Protecting the victims of domestic violence – the Domestic Protection Act 1982

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In 1982 the New Zealand Parliament passed legislation designed to provide appropriate legal intervention in the area of domestic violence. A growing awareness throughout the country and the world of the reality of such violence and of its moral unacceptability made it inevitable that pressures for legislative change would be acceded to in New Zealand. The result was the Domestic Protection Act 1982.[1] *In this article the authors discuss the evolution of the new law and the policy considerations underlying it, highlight the innovative aspects of the remedies available under the Act, and discuss the role of counselling in the area of domestic violence.*

I. LEGISLATIVE HISTORY

Under the now repealed Domestic Proceedings Act 1968, the principal relief for violence in the home was the non-molestation order, but that was limited in its operation to persons who were still married.[2] Some transitional measures had been included in the Family Proceedings Act 1980 which, along with other Acts in the "family law package", brought with it new rules relating to dissolution of marriage, maintenance and a new system of family courts.[3] These measures were of a very limited nature. They were designed essentially to provide power for the courts to grant occupation orders excluding a violent spouse from the

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1 This Act came into force on 1 March 1983.

2 Section 23.

3 See especially ss. 176-179, Family Proceedings Act 1980. Other parts of the "family law package" were the Family Courts Act 1980, the Guardianship Amendment Act 1980 and the Social Security Amendment Act (No. 2) 1980.

matrimonial home,[4] to lay the ground rules for granting ex parte orders, and to expand slightly the scope of non-molestation orders.[5] The Family Proceedings Act 1980 offered no radically new approaches to the problem of domestic violence, nor did it extend, despite submissions by interested parties to that effect, beyond married and divorced persons. At the time, further legislation was promised.[6]

Towards the end of the 1981 session of Parliament, the Minister of Justice, Honourable Mr J. McLay, introduced the Domestic Violence Bill,[7] indicating that it would go to the Statutes Revision Committee for study during the summer recess. The Bill was designed to offer remedies in addition to those already available under the Family Proceedings Act 1980. There were, however, several major differences between the 1980 legislation and the new proposal. The provisions in the new law were to be available not only to married persons but also to those in de facto relationships. Two new orders were to be obtainable: an accommodation order[8] (which in addition to giving the applicant possession of the family home would have outlawed certain kinds of molesting actions) and a non-violence order[9] (breach of which would have lead to arrest and detention for 24 hours in police custody).

The 1981 Bill was a positive attempt to tackle the domestic violence issue. Unfortunately, it was also a very confused attempt which would have complicated a delicate area of the law to the extent that it may have been quite counter-productive. The major points of criticism were that (1) it would have enshrined two separate but overlapping legal codes, the existing law in the Family Proceedings Act and the new legislation; (2) it would have required careful legal advice to determine which remedies were available and most advantageous in any given situation; (3) it failed to distinguish coherently the different needs of shelter on the one hand, and protection from violence and harassment on the other; (4) it introduced a controversial police power to hold abusers for 24 hours without trial; and finally (5) while recognising that de facto relationships could create needs of the same kind as married relationships, it fell short of treating such like situations in the same manner.

Following submissions by interested members of the public and deliberations on the Bill by the Statutes Revision Committee, the parliamentary process took a most unusual turn. The Committee reported back to the House and obtained permission to circulate a completely new Bill, the Domestic Protection Bill 1982.[10] This new Bill was not formally introduced into Parliament at the time, but

4 Until the Family Proceedings Act 1980 came into force, occupation orders were not available on the grounds of domestic violence but were merely part of the process for dividing matrimonial property between separating spouses. See the Matrimonial Property Act 1976, especially ss. 25, 27 and 28.

5 Non-molestation orders were made available to persons who were formerly married.

6 N.Z. Parliamentary debates Vol. 435, 1980: 5107 per Mr. McLay, M.P. (Minister of Justice).

7 A Bill by the same name had in fact been introduced by Mrs. Batchelor, M.P. (Opposition, Avon) in 1978, but that Bill did not go to a select committee and lapsed.

