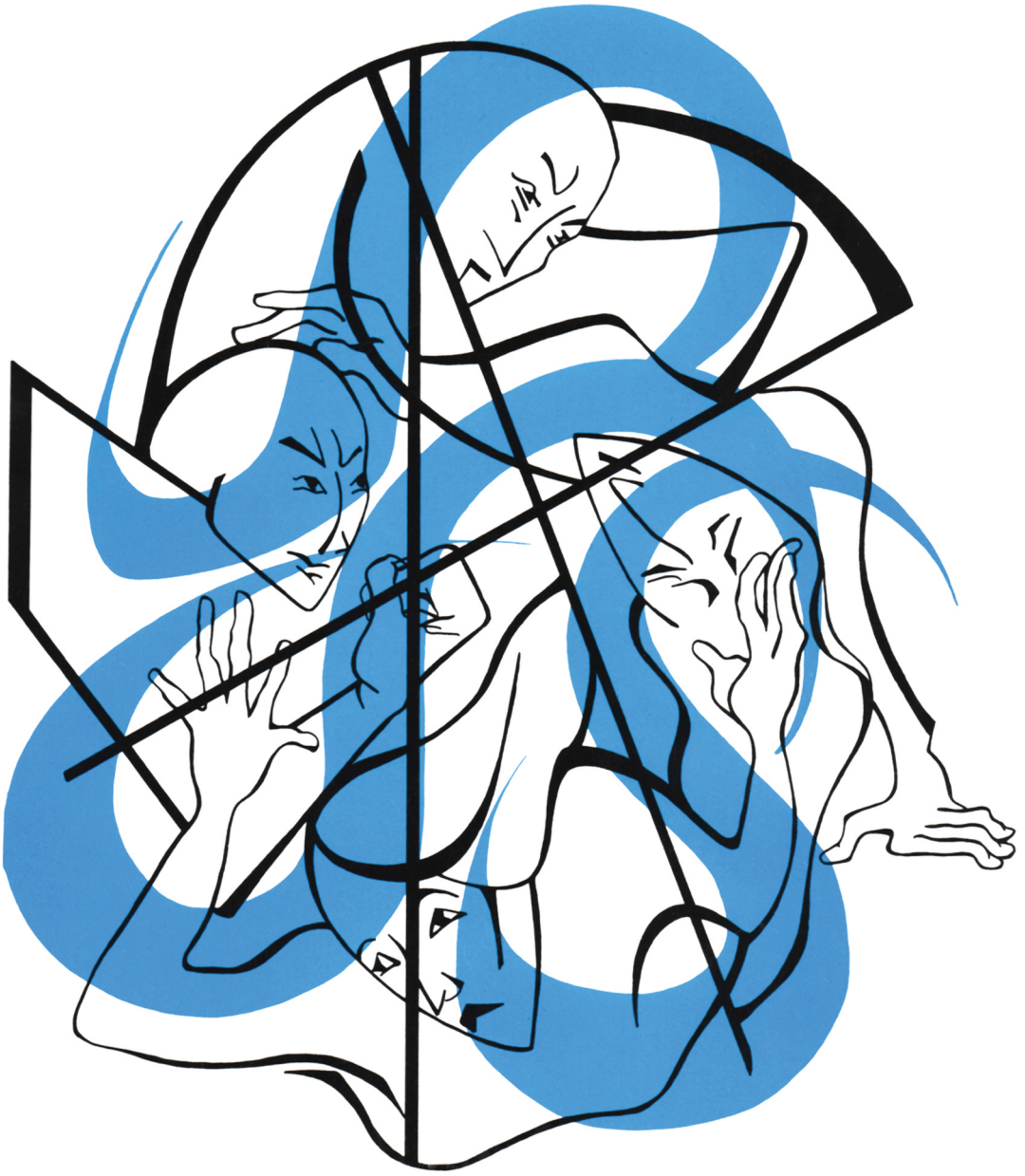
CONFRONTING VIOLENCE

A MANUAL FOR COMMONWEALTH ACTION



Commonwealth Secretariat

CONFRONTING VIOLENCE

A MANUAL FOR COMMONWEALTH ACTION

(Revised)

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CONTENTS

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The Sexual Assault kit and the Guidelines for Interviewing Child Victims of Sexual Abuse are reproduced here by kind permission of the Royal Canadian Mounted Police.

Legal change in the Commonwealth is rapid and it has taken endless revisions to ensure that the text before you remains current. Special thanks therefore go to the Word Processing Unit of the Commonwealth Secretariat and to the staff of WDP.

INTRODUCTION

North or South, East or West, in rich countries or in poor ones, women share a common problem: violence. Much, if not most of the violence in society is directed against women: in the home, in the streets, in the workplace. It is violence that has been largely invisible, under-reported, unrecorded and, to a certain extent, tacitly condoned.

This is the second edition of the Manual, produced by the Women and Development Programme and published in 1987 that emerged in response to an urgent mandate from Commonwealth Ministers Responsible for Women's Affairs who in 1985, met before the UN Nairobi World Conference which marked the end of the Decade for women, and called for immediate, pan Commonwealth action to confront this abuse. At that time, Ministers were concerned, in particular, to promote Commonwealth action against violence in the home, sexual abuse and sexual harassment. As a first step in this process, the Women and Development Programme (WDP), assisted by the Legal Division, and the Human Rights Unit of the International Affairs Division, called together a group of women and men with long experience of addressing a wide range of issues concerning violence against women. Instead of publishing a report on the deliberations of that meeting, WDP produced the first edition of this Manual, which, by enlarging on the concerns identified by the group, sought to provide an action guide for women's groups, lawyers, and health officials sought to provide and action guide for women's groups, lawyers, health and media professionals, the police and the judiciary which would truly assist in confronting violence.

Four years have gone by since the first edition of the Manual. During that time, Commonwealth governments have become more aware of women's victimisation. They have undertaken legal reforms, provided remedial and support services and publicly acknowledged and condemned the violence to which women, as a sex, are subjected. However, as Ministers meeting at the third Commonwealth Meeting for Ministers Responsible for Women's Affairs in Ottawa in 1990 acknowledged, although progress has been made in the development of measures to reduce the incidence of such violence, and to support and rehabilitate its victims in our countries, there is still much to be done.

HOW TO USE THE MANUAL

The Manual is divided into four sections. The first deals with domestic violence, the second, sexual assault, sexual harassment and child sexual abuse, the third, violence related to custom or tradition and the fourth, the media and violence against women.

Each section provides definitions of the various types of violence, examines the legal approaches currently operating in the Commonwealth and explores positive mechanisms which provide support for victims or which can be used to bring about changes in public attitudes. The discussion of legal approaches is designed, not only to provide comparative material useful to the legal profession, but to offer individual women and women's groups, ideas and information about the types of legal mechanisms which might best address their particular needs and circumstances. We hope that the material will, therefore, encourage a closer working relationship between those responsible for legal reforms and those on the receiving end of those reforms. When the first edition of the Manual was produced, most f the legal approaches were

very new. Since that time, there has been some evaluation of their impact and we have sought to incorporate this in the new edition. As we pointed out in the last edition, evaluation of strategies is almost as important as the strategies themselves and reports of evaluations are most helpful for other jurisdictions considering legal reform.

There are a number of important issues that are not touched on in the Manual. One of them is the mounting evidence that some scientific advances have resulted in new methods of female victimisation. For example, pre-natal tests, developed to identify genetic abnormalities, have had serious implications for women. These tests also reveal an unborn baby's sex and researchers suggest that there is an overwhelming incidence of female foetuses being aborted subsequent to the tests, a suggestion that has led the Maharashtra government in India to ban pre-natal sex determination. Again, although the Manual does examine sexual offences, it does not consider the implications of the Pakistani Hudood Ordinances for victims of such offences. Further, as the Commonwealth is a vast and varied legal and social tapestry, a Manual of this nature cannot hope to cover all manifestations of violence against women or all strategies that have been used to confront them. We welcome any information on issues addressed here which you feel are important and on measures implemented which have not been described or described inaccurately.

Although different forms of violence against women are considered in the Manual, we would like to suggest that they and all other violations of women are rooted in a common cause: inequality. We believe that violence against women is the ultimate form of discrimination in a world which discriminates against women generally. Commonwealth countries, to a greater or lesser degree, have implemented legal and other strategies to confront the violations we consider in this Manual. Most of these are in the nature of responses to an individual problem, rather than to a general pattern of discrimination. We believe that violence against women must be addressed, not as an individual problem alone, but also an issue of the structural inequality of our societies. In the long term, the solution of the problem of violence against women lies in commitment to the value of gender equality, most eloquently described in the text of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women.

PART I: DOMESTIC VIOLENCE

1. INTRODUCTION

It is becoming increasingly evident that the physical and mental abuse of women within the household is of far greater magnitude than had been imagined. It is still common, however, for marital abuse to be taken for granted and conclusions to be drawn that little can be done about it.

Violence against women in the family has a long history. In all countries and cultures[1] women have been battered, sexually abused and psychologically injured by persons with them they should enjoy the closest trust. This maltreatment, in the main, has gone unpunished, unremarked and to a certain extent, as adages such as "A dog, a wife and a walnut tree, the more you beat them the better they be" indicate, received tacit condonation.

Legal systems often gave the husband the right to chastise, or even kill, the wife, if she were regarded as sufficiently disobedient. In his Commentaries on the Laws of England in 1775, Blackstone stated that the husband was empowered to correct his wife "in the same moderation that a man is allowed to correct his apprentice or children"[2], a power which was confirmed in judicial decisions in England until 1890 when the common law right of a husband to chastise his wife physically was abolished in the case of R U Jackson[3]. However, even after this right was abolished or in those unusual systems where the husband never enjoyed the right, physical abuse by the husband was often justified on grounds such as provocation[4] or if he were punished, his sentence was generally light.

In most systems, husbands were given the right to violate their wives sexually, a right, again, reflected in legal institutions. Thus, in many systems husbands had the right to bring actions against anyone who committed adultery with or seduced their wives[5] and they were not subject to legal sanction if they forced their wives to have unwanted sexual relations[6].

These legal structures merely mirrored the predominant view of most societies and cultures that the wife was subordinate to and, indeed, the property of, her husband, a view which is not purely historical. Many countries still fail to take the physical abuse of a wife seriously, most refuse to penalise a husband who forces his wife to engage in unwanted sexual activity and a minority are prepared to exonerate a male relative who murders a woman who commits adultery. The view that the wife is subordinate goes hand in hand with the philosophy that the dynamics of a particular family acting within socially accepted structures are private and should be interfered with rarely. Certainly, it will be unusual for such interferences to be on behalf of the wife.

The twin philosophies - that the wife is subordinate to her husband and the family is a private place - served to delay the discovery of the problem of violence against women in the family. Very occasionally liberal philosophers, such as John Stuart Mill[7] and pioneer feminist activists like the British Frances Power Cobbe[8] drew

attention to female victimisation within the family, but it was not until this century, at the beginning of the 1970's, that large scale campaigns to draw attention to the issue were launched. Although these campaigns began in Europe[9] and North America[10], they quickly spread to other areas of the world, so that in the 1990's it is safe to assert that violence against women in the household is almost a worldwide concern.

Although violence against women in the family is now acknowledged to be a serious problem in both incidence and effect in most countries of the world and has been the subject of much research in the last twenty years, it is nevertheless an issue which remains clouded in mystery. It can be stated confidently that violence against women in the family is an issue which confronts women from all countries, races, creeds, colours and socio economic group and that the violence has multifarious manifestations and serious effects[11], there are serious gaps in our knowledge of the issue. For example, we are unable to answer questions such as who, apart from women, are at most risk of such violence, who, apart from men, are most likely to perpetrate such violence, what causes the violence, how resources can be allocated most effectively and what sort of treatment and intervention strategies are most useful with any degree of precision[12]. Most importantly, we are unable to discern whether the definition of violence against women in the family is a common one across society and culture or whether it is something which can only be defined against a backdrop of culture, tradition and custom. This final questions is a crucial one when considering strategies for intervention, as it may suggest that strategies used in one society are not helpful on another, or, that strategies that may be valuable where one group in a society is concerned may be of little value with another group. Certainly, this question of definition, at the very least, invites us to be cautious in applying strategies which have been used in one cultural context to another, without considering modification.

