report of J Stubbs and D Powell, op cit. One finding was that police increasingly used assault charges and also increasingly acted as complainants in ADVOs. Another finding was that Chamber Magistrates suggested making ADVOs available to a wider range of relationships and introducing an interim order. In relation to victims, the report found that slightly over half of applicants interviewed were successful in having an ADVO granted by the court, which represented about 80% of those applicants which proceeded to a court determination. A brief summary of these findings is presented in J Mugford et al, *Report to the ACT Community Law Reform Committee*, Canberra 1993, pp 28-30.

[33] P Wright, "Should a Defendant Consent to an AVO?", (October 1994) *NSW Law Society Journal* 55-56, p 55.

[34] Ibid, p 56.

cent of those 32,500 applications did not involve domestic violence". The article went on to say that: 60 per cent of applications for non-domestic AVOs were successful; 12 per cent were refused; 7 per cent were referred to mediators; and the rest withdrawn. A senior Departmental official was quoted as saying that "too many personal AVOs were being issued". Maurie Stack, President of the NSW Law Society, was also quoted as stating that, while the legislation was needed, the AVO system was open to abuse.[35]

The "comments" section from the *Apprehended Violence Statistics 1994* report prepared by the Local Courts Statistics Unit is set out in Appendix A.

Leal and Robson published in the December 1994 issue of the *NSW Law Society Journal* a "step by step guide" to AVOs, in which they set out in clear terms the legal position relating to such matters as the variation or revocation of AVOs, their terms and duration, as well as the commencement of AVO proceedings and the availability of interim orders in this context. Importantly, they clarify the point that the test of a person's "fear", for the purposes of attaining an AVO, includes both subjective and objective elements: "Not only must the person in need of protection actually fear personal violence or the relevant conduct(except in the case of minors or persons with an 'appreciably below average general function') there must also be 'reasonable grounds' for such fear. A further control test with regard to complaints based on harassment, molestation, intimidation or stalking is the requirement that the conduct complained of be 'sufficient to warrant' the making of an order".[36]

In the same issue of the *NSW Law Society Journal*, Sarah Todd of the Domestic Violence Advocacy Service took issue with some aspects of Wright's account of AVOs. In particular, she agreed that "frivolous complaints are indeed increasing", but stressed the point that "the majority of frivolous complaints in AVO matters involving *domestic* violence (as opposed to *personal* violence such as that between neighbours) in our experience appear to be taken out by men against their female partners". Todd stated that a great many complaints by men against their female partners are cross applications, made only after the woman has already initiated a complaint. The further point was made that, "the discussion by Ms Wright tends to conflate the distinction between AVOs involving domestic violence and those involving personal violence".[37] Todd also emphasised the strong objective element to the test under section 562B and noted serious concerns about Wright's representation of the purpose and effect of the legislation, in particular, her suggestion that an AVO is capable of being taken into account by a court when sentencing on some future offence. Todd took issue, too, with Wright's "apparent disregard of the gendered nature of domestic violence".[38]

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[35] "Court Order Farce", *Telegraph Mirror*, 26 April 1995.

[36] S Leal and S Robson, "The What, Where and How of AVOs: A Step by Step Guide", (December 1994) *NSW Law Society Journal* 30-34, p 30.

[37] S Todd, "Fears About Abuse of Legislation are Unjustified" (December 1994) *NSW Law Society Journal* 38-39, p 38.

[38] Ibid, p 39.

It is interesting to note in this context the apparent contrast between the recent legislative developments in NSW and in South Australia. Whereas in NSW domestic violence orders are now subsumed under the general category of Apprehended Violence Orders, in South Australia separate legislation was created in 1994 to cater for domestic violence orders, on one side, and other restraining orders, under the *Domestic Violence Act 1994* and the *Summary Procedure (Restraining Orders) Amendment Act 1994* respectively. In the relevant Second Reading Speech the Deputy Premier, the Hon SJ Baker MP, commented: "The enactment of a *Domestic Violence Act* which applies to those within a narrow definition of family is not intended to detract from the seriousness of violence in other relationships or in the community generally, rather it is intended to emphasise the seriousness of domestic violence as the ultimate betrayal of trust in a relationship which parties have entered voluntarily and the consequences of the violence on the children who are part of that relationship".[39]

Terms of AVOs: This area has been flagged as one in which the Government intends to introduce some changes, including giving courts the power to remove an offender from the family home in domestic violence cases.