8 Clauses 4, 5, 6 and 7.

9 Clauses 8 and 9.

10 N.Z. Parliamentary debates Vol. 444, 1982: 1119.

went back to the select committee which again called for submissions. The new Bill represented a complete rewriting of the earlier Bill and was drafted to overcome most of the criticisms of the latter. Perhaps the most significant improvements were the treatment of all domestic situations in the same way and the combining in the one statute of almost all[11] the law relating to domestic violence, including the existing law in the Family Proceedings Act 1980. It was only at about this stage that two new lines of criticism of the legislation began to emerge, neither of which in the end prevailed. First, certain morally conservative voices in the community objected to the inclusion of de facto relationships in the Bill on the grounds that it undermined marriage and the family.[12] The other criticism was that, quite independently of any of the obligations of marriage, a person could be unfairly stripped of property rights.[13] More changes were made to the Bill after the further round of deliberations by the Statutes Revision Committee, but none of these changes fundamentally altered the basic principles of the proposal. The Bill was passed and the Act came into force on 1 March 1983.

II. THE PRINCIPLES AND POLICIES BEHIND THE LEGISLATION

A. Changing Values

A number of important ideas and policies lie at the heart of the Domestic Protection Act 1982. The first point to be mentioned is a rather fundamental one. A gradual change in values has taken place within the community over time. Without this, the passage of the present legislation would have been unlikely. Historically, the law has tended to take a non-interventionist stance towards domestic violence. Indeed domestic violence, except in its most extreme instances,[14] had not necessarily been regarded as wrong until quite recently and a change in community awareness of its undesirability has been the necessary premise before significant legal intervention could be justified. Three legal examples of "non-intervention" will suffice. First, husbands traditionally had the right to chastise their wives.[15] This right no longer exists. Secondly, they have been granted immunity from prosecution for raping their wives,[16] a rule which is currently under severe attack.[17] And thirdly, one spouse is not compellable, indeed

11 The ordinary criminal law was not incorporated into this statute nor was the quasi-criminal law found in the Summary Proceedings Act 1957. See footnote 28. Also not incorporated was the child abuse law found in the Children and Young Persons Act 1974.

12 See especially Society for Promotion of Community Standards *Submissions to Select Committee on the Domestic Protection Bill* (1982) and Equal Parental Rights Society *Submission to the Statute Revision Committee on the Domestic Protection Bill* (1982).

13 Cf. the comments of Mr. de Cleene, M.P. (Opposition, Palmerston North), *Evening Post,* Wellington, 7 Sept. 1982, p. 1, who described the Bill as "a case of women's rights gone mad".

14 E.g. Cruelty as a matrimonial cause, and the use of the ordinary criminal law.

15 Cf. Eekelaar and Katz *Family Violence: An International and Interdisciplinary Study* (Butterworths, Toronto, 1978) 79.

16 Section 128(3), Crimes Act 1961, as amended by the First Schedule of the Family Proceedings Act 1980.

17 Cf. Young *Rape Study: A Discussion of Law and Practice* (Department of Justice, Wellington, 1983) Volume 1, 118-123. Despite this criticism, cl. 4 of the Rape Law Reform Bill 1983 retains the husband immunity.

at one time not even competent, as a witness against the other spouse in domestic violence prosecutions.[18] Today, violence in the home is openly frowned upon and legislative solutions are actively sought.

At an even deeper level of community values, there has been a changing attitude to marriage itself. Historically, marriage has been thought of as indissoluble. The law was expected as a result to take a "hands-off policy" towards what went on within the marriage relationship. "For richer, for poorer, for better, for worse . . ." dominated as a philosophy — violence in the home was on the same level as sickness, one of the risks involved in getting married. Today marriage is no longer regarded as an indissoluble union. The current philosophy of marriage is much more hedonistic — if you cannot take the heat, you may, perhaps even should, get out of the proverbial kitchen. With this approach to marriage, the consequences of legal intervention in the face of domestic violence (even the likely consequence of the ending of the marriage) are much more acceptable to the community. What goes on within families and marriage is no longer a purely private affair but of concern to the whole community. If people are getting hurt, the law may properly intervene to provide special remedies.

B. Recognition of the Special Nature of Domestic Disputes

The Domestic Protection Act 1982 represents the culmination of a gradual process recognising the need to treat violence in the home in a different way from other acts of violence within the community. The law has long nodded partially in the direction of this principle by its use of the concept of cruelty as a matrimonial cause. And anti-molestation rules have existed in New Zealand law since the Destitute Persons Act 1910, though originally tied to the granting of separation orders.[19] Under the Domestic Proceedings Act 1968, non-molestation orders were obtainable on the granting of a separation order or at any time while a husband and wife were living apart.[20] The Family Proceedings Act 1980 reduced markedly the significance of separation orders but retained and expanded the rules for obtaining non-molestation orders and ex parte occupation orders. The Domestic Protection Act 1982 has now brought together the special rules relating to domestic violence and severed them from the law relating to matrimonial causes and dissolution of marriage. In doing this and in expanding the protection beyond marital relationships, the law is affirming both that the law of domestic violence needs to be easily recognisable from the rest of family law and that the ordinary criminal law is inadequate to deal with the situation.