Much of the uncertainty surrounding the question of violence against women in the family is due to the fact that the available research into the issue is new, emerging only in the last twenty five years. This research, furthermore, is fragmentary and is, in the main, from Western Europe, North America, Australia and New Zealand. Predominantly, also, these studies have concerned women from the dominant culture, avoiding native populations, immigrant groups and refugee populations. Few studies have been made in the developing world and it is perhaps safe to say that the only comprehensive and systematic study of violence against women in the home which has been undertaken in a developing country is from Papua New Guinea, where the Law Reform Commission has produced four publications on the issue[13].

Despite the fact that the current state of research into violence against women in the family is imprecise, many countries have introduced strategies with the aim of protecting the individual victim and of eradicating the problem entirely. Accordingly, this chapter outlines the strategies which have been employed, evaluating them, where appropriate. In order to provide a context for an assessment of these strategies, the chapter begins with Part I, which surveys the definition of violence against women in the family, the incidence of the problem

and the causes and effects of the conduct. It then moves on in Part II to examine the legal approaches which have been experimented with throughout the Commonwealth to provide assistance for victims of abuse, which, it will be seen, include divorce, judicial separation, resort to the criminal law, quasi criminal remedies and injunctive relief. Part III surveys the response of the health, welfare and community sectors, while Part IV seeks to draw conclusions from the previous parts, recommending short term and long term strategies to confront the issue of violence against women in the home. The final three parts of the chapter move on to describe how community health workers and those providing social services may encourage women to break their silence and complain of abuse, discuss the relationship of alcohol abuse and violence in the home and provide a practical guide to the establishment of a woman's refuge and other support services.

2. THE CONTEXT OF THE PROBLEM

a) The nature of the violence

Studies indicate that violence against women in the family takes various forms. Most obviously, it consists of physical violation of the woman's body. This can include pushing, pinching, spitting, kicking, pulling the woman's hair, hitting, punching, choking, burning, clubbing, stabbing, throwing acid or boiling water. It can range from minor bruising to murder, often starting out with what appears to be trivial conduct which excalates both in intensity and frequency of occurrence. Physical attack is often accompanied by, or may culminate in, sexual violence[14].

At a more sophisticated level, the violence may be psychological or mental violence, which can include constant verbal abuse, harassment, excessive possessiveness and depriving the woman of economic, physical and personal resources. Women, for example, are forbidden contact with their families and friends, denied access to the family income, degraded and belittled, either alone or in front of others, threatened with murder or suicide, taunted with threats of divorce, intentions of taking another wife or deportation, in circumstances where their continued residence in a country may depend on the continuance of the relationship. Violent activity also encompasses denial of sexual contact or any other conduct which leads to loss of self esteem. Further, any action which is designed to frighten the women, such as the destruction of her property or pets or any other behaviour which indicates a threat to her or those she cares for, falls within the definition.

While violence against women in the family may take these various forms, it is not to be concluded automatically that isolated minor violent incidents fall within the definition. Although such occurrences are distressing, regrettable and to be condemned, it is the persistence and recurrence of the violence which establishes it as coming within the definition and thus a subject of concern of this Manual. Certainly, an isolated attack with serious consequences falls within the definition, but the particular concern of this Manual is persistent, recurrent and frequent physical, sexual or psychological abuse of a woman by the man with whom she lives.

b) The victims and the victimisers

Modern studies indicate that, although the term "family" suggests safety and security, a place where its members should be able to coexist in security and harmony, that the family is often, for women, particularly those who are wives, an extremely violent place and that the most likely perpetrator of this violence will be her husband[15].

Certainly, there are other victims of abuse with the family. The 'battered child syndrome' has been acknowledged since 1961. Young girls are victims of sexual assault within the family, and, to a lesser extent, so are young boys. Elderly family members, particularly elderly women, are vulnerable to their grown up children[16], as are sick and infirm family members. In polygamous households, wives assault co-wives

and in the extended family, female members are often at risk from both male and female relatives. Further, female domestic servants are at risk both from their female employers and the male members of the employing family. Nonetheless, much family violence is directed at the wife, specifically in her role as wife. Thus, even where a woman is victimised by someone other than her husband, for example, as in India, by her mother in law to extract larger dowry payments from her natal family[17], this violence finds its roots in the wife's inferior status and subjugation, which makes her victimisation tolerable.

The extent to which husbands are subject to victimisation in the home is a matter of some controversy. Certainly, studies exist which suggest that husband battering is common[18], but most writers in the area of domestic violence have concluded that while women can be violent to their husbands,. this violence is not as common as violence against wives and is usually motivated by self defence and is rarely repeated or causes severe injury[19]. It appears, therefore, that while 'husband battering' is a phenomenon which clearly exists and is to be deplored, wives are victimised in the family to a much greater extent and thus deserve to be the focus of the most immediate remedial steps.

While it can be stated with some confidence that wives are the usual victims of violence in the home and husbands are the usual perpetrators, it is unclear what particular wives and husbands are at particular risk. Studies indicate that marital violence occurs in some communities in as many as one in three marriages[20] and it is always asserted that it is class, colour and culture blind[21], but little is known of the precise prevalence of violence against women in the home in the general population. Further there is little data in the social characteristics, such as age, class, culture, economic status and ethnic background of abused wives and their partners. Evidence of the problem comes from most Commonwealth countries[22] and from all classes and backgrounds, but much of this is unsystematic and anecdotal.

The reasons for this imprecision are varied. Marital violence is very much a hidden problem, the cause of much shame. Even where it is identified, little information is collected, particularly in developing countries. Again, the usual data base on violence against wives tends to lead to conclusions that may be totally inaccurate. For example, there is an overrepresentation in the literature of victims who are economically disadvantaged or who might be described as lower class[23]. Studies from the United States reveal an overrepresentation of victims who are black or in receipt of welfare benefits, while an unpublished study from Nigeria indicates that victims are most likely to be from polygamous households that are economically disadvantaged[24]. Other studies reveal the victims to be younger, rather than middle aged or old[25]. From this limited data, a typical battered woman, who is young, working class and perhaps, if such is available, on welfare, is revealed.

It must be stressed that conclusions such as the above must be treated with suspicion as they may be the result of the available research data, culled in the main from populations in women's refuges, public hospital, social work records and police information, which may lead to skewed information. Women from the middle and upper classes are

less likely to use women's refuges, while public hospitals are used primarily by the economically disadvantaged, with the wealthy able to take advantage of private doctors and clinics who are less open to researchers. Records from social work or welfare files, in general, contain information about less privileged groups who are more open to the intervention of government officials than the upper classes, who are, similarly, able to insulate themselves from the attention of the police. it could be, therefore, that the 'typical battered woman', as described, is a conclusion based on the available visible research material, thus indicating that anecdotal material and small research samples can be crucial to support the assertion that wife battery crosses all barriers of class, culture and colour.

Although it does appear that there is no culture nor level of society immune from the problem, there is no evidence to suggest that violence against wives is distributed equally amongst all groups in society. It well may be that there is more domestic violence in families that are economically disadvantaged or where the husband has received less education than the wife. Nonetheless, despite the variations that exist, all research that violence economic and social structure and appears to have no cultural barriers. Beyond this, all that can be said is that there is no typical abuser or victim, except insofar as the victim is overwhelmingly female and the perpetrator male.

For the purposes of this Manual, therefore domestic violence is defined as violence perpetrated by a man upon a woman exercising the role of wife in the domestic sphere. The definition is not confined to legally married couples, but extends to conver couples who are cohabiting or lovers living apart. It also covers women, such as mothers or sisters, or co-tenants, who may be the subject of violence from male relatives or friends, where the relationship is a non conjugal one. We therefore define domestic violence in such a way that it includes many women in the Commonwealth who are, at present, excluded from the protection of the law. For the purposes of this Manual our definition does not, however, extend to include other forms of family violence, such as child abuse, which is discussed briefly on pages - or abuse of the elderly or disabled within the home, issues which are serious and acknowledged as requiring further study.

Finally, it must be noted that in the literature, violence against women by their partners is termed spouse abuse, marital violence, domestic dispute, domestic violence and family violence. To a certain extent, these terms are misleading because the evidence that exists indicates that the problem is not one of spouse abuse, but wife abuse. The use of neutral terms obscures the issue, hides the connection between wife battering and male supremacy and suggests that women are as much to blame for the violence as men[26]. So also, the term 'battered wives' or 'wife battery' is misleading, serving to shift the emphasis from the instigator to the victim, allowing her to be blamed for the violence and solutions to be sought in her conduct[27]. The issue is one of violent husbands or wife assault or wife abuse and those, although the term "domestic violence" is used in this Manual, it is acknowledged that this term does not accurately, nor adequately, describe the nature and direction of the activity.

c. Incidence, results and causes

It is extremely difficult to estimate the true incidence of violence against women in the household for a number of reasons, the most important being that the problem is largely a hidden one, often denied by communities out of fear that an admission of the existence of the problem is an assault on the integrity of the family. Further, research into the problem is relatively new, so that until recently available information was so incomplete and disorganised as to be functionally useless. This is particularly so in developing countries where gender specific research is relatively uncommon.

Again, current methods of estimating the statistical level of wife battery are problematic as they rely, in the main, on reported incidents of abuse from, for example, police, welfare and hospital records, populations in women's refuges or self-reports from phone-ins or field surveys.

Statistics gathered from police records and other official sources certainly indicate that wife abuse exists, but these statistics notoriously under represent the problem, both because victims are often reluctant to report that they have been violated, for reasons such as shame and loyalty and also because even where the victim does report, that statistic may be lost because the official fails to record the incident or records it in a way which is meaningless for research purposes. Criminal statistics, for example, although they could be a major source of comprehensive data on violence against women in the home, frequently fail to indicate the sex of the victim and the assailant and rarely record the relationship between the victim and the offender[28]. In these circumstances, it is impossible to distinguish wife assault from any other assault and thus, for statistical purposes, it becomes invisible.

Again surveys based on self-reporting also present problems. Women who have been abused may prefer to keep this to themselves, or where they do respond, they may overestimate or, more commonly, underestimate the amount of violence they have suffered. Thus, for example, such women may consider pushes and slaps to be insignificant and fail to mention such violence. Further, the self-report survey may by its method reduce its data base. For example, if the 'phone in' survey method is used, the data base is immediately restricted to those women who have access to a phone and verbal confidence. Frequently, this will exclude women from ethnic minorities from the data base.

Furthermore, surveys, in general, can never claim to be fully representative. They are limited by the definition of violence used by the researcher, they rely on the researcher's perception of interpersonal relations and they often lose claim to be representative by excluding various groups from the data base. Often, for example, surveys are taken of couples who are currently cohabiting, thereby excluding evidence of violence in relationships which have ended, while any survey of a particular population, such as women who have used a refuge, is automatically unrepresentative as those women have themselves already defined themselves as battered.

Notwithstanding these problems, however, anecdotal and other evidence, from all parts of the Commonwealth, makes it clear that violence against women in the home is a serious social problem[29]. In Canada, based on statistics from doctors, lawyers and social workers and police records, it has been estimated that one woman in ten is abused by her partner[30], while a survey conducted into community attitudes in Australia in 1987 showed that one in five Australians thought that threatening to hit can be justified[31]. Statistics from Papua New Guinea, one of the few developing countries to have comprehensively considered the problem, indicate that in some areas of the country up to as many as 67% of wives have suffered marital violence[32].