At present under section 562D (1) an AVO may include terms prohibiting or restricting:

- approaches by the defendant to the protected person;
- access by the defendant to any specified premises occupied by the protected person, any specified place of work of the protected person or any other specified place of work of the protected person or any other specified premises or place frequented by the protected person;
- the possession of all or any specified firearms by the defendant; and
- specified behaviour by the defendant which may affect the protected person.

Section 562D (2) then directs the court, in deciding whether to make an order prohibiting or restricting access to the defendant's residence, to consider:

- the accommodation needs of all relevant parties; and
- the effect of making an order on any children living or ordinarily living at the residence; and
- the consequences for the person for whose protection the order is made and any children living or ordinarily living at the residence if an order restricting access is not made.

[39] SAPD(HA), 10 May 1994, p 1116.

From this it would seem that magistrates already have the power to make orders for the perpetrator of violence to be removed from the house occupied by the victim. As the *Sydney Morning Herald* said in its editorial comment of 8 March 1995, the Labor Party proposal to remove violent men from the family home seems to imply such removal, "if that is what the wife wants, as a general rather than an unusual option". The editorial said in addition, "It makes no sense, in policy and social terms, for an abused wife to be forced out of the family home, usually with her bewildered and upset children, because her husband has made her life a misery of beatings".[40]

Further amendments in 1993: Aspects of the legislation relating to AVOs were overhauled again under the *Crimes (Registration of Interstate Restraint Orders) Amendment Act 1993*, which allowed orders made in other States to be registered and enforced in NSW,[41] and the *Crimes (Domestic Violence) Amendment Act 1993*. The latter Act amended the provision dealing with interim orders. A new section 562BB was introduced for this purpose. At present, a court may make an interim order "if it appears to the court that it is necessary or appropriate to do so in the circumstances". An interim order may be made whether or not the defendant is present at the proceedings, or notice of the proceedings has been given to the defendant. Where an interim order is made, the defendant is to be summoned to appear at a further hearing "as soon as possible after the order is made". At those further proceedings the court may confirm or revoke the interim order, irrespective of whether the defendant attends the hearing. While it is in force, an interim order has the same effect as a formal order made under section 562B.

Also, a new section 562H was introduced providing for telephone interim orders, under which a police officer may apply to an authorised justice for an interim AVO. This may arise where the incident occurs after the court's sitting times or where a court is inaccessible, and the police officer has good reason to believe that the complainant may suffer personal injury unless an order is made. Under a telephone interim order the defendant is prohibited from causing any personal injury to, or from harassing or molesting, the protected person. If the police officer has good reasons to believe that the protected person is in imminent danger of personal injury from the defendant, the officer may request that additional conditions be imposed, namely: to restrict or prohibit approaches by the defendant to the protected person; and to prohibit or restrict access to specified premises "occupied" by the protected person. These exclusionary orders are not available where the defendant is under 18 years. Following Leal and Robson, a telephone interim order can only remain in force up until 9.00 pm on the fifth working day after the date the order was originally made, and may be revoked during its term by another authorised justice or court. Provisions excluding the defendant from premises or from approaching the protected person cannot remain in force beyond 9.00 pm on the next working day after an order is made. A police officer who makes or is about to make an application for a telephone interim order may direct the defendant to remain at the scene

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[40] "Stopping Violent Men", *The Sydney Morning Herald*, 8 March 1995.

[41] For a detailed account of this legislation please refer to the Parliamentary Library's Bills Digest (No.1/1993), *Crimes (Registration of Interstate Restraint Orders) Amendment Bill*, by Tony Clark.

of the incident. If the defendant refuses to do so, the police officer may arrest and detain him/her until the order is made and served.