C. Relationship with Family Law

It follows from the above point that some of the underlying principles of modern family law are inappropriate when dealing with domestic violence. Two such principles which have gained general acceptance in recent times are that the rights of parties on marriage breakdown should be determined irrespective

18 This is in fact the rule for all criminal proceedings: s. 5(3), Evidence Act 1908. Section 4, Evidence Act renders spouses competent and compellable witnesses for civil proceedings.

19 See s. 19, Destitute Persons Act 1910.

20 Section 23, Domestic Proceedings Act 1968.

of fault, and that non-adversary procedures should be used to help parties resolve their differences. Domestic violence might from one point of view be seen as a latter-day form of matrimonial (and "quasi-matrimonial") fault. While in most family law discussions it is now thought unsuitable to talk of the guilty and innocent parties, expressions such as "victim", "battered spouse", "batterer", and "abuser" are regarded as acceptable when discussing cases of domestic violence. More importantly however the presence of violence is said to justify extraordinary legal measures which supercede the normal rights of property ownership and possession, the usual incidents of social intercourse, and even the common right of personal liberty.

The family law package of legislation in 1980 ushered in a new system of family courts, with specialist judges and specialist back-up services. The emphasis in resolving disputes is not on adjudication but on self-resolution by the parties themselves, aided by counsellors and the mediation conference chaired by a Family Court Judge. In many cases, these processes are unsuitable for dealing with domestic violence, which may call for the quick settlement of the parties' rights and the procedural safeguards of the adversary system.[21]

D. Domestic, Not Just Marital, Relations are Protected

The law in general has started to take greater account of the existence of non-marital relationships but it cannot yet be said that there is a consistent trend towards treating such relationships on the same basis as marriages.[22] Nevertheless, one of the principal changes wrought by the 1982 Act is to treat domestic relationships on the same basis, irrespective of whether the parties are married to each other or not. The provisions in the Act are in general made available to all those who are "living together in the same household" as well as those who are married.[23] The new rules also apply to all those who have been married but whose marriage has been dissolved and to those who have ceased living together in the same household.[24]

Several points are worthy of comment about this change. First, while in one sense there is an implied recognition of de facto relationships and an equation of them with marriages, this is only for a very limited purpose. The object of the law is to deal with acute need and to treat the same symptoms with the same remedies. It does not follow that the institution of marriage will in any way be undermined or that formal encouragement is being given to non-marital living arrangements. People are hardly likely to determine whether or not to marry on the basis of what kind of legal provision is made in the event of violence.

Secondly, the law only applies to persons of the opposite sex. The Act expressly refers to "a man and a woman . . . living together in the same household" and

21 These points are examined in greater detail in Part IV of this article.

22 For instance, Parliament dropped a proposal that the Matrimonial Property Act 1976 apply to de facto unions (cl. 49, Matrimonial Property Bill 1975) and dropped from the Human Rights Commission Bill 1976 a definition of "marital status" that included de facto relationships (cl. 2).

23 Sections 4, 13, 19 and 24.

24 Idem.

it follows that the parties to a homosexual relationship (whether male or female) cannot take advantage of the Act.

Thirdly, while the Act is clearly designed to extend to those living in de facto relationships, the terms of the Act do not limit its application in this way. Arguably many relationships between adults with no sexual overtones may amount to a man and a woman living together in the same household.[25] An adult child and a parent residing together may be included or an adult brother and sister. Even two unrelated adults of the opposite sex with no sexual relationship may be included.

Fourthly, the Act is irrelevant to unmarried couples where there is no element of cohabitation. This includes the non-cohabiting engaged couple, the boyfriend/girlfriend relationship (so long as they are not living together) and the situation, as in *Horrocks* v *Forray*,[26] where a happily married man has set up his mistress in a home which he visits but never lives in.