Clearly, the actual extent of violence against women in the home will never be quantified accurately, but it may be concluded that such violence is part of the dynamics of many family situations in both the developed and developing Commonwealth. In short, the research that does exist reveals that women are murdered, physically and sexually assaulted, threatened and humiliated within their own homes by men to whom they have committed themselves and that this is not uncommon or unusual behaviour.

While it is impossible to gain an accurate picture of the actual extent of marital violence, the results of such conduct is relatively clear. At its most basic level, wife battery causes physical injury to the woman which may range from bruising to death. She may often suffer debilitating health and psychological sequalae, studies indicating that battered women report a significantly higher level of anxiety, depression and somatic complaints than women who have not suffered such abuse[33]. They may often exhibit what is called the 'battered woman trauma syndrome', whereby they display a paralysing terror increased by the stress of an ever present threat of attack[34]. Further, battered women are overrepresented among female alcoholics, drug abusers and women who have mental illness and are twelve times as likely to attempt suicide than women who have not been battered[35].

The adverse consequences of marital violence are not confined to the victim of the abuse. Indeed, the abuser himself may suffer the consequences of his behaviour, a significant amount of research indicating that women who kill their husbands do so more often than not in response to an immediate attack or threat of attack from husbands[36]. Domestic violence is also hazaradous for family members or others who seek to intervene, who may be hurt or killed by the abusive man or who may, indeed, injure or kill the man himself.

Apart from the short term consequences of domestic violence, many commentators point to the effect violence against women may have on children. Children in families where the wife is abused run the risk that they themselves may be injured or killed by the abuser if they become involved in an incident of violence, either by chance or in an attempt to protect their mother. Research suggests, furthermore, that wife assault is one of the major precipitating factors in child abuse, children whose mothers are battered being more than twice as likely than children whose mothers are not battered to be themselves abused, whether by their mothers' attackers or their mothers[37]. Again, it is well established that children from homes where there is violence against the

wife suffer signficantly more behavioural problems and lack greater social competence than children where there is no such violence. Further, a high proportion of street children report the incidence of marital violence in their family home, while, clearly, where domestic violence leads a woman to leave the home, taking the children with her, the children suffer psychologically, emotionally, socially and economically.

Wife abuse has serious long term consequences. It is frequently asserted that violence in family of origin begets violence, so that children whose mothers were abused by their fathers go on to repeat this pattern when they themselves establish their families. Thus, it is suggested that young men learn to batter their wives from the behaviour of their fathers while young women learn to become victims of abuse because of the response of their mothers. So also, child abuse is frequently seen as learned behaviour and is regarded as more prevalent in families where the mother or father observed or experienced violence in their families of origin.

Certainly, these assertions are surrounded by some controversy, but[38] there is fairly clear evidence that observation or experience of violence in family of origin may be implicated in later violent behaviour unconnected with the home, one study suggesting that observation of parental conflict and violence during childhood 'were significantly predictive of serious adult personal crimes (eg. assault, attempted rape, attempted murder, kidnapping and murder)' in adulthood[39].

Beyond the vast personal and human costs of domestic violence, lie the social and economic costs of the conduct. Such social costs include stigmatisations of the individual family, social isolation and temporary or chronic economic and psychological dependence of the woman on support groups or the welfare system. The cost to the community in financial terms is enormous, huge sums being spent on police and court services, health and welfare services, women's refugees and social security benefits, one Canadian estimate suggesting that in 1980 alone, Canadian taxpayers and their governments paid at least thirty two million Canadian dollars for police intervention in wife battering cases and for related support and administrative services[40].

In terms of economic costs alone, violence against women in the home is a serious issue, requiring effective response. Effective and appropriate response depends, however, on determining the cause of the conduct. Many theories have been advanced to explain the prevalence of violence against women in the home. Most presuppose that an erradicable cause can be isolated to explain the phenomenon. Thus, many studies, for example, draw attention to the close relationship between the consumption of alcohol or drugs and violence in the home[41]. Others suggest that violence is often the result of victim precipitation, mental illness, stress or frustration or underdevelopment[42], while many conclude that most violent men come from violent families of origin[43].

Recently, however, the overwhelming pervasiveness and acceptability of violence against women in the family has led some scholars to question the validity of explanations based on an external cause. These scholars, predominantly feminists, have concluded that violence against women in the home has its roots in the structure of society itself and suggest that wife battery is a reflection of the broad structures of sexual and economic inequality in society. Their view is that rather than representing an aberration, violence against women in the home is the norm, being merely an exaggeration of the role society expects men to play in their domestic sphere. In this analysis, the abuse of women in the household can be seen as a naked display of male power, the outcome of social relations in which women are kept in a position of inferiority to men, responsible to, and in need of protection by them[44]. These scholars have led us to ask whether the **social, political and economic dependence of women on men provides a structure wherein men can justify violence against women?**[45].

It is clear that there is no simple explanation for violence against women in the home. Certainly, any explanation must go beyond the individual characteristics of the man, the woman and the family and look to the structure of relationships and the role of society in underpinning that structure. In the end analysis, it is perhaps best to conclude that violence against wives is an outcome of the belief, fostered in all cultures, that men are superior and that the women with whom they live are their possessions to be treated as they consider appropriate. The collected scholarship that seeks to explain violence against wives indicates that the causes are complex and certainly multifactorial. Nonetheless, any explanation must be seen against a background of gender inequality, wherein the victim of the violence is most frequently the woman and the perpetrator the man and the structures of society act confirm this inequality.

3. LEGAL APPROACHES

a) Introduction

Throughout the Commonwealth, the problem of domestic violence has been seen as requiring primarily legal solutions, but the policies that those involved in law making and the approaches those within the legal system have pursued when grappling with the issue have not been uniform. In all countries where domestic violence has emerged as a serious issue, those involved in the law have been forced to confront the central question of **whether the penal or criminal justice system is appropriate in the management of domestic violence.**

Two divergent view have emerged in the context of this question. The first is that in the management of violence against women in the home, the criminal law is at best a blunt instrument and at worst, totally inappropriate. Those of this view favour an approach focusing on meditation or conciliation or a model which is welfare oriented or therapeutic and avoid the intervention of the law enforcement process with its accompanying arrest, prosecution and sentencing. The criminal law, they argue if it has a place at all, should be confined to the most serious cases of wife assault, or, in other words, is perceived as a 'last resort'. Those of the second view, on the other hand, emphasise that domestic assault, notwithstanding the fact that it takes place inside the family and occurs between intimates is a crime and demand that such conduct be treated no differently from any other crime.

These two views underpin all legal responses to domestic violence, such responses moving, in effect, along a continuum, at one end of which is a purely welfare or therapeutic response, while at the other end is an approach which advocates criminal sanction in all cases. It is crucial, therefore, to explore the basis of each philosophy.

Forceful arguments can be raised against the use of the criminal law in the domestic context. The criminal law is punitive, rather than rehabilitative. It looks to past conduct and is rarely concerned with future behaviour. It is rare, therefore, for criminal justice systems to provide support and treatment programs that could, for example, teach the man to control his aggression or provide support for the wife. The criminal law depends for its effectiveness on the actors involved in the penal system - the police, prosecutors and judges - all of whom have notoriously failed to perceive wife abuse as a serious, let alone criminal issue and have, thus, refused to intervene, arrest, prosecute and convict. Even in those cases where police, prosecutors and judges do respond, a criminal conviction is not inevitable, perhaps because there is insufficient evidence to carry the burden of proof. If this is the case and the violent man is acquitted, even on a technicality, he will not necessarily refrain from further victimising his wife. Even where he is arrested, prosecuted, convicted and sentenced, this sentence is likely to be trivial, amounting to a fine or a short period in custody. Further, any sentence will penalise his victim and family as well as himself. In all probability, any fine will be paid out of joint family finances and imprisonment may cause financial hardship because he may be the breadwinner or because he may lose employment permanently.

Again, any sanction, whether by fine or imprisonment in no way guarantees the victim's safety. Certainly, where the man is imprisoned, the woman is temporarily relieved from victimisation, but she may well be confronted with an even more violent man on his release.

Finally, those who oppose the use of the criminal law in the context of domestic violence point to the fact that it has the capacity to harm the family disastrously. This they suggest is particularly so in minority populations and traditional societies where a wife would be isolated by her extended family and community and, in all likelihood, the husband's kin would revenge themselves on her[46].

In short, critics of a criminal justice response to domestic violence point to the limitations of the criminal law as a means of rehabilitation, the current failure of its personnel to act in accordance with its spirit, its technical limitations and the destructive effect it can have on the victim and her family. They then bolster their arguments by pointing to research which reveals that mediation and therapy is highly successful in reducing recidivism in domestic violence[47].

Against these objections, those who advocate a criminal justice response marshal highly cogent arguments, some going so far as to make the criminal law the central focus of any treatment of domestic abuse.

Criminal justice model advocates are prepared to acknowledge that the criminal process as it currently operates in the context of domestic violence may well be defective. This, they suggest, is a reflection of societal values that have denied the existence of, or trivialised, the problem of violence against women in the home. They point, first, to the symbolic power of the law, suggesting that arrest, prosecution and conviction, with punishment, is a process that carries the clear condemnation of society for the conduct of the abuser and acknowledges his personal responsibility for it. It is a process that indicates that violent crime within the household is as much a crime as violent crime in the street. As such, the criminal process focuses on the interests of the woman, refusing to subordinate her protection to the preservation of the relationship or the maintenance of the family, which, criminal justice advocates argue, is in contradistinction to the counselling/mediation model which downgrades the violence, seeking to re-establish the relationship and preserve the family. Further, they suggest, that mediation schemes and the current neutrality of the criminal justice system subtly encourages violent men and unfairly places blame on the woman for being involved in the violence. Such schemes, they believe, run the risk of removing the responsibility for the violence from the violent man by creating a context in which the woman is perceived as sharing, although perhaps not completely, the responsibility for the violence directed towards her. This may serve to bind women more strongly to existing violent relationships or create personal involvement where none existed previously. Fundamentally, the advocates of criminal justice model are of the view that the criminal model, unlike the counselling/mediation approach refuses to accept or condone any violence against women in the home, places full blame on the man, and thus avoids further victimisation of the woman and creates a general culture in the community wherein violence in the home is condemned.

Certainly, the symbolic and educative role of the law has important implications for the ultimate eradication of violence against women in the home, as the law can shape and change attitudes, but those who advocate the criminal justice response are able, further, to point to research studies which indicate that this approach has practical, as well as symbolic implications. Here proponents rely on mounting evidence which suggests that the involvement of the police in their law enforcement role, followed by prosecution and conviction is not only the most effective mechanism for stopping acts of violence in the short term, but also has a profound effect on the man's future behaviour. In this context research evidence is cited which reveals, first, that arrest with its associated intimidating procedures, both at the scene and at the police station reduces the risk of recidivism in the abuser and second, that a policy of mandatory prosecution has a positive effect in the management of abuse[48].

The research into arrest and charging over the past ten years has proved highly influential in the development of policies for the management of domestic violence and has resulted in a number of countries, for example Australia and Canada, instituting policies encouraging arrest in cases of domestic violence[49], such policies generally advocating a presumption of arrest unless there are good clear reasons[50], while some have gone so far as to introduce mandatory arrest in domestic violence cases[51]. Indeed, the current popularity of the pro-arrest policy had led one commentator to say that the use of arrest has emerged from the debate surrounding the management of domestic abuse as the preferred response of policymakers, police chiefs and feminists[52]. The charging policy has proved to be similarly popular, thus, since 1983 Canadian policy have been directed to lay criminal charges in all cases of domestic violence, even if the woman would prefer to withdraw the complaint[53] a policy which has also been introduced in New South Wales, Australia[54].

