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REPRESENTATIONS
FROM THE
UNIVERSITY OF CAPE TOWN
CAUCUS ON LAW AND GENDER
(Ccor.acg)

ON THE

VIOLENCE DRAFT BILL.

SUMMARY OF THE SUBMISSIONS
CONTAINED IN THIS DOCUMENT#*

SECTION ONE: GENERAL PROBLEMS UNDERLYING

THE APPROACH TO DOMESTIC
VIOLENCE

A number of issues underlying the general approach to domestic violence adopted in the Bill are discussed. One of these issues is the lack of consultation prior to the drafting of the Bill. Another is the inevitable conflict between the protection of womenâ\200\231s rights and interests and the preservation of the family unity. In this regard it
is submitted that to ensure the protection of women (and, where relevant, children) from domestic violence, legislation should focus on the need to secure the health, safe ty
and well-being of the victims of domestic violence rather than focusing on the technicalities of the respondentâ\200\231s behaviour. We also express our concern at th e
impression created by the Bill that domestic violence has been removed from the criminal arena. In addition. we submit that domestic violence protection orders should only constitute one aspect of a coherent and multi-pronged, multi-departmental strategy to combat domestic violence. Finally, we discuss the need to reduce the dependency on professional legal intervention in domestic violence procedures, to train magistrates, prosecutors and police and to educate the public about domestic violence.

SECTION TWO: CLAUSE-BY-CLAUSE
ANALYSIS

1. Clause 1
1.1 The definition of â\200\230matrimonial homeâ\200\231:
(a) The problem of â\200\230stalkingâ\200\231 is not covered.

(b) The definition does not deal with the situation where the parties are not living or have not lived together.

1.2 â\200\230Parties to a marriageâ\200\231

The provisions of the Bill should be extended to cover domestic violence between people who are in relationships other than one of â\200\230marriageâ\200\231 as defined
in the Bill, eg extended family situations and homosexual relationships.

2. Clause 2

% Background research for these submissions was assisted by funding from Lawyers for Human Rights. The opinions expressed in this document, however, do not necessarily reflect the views of Lawyers for Human Rights.

â\200\230On lication

Clarity is required as to the nature of the application envisaged in the Bill. In particular, specific provision must be made for urgent and ex parte applications.

â\200\230By a party to a marriageâ\200\231
â\200\230In appropriate circumstances... grant an interdictâ\200\231
Reference to â\200\230interdictâ\200\231 should be scrapped in order to avoid the inter pretation

of â\200\230in appropriate circumstancesâ\200\231 to mean that an applicant must prove the
requirements of ordinary interdictory relief.

The phrase â\200\230in appropriate circumstancesâ\200\231 should be replaced by the phr ase:

â\200\230whenever there is a need to secure the health, safety and well-being of the applicantâ\200\231.

: i iolen f physi iolenceâ\200\231

The word â\200\230physicalâ\200\231 preceding â\200\230violenceâ\200\231 is too restric tive and should be
deleted.

Clause 3
: Ti f law h interdictâ\200\231

Provision should be made for the automatic issue of a conditional warrant of arrest whenever an order in terms of clause 2 is made.

Â¢ i is lai fi 2

Clarity is required as to the nature of the â\200\230evidenceâ\200\231 envisaged. It mi ght be
necessary to waive some of the rules of evidence in order to secure the protection of the applicant.

"A real danger that such a party will probably disregard the interdictâ\200\231
The problem with this clause is that it will reinforce the attitude that a conditional warrant of arrest will only be issued in extraordinary cases.

The wording should be amended to read:

â\200\234...that there is a possibility that the respondent may disregard the order...â\200\231

Clause 3.2: â\200\230Commits an actâ\200\231

We suggest the adoption of broader terminology:

*...if the said party does anythingâ\200\231.

3.5

4.1
4.2

4.3

4.4

5.2

â\200\230Which reasonably justifies an inferenceâ\200\231

"In view of the historical reluctance by police to exercise their powers in

domestic violence matters, there is a danger in giving police the discretion to determine whether an inference of breach of an order is justified. This will

Seriously undermine the effectiveness of the mechanism of conditional warrants of arrest.

Clause 4

We submit that while the extension of jurisdiction to the magistratesâ\200\231 courts m
ay
make the procedures more accessible to victims of domestic violence, certain Cautionary comments must be taken into account:

â\200\230Interdictâ\200\231 to be replaced by â\200\230domestic violence protection ord
erâ\200\231.