Finally, a minor has no means of applying for an order under the 1982 Act. This is so even if such a child is affected by violence occurring between its parents.[27]

E. Relationship with Criminal Law

The new Act in no way restricts the scope of the ordinary criminal law. In appropriate cases, a violent partner may be charged with a criminal offence.[28] The new Act operates however on the assumption that there are many other cases where the criminal law fails to provide adequate solutions to the problem. This follows in part from police uncertainty whether or not to arrest and complainants' reluctance to see a prosecution through. There are other difficulties, such as the likelihood of defendants being released on bail and given a non-custodial sentence, and the fact that the criminal law has little to say about molesting behaviour. Criminal cases are also handled in isolation from the other needs of the situation. Thus, alternative measures are required to provide the victim with accommodation and financial security.

25 Indeed, in a pamphlet recently released to the public, the Justice Department puts forward this wide interpretation of the Act as the correct one: *Keep Safe* April 1983, p. 2.

26 [1976] 1 W.L.R. 230, [1976] 1 All E.R. 737.

27 It may be noted that the Act gives some protection to a "child of the family" upon application by an adult (cf. ss. 5(1)(a), 7, 20(1), 21(2)(b), 25(1), 26(2)(b) and 30(2)), a phrase which extends to a child fostered by both parties, while the protection of a non-molestation order extends to a "child of the applicant's family", a phrase which includes a child who is currently in the care of the applicant but has not necessarily ever been cared for by the other party (ss. 14(1)(a), 15 and 16). The more important laws for the protection of children as such are found in the Children and Young Persons Act 1974, especially ss. 7, 8, 9, 27, 28 and 31.

28 E.g. the Crimes Act 1961, ss. 188, 189, 190, 193, 194, 196, Summary Offences Act 1981, ss. 9, 21, or the Trespass Act 1980, ss. 3, 4. Cf. the quasi-criminal procedure of binding over to keep the peace in ss. 186-191 of the Summary Proceedings Act 1957 and its successful use in *Khan* v *Brown* (1982) 1 N.Z.F.L.R. 369.

F. The Police Role

One of the criticisms frequently made of the community's response to domestic violence is the unwillingness of the police to pursue cases. Police reluctance is not surprising. Few areas of their work can call for such fine judgment as that involving disputes between persons living in the same home. When does a commonly occurring kind of argument become one that calls for the intervention of the law? How can the police prosecute a matter when a leading participant, the victim, is often likely to be swayed by emotional commitments or fear of the other person and to refuse to co-operate with any further legal action?[29] On the other hand, police inaction may leave a victim in a dangerous situation. Relations between the parties may have deteriorated to such an extent that the only course of action is to separate the parties and provide some protection for the victim by using the law against the perpetrator of the violence. If a court order is already in existence when the police are called in to deal with a problem, they should have less hesitation in intervening.

The Domestic Protection Act maintains a significant role for the police. If anything the role of the police is extended because of the increased scope of orders which may be made under the Act and the novel powers given to the police under the new non-violence orders. Because no prosecution need follow, the police may be more willing to take positive action following breach of a non-violence order, but whether this is so will be examined later.[30]

III. THE ORDERS AVAILABLE UNDER THE ACT

The new orders available under the Act are the non-violence order and the furniture order (which is only available ancillary to occupation or tenancy orders). The other orders available — the non-molestation order, the occupation order and the tenancy order — are not new concepts but their availability has been extended.

All the orders may be made on an ex parte application but any such order will be interim and a date assigned to give the respondent the opportunity to be heard.[31] The ex parte procedure is especially important in domestic violence situations. It not only gives emergency relief but enables the victim of violence to obtain the protection of a court order without the requirement of prior notice to the violent partner. This recognises the danger that notice of intended proceedings may well provoke a further violent outburst from the respondent.

There are specific provisions in respect of each order for an application to the court to have the order discharged[32] and in the case of an occupation order to have the terms or the period varied. Only the non-molestation order is automatically discharged if the parties, with the free consent of each, resume cohabitation.

29 Because of the rule of evidence about compellability, the police cannot force a spouse to give evidence: supra n. 10. This point does not apply to unmarried cohabitants.
30 See Section D. of Part III of this article.
31 Section 31.
32 Sections 8, 17, 23 and 28.

A. Occupation Orders and Tenancy Orders

The innovative aspect of occupation and tenancy orders under the Domestic Protection Act is that the availability of each order is extended to men and women in de facto relationships. The effect of such an order is to exclude the violent partner from the family home. Both orders are available ex parte only in situations where violence has occurred and where delay caused by proceeding on notice would be dangerous.[33] The court has power to make a final order if satisfied that such an order is necessary for the protection of the applicant or in the best interests of a child of the family.