While the criminal model has proved to be popular in the context of violence against women in the family, it is essential that those involved in policy making in this area should take account of the cultural, economic and political realities of their countries. In all Commonwealth legal systems, physical and some forms of sexual and emotional abuse of a woman within a family are crimes. It is impossible, however, to ignore that although they are crimes they take place within the family between persons who are emotionally and financially involved with each other. Any policy which fails to acknowledge the singular nature of these crimes and which is unaccompanied by attempts to provide support for the victim and help for the abuser will be doomed to failure. In other words, any pro arrest or charging policies introduced into a vacuum without complementary changes in the pre and post arrest stage will be ineffective and may be counterproductive. Thus, for example, policy makers considering the abuse management policy of London, Ontario, often cited as a model for domestic violence treatment, where a charging policy exists, must take account of the fact that there the police force, which receives intensive training on how to deal with wife battering, funds a family consultant service that provides a 24 hour crisis intervention service, while a community service exists which includes a battered women's advocacy clinic to provide legal and emotional counselling for women, as

well as a treatment group for men who batter. In short, policies to deal with violence against women in the family must be appropriate to the country context. Reformers should note, further, that certain communities, for example those that are native or traditional, may find strategies based on the criminal model alien and oppressive and be more familiar and receptive to strategies based on mediation and conciliation[55].

No matter the approach adopted, it is essential that it be applied flexibly, not rigidly and take into account the needs and desires of the woman, not treating her as incidental to the issue. Flexibility is particularly important in multicultural societies, where certain groups of women may have particular difficulties with the criminal justice system. Aboriginal and immigrant women are often distrustful of a country's legal system in general and criminal justice system in particular[56], a distrust which may preclude such women co-operating in any strategy based on a criminal model. Again, any strategy must be introduced sensitively and explained both to the community generally and those who will be involved in its management. Thus, the police, lawyers and judges must be trained both practically and in terms of attitude[57].

In the end analysis, it is clear that no policy introduced to deal with the issue of domestic violence will provide all battered women with all the services they require. Important lessons can be learned from jurisdictions which have adopted particular approaches. For example, Canada opted for the criminal justice model, introducing a pro-charging policy in 1983, but this has not always worked smoothly. Police, for example, have in some cases been reluctant to charge, despite the policy[58] and there are reports that women often asked for charges to be dropped after they had been laid. Further, a number of women expressed the view that the policy left them feeling oppressed and helpless, one woman being quoted as saying:

> Participation in the criminal justice system wasn't presented to me as a right. It was an obligation. I was made to feel that I was wrong if I wanted any other kind of support or help[59].

In Canada, further, rigid application of the criminal justice model has on some occasions resulted in the imprisonment of some battered women because they have refused to testify against their abusive spouses or failed to co-operate in the prosecution process in some other way[60]. Again, in Australia, Aboriginal women have indicated an unwillingness to co-operate in any domestic violence policy which depends on the criminal justice system, a system which they distrust and from which they are anxious to protect their men. Perhaps, in the final analysis, the ideal approach is of the Australian Law Reform Commission:

> It is not impossible to accommodate both the criminal and the counselling approach. When it is said that domestic violence offenders must be treated in exactly the same way as other offenders it does not necessarily mean that they should inevitably be gaoled. Other offenders are treated by the

criminal Justice System in a flexible way which takes into account many factors in deciding how the criminal process should proceed and what punishment is appropriate to the particular case[61].

b) The role of the police

Whether a country follows a welfare or criminal justice policy in its approach to violence against women in the family, it is certain that the role of the police will be crucial. Indeed, the important key to a country's response to domestic violence is the response of the police. The police is the only agency that offers the woman a combination of accessibility and the coercive power of the State. In most countries, the only service available to battered women twenty four hours a day and seven days a week, apart from hospital accident units, is the police. Further, unlike other social services, the police force offers an emergency telephone system and comprehensive geographical coverage. Given that many incidents of wife abuse occur in the evening and weekends, when families are together and alcohol is more likely to be consumed, the police can be expected to be one of the first contacts for many women. Evidence exists from throughout the Commonwealth that the police response in the context of domestic violence is, in general, inadequate.

Police are criticised for failing to offer the woman adequate protection from the violent man, underestimating the violence or fear of violence and dismissing some appeals for help because they are of the view that there are insufficient grounds for intervention. They are perceived as placing too great a value on family privacy and marriage rights, at the cost of the woman's right to be free from assault or fear of assault. They are seen as subscribing to the view that the woman probably provoked the violence in some way. They appear to be unwilling to act and show little interest in a case if they do not see it as leading to a successful prosecution and finally, they are unaware of sources of help and support available to the woman[62].

Studies indicate that the police practice in cases of domestic violence is to attempt to mediate or counsel the parties and achieve reconciliation rather than to fulfil a role of law enforcement. Police, thus, traditionally prefer not to arrest the violent spouse, even though in other cases arrest would be automatic, even where the woman requests arrest, unless there is some other factor, for example, the violence is severe or the man is belligerent towards the police. Mediating, rather than pursuing a role of law enforcement is particularly likely where the couple are married and living together, rather than cohabiting and is the preferred response in parts of the developing Commonwealth[63].

A number of factors lead to the police responding in a peace-keeping, rather that law enforcement role in the context of domestic violence. First, recruit-training frequently categorises violence in domestic circumstances as a social, rather than criminal matter. Second, police-officer experience in cases of domestic violence is often frustrating. For example, despite routine beatings, victims remain in violent relationships and even refuse to assist in the prosecution of their abusers, leading police officers to explain their

failure to act as law enforcers as the result of the reluctance of victims to press charges in the initial phases of the investigation and their subsequent failure to give evidence in court. Police, generally unaware of the dynamics of abusive relationships and thus not attuned to the woman's feeling of dependency, fear, responsibility for the children and general helplessness, may quickly conclude that the woman enjoys the abuse and is merely seeking attention[64]. Third, police, like many others in the community, see family violence, which provides them with some of their most dangerous and least liked work, as a normal feature of domestic life, which they consider should not be part of police work at all. In some situations, further, the police may merely reflect the societal view that a man has the right to beat his wife.

There is no doubt that the police role in domestic violence is ambiguous and the task very difficult. Much of this is due to the fact that in most countries there is no clear view as to whether wife assault is criminal activity or whether it is a private family matter, perhaps requiring counselling. This confusion operates to colour the response, not only of the police, but of other actors in the legal system: prosecutors, crown attorneys, magistrates and judges. Ultimately, the ambiguity colouring police response will be resolved only where domestic violence is clearly condemned by the whole of a society. In the short term, however, much of the difficulty confronting the police in this context is remediable.

Poor police response results, to a certain extent, from inadequate or unclear police powers, such as power of entry, power to arrest and power to release on bail. Again, police ineffectiveness is exacerbated by lack of clear police policy, which leaves the individual operational officer with an open discretion to act in particular cases, while the low priority given to training officers about domestic violence, the needs of the victim and the importance of appropriate police response is neither helpful for those who are battered nor officers themselves. Before moving on to consider the legal approaches that have been used in the Commonwealth to confront violence in the family, police powers of entry onto private premises in cases of domestic violence, police powers to arrest the suspected offender, the release of the suspected offender on bail and police training are reviewed.

(i) Police powers of entry

Throughout the Commonwealth, the power of the police and others in authority to enter the private premises of an individual is limited. This limitation, enshrined in national, regional and international human rights documents, is an important guarantee which protects the lives of ordinary women and men from arbitrary State interference. In the context of domestic violence, however, too great adherence to this guarantee can protect the violent man at the expense of the woman.

In most Commonwealth countries, police powers of entry onto private premises are limited to cases where they have reasonable grounds to suspect that a breach of the peace is occurring, is about to occur or they have been issued with a warrant. An actual or potential breach of the peace cannot reasonably be suspected in circumstances where there is

no indication that an assault has or is about occur. In the typical case, police will be called to a case of domestic violence by a family member or a neighbour and they will be met by a member of the household who will tell them that no violence is occurring or has occurred. In the absence of a warrant the police, unless invited in or able to justify their suspicion that a breach of the peace has occurred or is about to occur, by, for example, noise of indications of injury, will have no right to enter. If they enter by trick or force, they may face consequential legal suit from the occupier or a disciplinary hearing within the force.

Some jurisdictions, alive to the dangers that the usual restrictions on police powers of entry can have where domestic violence is concerned, have introduced special strategies. Thus, a number of the Australian States have introduced legislation to clarify and extend police powers of entry to investigate offences of domestic violence. Legislation in New South Wales, Tasmania and the Australian Capital Territory allows the police to enter if requested to do so by a person who apparently resides on the premises or where the officer has reason to believe that a person on those premises is or may be under threat or attack or has recently been under threat or attack or an attack on such a person is imminent[65]. In simple terms, this means if, for example, a child who appeared to live on the premises asked the police officer into the home, the officer would not need to hear or see evidence of breach of the peace and would not require a warrant for entry to be legal. One State, moreover, facilitates police entry into suspect premises by allowing an entry warrant to be acquired over the police radio telephone[66]. The procedure for obtaining a telephone warrant is detailed and, in practice, these warrants are rarely used, the highest number of such warrants being applied for between 1983 and 1987 being eight[67], but their availability must make it easier for police to secure entry by invitation.

(ii) Powers of arrest

After gaining entry, the police may wish to make an arrest. In cases of domestic violence, arrest not only provides immediate protection for the victim, but decides the important policy question raised by such cases, that being whether the issue is a criminal or social welfare one.

As with the question of powers of entry, and again as an essential protection for individual civil liberties, the power of the police to arrest, although varying from jurisdiction to jurisdiction, is controlled, being confined, usually, to matters of some urgency. In most Commonwealth countries, unless the offender has committed or is in the process of committing a breach of the peace or there is a danger that further breaches of the peace or offences will occur, a police officer must have a warrant to arrest. In some jurisdictions, furthermore, arrest is discouraged, proceedings by summons being favoured.

The question of whether an officer has the power to arrest in a given jurisdiction is a technical one. Suffice it to say, although the power to arrest for a domestic crime is the same as for any other crime, officers are often uncertain as to their legal powers and this is the case even in cases of very serious violence.

Many commentators argue that the police should be given special powers of arrest in situations of domestic conflict and that they should be mandated to implement these powers. They believe that arrest not only provides the woman a with immediate safety, but gives her a feeling of power, leaving the man with an immediate message that his behaviour is unacceptable, a message which is said to have long-term effects on his future behaviour (see p. 14). Further, they argue, that arrest of the offender gives the woman a period of time when her spouse is absent which allows her to sort out her options as to the future.

In essence the central question here is that of the purpose of and justification for arrest. The most radical advocates for mandatory arrest in domestic violence cases argue that arrest is a means of deterrence, a "short, sharp shock" to modify the man's behaviour[68]. Opponents, on the other hand, suggest that to use arrest in this fashion not only infringes human rights guarantees, but also punishes the batterer before his guilt is proven.

It is unusual for the police to be mandated to arrest in cases of domestic violence. However, in a number of Commonwealth countries, police powers to arrest have been clarified so that officers are no longer confused as to their powers. Thus, for example, in England, the London Metropolitan Police issued a force order in June 1987 which encouraged the use of arrest in domestic violence cases, while policies in Canada and Australia have been described on page 14. In a number of jurisdictions, moreover, civil injunctions have been introduced to protect victims of abuse and it is common for a power of arrest to be attached to such an injunction where it is breached (see page 29).

Nevertheless, even in jurisdictions where police are encouraged to arrest or their powers to arrest have been clearly spelled out, it is not uncommon for officers to prefer to mediate rather than arrest. Thus, for example, in the United Kingdom where legal powers of arrest are frequently attached to civil injunctions, police prefer to mediate.