In addition, section 562BA was introduced under the *Crimes (Domestic Violence) Amendment Act 1993*, permitting a defendant to consent to an order being made without admitting to the alleged conduct. Leal and Robson note on the issue that practitioners must inform their clients that "consent orders are final irrespective of whether they are made with no admissions and accordingly expose the defendant to arrest and charge in the event of a breach".[42]

Further, the penalties under section 562I for a breach of an order were increased in 1993 from 20 penalty units ($2,000) and/or imprisonment for 6 months to 50 penalty units ($5,000) and/or imprisonment for 2 years.

6. STALKING AND INTIMIDATION[43]

The criminal offence of stalking or intimidation with intent to cause fear for personal safety was also created under the *Crimes (Domestic Violence) Amendment Act 1993*. Section 562AB was inserted into the *Crimes Act* for this purpose and the terms "stalking" and "intimidation" were defined under section 562A (1).[44] At that time the offence was restricted to "domestic relationships", a term which was itself defined under section 562A (3).[45]

Section 562AB (1) stated:

> A person who stalks or intimidates another person with whom he or she has a **domestic relationship** (emphasis added) with the intention of causing the other person to fear personal injury is liable, on conviction before a Magistrate, to imprisonment for 2 years, or to a fine of 50 penalty units, or

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[42] S Leal and S Robson, op cit, p 31.

[43] For a detailed discussion of the broader issues please see the Parliamentary Library's Bills Digest No 40/1994, *Crimes (Threats and Stalking) Amendment Bill 1994*, by Vicki Mullen.

[44] "Stalking" was defined to mean: "the following of a person about or the watching or frequenting of the vicinity of or an approach to a person's place of residence, business or work or any place that a person frequents for the purposes of any social or leisure activity".

[45] The definition is comparable to the definition of "domestic violence offence" under section 4 (1). Thus, section 562A (3) provides that for the purposes of Part 15A, a person has a domestic relationship with another person if the person: (a) is or has been the spouse or de facto partner of the other person; or (b) is living with or has lived ordinarily in the same household as the other person (otherwise than merely as a tenant or boarder); or (c) is or has been a relative (within the meaning of section 4 (6)) of the other person; or (d) has or has had an intimate relationship with the other person.

both.

Further to section 562B (2), a threat directed at a family member of the victim can constitute the offence of intimidation of that victim.

Under section 562A (2), "For the purpose of determining whether a person's conduct amounts to intimidation, a court may have regard to any pattern of violence (especially violence constituting a domestic violence offence) in the person's behaviour."

Under section 562BC, unless otherwise ordered, every AVO is taken to prohibit the defendant from stalking the protected person, or from intimidating that person or a person "with whom he or she has a domestic relationship".

That scheme commenced operation on 19 December 1993. It was amended by the *Crimes (Threats and Stalking) Amendment Act 1994* which extended the offence of stalking beyond situations involving domestic relationships. This was achieved by deleting the words "with whom he or she has a domestic relationship" from section 562AB. Also, the Act was intended to increase the maximum term of imprisonment that may be imposed for the offence of stalking from 2 to 5 years. However, section 562AB refers exclusively to "a conviction before a Magistrate", the effect of which is to limit the maximum penalty to 2 years imprisonment. It is that "loophole", restricting convictions for stalking offences to courts of summary jurisdiction, which the present Government has said it will correct.

The obvious point to make here is that legislation designed to deal specifically with an issue of domestic violence has been generalised to include all instances of stalking and intimidation.[46] There is a sense in which this can be viewed as an instance of the absorption of domestic violence into the general criminal law. What is interesting here is that the legislative changes which grew out of the call in the 1970s for the recognition of the violence committed in the family home against women, in particular, have themselves been developed to combat the now broader concerns regarding personal violence in very different contexts. That has a positive aspect in itself, suggesting as it does the scope of societal recognition of the problem of domestic violence and the preparedness to use mechanisms devised to counter it as a basis for tackling the wider intractable problems of violence and harassment. On the other hand, what needs to be kept in focus is that, as Sarah Todd explains, "the social issues involved in domestic violence are quite distinct from those involved in personal violence".[47] For example, women victims are, if anything, more likely to minimise rather than exaggerate the degree of violence involved when disclosing it to a third party. In that sense at least domestic violence is different and