It is these orders which gave rise to the objection that a person could be "unfairly stripped of property rights". These objections used emotive language but an important point needs nevertheless to be considered. When a married or formerly married person applies for one of these orders the ultimate resolution of the allocation of the property rights between the parties lies under the Matrimonial Property Act 1976. In the case of de facto couples there is no such ultimate resort and the court's ruling on the nature and duration of the occupation order will stand until the period expires or either party makes further application to the court.[34] In the case of a tenancy order the decision of the court has the effect of transferring the tenancy to the applicant until the tenancy itself expires or the court orders the tenancy revested in the respondent on the application of the respondent.[35]

There is no difficulty in situations where the violent partner has no legal or equitable interest in the property. The problem arises where the violent partner is the property owner or tenant. How long should a court exclude house-owners from their property? If the period is a long one then the "punishment" to the violent partner is likely to be far more serious than the consequences of a criminal prosecution. If the period is short, it will be of little help to the victim. Clearer legislative guidance on the maximum period for an order would have been helpful.

B. Furniture Orders

The furniture order is a new provision under section 30 of the Act. The court may make an order granting to the applicant the use, for such period and on such terms and subject to such conditions as the court thinks fit, of all or any of the furniture, household appliances and household effects in the premises to which the occupation or tenancy order relates. The order is only available ancillary to the grant of an occupation order or a tenancy order and will only be made where there is a child of the family living at the premises. It expires after three months or when the main order lapses, whichever is the sooner. These provisions are thus very restricted.

C. Non-Molestation Order

Besides making non-molestation orders available to persons presently or formerly

33 Sections 20 and 25.
34 Section 23.
35 Section 28.

in de facto relationships,[36] the non-molestation provisions in the Domestic Protection Act 1982 differ little from those in the Family Proceedings Act 1980. They are still concerned with such actions of harrassment as entering or remaining on land or in buildings occupied or used by persons in whose favour certain orders (such as occupation orders) are in force, waylaying persons in public places, and persistently phoning persons.[37] They are still available only to persons who are already living apart or for whom living apart is on the cards by virtue of some other proceedings (such as separation proceedings).[38] They still cease to have effect if the persons concerned resume living together.[39] And their breach is still an offence punishable by imprisonment.[40]

Interestingly, despite the similarity between the old and the new non-molestation provisions, there is some prospect of the 1982 Act effecting a gradual change in the practice of the courts such that non-molestation orders may become more readily obtainable. It has in the past been the general practice of the courts to grant non-molestation orders only on evidence of the likelihood of future violence, and often only on such evidence combined with evidence of actual violence. This has been despite the grounds for non-molestation orders being phrased in terms of need for protection in general,[41] not in terms of violence or even the threat of violence, and despite such orders prohibiting actions which, at most, are in the nature of preliminaries to violence rather than violence itself. The availability under the new Act of non-violence orders, which are concerned with violence as such, might lead courts increasingly to issue non-molestation orders in situations of harm falling short of physical violence, such as those characterised by emotional or psychological "violence".

D. Non-Violence Orders

The new non-violence provisions to be found in the Domestic Protection Act 1982 are arguably both the most useful and the most troubling of the Act's provisions. They provide for the first time a special order aimed directly at protecting persons from domestic violence. At the same time, they provide for a police power of enforcement of that order virtually unprecedented in its potential for the deprivation of personal liberties.[42] The Act provides that the courts may issue non-violence orders against persons who have already engaged in physically violent actions and who are likely to do so again.[43] Such orders prohibit the use of violence and threats of violence.[44] They are available to persons who continue to live together as well as to those who opt for living apart.[45] Their breach is not an offence but it is sanctionable by detention.[46]

36 Section 13.
37 Section 16.
38 Section 13.
39 Section 17.
40 Section 18.
41 Section 15.
42 But see the Crimes Act 1961, s. 315(2) (power to arrest for a breach of the peace) and the Alcoholism and Drug Addiction Act 1966, s. 37A as added by the Summary Offences Act 1981, s. 49 (power to detain for public intoxication).
43 Section 6.
44 Section 7.
45 Section 4. Because they are available to persons still living together, non-violence orders can offer protection in situations where non-molestation orders cannot.
46 Section 9 and 12.