In the end analysis, whether the police arrest in cases of domestic violence is a reflection of force policy, which, in turn, is a reflection of wider societal attitudes. If the wider community perceives domestic violence to be a crime and this is reflected in prosecution policies and judicial sentencing patterns, police training will reflect this and officers will be more inclined to arrest. Whether an officer arrests can also be affected by social pressure, campaigns and vigilant response from activists where arrest powers are not used. In this context, two cases from the United States are instructive.

In the first, Bruno v Codd[69], 12 New York City women who had been beaten by their husbands sued the Police Commissioner and others for failing to provide them with protection against their abusive husbands. Specifically, they objected to the implementation of the New York Family Court Act 1962, which had empowered the Family Court to issue injunctions to battered women whose husbands had been violent against them. The maximum penalty, rarely imposed, for violation of the orders was six months imprisonment. Police routinely refused to arrest the husband unless the wife secured a Family Court Order; however, the Family Court refused to issue such orders. The Manhattan Supreme Court

refused to dismiss the suit against the Police Commissioner and ultimately the Police Department entered into a voluntary arrangement with the women to treat wife abuse in the same manner as any other assault, and to remain at the scene of the attack long enough to stop the violence and to secure any necessary medical treatment for the woman.

A similar action was taken in Scott v Hart[70], where four women sued on behalf of a class of married and unmarried women in Oakland, who, when they telephoned the Oakland Police Department for assistance and protection against physical abuse from the men with whom they were involved received either no response or one that was inadequate. This, they argued, discriminated on the basis of sex, encouraged violence and was based on assumptions that what a man does in his home is not the State's business and that a man had a legal right to punish his wife. As in the first case, the Police Department entered into a settlement with the women wherein it guaranteed that domestic violence would be treated like any other criminal behaviour and the police discretion not to arrest would be curtailed. This case also proved to be effective in putting pressure on agencies to change their policies in the area of domestic violence. Training programs were introduced for police, large sums were given to provide shelter for women and a Battered Women's Resource Card, explaining the legal rights of battered women and resources available to them was designed so that it would be carried by police and issued to women at risk.

(iii) Bail

In most Commonwealth countries, a person who has been arrested has the right to be released on bail either by the police or by a judicial officer. Frequently, he will be required to lodge a sum of money or produce a person to act as surety, promising to forfeit a sum of money if the arrested person does not appear.

In many cases of domestic violence, immediate release of the offender may be dangerous for the victim and, certainly, release of the offender, without prior warning to this victim, may have serious consequences for her.

The offender's right to bail is an important part of his civil liberties, but his right to release must be weighed up carefully against the right of his victim to be safe. A number of Australian jurisdictions attempt to strike a balance between the interests of the offender and the victim by allowing conditions which are designed to protect the victim to be attached to the release of the offender. In New South Wales, for example, a special bail form, providing a pro forma for conditions which may be imposed on the person to be released, is used by police in cases of domestic violence. Hence, the offender can be released on condition that he does not drink alcohol or approach his spouse, while bail may not be granted where the offender has previously broken protective bail conditions, unless the person granting bail is satisfied that the conditions will be complied with[71]. Legislation in New Zealand has wider effect, providing that in cases of sexual violation or other serious assault or injury, the prosecutor should convey to the judicial officer any fears held by the victim about the release on bail of the alleged offender[72].

(iv) Training

Domestic disputes provide the police with a large part of their work. This work is unpleasant, difficult, sometimes dangerous and always stressful for police officers. To a large extent, also, legal intervention ranging from initial arrest to enforcement of orders that may be issued by a court depends on the action of the police. However, very few countries provide specific training for police on the subject of domestic violence, or if they do so, this training is inadequate.

To an extent the effectiveness of police intervention depends on the personality and maturity of the individual operational officer, but training at all levels can help to change police attitudes to domestic assault and can also alert officers to operational techniques which can be helpful. Police must be made aware that domestic violence is a serious issue which is neither a normal part of family life nor a private problem that will not profit from police intervention. Operational training should encourage officers to refer the victim to support services, such as medical and legal services and women's refuges.

Some Commonwealth countries have introduced police units that have been specially and intensively trained for the purpose of dealing with spousal assault. These units, which are sometimes multi-disciplinary and include social workers, testify to the commitment of those countries to battered women, but such units are beyond the resources of many countries and may not be appropriate in all situations. Small communities may find that the establishment of a special unit is too expensive, while large communities may find that it is impossible to provide sufficient specialised units to cater for the demands of the community. Care must also be taken where these specialised units are established that training in domestic violence is still given to all police officers, and not just the specialised officers, as in most countries officers are sent to calls on a random basis and not in accordance with special knowledge. It is common, further, for training in issues directly related to women to be confined to female officers. This can be dangerous, also, as there is no guarantee that the operational officer at the time of a domestic violence offence will be a trained female.

Allied with the question of training for police officers is the issue of appropriate record keeping. Much research indicates that police officers, perhaps as a reflection of their attitudes to wife assault, either fail to record the fact that they attended the scene of domestic violence or if they do so, the record is inadequate[73]. Adequate record keeping is essential for successful prosecution, important to increase our knowledge of domestic violence and indicates that the problem is viewed seriously. While training should instil the importance of record keeping into officers in the long term, in the short term, the goal of accurate record keeping can be achieved by devising a form to record such offences, which officers could be mandated by legislation to use.

c) Current Legal Strategies

Although the legal response to domestic violence throughout the Commonwealth varies from country to country, a common pattern of remedies can be discerned:

* Most countries allow for **divorce and judicial separation,** remedies which may well be the principal responses to domestic violence, but which are, of course, applicable to married spouses only.

* All countries in the Commonwealth provide that physical assault between spouses is as criminal as if such activity had occurred between strangers. In all countries, **criminal prosecutions** may be sought by the state or by the victim.

* **Quasi criminal** remedies (actions midway between civil and criminal law) derived from breach of the peace provisions exist in most Commonwealth jurisdictions. Their potential as a remedy for domestic violence has been developed in some jurisdictions.

* **Injunctions** are available in all Commonwealth countries as ancillary proceedings to a matrimonial cause or a civil action. A number of countries have, however, gone further and enacted special legislation so that injunction proceedings can be taken independently of other proceedings. This is in order to provide protection for women who are the subject of domestic abuse.

Each of these remedies is discussed in the sections that follow.

(i) Divorce and judicial separation

Ending a marriage through divorce or judicial separation is the most basic remedy for domestic violence in circumstances where the parties are married. The law relating to matrimonial causes differs from country to country and, sometimes within a country from group to group, thus it is impossible to give a short description of the grounds for divorce and judicial separation which exist in the Commonwealth.

In general terms, however, three varieties of marriage law exist. The first is the general law, based on a European model, such as the English common law, Roman law or Roman Dutch law. The second is customary law and the third is religious law, such as derived from Islamic law. A short description of matrimonial law is complicated further by the fact that in some countries, parallel systems of legal regulation exist. For example, in Malaysia, Muslims are governed by Islamic law, certain indigenous groups are governed by customary law, while the balance of the population is governed by general law principles derived from English common law[74]. In the countries of Commonwealth Africa, plural matrimonial causes law exists, so that some are governed by customary principles, others by principles derived from religious law and others by general law principles[75].

Despite the legal pluralism matrimonial causes law throughout the Commonwealth exhibits, it is possible to make some generalised comments about the availability of matrimonial relief in cases where there is violence against women in the home.

Where a couple's marriage is governed by a customary law regime, marriages can be dissolved, but such dissolution is discouraged and is a matter between the families of the couple who will first attempt to reconcile them. This is particularly so on customary systems where dissolution of marriage will oblige the woman's family to return the bride price which has been paid by the husband[76]. Although dissolution will be discouraged, persistent cruelty by the husband will be accepted as grounds for dissolution of a customary marriage[77]. Dissolution of a customary marriage may not be allowed, however, for minor physical cruelty or emotional abuse. Similarly, in those jurisdictions where marriages are governed by religious law, a woman who has been treated with cruelty by her husband can divorce him[78].

The general law governing divorce and judicial separation throughout the Commonwealth appears to fall into one of three models. The first allows for divorce where the other party is guilty of some fault, the second allows for divorce where the marriage has broken down irretrievably and there is some evidence to show this, evidence which is usually very like fault, and finally, divorce where the marriage has irretrievably broken down either because the parties assert that it has or because they have separated for a period of time which is taken to prove this breakdown[78]. In jurisdictions which follow the latter two models, any woman who wishes to divorce her husband for physical, emotional or sexual abuse, will have no difficulty in achieving her aim. Where the law fits into the first model, however, she may face difficulties.

In some Commonwealth jurisdictions, legislation will only allow a woman to divorce her husband where he has changed his religion and gone through a form of marriage with another woman; where he has been guilty of incestuous adultery or bigamy with adultery where he has married another woman; where he has been guilty of rape, sodomy and bestiality or adultery coupled with desertion without reasonable cause for two years[80]. A man, on the other hand, need only to prove that his wife is guilty of adultery.

Most Commonwealth countries retain the decree of judicial separation, which relieves the petitioner of the duty to cohabit with her husband, but does not involve her in divorce[81]. This decree is usually allowed on the same grounds as divorce, so that a married woman who was the subject of domestic abuse could obtain such relief.

The fact that a woman who is the subject of domestic maltreatment may proceed for divorce or judicial separation may be a hollow solution to her. First, legal separation and even divorce do not guarantee that the woman will be protected from violence, a number of studies reveal that a woman may well be victimised by her ex husband after divorce[82]. Second, many women who are the subject of domestic violence are not married or if they are they may not wish to separate from or even divorce their husbands. Their priority is to end the

violence in their relationship, not the relationship itself. Further, a woman may shun matrimonial relief out of shame, because divorce is culturally and socially unacceptable or in order to keep her family together or maintain her and her children's standard of living. Finally, even in cases where she wishes to end the marriage she may face legal obstacles.

Except in those jurisdictions where divorce is available on assertion of breakdown or on proof of separation, the petitioner will have to show that grounds for divorce exist. In these cases, the burden of proof is on the petitioner and this burden must be carried to the satisfaction of the judge. This may be a difficult task where the judge is dedicated to the concept of the sanctity of marriage or is of the view that a husband has the right to discipline his wife. In simple terms, the marriage will not be dissolved even in cases of domestic violence if the judge is of the opinion that the battered woman's circumstances do not indicate that her marriage should be brought to an end.[83]

In some countries, furthermore, couples who wish to divorce must attempt to reconcile before the courts will countenance an application for divorce. In Malaysia, for example, it is compulsory for couples to attend reconciliation sessions where certain ground for divorce are relied on [84]. A woman who has been the victim of abuse in such a jurisdiction is in the unhappy situation, when she decides to end her marriage, of having to meet with and attempt to agree with her attacker before she can separate from or divorce her husband. Finally, in many jurisdictions a divorce petitioner has to await the elapse of a time bar before divorcing or separating from her husband. Effectively, this may keep a battered woman bound to the man, unless she can prove her circumstances are exceptional for, in some cases, up to five years[85].

(ii) Criminal law remedies

In all Commonwealth countries all forms of physical domestic violence and some forms of emotional abuse such as threats of physical injury and demands for dowry[86], are crimes, as a man is not entitled, by reason of marriage or cohabitation, to inflict violence upon his wife.

In principle, therefore, the criminal law may be invoked in the form of a state or private prosecution[87] against a violent spouse for common assault, assault occasioning actual bodily harm, assault occasioning grievous bodily harm unlawful wounding, manslaughter, murder or any other criminal act[88]. In some Commonwealth countries, furthermore, new criminal legislation has been introduced to meet the challenge of certain objectionable conduct. Thus, for example, India and Bangladesh have passed statutes establishing severe criminal penalties for those who are violent in the context of dowry. In the majority of Commonwealth countries, however, it is not a crime to rape or sexually assault a woman to whom one is married and from who one is not legally separated[89].