Specific provision must be made for relief to be sought on an urgent and ex parte basis.

Every effort should be made to lay down procedures that make it realistically

possible for an applicant to successfully bring an application without reliance on a lawyer.

Alternate models of recourse should be introduced such as extending police powers in domestic violence matters.

Clauses 5 and 6

Th ion of 1 convicted of raping his
wife

We are utterly opposed to the preservation of this rule. Real advances against the practice of domestic violence can only be made if one of the most serious forms of such violence, viz the rape by a husband of his wife, is dealt with by the full force of the law.

The retention of the rule providing that a man cannot be convicted of raping his wife is in direct conflict with the provisions of the Equal Opportunities Draft Bill which prohibits discrimination on the basis of marital status.

The following provision criminalising marital rape should be included: â\200\230The fact that a man and a woman are married to each other does not preclude the man from being held criminally liable for the rape of his wifeâ\200\231.

Clause 7

Duty on police to charge respondent for disregarding an order made under

Clause 2

In order to ensure the effective enforcement of orders granted under the Bill, the police should be place under a duty to charge any respondent who disregards such an order.

6.2

The need to adopt an innovative approach to the question of the
. punishment of the respondent wh ho disregards an order.

Traditional approaches to the question of the punishment of the respondent who disregards an order made by the court will not be appropriate and/or effective.

Consultation with organisations such as NICRO and FAMSA should be undertaken in relation to the work they are doing with compulsory offender programmes.

Periodic imprisonment with compulsory counselling and related activities should be adopted as the preferred form of punishment.

SUBMISSIONS IN FULL

INTRODUCTION

We have divided Our comments on the Prevention of Domestic Violence Draft Bill into two main sections. The first contains commentary on certain fundamental issues

Jngeniving the draft Bill. The second section comprises a clause-by-clause analysis of e Bill.

We wish to stress at the outset that although we have engaged in the task of commenting and making suggestions on the Bill we feel very strongly that the Departmentâ\200\231s chosen method of eliciting public comment on its proposals is seri ously
defective. The problem of domestic violence is far too complex an issue to be properly dealt with by way of written representations only. In our view, there is a crucial need for discussion between the Department and a variety of groups in order to properly understand the problems associated with domestic violence and thus to arrive at a workable strategy to combat it. In this regard, we would be willing to engage with the

Department in an appropriate forum to illuminate and expand on our submissions and analysis of the Draft Bill.

SECTION ONE: GENERAL PROBLEMS UNDERLYING
THE APPROACH TO DOMESTIC
VIOLENCE

1. nsultation:

The lack of adequate consultation around this draft bill not only has political ramifications, but it also undermines the efficacy of the undertaking. We will confine ourselves to this latter aspect. During some informal networking around the draft bills it became clear that not even the Department of Justice personnel (Senior state prosecutors) were given the opportunity to discuss the practical implications and difficulties of the present draft, despite the fact that they are in a far better posit ion to
comment on the draft bill than officials of the Attorney Generalâ\200\231s Office who a re
confined to Supreme Court work. In addition, there is a wealth of expertise in organisations such as NICRO, FAMSA, RAPE CRISIS, POWA and other service and counselling organisations which is potentially invaluable to the task of developing workable strategies to protect women from domestic violence. Furthermore, there are many skilled and experienced women lawyers all over the country who have been

practising in this area or who have been researching these issues for some time. While some of these women will have contributed to the various written comments on the Bill, such input is inadequate. Clearly the Department should undertake to consult with all such groups before drafting the final version of the Bill.

2 The fi f ill shoul n n the health, safety

Much of the legislation in different jurisdictions concerning domestic violence has focused on the behaviour of the respondent. This has resulted in the legal protection available to victims of domestic violence being dependent on the fulfilment of highly technical requirements relating to the respondentâ\200\231s behaviour. If the victim is unable to show that the respondentâ\200\231s behaviour fits any of these requirements, the law wi ll not assist her. In a recent report of the Law Commission in England (Domestic Violence

behaviour of the respondent. (see: Edwards and Halpern: â\200\230The Pro Protectionâ\200\231 New Law Journal, June 5 1992, 798).

