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The Ministry of Justice

I am writing on behalf of the member lawyers of the Domestic Violence Committee of Wellington Women Lawyers Association who were available over the past month to contribute their time and their thoughts to this submission.

We are submitting our comments in response to the invitation contained in the *REVIEW OF THE DOMESTIC VIOLENCE ACT 1995 AND RELATED LEGISLATION. A DISCUSSION DOCUMENT* (MINISTRY OF JUSTICE, DECEMBER 2007).

We have chosen to lodge our comments although we are disturbed by Ministry's extermely limited time frame for comments to the many proposals contained in the Review. After discussion and consultation with other groups and individual stakeholders, we believe that the Ministry's request for comment is ill-timed considering the summer and Christmas holidays and the very limited time frame for analysing the various implications of each proposal contained in the review.

If the purpose of the Act is to be honoured, by establishing the government's best efforts to create better safety systems in the courts for victims of domestic violence, then the Ministry must allow for full debate and analysis of the consequences of the proposals. Consideration of the variety of potential impacts on the various populations seeking assistance under the Act requires consultation among individuals and groups representing New Zealand's wide range of geography, ages, racial and cultural diversity, health and immigration status as well as the interaction of these various factors. The time period for response to the Review does not allow full and careful consultation between representative groups to occur.

Further, the Review process undertaken by the Ministry does not allow for consideration of other options for proposals for amendments to the Act other than those contained in the Review.

We believe the process the Ministry has chosen will not produce the best analysis nor assistance in creating better safety mechanisms for victims of domestic violence.

We recommend that the Ministry halt its current process to amend the Act and establish a better means to study the effect and implementation of the Domestic Violence Act. We simply cannot endorse amending the Act with any certainty that the proposals will neither increase the possibility of harm nor ensure greater safety to victims of domestic violence.

Sincerely

/s/

Alana Bowman

SUBMISSION OF THE
DOMESTIC VIOLENCE COMMITTEE OF
WELLINGTON WOMEN LAWYERS ASSOCIATION
ON *A REVIEW OF THE DOMESTIC VIOLENCE ACT 1995 AND RELATED LEGISLATION. A DISCUSSION DOCUMENT*
(MINISTRY OF JUSTICE, DECEMBER 2007)

Preliminary Statement

Research conducted by the Ministry of Women's Affairs and other agencies and individuals since 1995 has repeatedly demonstrated the many areas of inadequate implementation of the Domestic Violence Act of 1994 (the Act). Research is supported by individual experience reflecting the need for greater efforts to monitor the various elements of within the systems, to study patterns of inadequacies, and to remedy the existing Family court and criminal court systems.

The findings most commonly demonstrate the need for greater resource allocation to provide

- Regular, intensive training for all members of the courts, police, prosecutors, and service providers to achieve greater understanding of the dynamics of domestic violence and best practices to improve safety
- Higher compensation allocated to attorneys undertaking representation of victims attempting to apply for assistance under the Act
- Development of compilations of best practice under all aspects of the Act
- Consistency of practice among and between courts, police, prosecution and service providers
- Regular independent and comprehensive system and service audits to improve performance focusing on the needs of each domestic violence victim.

The Domestic Violence Act of 1994 has been the model for other nation's legislation. Upon study, little can be improved upon the Act as it is well constructed and its provisions clear.

We propose that the full effort of the government instead be placed in ensuring that the existing provisions of the Act are enforced and all best efforts towards its purposes be achieved. Only after ensuring compliance with all aspects of the Act and then conducting a thorough system review should the Act be amended, and then only following a sufficient period for reflection and debate among participants in the government systems and among community stakeholders.

Comments to Proposals

The following comments are submitted with the greatest reluctance and reservations to participating in the process the Ministry has undertaken.

INTRODUCTION

The Domestic Violence Act 1995 is a good law which has worked well since it came into force. Deficiencies have been largely the result of inadequate enforcement by and lack of training for those responsible for applying the law.

The proposed legislative amendments in the Discussion Document are inadequately researched, under-developed and piecemeal. If implemented, they risk undermining a good law and putting the safety of victims of domestic violence at further risk. We can do no better than refer the Ministry to the recent comments of Sir Geoffrey Palmer, President of the Law Commission (Dominion Post, Saturday 9 February 2008):

We have this habit in New Zealand that we'll enact in haste and repent at leisure. So we'll pass a law, we haven't got it quite right but we're in a hurry so we pass it. Then we say we'll amend it next year and the next year. ***But down that path lies bad law because you end up with big amendments and then you wreck the logic and structure of the statute.***

The amendments proposed in the Discussion Document would, if they become law, wreck the logic and structure of the Domestic violence Act. Victims of domestic violence deserve better.

PROTECTION ORDERS

Police-issued orders

1. **Do you think police-issued orders should be introduced or do you believe that current police powers are sufficient for enforcement purposes? Please give reasons for your view.**

We do not support the introduction of police-issued protection orders.