In practice, the criminal law has proved to be of little assistance to the victim of domestic violence. Traditionally, the police have been blamed for the gap between the victim's abstract legal

rights and her remedies in practice. The courts, also, have been criticised for their reluctance to view violence between spouses as a crime comparable to crime between strangers and for their willingness to accept the premise that traditional criminal law is inappropriate in the context of intimate relationships.

The appropriateness of the criminal justice system to and the role of the police in the context of family violence have already been canvassed, and the response of the courts and their personnel will be addressed shortly. At this point it is important to remember that the criminal court is concerned primarily that the guilt of the offender be established beyond all reasonable doubt and for this purpose cogent evidence will be required.

Crimes against intimates present serious evidentiary difficulties. Domestic violence usually occurs in private, so the victim will often be the only witness. Her evidence will, therefore, be crucial in proving the guilt of the accused. In many situations the victim will continue to live with or, at the very least, be in contact, with the offender until the trial occurs. She is, thus, susceptible to threats and pleadings encouraging her to withdraw her complaint or fail to give evidence when the charge is heard.

Common wisdom suggests that a disproportionate number of women withdraw criminal charges against their spouses, wisdom which is often offered to justify inaction on the part of the criminal justice system in cases of domestic violence. Studies indicate that there is no greater withdrawal of charges by wives than any other crime victims[90], and some jurisdictions have introduced changes in prosecutorial policy to circumvent any problem of this nature that might exist. In Canada, New Zealand and some of the states and territories of Australia, therefore, police and prosecutors have been instructed to proceed with domestic violence cases as though they were cases between strangers, even in situations where the woman indicates that she would prefer the case not to proceed[91].

In some Commonwealth countries, criminal prosecution of domestic violence is seriously hampered because wives are precluded from giving testimony against their husbands or, if they are allowed to give such testimony, they need not do so if they do not wish to. In legal terms, wives are often <u>incompetent</u> to testify against their husbands, or if <u>competent</u> are not <u>compellable</u>.

In those jurisdictions where wives are not competent to testify against their husbands, evidence of violence sufficient to convince a criminal court will be almost impossible to obtain. If she is a competent, but not compellable witness, her husband may be able to convince her to refuse to testify. In a number of Commonwealth jurisdictions, including England, Canada and most Australian states[92] legal provisions have been introduced to make the wife a compellable witness either in all cases or in domestic violence cases only, thereby putting her in the same position she would be in were she not married to the defendant. In most cases, the legislation allows a wife to be excused if she can show that the circumstances are exceptional and she can show she has not been intimidated.

Reforms such as the pro-charging policy and those that make a woman a compellable witness serve to remove some of the important technical difficulties that stand in the way of a successful criminal action. Even with these strategies, however, it is difficult to obtain a conviction in any criminal action, a difficulty compounded in the context of domestic violence. It should be noted, furthermore, that legislative reforms such as those making wives compellable witnesses are not necessarily effective. Thus, for example it has been suggested that in some jurisdictions, judicial officers have undermined the provisions by allowing may women to be excused from the obligation[93]. Moreover, even if the woman is a compellable witness, there is practically nothing that can be done to force her to testify, although recalcitrant women have been imprisoned for contempt of court in Canada[94] and England.

Because of the difficulties of obtaining criminal convictions in domestic violence cases, many Commonwealth jurisdictions have sought other legal solutions for the problem of domestic violence. While most jurisdictions have turned to the civil law for such solutions, a number have developed quasi-criminal remedies to confront the issue.

(iii) Quasi Criminal remedies

In most Commonwealth jurisdictions, there is a procedure whereby someone can complain to a magistrate or a justice that violence has taken place and the violent party is then requested to enter into an undertaking (recognizance), with or without a pledge of money to keep the peace or to be of good behaviour. This remedy, often called a "bind over" is usually available in proceedings commenced by a complainant who has "just cause of fear that another will...do 'him' some corporeal hurt"[95]. If the undertaking is breached, the offender forfeits a specified a sum of money or he may be imprisoned. Essentially, the remedy lies between the criminal and civil law. The process is criminal, but the standard of proof is lower. Binding over can occur before any actual violence has taken place and thus it has particular potential in the context of violence in the home.

In most countries, this remedy has not been exploited in the domestic context as it has been seen to be of limited usefulness in its current form because the offender cannot be excluded from the home and the court is unable to attach any conditions to regulate the conduct of the perpetrator. Moreover, commentators have questioned the effectiveness of this process in providing future protection for a victim of domestic violence, pointing out that enforcement for breach requires a further court hearing, brought by the original complainant and not by the police, in which the judge or magistrate has limited coercive powers. They suggest, further, that it may be difficult to identify or prove a breach of the original order because of the vagueness of the expressions "keep the peace" and "be of good behaviour" and argue that the peace complaint may be of limited use in situations of harassment falling short of actual violence[96].

Despite these criticisms, the "bind over" may provide some women with appropriate relief, particularly in those jurisdictions where there is no special domestic violence legislation. Further, legislatures may find it easier to modify the existing "bind over" procedure so as to provide a remedy for women, rather than initiate completely new processes.

Law reformers in Australia, for example, recognised the potential of the breach of the "bind over" process in domestic violence. Some jurisdictions, therefore, modified and strengthened the existing process to make it more applicable to such cases, while others, although taking their inspiration from the "bind over", introduced a procedure aimed specifically at domestic violence. These procedures have been called "protection orders".

The legislation governing protection orders in Australia varies from jurisdiction to jurisdiction[97]. Thus, there are differences in the individuals who are able to apply for protection orders, the definition of domestic violence differs, as does the criteria and procedure for obtaining orders and the types of orders available. In general terms, however, the Acts provide for a court order, obtained on the balance of probabilities, protecting the victim against further attacks or harassment. Breach of the order is a criminal offence and police may arrest, without warrant, a person who has contravened a protection order. The man does not have to be present in court and the order is granted if it is shown that it is more probable than not that he caused or is about to cause damage. Orders that can be made include forbidding the offender to approach the woman and limiting his access to premises, even the matrimonial home that he legally owns.

Protection orders appear to offer the victim of domestic violence a viable response for her situation. Procedures for obtaining the orders is quick and cheap and the enforcement process is effective. The order can be specifically tailored to deal with the woman's particular situation and is not confined to conduct which is classifiable as "criminal" or "tortious". Response to the orders has, however, been mixed.

To a great extent, the usefulness of protection orders depends on the police and magistrates. Except in those cases where the obtaining of the order acts as a deterrent, the order is useless if not properly enforced. In one Australian jurisdiction, the police have been quick to see the advantages of the order and have been vigorous in their pursuit of it[98], while in some others they have not been so helpful[99]. Police response can be best assured by training and involving them very early in an initiative. In some jurisdictions, victims have tended to view the orders negatively[100], although in others they have been enthusiastic and sought orders on their own behalf[101]. Legal and welfare workers have been responding positively to the orders, seeing them as a necessary complement, but not a substitute, for the criminal law, providing victims with a "softer" response than immediate criminal prosecution, but nontheless, providing the offender with a clear warning[102].

Despite mixed response to the orders, no Australian jurisdiction has sought to dismantle the legislation. Indeed, New South Wales has amended its legislation a number of times, extending the availability of the order beyond spouses, initially, to those who share or have shared a common residence with the offender, thus acknowledging the fact that siblings, parents and others in intimate relationships may be the subject of abuse and, ultimately to any person fearing violence from another, thereby rendering the order of general application. Moreover, NSW evaluated the impact of the legislation from its introduction in 1983 to 1988.

The evaluation revealed that the number of domestic violence matters being dealt with by the police and the courts had increased markedly a since the introduction of the legislation. The police appeared to be increasingly responsive to the issue and the community had become aware of the relevant legislative provisions. Indeed, while only 22 protection orders had been sought by the police on behalf of victims in 1984, 270 had been sought in 1987. Further, this had not been at the expense of criminal proceedings, as there had been an increase of police prosecutions in domestic violence cases from 485 in 1984 to 1,088 in 1987. Again, the proportion of police, rather than the women laying charges had increased from 56.3% in 1980 to 86.7% in 1987[103].

It is clear that strategies in the nature of protection orders offer significant possibilities in certain cases of domestic violence. Like other legal strategies, however, they do not provide a solution for all cases. Unlike a criminal conviction, a protection order does not immediately penalise the offender. Arrest and prosecution will follow only in those cases where he repeats his conduct. Clearly, such an order will be ineffective in those cases where the offender has no respect of the law and where he is extremely violent and unpredictable. Moreover, legislation on these lines will be ineffective where the police and the courts have not been sensitised to view domestic violence seriously.

(iv) Civil law remedies

Law reformers in many countries have responded to the general concern with violence against women in the home by improving civil, rather than criminal, remedies.

Most legal systems provide an aggrieved person with personal remedies at civil law for any wrong that has been done to her or him. Thus, if a person is assaulted by another, in any context, she or he can proceed against the attacker at civil law, tort or delict, for monetary compensation. In principle, therefore, a wife is able to bring an action in tort or delict against a husband who assaults her or commits any other civil wrong against her. However, in a number of Commonwealth countries women are denied this right.

In some countries of the Commonwealth women are considered to be perpetual minors and must sue under the guardianship of a man, their father or brother if the are unmarried, or their husband if they are married[104]. This effectively serves to block off any claim by such women in the context of domestic violence. In other systems, although women are fully competent to bring legal actions, they are denied the right of bringing actions against their husbands, as husband and wife are viewed as one and for one to sue the other would be to sue oneself. Finally, even in those systems where a civil suit is allowed between spouses, actions can normally be stopped by the court if it does not consider that any benefit will arise from the litigation[105].

Apart from the difficulties thus presented, it is questionable whether much benefit can be gained from suing in tort where domestic violence is concerned. The object of such an action is financial compensation that must be provided by the defendant. There is thus no

therapeutic or punitive aspect to the action, beyond the fact that the offender will suffer financially. Unless the defendant was possessed of financial resources which were independent of the resources used to maintain the woman or the rest of the family, there would be little to gain from such an action as, in general terms, it would serve only to reduce the finances available to maintain the family.

Financial compensation for victims of domestic violence is not only available in civil actions, but is also available under government funded criminal compensation schemes that exist in some Commonwealth countries. Unfortunately, these schemes are often of limited value to battered women because compensation is usually available only where certain preconditions are met. Thus, for example, the scheme in the United Kingdom excludes claimants who continue to live with their assailants and claimants who fail to co-operate with the police, while schemes in other countries incorporate a blanket provision excluding the availability of compensation in cases of domestic violence. Some battered women have, however, benefitted from compensation schemes of this nature. In Australia, for example, a woman who had been the victim of long term violence from her former cohabitant and now suffered from anxiety, symptoms of panic, insomnia and nightmares, was awarded $A 45,000 under such a scheme[106].

Civil law remedies are not confined to compensation. Commonwealth legal systems provide a remedy that is known variously as an injunction or an interdict, which is used to support a primary cause of action. Thus, for example, an injunction or interdict can be granted to stop the sale of a house, the ownership of which is in dispute or to direct an individual to desist from conduct which is classified as a nuisance. Where domestic violence is concerned, an injunction on interdict can be granted as incidental or ancillary proceedings for divorce, nullity or judicial separation or other civil proceedings, such as assault or battery. Such incidental relief, for example, could take the form of an order directing that the husband refrains from making contact with his wife or that he vacates the shared matrimonial home.