It is submitted that any legislation concerning domestic violence in South Africa shoul d adopt a similar shift in focus. The Bill as it stands clearly reflects the traditional approach. (See, for example, our comments on Clause 3 of the Bill below.) This places an unacceptably heavy evidential burden on the victim to show that the technical requirements for legal protection have been met. In addition, the meaning of these requirements is not clear and this causes complications by creating uncertainty in the law. We submit that the process of protecting victims of domestic violence will be made more simple, clear and effective if legislative acknowledgement is given to the need to protect the health, safety and well-being of the victims.

recognised that if a serious attempt is to be

3. P n

While the Domestic Violence Protection Order (DVPO - note that this term is used in preference to the term â\200\230interdictâ\200\231 for reasons discussed in our comment on Clauses 2 and 4 below) has been effectively used in certain jurisdictions to help address the critical phenomenon of violence in the home, we feel that in order to address the problem in all its complexity it is crucial to develop a coheren Iti-pron multi- n , only one aspect of which would be the DVPO. (See in this regard our comments on Clause 4, below.) Other considerations include, inter alia, developing a separate offence or a new category of aggravated assault, looking more extensively at mandatory arrest laws, addressing the real and underlying problems regarding complainantsâ\200\231 reluctance to give evidence and the contempt provisions which impact on them, looking into the prosecutorial discretion in domestic violence cases, and analysing the socio-economic considerations which prevent women from leaving abusive relationships or environments. We believe that in offering women a DVPO in this draft bill the impetus to deal with the problem in its complexity will disappear unless the department expressly and publicly commits itself to such a program.

4. De-criminalising the issue:

Although we support the notion that all arms of the law must be used to address the problem and that the criminal justice system is fraught with problems regarding domestic violence cases, we are concerned about the impression the bill creates of removing the problem in its entirety from the criminal arena. This entrenches the ambivalence about whether battering is a crime in the mind of the batterer and the community, it provides further excuses for the police not to treat the offence of battering with the seriousness it deserves in terms of responding to calls and investigation of dockets, and it places the responsibility of protection from this crim e on the shoulders of the victim of the crime, rather than on the state. In our view it i s crucial to develop the perception among the police and the community that domestic violence infringes not only the private interests of the complainant but also the moral sensibilities of society at large.

5. Profess ional Legal Intervention:

In exactly the same way that an interdict in the Supreme Court is unaffordable, a DVPO, if it requires a lawyer to bring the application (as the language of the draft legislation suggests), will be completely unaffordable to the majority of women who need it. It is, therefore, imperative that the procedure is redrafted to establish a procedure akin to the Small Claims Court with a Court Clerk assisting the applicant and thus reducing reliance on professional legal assistance. While it is noted that Clause 8
appears to recognise the need for simplified procedures, we feel that the basis for a special procedure to deal with the particular problem of domestic violence should be contained in the proposed Bill itself.

6. Training of Magi Pr Ir Police:

Evidence has shown that magistrates are biased against women and that they view them within the scope of a limited set of stereotypes. This profoundly affects issues such a s
credibility findings in domestic violence cases. It also renders problematic the use of a
"reasonableness" test as a requirement in domestic violence legislation. The ambivalence and utter indifference of the police regarding disputes involving members of the same household is a matter of common knowledge for anyone who has ever assisted a battered woman. Therefore, if domestic violence protection orders are to be effective, it is essential to provide such agencies as magistrates, prosecutors and pol ice
with training regarding the reality of a battering situation and to debunk the myths th at
surround the problem. In London the Metropolitan Police have established â\200\23062 dedicated domestic violence units staffed by trained officers whose primary function is to offer protection for the victimâ\200\231 (Edward and Halpern, ibid, 799). These appe ar to
have been successful.

7. Inf ion E i f ic:

It goes without saying that women who do not know and understand their rights will not benefit from this legislation at all. It is therefore crucial that resources be set aside
to inform and educate them, in all relevant languages, and through all forms of media, across the geographical divides of our country.

SECTION TWO: CLAUSE-BY-CLAUSE
ANALYSIS

1. Clause 1
1.1 The definition of â\200\230matrimonial ll
The definition as it stands is problematic in two respects:

(a) No provision is made for the protection of an applicant who is â\200\230stalkedâ \200\231 by the
respondent in places other than the matrimonial home or other place of residence. â\200\230Stalkingâ\200\231 consists of following a woman around, monitoring her
daily routine, harassing the children etc. Stalking forms an integral part of the trauma and abuse suffered by a battered woman. An example of stalking may be drawn from the files of the UCT Legal Aid Clinic. In this case the respondent, who was unemployed at the time, followed the applicant by car to and from her work each day and parked outside the work premises. Against a

background of violence such behaviour would form part of the overall pattern of abuse and it could, therefore, be argued that such behaviour on the part of the respondent would warrant an order in terms of Clause 2(a) of the Bill.