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[46] For a more general account of the history of stalking legislation please refer to M Goode, "Stalking: Crime of the Nineties?" (February 1995) 19 *Criminal Law Journal* 21-31. Goode notes that stalking legislation originated in modern times in the United States, specifically in California in 1990 where the main concern was to prevent the stalking of celebrities.

[47] S Todd, op cit, p 38.

the question is to what extent that difference needs to be recognised under the law.

7. DOMESTIC VIOLENCE AND THE BAIL ACT 1978

The difference or distinctiveness of domestic violence, from a legal as well as social viewpoint, is certainly recognised under the *Bail Act*. Under section 9 of that Act, consistent with the presumption of innocence in relation to criminal offences, there is a presumption in favour of bail for most offences. That presumption was removed under the *Bail (Domestic Violence) Amendment Act 1993* in relation to either domestic violence offences or to a breach of an Apprehended Domestic Violence Order by an act of violence or by intimidation, where the accused has a history of violence against any person or has committed a previous act of violence against the specific person concerned.

Under this scheme the term "domestic violence offence" has the same meaning as it does in the *Crimes Act* and refers therefore to a personal offence committed against defined classes of persons. "History of violence" is defined to mean where the accused has been found guilty in the last 10 years of either a personal violence offence or of a breach of an AVO.

"Apprehended Domestic Violence Order" is defined to mean an AVO under part 15A of the *Crimes Act*, where the protected person:

(a) is or has been the spouse or de facto partner of the defendant; or

(b) is living with or has lived ordinarily in the same household as the defendant (otherwise than merely as a tenant or boarder); or

(c) is or has been a relative (within the meaning of section 4(6) of the Crimes Act 1900) of the defendant; or

(d) has or has had an intimate personal relationship with the defendant.

These reforms built on the changes which had been introduced in 1987 and 1988 which recognised that offences against persons other than the spouse may be occurring in a context of family violence. Three other sections of the *Bail Act* are also relevant to the issue of domestic violence. These are as follows:

- sub-section 32(1)(b1) broadens the criteria of matters to be considered in bail applications by looking towards the need for protection not only of the immediate victim but also his or her family;

- sub-section 37(5) recognises that restrictions relating to bail conditions, where bail is to be granted, needs to extend beyond the immediate victim;

- sub-section 48(1)(a)(iii) allows the complainant to seek a review of a bail decision when the offence is a domestic violence offence or in relation to a complaint for an AVO.

The comment has been made that "This legislative framework clearly requires police and the judiciary to heed the special dangers inherent in situations involving domestic violence. By requiring those making bail decisions to consider these contextual matters the real concerns and risks of releasing the defendant are more likely to be given due weight".[48]

That comment underlines the point made by Stubbs and Powell that "Bail is a particularly significant consideration in domestic violence matters, since it allows for the provision of victims with a measure of protection by way of bail conditions, pending the matter being determined in court".[49] They note further that a special domestic violence bail form has been introduced to guide police in reaching a bail determination.

8. DOMESTIC VIOLENCE AND THE FIREARMS ACT 1989

A similar recognition of the particular problems associated with domestic violence is to be found in the 1992 amendments to the *Firearms Act 1989*. In the Second Reading Speech for the Firearms Legislation (Amendment) Bill 1992 the Minister said:

> The legislation particularly reinforces the Government's absolute commitment to protect women and children who can be at risk from the misuse of firearms in situations of domestic violence. A mandatory obligation will be imposed on police to confiscate firearms from any residential premises where actual or threatened domestic violence has occurred or whose occupants have been involved in a domestic violence incident elsewhere and from persons against whom apprehended violence orders or interim apprehended violence orders have been issued. It will be mandatory for police to suspend the shooter licence or permit of any person who has committed or is alleged to have committed a domestic violence offence as defined in the Crimes Act.[50]