In many Commonwealth countries, injunctions or interdicts can only be awarded in this incidental fashion. In other words it is not possible for a woman to get a court order ordering her spouse not to molest or harass her unless she also applies for primary or principal relief, such as a divorce, or sues him for a civil wrong. In these countries, which include Malaysia[107], while it is possible for a woman to acquire an order preventing her spouse from interfering with her from the courts, the circumstances in which the remedy is available limits her protection to situations where she wishes to apply for matrimonial relief. If she prefers not to seek such relief she is without remedy.

Some Commonwealth jurisdictions have enacted legislation removing the requirement of application for principal relief and allow the woman to apply for injunctive relief independently of any other legal action. These jurisdictions include Australia, Hong Kong, Jamaica, St Vincent and the Grenadines, the Turks and Caicos Islands, England and Wales, Scotland and New Zealand, Northern Ireland and various of the provincial jurisdictions of Canada[108]. Naturally, the legislation that has been introduced differs from jurisdiction to jurisdiction. However, they do display similar characteristics that can be described and discussed.

In general terms, two sorts of orders can be given to the woman by the court. The first prohibits the man from molesting or harassing her, terms which have differing definitions and are usually subject to judicial interpretation, but have been held to encompass threats, constant following, telephone calls and contact. The second, variously called an "exclusion", "eviction" or "ouster" order is more draconian, providing that the man can be excluded from a part or all of the matrimonial home, or under certain statutes, the area in which the home is situated, even if he legally owns it. The orders are usually supported by a provision entitling the police to arrest the man, without warrant, if he breaches the order. Here, under some statutes, a power to arrest is automatically attached to the order, in others this is a matter of judicial discretion, or is only available if the victim requests the attachment of an arrest provision. New Zealand's provision is unusual. There if the man breaches the order he is arrested and compulsorily imprisoned for 24 hours, a provision that has been criticised as amounting to a violation of the man's rights in that he is denied the right to appear before an adjuciatory body and is so held guilty without trial[109]. Penalties on arrest are also various, but the ultimate is imprisonment.

The aim of the injunction procedures is to provide the woman with a short term measure which falls short of a criminal sanction where she has been, or is potentially, the victim of domestic assault. The remedy has a number of advantages in this context. The legislation indicates unequivocally to the man that his behaviour is unacceptable and it usually provides the Police with effective power to act if the violence reoccurs. Generally, also, the legislation allows orders to be applied for in the absence of the attacker and in an expedited fashion.

The legislation and its implementation are not, however, without problems. Very often, the remedies are limited by the statutes that authorise them. Some countries continue to allow the remedy as an ancillary process only, and in some countries the coverage of the legislation is not universal. The Malaysian provision, for example, is not available to Muslim or aboriginal women, who must depend on their own personal laws for relief. Some statutes limit their effectiveness by their definition of abuse. Few, for example, include emotional, psychological or sexual abuse. Again, the statute may apply only to certain relationships. It may apply to married couples only, require parties to be adults, be confined to those who are in a sexual relationship or those who are or have lived with each other. This excludes large sections of the population from the remedy and these exclusions may well be arbitary. For example, most statutes exclude couples who have never lived together, thereby ignoring the reality that some couples have longstanding relationships and, possibly, children, but have always lived separately. Many statues do not cover divorced couples, again failing to recognise that incidents of violence are very common between divorced couples, often occurring on occasions where the man seeks to exercise access to his children[110].

The procedures required by the legislation may similarly limit access. There may be a court filing fee and the procedures may be too complex for a lay person who may be forced to seek legal assistance. Here the woman may confront further difficulties. Legal assistance may

be scarce or expensive, or if available, lawyers may not be aware of the remedies. Legal aid may not be available in the jurisdiction or if it is, the woman may be disqualified from it because her eligibility may depend on the level of her husband's income. Finally, sanction procedures may not be clear or strong enough.

Protective injunctions, like all other legal remedies used in the context of domestic violence, depend, ultimately, for their effectiveness on the co-operation of the official actors involved. Here again, the role of the police and the courts is critical. This can be seen particularly in the case of England and Wales. There extremely comprehensive, albeit complex, legislation exists to provide women with injunctive protection but police and judicial response has been disappointing, thus weakening the scheme. Police are often unaware of the existence of protection orders and reluctant to intervene even if the are aware of them[111]. Furthermore, judges and magistrates are usually unwilling to grant non molestation orders that last more than three months and are extremely reluctant to exclude a man from his home unless there is evidence of severe violence[112].

(v) Conclusion

In many Commonwealth countries, laws to protect women who are the subject of domestic violence are technically in place. At every level, however, the implementation of the law is fettered by the attitudes of those involved in the legal system: the police, prosecutors, judges and magistrates. Throughout the system, there is reluctance to intervene in the family unit, a reluctance that reflects the twin ideologies of the sanctity and privacy of the family.

Like police, prosecutors, tend to view their role in cases of domestic violence as one of mediation, rather than prosecution and they will often to seek to pressurise a woman into dropping her complaint or they will attempt to divert her case to a civil or family court.

To a large extent, also, the protection of women depends on the reaction of judges. Judges have the ultimate legal authority in the legal system. If they place credence on pleas of provocation based on "flightiness" or "nagging" or trivialise family violence by sentencing lightly, they reinforce dominant ideologies and the victim will receive neither protection nor justice. The individual man will perceive his behaviour as insignificant or even justified, he will continue to abuse and the community will continue to view domestic violence as acceptable. The success or failure of innovative legal strategies also depends on the judiciary. Very often legislation is open to interpretation and narrow interpretation may emasculate a statute. Here the example of the Domestic Violence and Matrimonial Proceedings Act 1976 (England and Wales) is particularly instructive. Here the Act was widely worded, allowing for judicial discretion. Initially, response by the judiciary was sympathetic, but later interpretation became narrower being coloured but attitudes towards the family, the position of the woman as a mother and the property rights of the man[113].

Effective legal response is dependent, therefore, on all levels of the legal system, from the police to the judiciary. Inadequate response stems from a combination of factors.

Generally, all levels of the legal system are ignorant of the dynamics of domestic violence. Most police, prosecutors, magistrates and judges adhere, in some cases unconsiously, to traditional values that support the family as an institution and the dominance of the male party within it. This makes it difficult for them to break out of the traditional belief that the family is vital for healthy society and thus, conciliation and the preservation of the family, becomes the primary aim.

Members of the legal system face frustration, furthermore, because of the disposition of cases at other levels of the system. Arresting officers, for example, become disillusioned if prosecutors fail to pursue cases, while the prosecutor, in turn, becomes frustrated, if the defendant is acquitted on technical grounds or, if convicted, receives a nominal sanction only. Much of this frustration is the result of the fact that approaches to wife abuse are unco-ordinated, but some is the result of the fact that sentencing options available to justices at the end of the process appear inadequate.

To many judges, the traditional punitive response of the criminal justice system appears totally inappropriate to cases of domestic crime. Fines and imprisonment affect not only the offender, but the victim and her entire family. Judges, thus, impose sanctions that are lenient. The man is usually discharged, conditionally or absolutely or released on probation. Fines are occasionally levied and incarceration is rare.

Because of this, diversion or me diation schemes, which defer or suspend prosecution if the man agrees to enter into a mediation/conciliation process with his wife, so that they can reach a voluntary and mutually satisfactory agreement have been advocated. Typically, such schemes require the man to enter into a program of counselling.

Diversion occurs before any adjudication of guilt and, in the schemes that currently exist, divert the man from the criminal process at one of two stages: at the time when an arrest would normally have been made, thus being police initiated; or prior to trial, on the request of the prosecutor.

The schemes are based on the premise that families should be protected from the intrusiveness of the justice system and that problems in families are best solved through informal remedies that help the parties communicate more effectively[114]. The schemes are attractive because they promise a more humane approach to domestic violence than available legal strategies. They are not, however, unproblematic, and have received serious criticism.

The schemes place the parties on an equal footing and ask them to negotiate an agreement for future behaviour. This means that the assailant is not formally punished for his crime and, to a certain extent, it may suggest that the victim shares responsibility for his actions. It suggests that she should modify her behaviour in exchange for his promise not to abuse her further. Any agreement that arises out of the mediation or conciliation is voluntary and unenforceable, thus the woman is given no guarantee that she will be protected from future violence.

Commentators have argued that the forum in which mediation occurs and in which agreements are reached is inadequate. Most mediation is conducted in private, no records are kept, or if they are, they are confidential, thus protecting the process from public accountability. Both parties are usually present, representation is rarely allowed or, if allowed, parties do not take advantage of this right. Hearings are usually short and mediators are of varying competence. Some cases are mediated without reference to the violence and many abused women are reluctant to bring it up in the presence of their husbands.

Perhaps the most important drawback of mediation schemes is that they cater more directly to the needs and desires of the abuser that those of his victim. He has the most to gain from a satisfactory settlement and will, therefore, appear co-operative. She may acquiesce in the settlement because of her unequal position both in the relationship and in the mediation process generally. She may thus suffer further victimisation, receiving the message that society considers the abuse to be trivial, while her abuser is subtly informed that he can get away with his actions.

Diversion schemes, therefore, present some difficulties. This is not to say, however, that all approaches to domestic violence based on mediation and conciliation are necessarily productive or serve to implicate the woman in the abuse. In certain societies, mediation and conciliation are part of the cultural structure and can be as effective a sanction and shaming device as arrest and prosecution are in others. For example, the intervention of the Village court in Papua New Guinea or conciliators in African countries may be enough to show the man that his violence is unacceptable and should not be repeated. No matter what approach is used the essential factor is that the man must be given the clear message that he alone is responsible for his actions and the woman must be absolved from all blame. In many systems, this message is given most clearly by arrest and prosecution.

Sentencing on conviction need not, however, be confined to traditional punitive options, such as incarceration and fines. It can, for example, take the form of weekend or evening incarceration and can incorporate effective treatment for the abuser. Here the 1987 amendment to the New Zealand Domestic Protection Act which gives the court the power to direct that the man participate in counselling, is particularly interesting.

In the context of domestic violence, legal remedies are insufficient. Strategies must be introduced to close the gap between the formal legal rights of battered women and their rights in practice. If the law is to be used to its best advantage there must be a change in the attitude to family violence, which can be best brought about by a clear commitment from governments who must ensure that adequate resources are available to provide for battered women, that education and training schemes for police and all those involved in the system are introduced and that public education measures to raise the general level of awareness of domestic violence are initiated.

Women and men in the community must be well informed about domestic violence, the conduct must be clearly condemned and the strategies available to deal with its occurrence well publicised and easily accessible. Moreover, legal strategies must be well co-ordinated

4. THE HEALTH, WELFARE AND COMMUNITY SECTORS

a) Introduction

Domestic violence has been viewed primarily as a problem requiring legal solutions and it has been regarded as critically important that legal strategies should be introduced so that the woman is provided with a framework of rights which guarantee her immediate protection and the promise of future security. Nonetheless, it is important to understand that legal change alone will not prevent violence against women in the family, nor necessarily protect a woman at risk.

In practice, even in those Commonwealth countries which provide comprehensive legal remedies for domestic violence, the law is the last resort for abused women. Victims of violence follow a familiar pattern in their search for help. First, informal sources, such as family or friends are approached. Then, perhaps, they will go outside the family and seek assistance from, for example, a priest, pastor or mullah. Then, they may ask nurses, doctors and social workers for help. It will only be as a past resort, generally where the abuse is very serious and frequent, that police and lawyers will be approached.[115]

Given this pattern, it is important to examine the response of individuals who may come in contact with women who are abused within their families. As the first outside contact is usually a doctor, we will begin with an examination of the response of the health sector. This will be followed by a consideration of the welfare sector response. Finally, community level response will be examined, concentrating on the shelter movement and "battering men's" programs.

b) The health sector

Although available evidence suggests that the medical practitioner will be the first formal source of help that a victim will approach, the response of doctors has, in the main, proved to be unsatisfactory.