However, where the abuse actually takes the form of stalking in public places, . without any more direct or overt threats of violence, the provisions of the Bill will not assist the applicant. This is because Clause 2(c), which specifically deals with orders preventing the respondent from entering or being in certain places, is confined to the â\200\230matrimonial homeâ\200\231 and its surrounds or â\200\230other place
of residence of the applicantâ\200\231. We submit, therefore, that the emphasis should not be placed solely on the â\200\230matrimonial homeâ\200\231 and that specific provis ion

should be made for orders preventing the respondent from stalking the applicant beyond its borders .

The definition does not cover the situation where domestic violence occurs and the parties are not living or have not lived in the same home. This type of situation is not at all uncommon in practice. For example, the Legal Aid Clinic at the University of Cape Town has been involved in a case concerning a woman with two children by a man with whom she had a relationship for a number of years. Both thÃ© man and the woman live with their respective parents. The older child stays with the father and the younger child with the mother. The parties have never lived together. The boyfriend has been entering the motherâ\200\231s home and has assaulted her. In this case the restricted definition of â\200\230matrimonial homeâ\200\231 would prevent the woman from obtaining an
order prohibiting the man from entering her parentsâ\200\231 home.

â\200\230Parti marriageâ\200\231 in Cl 1(2

The specific inclusion of â\200\230common lawâ\200\231 husbands and wives in the defini tion of
â\200\230marriageâ\200\231 is to be welcomed. In this respect, however, we submit that it is
shortsighted to limit the definition of such relationships to those where the parties live or have lived together. See in this regard our comments on the

definition of â\200\230matrimonial homeâ\200\231 in section 1.1 above.

Further criticism must be levelled at the failure of the Bill to deal with relationships other than those of marriage, as defined. Domestic violence takes place between partners of the same sex, between adult children and single parents living together and, more generally, between different members of an extended household, for example, a brother-in-law and his sister-in-law. None of these relationships qualify for the domestic violence protection afforded by the Bill. This is a severe oversight particularly in South Africa where extended households are prevalent.

Clause 2

â\200\230On licationâ\200\231

It is not clear from the provisions of the Bill what the nature of such an application would be. An important question that is raised in this regard is whether an applicant will be able to seek urgent relief on the basis of an ex parte application. In many cases of domestic violence such relief is crucial for the protection of the applicant. In a number of applications for interdicts in domestic violence matters brought before the Cape Provincial Division, the court has shown great reluctance in granting urgent relief and has insisted on papers being served on the respondent. For this reason domestic violence legislation should actually spell out that urgent relief may be granted and that the application may be made ex parte. It is submitted that as urgent ex parte orders are always interim in nature this will not _unduly prejudice the respondent. In any event, whatever temporary prejudice might result to the

respondent, it will be warranted by the overriding need to protect the â\200\230health, . safety and well-beingâ\200\231 of the applicant.

Another reason for spelling out the availability of urgent and ex parte relief is that magistratesâ\200\231 courts have no inherent Jurisdiction. Therefore, unless they i f the ordinary rules of

in a magistratesâ\200\231 court
on.

The Bill is also deficient in that it is difficult to comprehend what standard of proof is required and on whom the onus of proof will rest. Given the traditional prejudice shown by our courts against the evidence of women in, for example, rape and other sexual offence cases, there is a real likelihood that issues relating to the standard and onus of proof will in effect serve to reduce the level of protection actually afforded to women by the legislation. This is particularly likely in respect of an application for an order in terms of Clause 2(c), which might directly infringe a respondentâ\200\231s property rights, and in cases where children are involved, as an order in terms of Clause 2 generally could prejudice a respondent in a custody action or application. In such cases it is likely that a heavy evidentiary burden will be placed on the applicant.

Further to the comments made in this regard in section 1.2 above, we submit that the Bill be amended to enable persons in domestic relationships other than marriage, as defined, to apply for protection against domestic violence.