These reforms were based largely on the 1991 *Report of the Joint Select Committee Upon Gun Law Reform.*

Using the account presented in Leal and Robson as a guide, the main aspects of the current law on the subject of domestic violence under the *Firearms Act* can be stated thus:

- Under section 36(2) the making of a final AVO automatically revokes any licence or permit to possess a firearm, so the defendant loses all rights to possess a firearm;

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[48] Z Rathus, *Rougher Than Usual Handling*, 2nd ed, Women's Legal Service, Brisbane 1995, p 150. Rathus views these provisions as a model for the reform of the relevant aspects of Queensland's Criminal Code.

[49] J Stubbs and D Powell, op cit, p 8.

[50] NSWPD, 4 March 1992, p 358.

- Under section 25(1)(b1) the Commissioner of Police must refuse any application for a firearm licence or permit if the applicant has been subject to an AVO during the past 10 years, unless the AVO has been revoked;

- Under section 35A the making of an interim order suspends any licence or permit during its term of effect, so the defendant is not then able to retain possession of any firearms.

These provisions operate alongside certain sections of the *Crimes Act*. For example, section 562D(1)(c) of that Act provides that an AVO may "prohibit or restrict the possession of all or any specified firearms by the defendant".

9. CONCLUSION

As Stubbs and Powell said in 1989 the legislative policy designed to combat domestic violence in NSW represents a two-pronged approach, emphasising both the use of the criminal law to prosecute domestic violence offences and the use of the ADVO to provide protection to the complainant.[51] ADVOs have since then been replaced by AVOs, which suggests the scope and pace of the legislative changes which have occurred in this area. Some of the concerns regarding the operation of the new AVOs have been noted. What is clear is that great strides have been made in the legal and social recognition of the problem of domestic violence since the matter was placed on the political agenda in the 1970s. Doubtless, the problem itself remains, as does the continuing need to debate the adequacy and efficacy of the complex legislative schema which now exists in this field.

[51] J Stubbs and D Powell, op cit, p 9.

APPENDIX A

Attorney General's Department

Local Courts Administration

Apprehended Violence Statistics

1994

Prepared by Local Courts Statistics Unit

Comments

Every working day in NSW Local Courts around 180 people are interviewed in relation to apprehended violence, and following these interviews 130 applications for apprehended violence orders are issued each day. Magistrates, on average, hear at least one domestic violence matter every day they sit. A number of large city courts have at least one day set aside each week to hear apprehended violence matters, and on those days routinely list between 40-60 matters.

Personal Violence Matters

- The number of interviews and applications each month remained fairly steady over the period,
- 57% of the interviewees were female,
- 60% of interviews resulted in an application for a personal violence order,
- 12% of interviews resulted in the application being refused,
- 7% of interviews resulted in a referral to Community Justice Centre, and 17 courts generated 85% of referrals to Community Justice Centre

Domestic Violence Matters - Interviews and Applications

- In January 1994, the number of Domestic Violence interviews and applications issued was more than 50% above the monthly average for the rest of the year,
- For the period Feb-Dec 1994 the number of Domestic Violence interviews and applications issued remained relatively stable,
- 79% of the Domestic Violence interviewees were female,
- 78% of interviews resulted in an application for a domestic violence order,
- 5% of interviews resulted in an application being refused,
- the proportion of police initiated applications has remained steady since February 1994, between 48%-51%, compared to 40% in January 1994,
- in the top 25 list, Burwood Court recorded the highest percentage of police initiated applications 89%, and the Mt Druitt Chamber Magistrate service the lowest with 17%.

Domestic Violence Matters - Court Results

- In 18 courts complaints were withdrawn in more than 50% of domestic violence hearings, the largest courts where this occurred were Penrith and Blacktown in the city, Port Kembla and Coffs Harbour in the country.

- In the top 25 courts, Waverley recorded the lowest level of complaints withdrawn at 13%