It is this last feature that mainly gives rise to both the useful and the troubling aspects of the Act's non-violence order provisions. Under them, the police may arrest without warrant any person whom they have good cause to suspect of having committed a breach of a non-violence order if they believe the arrest is reasonably necessary for the protection of the person in whose favour the order is made.[47] Once arrested, the person must be detained in police custody for a mandatory period of 24 hours unless either that person or the police decide to initiate an appearance before a judge or a justice, who may then direct an earlier release from custody.[48] In any case, no detention is allowed beyond the 24-hour period.[49] Also, no charge may be laid for the breach of the order as such (though a charge of assault may be laid as a separate matter) as that breach is not an offence per se. Contrast this with the case of a person arrested on good cause to suspect of having committed an offence of assault. Such a person must be brought before a court as soon as possible,[50] so that a decision as to the length of that person's detention in custody can be individually determined by a court weighing the victim's need for protection against the presumption of innocence and the accused's concomitant right to be free pending a hearing on the charge.[51]

On the one hand, the Act's non-violence order provisions might prove peculiarly useful to victims of domestic violence as they might alleviate the problem of police unwillingness to pursue cases of domestic violence. Where there is a non-violence order in force, no longer do the police have to face the dilemma of choosing between arresting for an offence and merely trying to calm the situation down. Instead, the 1982 Act gives them the additional choice of detaining the perpetrator of the violence for 24 hours without charge, thus giving the victim a chance to think the situation through in an atmosphere free of immediate fear and to seek out a means of more permanent protection. It also arguably gives the perpetrator a chance to "cool off" in circumstances which reflect society's condemnation of domestic violence.

Moreover, there is some protection against the abuse of this power to detain without charge in that it cannot arise unless there has been a non-violence order issued first by a court. Such an order can only be granted if actual violence and the likelihood of further violence are both proved. Also the police are not able to arrest for breach of an order just on good cause to suspect a breach (good cause to suspect being the sole requirement for nearly all other arrests). They must in addition believe the arrest is reasonably necessary for the victim's protection. Finally, the person arrested has the right to ask to be brought before a judge for an individual determination as soon as practicable of the need for continued custody. In any event, it has been argued,[52] any abuse of this power results in only a minor deprivation of personal liberties in that detention cannot extend beyond 24 hours.

47 Sections 9 and 10. 48 Section 12.
49 Idem.
50 Crimes Act 1961, s. 316(5).
51 See, in general, Criminal Law Reform Committee *Report on Bail* (Justice Department, Wellington, 1982) 3-20.
52 See Battered Women's Support Group *Submission to the Statutes Revision Committee on the Domestic Violence Bill* (1982) 4.

On the other hand, the Act's non-violence order provisions are particularly troubling, for the mere existence of a power to detain without charge is held by many to be an abuse of natural justice.[53] It has been argued that a period of detention, no matter how short and no matter for what purpose, is a significant deprivation of personal liberties. As such, it must not be imposed without due process of law. Due process requires that personal liberties not be restricted without sufficient safeguards to ensure that there is made as soon as possible an objective, informed, and principled determination of the necessity for such restriction. It is to abide by this principle that there is a legal requirement that persons arrested for an offence be brought before a court as soon as possible and that it is left to the court to apply general principles of law to the individual circumstances of each case. The safeguards against unnecessary detention should be no fewer because the detention follows from the suspected breach of an order instead of the suspected commission of an offence. So the right to a hearing before a judge should not be dependent on the goodwill of the police or the initiative of the person arrested; it should be automatic. It must be recognised that arrested persons are unlikely to know their right to a hearing (there is no duty on the police to make such a right known), and even if they do know of it, they are likely to be deterred from exercising it by the very nature of police custody itself. It is anomalous to provide suspected perpetrators of domestic violence with an absolute right to a hearing on the need for continued detention if they are arrested for an offence of assault but with a merely conditional right if they are arrested for a breach of a non-violence order. It does not matter that in the latter case there has already been a hearing on the need for the order, which must be founded on a showing of previous violence. It would be a denial of due process to use a previous conviction as an excuse to deny persons detained for an offence of assault (or for any other offence) their absolute right to a hearing on the need for continued detention. The same is true of using a non-violence order as an excuse in the case of persons detained for a breach of that order. This is all the more so when it is considered that a conviction requires proof beyond reasonable doubt but an order only proof on a balance of probabilities.[54] The requirement of a non-violence order before a person can be subject to detention without charge serves only to reduce the number of persons whose personal liberties are liable to violation; it does not reduce the violation itself.