The discussion paper suggests that police-issued orders could be an effective addition to police powers in the domestic violence context – especially when officers can not arrest as no offence has been committed – that is, they may "provide a further tool for police to keep victims safe, especially in situations were no offence has been committed and the offender cannot be arrested". However, it is difficult to envisage many situations that would fall into this category, especially when, as the discussion paper notes contacting the police is "usually an act of desperation". It seems to us that a woman will call the police when the violence has or is escalating so it is most likely that in all cases, an offence will have been committed (even if no actual violence, there will still be an assault arising from the threat of violence). Further, it is also our view that an offence is likely to have been committed when the situation is "volatile or dangerous".

Our first point then is that we think it highly unlikely that the police will be called to a domestic violence incident when no offence has been committed. In such a case, the police should make an arrest, consistent with their pro-arrest policy. Unless there is compelling evidence that the police are called to domestic violence incidents where no offence has been committed, there does not seem to us to be a strong case for introducing police-issued orders (see further points below).

We also note that in Tasmania, the police–issued orders are subsequent on arrest, not in substitution (requiring suspicion that a person has committed "family violence"). Therefore if there is concern that police are attending domestic violence incidents which do not amount to offending, then an similar approach could be introduced – for example, whenever someone has committed "domestic violence", as defined by the domestic violence Act, the police have powers of arrest and detention, or alternatively new offences could be introduced so that an arrest will always be possible when domestic violence has occurred.

Other experience internationally should be further examined, in addition to a detailed review of the experience of the Tasmanian legislation as well as the similarity of Australian and New Zealand laws.

Review of experiences of police-issued protection orders authorised by jurisdictions other than Australia should be made before undertaking this

significant change in the law, and the limitations on the police powers they may have developed to meet some of the possible harmful outcomes.

For example, since the 1980s California law has authorised police to issue protective orders at the scene of a domestic violence incident. However, the legislation requires that the order can only be issued after the police consult with a 24 hour duty judge to determine that the facts support an order and that the appropriate party is restrained. This requirement reflects the concern that this significant shift of judicial power to police is modified through judicial involvement. Other US states have since adopted variations on this law and their experiences should be considered as well.

2. What do you see as the benefits of police-issued orders?

We do not believe there are any, unless they are made in conjunction with arrest and detention. See further below.

3. What disadvantages would there be in introducing police-issued orders? How could those disadvantages be addressed?

Preference of Protective Orders over Arrest

Domestic violence is a crime and must be dealt with in the same way as other criminal offences. Offenders must be arrested and charged.

We do not want to see the making of orders become a substitute for charging the person perpetrator with an offence. Given the issues around enforcement of protections orders, we support the arresting and charging of offenders in cases where the police are called (see also Recommendation 31 of *Living at the Cutting Edge*). Although the issue is difficult, with regard to the concern about disempowering victims, we believe the better option at this point is for the police to control the arrest and charging process. Although the victim's views should be taken into account when police officers are determining whether to lay charges, the final decision must rest with the police, as it does in all other situations.

If the effect of the proposal could be the de-criminalisation of domestic violence crimes we cannot support the possibility that victims will not receive the protection of full police power to arrest that is expected for the victim of any other violent crime.

Decriminalisation of domestic violence, and substituting arrest and prosecution with "police issued orders" would be a huge step backwards.

Uncertain effects of limited detention power

The proposal includes introduction of the power to detain so as to serve the person with the detention order. In our view, this may not be a sufficient "extra" power. Once the detainee is served, he may well return to his home, more enraged. In our view, victims who call the police want the violence to stop. If the offender is not arrested, there may not be a sufficient cooling off period. It would be better, in our view, to empower police to arrest and detain (and possibly charge with an offence – see above) whenever they have good cause to suspect domestic violence has occurred. As with the proposal to allow police to issue orders rather than arresting and charging the perpetrator of violence with a criminal offence, using a limited power of detention to deal with domestic violence in a very short term way does nothing to deter the perpetrator in the long term. It also sends a signal that domestic violence is less serious than stranger violence.

Mis-identification of the victim as the perpetrator or development of police practice favouring the issuance of mutual protective orders.

Both of these possibilities are very real and can only discourage victims from further contacting police in the future, as well as creating significant disadvantages in both criminal and family courts.

We are concerned that current police practice and training is are already insufficient. to execute the proposed new power without creating further harm to victims.

Many police officers are insufficiently trained in the dynamics of domestic violence to be able to distinguish between the actual perpetrator at the scene and the victim who may have inflicted injuries on the perpetrator in self-defence. Many constables are young and inexperienced both in police practice and in domestic violence and should not be placed in the position of making such an important judicial decision without appropriate training and experience.

Mis-identification of the victim as the perpetrator could produce dangerous consequences if an order is given which prevents the harmed parent from necessary contact with a child or forces the actual victim from the safety of the home.

Confusion of civil and criminal functions

Short term police issued orders confuse criminal and civil functions, and enforcement and judicial functions. The role of the police is to arrest and prosecute criminal offences. Under the Domestic violence Act, victims of domestic violence have the right to apply for protection orders. To allow police officers to decide who may, and who may not, have a "short term order" makes them judges in a civil matter. It also undermines their basic role as investigators and prosecutors of criminal offences.