â\200\234In appropriate circumstances... grant an interdictâ\200\231

The phrase â\200\230in appropriate circumstancesâ\200\231 is problematic in that no gui dance is
given as to the types of situations which would be appropriate for the granting of an order. This, coupled with the fact that the Bill specifically refers to relief in the form of an â\200\230interdictâ\200\231 raises the possibility that courts will i nterpret the
phrase â\200\230in appropriate circumstancesâ\200\231 to mean â\200\230in circumstances appropriate to
interdictory reliefâ\200\231. In other words, courts will apply the ordinary test for interdictory relief in determining whether an order under Clause 2 is appropriate. It is submitted that this will place an unmanageable burden on the applicant as she will have to prove not only that her interests are threatened by some immediate danger but also that the order is the only remedy available to protect her interests. Would the fact that the applicant may report or that she has reported the matter to the police mean that an order in terms of Clause 2 would not be appropriate? What if the applicant has been subjected to sporadic abuse over an extended period of time? Would she have to wait until her partner once again threatened or committed violence before the court would consider an order under Clause 2 appropriate? Evidence of the approach adopted by the Cape Provincial Division suggests that our judges have to date been very conservative in granting interdictory relief in domestic violence cases. There is nothing contained in the Bill to suggest that the courts will be required to adopt a different approach.

We submit that this fundamental problem may be overcome by scrapping the unhelpful phrase â\200\230in appropriate circumstancesâ\200\231 and by replacing it wit h a
phrase partly borrowed from the English Law Commission report, viz:
â\200\230whenever there is a need to secure the health, safety and well-being of the applicantâ\200\231. In addition, we submit that it is essential to avoid the use of the term â\200\230interdictâ\200\231 in describing the order that may be granted by the cou rt. It
must be made clear that the legislation has been adopted to deal with a particular

situation, viz that of domestic violence and that the procedure introduced to deal
. with itis to be distinguished from the Jurisprudence surrounding interdicts.

â\200\230Physical violence... threats of physical violenceâ\200\231
The use of the term â\200\230physical violenceâ\200\231 is too restrictive in that it i
mplies some
ical assault. Certa

and emotional abuse. These are nevertheless a
not be excluded from the ambit of the legislation.

Clause 3

â\200\230Wher f law h interdi â\200\231

Clause 3 has presumably been enacted to give teeth to Clause 2. The criminal sanctions that may be imposed in terms of Clause 7 for a breach of an order allow for ex post facto action to be taken against the respondent. This would not, therefore, be effective in preventing harm to the applicant immediately following the grant of the order. The underlying rationale for Clause 3 is thus clearly the safety and well-being of the applicant. In our submission, this rationale would be better served if the Bill provided for the issue of a conditional warrant of arrest as a matter of course whenever an order in terms of Clause 2 is granted.

The automatic issue of a conditional warrant of arrest would avoid what appears to be an unnecessarily cumbersome procedure established by the Bill. As it stands, it appears that the applicant would have to make a second application in order to secure a conditional warrant of arrest. In this regard, an additional

evidentiary burden is placed on the applicant. While the Bill is not very clear as to the technical details involved, it would seem that the procedure is sufficiently complicated to require the assistance of lawyers. As appears from our comments under section 4, below, we see this as being a factor which seriously jeopardises the effectiveness of the protection afforded by the Bill.

â\200\230And evidence is laid befor â\200\231

The Bill does not make it clear what kind of evidence will be required before a conditional warrant of arrest will be issued. This raises important technical questions. For example, would a Court be entitled to consider evidence of previous convictions for assault or contempt of Court as â\200\230evidenceâ\200\231 tha
t the
respondent will disregard the order? Will hearsay evidence that the respondent has said that he does not care what order a Court makes suffice? This is sometimes the response one gets when giving notice of an application to a respondent. If such evidence will not suffice and more substantive evidence is required this would give rise to the anomalous situation that the respondent must already have gone some way towards breaching the order before the court will be satisfied that a conditional warrant of arrest should be issued. Quite obviously this will not serve to make the position of the applicant more secure.

â\200\230Ar I h ill probably disregard the interdict...