The Act's power to detain without charge is objectionable not only for the lack of an absolute right to a hearing on the need for continued detention but also for the lack of a charge for a breach per se. Persons arrested for an offence are not saddled with the stigma of guilt of that offence without a hearing on the charge. Arrest for them triggers a process that ends either with a pronouncement of guilt after a hearing or with a pronouncement of innocence after a hearing (or at least with its equivalent, the dropping of the charge). Persons arrested for a breach of a non-violence order, on the other hand, are liable to be branded with guilt without any hearing, for there is no charge to follow from a breach

53 See Auckland District Law Society Public Issues Committee *Peaceful Protest and Arrest for Breach of the Peace* (1983).

54 Section 34.

per se. Arrest for them gives no opportunity for acquittal or even for dropping of a charge.[55]

Ironically, the new power which carries with it this violation of rights has every chance of proving far less useful to victims of domestic violence than hoped. The main purpose behind the Act's power of detention without charge is to provide a remedy to those victims of domestic violence who are not willing, whether out of fear of retaliation or out of emotional attachment, to see legal proceedings of assault through to the end. There are, however, likely to be few victims of domestic violence who can find the courage to seek and use a non-violence order but who cannot also bring themselves to pursue criminal proceedings.[56] Moreover, a 24-hour period of detention is not likely to be long enough for such victims to come to terms with their situation and to seek out a means of more permanent protection. It is, however, likely to be just long enough for the perpetrators of violence to become even more hostile towards their victims and to work out a means of retaliation.[57] If this is so, there is every chance the police will be no more willing to enforce the non-violence orders of such victims than they are to pursue other cases of domestic violence. As regards those victims who are willing to follow through criminal proceedings, the non-violence order provisions are a double-edged sword. Having a protective order is ordinarily the best way for domestic violence victims to convince the police that they are the sort of persons with the courage to pursue criminal proceedings, but the idea that a non-violence order is mainly for persons who do not have such courage defeats that. Thus, victims who are willing to see through legal proceedings for assault are not likely to experience any increased willingness by the police to pursue their cases by virtue of their having a non-violence order.

A better way to protect domestic violence victims and at the same time to avoid violating the rights of suspected perpetrators would be to make a breach of a non-violence order an offence and enact a special provision forbidding the granting of police bail to persons arrested for a breach and directing that court bail not be granted unless it is shown that further violence is not likely.[58] This means that all persons arrested for breach of a non-violence order would have to be brought before a court as soon as possible to decide the need for continued detention. That decision would be based on the application of general principle to individual circumstances, including especially the principle of protection for victims of violence. So if no continued detention were needed, the arrested person

55 There is the possibility of being brought before a judge and released. But this does not have the same effect as acquittal or dropping of a charge because it may simply mean, for instance, that the person has "cooled down" enough to be released.

56 This is not to deny, however, that there are some persons who are willing to use the non-violence order provisions but not the ordinary criminal law. The question is whether protecting these few is worth the concomitant violation of rights perpetrated by this legislation.

57 Perhaps mandatory counselling for those detained *while* they are detained could alleviate this problem to some extent.

58 See Atkin, Sleek and Ullrich *Submissions to the Statutes Revision Committee on the Domestic Violence Bill 1981* (1982) 12-19 and Atkin, Sleek and Ullrich *Submissions to the Statutes Revision Committee on the Domestic Protection Bill 1982* (1982) 2-3.

would be released but if detention for a long period of time were needed (e.g. until the hearing on the charge), the person would be so detained. This means that victims still in danger would have time to find a means of more permanent protection. It also means that the other difficulties of the present law, imposition of detention without due process, imposition of the stigma of guilt without a hearing, and likely continuation of police unwillingness to pursue cases of domestic violence, would be removed.

IV. COUNSELLING AND THE FAMILY COURT

Section 37 allows the court to recommend either party or both of them to participate in counselling of a nature specified by the court.[59] All the orders available under the Act can be made either by the Family Court or the District Court. Where there is a Family Court, it should be used in preference to the ordinary District Court. Obviously in those centres where the Family Court sits only occasionally, outbreaks of violence cannot be deferred until the Family Court judge happens to be in town. This counselling section and the joint jurisdiction of the District and Family Courts raise important questions about the way in which violent relationships are dealt with, once an application to a court has been made. Under the Family Proceedings Act 1980 the provisions dealing with violence between married and formerly married people were clearly part of the "family law package". The philosophy behind this package might be very briefly summarised by saying (a) that marriage breakdown is a family affair involving both partners and their children, (b) that the children's interests must be recognised, and (c) that conflict between the parties is best resolved through resort to counselling, negotiation and mediation rather than court fiat.