Failure to address the problem long term

The police investigate individual incidents of domestic violence. Issuing short term orders deals with individual incidents, but not the ongoing dynamics of domestic violence. That undermines the current system which focuses on longer term change as well as safety in the short term.

This danger has been should be thoroughly reviewed before any change in the law is undertaken to determine the possible harmful effects and the means to reduce those harms.

Should all the possible effects and implications of the proposal indicate the benefits of this change, we could not support its introduction into the Act unless, prior to its implementation, police are required to undergo a full training course in domestic violence.

Without a parallel requirement in the Act that all police personnel undergo a comprehensive, thorough, and extensive training programme – developed with the assistance of victim advocates and attorneys for victims - in the dynamics of domestic violence, identification of the dominant aggressor, and assurances that police are aware and make use of local community resources such as Women's Refuge, and will provide victims with referrals to these resources at the scene of the incident whether or not an arrest is made or a protective order is issued.

Until all of the possibilities for harm have been considered and the possibilities mitigated, we believe the decision to obtain a protection order is better left with the victim.

4. Do you have any views on the length of the short-term protection order?

With the objections noted above and if forced to make a choice, we prefer the Tasmanian approach (up to 12 months) to the more limited form available to police in WA. As the length of time can vary, there will need to be effective guidelines in place to inform the police as to the appropriate length of the order. Alternatively, the police could issue a standard order taking effect for a month, which could then be confirmed by the court as part of the usual process. This might be preferable as it allows a clear method and time frame for the offender to appeal the order.

With this in mind, we do not endorse changes to the Act without sufficient time to study the implications of all options. For example, Is a "short term protection order" the same as a "police issued order"?

We do not support the introduction of police issued orders, regardless of the

length, without the opportunity for a full and considered review of possible effects and implications of the proposals.

5. What conditions do you think should be attached to police orders?

We are unsure of the meaning of this question – conditions relating to children, property possession, appeal provisions? - and cannot speculate on the possibilities of the proposal given our serious reservations about its helpfulness for victims. The discussion document does not provide any detail about what provisions a "police order" would contain. It is a fundamentally unsound process to propose such a significant legislative change when the basic proposal the public is being asked to comment is so uncertain.

ENFORCING PROTECTION ORDERS

6. Should the Court be required to give written reasons when a section 13 application for a protection order is either declined or put on notice?

Yes, we believe the Court's reasons should be provided, in writing for both declining to issue an order and when an application is put on notice.

Over time, individual case experiences supported by the recent research has indicated that more applications are being set for notice, and requiring courts to provide reasons for their decisions may be helpful in addressing some of the problems applicants have encountered as a result of those decisions.

7. Do you think that rather than a without notice application being placed on notice that it should instead be referred to the applicant and the following queries made: whether the applicant wants the application to proceed on notice, or make a new application, or withdraw application completely.

Where a Judge is considering placing a without notice application on notice, applicants should be given the opportunity to address the Judge in person before the Judge makes the decision whether to grant a temporary protection order without notice or to put the application on notice. The applicant already has the right to withdraw her application or make a new application. We believe that the underlying assumptions of this question should be examined – that applicants are being denied the protections available under the current law through a without notice application. We believe courts would benefit from a comprehensive, thorough and regular course in domestic violence, the implementation of the Act, and best practices in court procedures.

DISCHARGING ORDERS

9. Do you think the Act should be amended to emphasize that the Judge can discharge a protection order (including a temporary order) only if he or she is satisfied that the order is no longer necessary for the protection of the applicant, or a child of the applicant's family or both?

We believe such an amendment would reflect the state of current case law developed under the Act.

However, we are concerned that victims not be placed in circumstances in court that requires them to become more vulnerable to further violence and intimidation. Criteria and court procedures could guide the court when undertaking this enquiry and should be developed in consultation with victim advocates and lawyers who have represented victims in these proceedings.

10. Do you believe that over-ruling the applicant's wishes is desirable?

We are very concerned about the perception of many that they may know what is best for victims who have come voluntarily into the judicial system in order to obtain the protections available to them through court orders.

We are mindful of the very real dangers victims face from intimidation and threats of violence which can cause them to request the dismissal of a protection order, we also believe that victims should be provided with every opportunity to receive competent information and advice when considering such an action. Victims should neither be compelled by the abuser to withdraw the protection nor forced into its perceived protection by the court but instead should be offered a flood of options and information from every system available.

Resources could include free legal advice and direct assistance from funded services through agencies such as Women's Refuge.

11. Do you think it would be more appropriate for the Act to specify criteria that have to be met before the Court discharges a protection order? What criteria do you think would be appropriate?

We believe victim's autonomy and judgment should be respected and courts and systems should exercise great restraint before they substitute their judgment for the individual factors of each case. Again, victims should be offered a greater quantity and quality of resources from the courts and communities than is currently available to them. We are concerned about individual cases where the standard for "necessity" for the granting of or the continuation of a protection order has been pitched far too high. In some cases the test of "absolute necessity" has been imposed. That test is simply wrong, given the object of the Act. Because some judges have simply "got it wrong", we support the imposition of criteria that would have to be met before a protection order is discharged against the wishes of the applicant.