Again the lack of clarity in this portion of Clause 3 is problematic in that it gives the courts the opportunity to interpret the phrase in such a way that it will be difficult for the applicant to secure the issue of a conditional warrant. It must be borne in mind that the courts will probably be influenced in their approach by the possible prejudice to the respondent if a conditional warrant is

il

issued. The use of the terms â\200\230real dangerâ\200\231 and â\200\230will probably d
isregardâ\200\231 will

. undoubtedly reinforce the attitude that a conditional warrant of arrest may only

be issued in extraordinary cases so as to avoid unduly prejudicing the
respondent. If this is the case, then the majority of applicants will not benefit
from the existence of the conditional warrant of arrest procedure.

We submit that in the event of our submissions under section 3.2, above, being
rejected, the wording of this portion of Clause 3 should be amended to read:

rfhat there is a possibility that the respondent may disregard the
order...â\200\231

In our view, the issue of a conditional warrant of arrest does not in itself
prejudice the respondent in that his arrest is dependent on him breaching the
order. â\200\230Thus, the requirements for the issue of such a warrant should be as wid
e
as possible to ensure the greatest degree of protection for the applicant.

1 2: â\200\230Commi 2

The phraseology â\200\230commits an actâ\200\231 unfortunately implies actual physical
assault

or a related action by the respondent in breach of the order. If this is how the

phrase will be interpreted by the court then the provision for the respondentâ\200\231s

Srey do little to safeguard applicant. We suggest that an alternative phrase
e used:

â\200\234...if the said party does anything...â\200\231
â\200\230Which reasonably justifi inferenceâ\200\231

This provision is particularly problematic in view of the historical resistance b
the police to exercising their powers in situations of domestic violence. The Biil
appears to give the potential arresting officer the discretion to determine
whether the respondent has or is about to disregard the order. Furthermore, the
inference that is required to be drawn by the arresting officer to warrant the
respondentâ\200\231s arrest is a reasonably justified one. What will police officers, w
ho
are already extremely cautious about acting in situations of domestic violence,
regard as giving rise to a â\200\230reasonably justified inferenceâ\200\231? Will they,
for
example, be willing to act on verbal threats by the respondent shouted in the
heat of an argument? Will they be prepared to act on the respondent parking
outside the applicantâ\200\231s house, for example, without any direct threat being mad
e
to applicant? Is it not likely that the police officer will wait until the respondent
takes violent action before intervening and if so, what kind of protection will
actually be afforded to applicants?

Clause 4

The extension of jurisdiction to the magistratesâ\200\231 courts to issue orders and wa
rrants
under the Bill is to be welcomed if this has the effect of making the procedure
established by the Bill more accessible to those who most urgently require it.
However, a number of cautionary comments are necessary in this regard:

4.1

For the reasons set out in section 2.3, above, we are concerned about the use of

the term â\200\230interdictâ\200\231 in referring to the orders that may be granted. We submit
that magistratesâ\200\231 courts should be given the power to grant â\200\230domestic violence
protection ordersâ\200\231 rather than â\200\230interdictsâ\200\231. This will serve to highlight the fact
that the procedures are aimed at dealing with a particular type of social
problem.

. We wish to reiterate our concern expressed in section 2.1, above, that without specific provision being made for urgent and ex parte applications an applicant

who chooses to proceed in the magistratesâ\200\231 courts will be unable to proceed on an such a basis.

One of the benefits of giving jurisdiction to magistratesâ\200\231 courts in domestic violence cases is that such courts are generally more accessible to the public, and particularly to the lower income groups, than the Supreme Courts. However, we submit that unless special and simplified procedures are established for domestic violence cases so that lawyers are not required to assist the applicant or to defend the respondent, even the magistratesâ\200\231 courts will remain inaccessible to applicants. Unfortunately, the manner in which the Bill is framed at present, particularly in relation to the procedures it establishes, will

make it impossible for an applicant to approach the court with any confidence without the assistance of a lawyer.

We submit that alternative models of recourse should be introduced to supplement the relief that an applicant may claim in the magistratesâ\200\231 court. In poorer communities, where domestic violence is, according to well-documented evidence, more prevalent than in more affluent communities, the magistratesâ\200\231 courts will remain inaccessible to applicants. In addition, interdict-type relief is not always effective in preventing abuse. One alternative and supplementary model which appears to have been successful in New South Wales, Australia, involves giving extended powers to police, including the power to enter premises where domestic violence is suspected. The emphasis here is on more effective policing in an attempt to prevent or halt domestic violence. The London Metropolitan Police initiative discussed earlier is another example of alternative and supplementary models of dealing with domestic violence. Of

course, it goes without saying that in South Africa, where police have always shown a reluctance to become involved in domestic violence matters, granting special powers to the police will not be effective without extensive training.