With the advent of the Domestic Protection Act, applications concerned directly with violence are dealt with in a completely separate statute. It is true that there are some situations, for example a de facto relationship with no children, where the only resort to the court will be under the Domestic Protection Act. In many other situations however, once an order is sought under the Domestic Protection Act 1982, applications for orders under the Family Proceedings Act 1980, the Guardianship Act 1968, and (for married persons) the Matrimonial Property Act 1976 are likely to follow. It would be inappropriate therefore to discuss the court's approach to violent relationships only in the context of the Domestic Protection Act.

59 Section 37 has an interesting legislative history. In the original Domestic Violence Bill 1981 the present section 37 appeared as cl. 11(1). It was however followed by two further sub-clauses which provided as follows:

(2) In any subsequent proceedings under this Act involving a party who has been recommended to undergo counselling, evidence may be given of the omission of that party to undergo counselling of the kind specified.

(3) Subject to the right of the party who has omitted to undergo counselling as recommended by the Court to explain the reasons for that party's omission and to call evidence, the Court may draw such inferences (if any) from the fact of the omission as appear to it to be proper in the circumstances.

See also Atkin, Sleek and Ullrich *Submissions to the Statutes Revision Committee on the Domestic Violence Bill 1981* (1982) 19-20.

It is doubtful that section 37 will be utilised very frequently. It is more likely that counselling and referral questions will arise under Part II of the Family Proceedings Act. The procedures set up by that legislation with the emphasis on bringing parties face to face to work out their differences are not necessarily appropriate for families in which violence has featured.

There is a wealth of information available on violence in family relationships.[60] Those working in the area need to be familiar with it so that they can recognise the difficulties which victims of violence experience in breaking away from such a relationship and be ready to provide the types of intervention which are most likely to be helpful at each stage in the process. In all relationships involving violence, the victim's fear must be respected and acknowledged. Counselling must be offered on an individual basis in the first instance rather than on a joint basis which is preferred by marriage guidance counsellors for normal married relationships. Mediation conferences should not be set up in circumstances where a victim would be facing the perpetrator of violence for the first time since legal proceedings have been initiated.

In some violent situations any prospect of counselling both parties together or seeing them in a mediation conference will be useless and even positively harmful. Individual counselling may be useful to explore feelings and form plans of action. Negotiation over property and custody issues may be best handled through lawyers. But this may not be the case in all relationships where there has been violence. Sometimes, in relationships where the violence has flared in connection with the breakdown, joint counselling may be possible especially after a cooling off period and perhaps some individual counselling. After such a process a mediation conference may also be feasible.

There are techniques for dealing with persons involved in violent relationships but there has been little recognition of the different skills needed by the professionals involved with the Family Court. The area is not dealt with at all in the National Training Programme for marriage guidance counsellors, although local Councils are beginning to make moves in this direction partly prompted by women's refuges. Lawyers and judges tend to lack the special skills needed and this can be compounded by their ignorance of the dynamics of violent relationships.

The new legislation will fall short of its expectations if these issues around counselling and professional skills training are not resolved. New strategies are needed in procedures under Part II of the Family Proceedings Act which recognise the special needs of violent families. District Court Judges who may be adjudicating under the Domestic Protection Act and counsellors taking referrals under section 37 also need to be included in any training programme.

60 E.g. Church *Domestic Violence: The Family Court Response* (obtainable from Church, Education Department, University of Canterbury) and J. M. Eekelaar and S. N. Katz *Family Violence: An International and Interdisciplinary Study* (Butterworths, Toronto, 1978).

V. CONCLUSION

It is arguable that the new law goes as far as is possible in providing legal remedies for adult victims of domestic violence. There is a need for more specialised training for judges, lawyers and counsellors involved in obtaining and enforcing these legal remedies and in dealing with ancillary legal matters so that they are able to ensure their most effective use. The other areas in which government could be active in alleviating the problems arising from domestic violence but which are not covered under this Act would be in providing funds for women's refuges[61] and for counselling and educational organisations. Such funding could be directed not only towards picking up the pieces of violent relationships but in researching and preventing the causes of such violence.

61 See especially, Synergy Applied Research Limited *A Socio-Economic Assessment of New Zealand Women's Refuges* (The National Collective of Independent Women's Refuges Inc., P.O. Box 607, Blenheim, March 1983).