Clauses 5 and 6

The pr ion of m i f raping hi

wiie

Clause 5 of the Bill reiterates the law as it stands at present in relation to the situation where a man rapes his wife. We are utterly opposed to the preservation of the rule that a man cannot be convicted for raping his wife. In our view, a genuine commitment to protecting women from domestic violence must of necessity involve the recognition that women are frequently the victims of this particular form of domestic violence committed by their husbands and that husbands who are guilty of such a practice should no longer be afforded the protection of the law. If real advances are to be made against the practice of domestic violence, then it is imperative that one of the most serious forms of domestic violence, viz rape, should be dealt with by the full force of the law.

The 1985 report by the South African Law Commission on Women and Sexual Offences in South Africa recommended that marital rape should be recognised in our law as rape. It expressly rejected the idea that this should be limited to cases where the spouses are living apart. The Commissionâ\200\231s report documents its findings in relation to many of the traditional arguments in favour of legal protection for the husband who rapes his wife. The Commission was unpersuaded that criminalisation of marital rape would lead to a flood of complaints. It also concluded that difficulties of proof did not constitute an

appropriate basis for refu
. Sig

An additional reason for our rejection of the proposed legislation must be seen

in the light of the Promotion of Equal Opportunities Draft Bill. This Bill

specifically prohibits discrimination on the basis of marital status.

that the retention of the rule relating to the rape of wives by their hu

clear conflict with the Promotion of Equal Opportunities draft Bill in this
We submit that for this reason alone Clauses 5 and 6 should be

riminalise marital
We suggest the inclusion of the following provision to criminalise marital rape:

â\200\230The fact that a man and a woman are married to each other does not

[eciade the man from being held criminally liable for the rape of his
wife.â\200\231

Clause 7

D n poli h. I nt for di ing order

We submit that orders granted in terms of the Bill will only be effectively policed if the police are placed under a duty to charge any respondent who disregards such an order. This will overcome the problem of police reluctance to investigate charges of domestic violence. It will also reduce the burden on the applicant who, at the stage that an order is disregarded, will already have pes embroiled in ongoing litigation in order to protect herself and/or her amily.

The need to adopt an innovative approach to the guestion of the
punishment of the respondent who disregards an order

In our submission the context within which domestic violence offences are committed means that traditional approaches to penalties in respect of these offences are inappropriate and ineffective. Where the penalty takes the form of a fine, this will often be paid from the communal finances of the applicant and respondent. This amounts to a penalty on the applicant and the household rather than on the respondent. Where the respondent is a breadwinner in the family, his imprisonment will again cause economic hardship for the applicant and the family. In addition, magistrates will be extremely reluctant to impose a period of imprisonment in such circumstances. The result is likely to be that the respondent will be given a fine which, for the reasons discussed above, will be inappropriate and probably ineffective as a form of punishment for the offence.

We submit that an innovative approach needs to be adopted to ensure that the punishment that is imposed for domestic violence offences is more appropriate and effective. Organisations such as NICRO and FAMSA have expertise in rehabilitative compulsory offender programmes which could be applied in this area. Periodic imprisonment, for example on weekends, would not prevent the respondent from earning his living. If compulsory counselling and related programmes were implemented at the time when the respondent served his periodic imprisonment this would go some way to treating the cause of the

domestic violence and would have beneficial and long-term effects for the - applicant, the respondent and the family. It would also prevent the respondent undergoing what is often a brutalising experience in prison which would not serve to treat the problem of domestic violence and could even exacerbate it. We feel very strongly that the whole question of appropriate forms of punishment for domestic violence offences has not been sufficiently dealt with in the Bill and that in-depth consultation and research is of crucial importance.

CONCLUSION

In concluding our submissions on the draft Bill, we wish to stress that the overall impression created by this piece of legislation is that of an ad hoc and largely uninformed attempt to deal with what is essentially an extremely complex social problem. It must be recognised that it is difficult to make straightforward submissions on a document as fundamentally problematic as the draft Bill. We trust, however, that these submissions go some way to alerting the Department of the extent and complexities of the issues involved and that as a result a workable solution to the problem of domestic violence in South Africa will be developed.