In general, the medical profession is not sensitised to the issue of domestic violence and is not aware of its nature and incidence. Frequently, women who present themselves with symptoms are misdiagnosed. Women often do not tell the doctor that they are abused, but complain of depression, anxiety and other complaints.[116] Even in cases where it is clear that the woman has sustained physical injury, doctors misdiagnose, accepting the woman's fictitious account of how she was injured, that she will produce because of shame or because she is fearful of wasting the practitioner's time. Doctors, who may suspect that the woman's story is untrue and that she is a victim of abuse, may prefer not to inquire further, perhaps because they do not wish to become involved in marital conflict.[117]

In cases where the doctor is forced to face the stark reality that the woman is abused, response is frequently inadequate. Commentators in the United States have documented the approach of the American medical professional which tends to exacerbate, rather than relieve the problem. The woman's immediate complaint is treated, but the cause of her complaint - the

battering is ignored. When she first presents, her physical injury is treated sympathetically and as a legitimate medical problem, but as she returns for further treatment, after continuing assaults, the doctor will reassess his or her response and categorise the abuse as arising from social or psychopathological causes. The original diagnosis shifts and the focus becomes not the abuse or the abuser, but the woman who is labelled as alcoholic, a drug abuser, depressive or hysteric. She is then prescribed antidepressants or in some situations diagnosed and treated as seriously psychiatrically disturbed.[118]

Generally, in those cases where the medical profession has recognised abuse, it has defined it as a problem requiring individual solutions. The root cause of the woman's problem is rarely addressed. She is not referred to social service agencies or supportive organisations. Most often, she is prescribed drugs that may be inappropriate or harmful. The abuse is seen as her problem, rather than that of the batterer.

The response of the medical profession finds its origin in doctors' perspectives on to wife abuse. Like all the helping professions, the medical profession sees the maintenance of the family unit as an important goal. Moreover, the many members of the profession see treatment of marital abuse as treatment of marital problems which they regard as the work of counsellors, rather than "real medicine", which is constituted of diagnosis and treatment of illness and injury.[119] This perspective stems from current medical training, which stresses individual case history and pathology, rather than an holistic approach. In other words, most medical students are taught to treat a patient's symptoms, not experience or situation.

Although the response of the medical profession can be explained, inappropriate response in the context of domestic violence reinforces the woman's victimisation and must be addressed. Education and training of the profession at undergraduate and postgraduate levels and through refresher programs is the key to attitude change. Student doctors must be made aware of the dynamics and incidence of family violence and must be taught to ask appropriate questions of patients who may be abused. Refresher programs concerning wife battery should be initiated, the issue should be addressed in professional and academic journals and protocols, which assist in the identification of abuse and suggest appropriate treatment for battered women, should be developed and used in hospitals and doctors' surgeries.

c) The welfare sector

Social and community workers, like doctors, have tended to regard abuse as a private event within a family brought about by some external cause, such as alcoholism or social deprivation. Many workers are unaware of the complexities and ramifications of the problem and they are often not attuned to the ambivalence the woman may feel and find it difficult to understand, for example, why the woman will not immediately leave her husband.

The welfare sector tends to be committed to a traditional view of the family and emphasises its maintenance through reconciliation.[120] Further, if the woman has children, welfare professionals are very likely to concentrate on the welfare of the children, thereby marginalising the woman's problems.[121] Studies reveal, moreover, that assumptions concerning the woman's role in the family very often lead welfare workers to offer her little positive support.[122]

Again, inadequate response in the welfare sector can be attributed to current patterns of training. In many countries, violence against women in the family is not a priority in social work training. Concentration is on child welfare and child abuse. Moreover, workers are taught to work with "families" and to seek solutions within the family context.

The welfare sector is a critical one and should have a crucial role to play in helping battered women. Community workers have access to women in need and should have the knowledge to provide information on the law and law enforcement, the available financial and other support offered by the state and the process of acquiring such support and other organisations, such as refuges, that might offer assistance. Community workers should be able to play a pivotal role and act so as to co-ordinate support for the woman.

Again, training is critical, as are protocols and guides to assist workers already in the field. Training must emphasise, however, that the woman herself must make her own decisions. It may take some time for a battered woman to decide whether she will leave or remain with her spouse. Community workers must be made aware that this is not because of weakness, but because the woman is an ambivalent position. Further, each woman is different and will make her decisions in her own way and in her own time.

d) Shelters

The first shelter for battered women was established in 1971 in England. Initially, it was conceived of as an advice centre for women with troubled marriages, but it was broadened to provide residential accommodation. In the years since the establishment of this shelter, the shelter movement has become international so that now there are shelters in such varied countries as Canada, Australia, Malaysia, Zimbabwe, Trinidad and Tobago and India. Although the movement is international, shelters for women in crisis do not exist in every Commonwealth country. Further, in those countries where they do exist, they are frequently overcrowded, not funded, or funded poorly and staffed by unpaid volunteers.

The shelter movement has had two effects. First and most importantly, it has provided a haven for women who are abused. Second, it has drawn attention to the fact that wife assault is a real social problem.

The movement is not without its critics. Some argue that the availability of refuge in a shelter speeds the breakdown of marriages. Research does not support this assertion. Studies indicate that the refuge is a place of last resort and that women will exhaust all mechanisms of informal support and only then turn to the refuge. Indeed, women who use refuges are often socially isolated and live long distances from relatives. Again, research reveals that women who stay in refuges are very often at the end of their relationship with the man. They may return to him, but they will usually eventually leave him. The evidence is, thus, that women will use a refuge when their relationship is ending, but the end may be slow and painful.[123]

There is little systematic research to date into the functioning of shelters or their impact on an abusive relationship. Further, there is little information on what happens to women after they leave the shelter. One study does suggest that a stay in a shelter does have a beneficial effect on the violent man, but this may depend on the attributes of the woman. If her stay in the refuge makes the woman appear to be actively taken control of her life, this may dramatically reduce the likelihood of further abuse, but in other situations, the shelter stay may have no impact or, indeed, trigger new violence.[124]

Further research into the impact of shelters on abusive relationships is important. It is clear, however, that abused women must have somewhere safe to go. This does not have to be a structured refuge, on the model of the first refuge, but advantage could be taken of safe places, such as churches, that may exist in countries. What is essential is that the woman has a safe haven. This must be appropriate to the cultural context and not be a slavish adaption of current shelter systems that exist elsewhere.

A refuge can be many things for women. It provides survival, safety, support, self esteem and information. A stay in the refuge can be a turning point for a woman. It can be a place where she can recover from her shame and isolation and where she can gain support, help and friendship.

Without alternative accommodation, battered women are to make the many decisions that concern their relationships. Hence, some form of shelter system is crucial. Care must be taken, however, that the shelters are of a decent standard, well funded and well staffed. The refuge must be well planned and take into account religious and cultural differences that may exist between residents. For example, religious food rules need to be considered. Provision must be made for women with particular needs, for example, immigrant women, aboriginal women and women with disabilities. The refuge must provide access to other services, such as counselling and alcohol and drug programs. Guidance must be available to assist the woman to find more permanent accommodation and employment.[125]

The shelter must be confidential. The location of the shelter should be kept as secret as possible and protection should be available for residents and staff, as violent men have been known to assault their wives who have take shelter, other residents and shelter workers. Protection for shelters is best guaranteed by a close relationship between shelter management and a sympathetic police force. Co-operation and co-ordination between the police and the shelter movement exists in a number of Commonwealth countries, including Canada.

Finally, any shelter or refuge system must be viewed only as a component of co-ordinated and multifaceted approach to domestic violence. It is essential that the shelter program is not overstretched or used as an excuse to relieve other sectors of their responsibility in combatting domestic violence.

e) Batterers' programs

Treatment programs for batterers have been established in a number of Commonwealth countries, such as Canada and Australia.[126] Most of these programs began as community based responses to the problem and many were linked to women's refuges.

The rationale behind batterers' programs is laudable. Their primary aim is to reduce recurrent violence, research revealing that recidivism is high within the current relationship, if it continues, or in any succeeding relationship. The programs also seek to address the fact that the criminal justice system has a paucity of sentencing options where men are convicted of offences in the context of domestic violence. The most common disposition is discharge or suspended sentence, in effect little sanction. This discourages the police and the victim from pursuing charges and gives the appearance that the system and, by implication, society tolerate the violence.

Terms of imprisonment, although punitive and expressive of abhorrence towards the violence, present difficulties. Goals are often overcrowded, place the man in an environment conducive to the maintenance of his violence in the family and frequently, imprisonment goes against the victim's wishes. Offender treatment, provided by "batterer's programs" is thus the logical alternative. It satisfies the desire of the justice system for rehabilitation and contributes to the victim's goal of eliminating the violence in her relationship. In practice, moreover, offender treatment in such programs may be part of a diversion scheme or part of the court sentence.

Batterers' programs are justified on rational and moral grounds. They do present a number of problems, however. First, on the whole, they are voluntary and underfunded and are usually unevenly distributed in the community, being found primarily in urban centres.

Second, the clinical work in this area is new and formal training differs. The groups follow various models. Some use two counsellors, some one, some stress the gender of the counsellor, while others do not. Further, a range of psychotherapy skills and techniques are used.[127]

Finally, there has been no well designed analysis of the effectiveness of the programs. Proponents are confident that programs work for at least some percentage of the men they see. However, most are unable to make conclusive generalisations about the overall effectiveness of the programs. They are unable, apart from anecdotaly, to predict the sort of men that are amenable to programs or how long changes will last.[128]

It is important that the real effect of these programs is explored systematically. Anecdotal accounts of effectiveness are insufficient. Moreover, it is important that resources are not diverted from programs for battered women to support programs for their abusers. Such an approach would amount to further victimisation and continue support of the structural gender inequality that supports violence in the home.

f) Conclusion

The response of the health and welfare sectors of the community to domestic violence has, like the responses of all other sectors, been coloured by traditional beliefs that value the maintenance of the family and perpetuate the inferiority of the woman to the man within the family unit.

Education is the key to improved response. Health and welfare professionals must be educated in the dynamics of wife assault, they must be taught to take an holistic approach to the issue and specifically guarded against the view that the problem is the woman's alone and of her own making. They must be trained to protect the woman and see her problem as central. Her children's welfare, although an important consideration, must not be emphasised so as to make her plight marginal and secondary. She must be protected and her dignity and wishes respected. She must not be sacrificed in order to maintain the family unit.

Grass roots responses to family violence have been most effective in bringing the issue to public attention and providing safety, shelter and support for women at risk. These responses must be supported and strengthened. The effect must be examined and they must be provided with adequate government support and funding.

No one response is sufficient, however. The response to violence against women in the home must be a co-ordinated, multi-faceted and interrelated one. Just as the issue itself has many dimensions, so must responses.

5. CONCLUSION

Violence against women in the home has many causes and the problem is complex. It is not, however, insoluble. Research in the United States, for example, has revealed a substantial drop in the incidence of violence against women in the home during the 10 year period from 1975 to 1985, a drop that is attributable to a combination of changed attitudes and norms. The researchers point to the effect of strategies that have been introduced in the United States to confront family violence that have provided women with alternatives and provided treatment and strategies for prevention. They indicate, further that the period has seen a marked swing away from the social acceptability of violence as a method of resolving conflict in the family.[129]

The complexity of domestic violence indicates that it is a problem that requires multiple strategies from many disciplines who must act collaboratively. Strategies must, however, be compatible with the conditions and resources of the country under consideration. All societies must recognise the issue as a serious one and ensure that domestic violence is condemned by those in authority, be they state or religious leaders or law enforcement agencies. Formal condemnation of itself is not, of course, sufficient. This must be accompanied by a clear manifestation of a resolution to act against abuse and to deal effectively and appropriately with both the abuser and the abused.

Improving responses to violence against women in the family will involve a number of strategies, crucial among which is the development of appropriate attitudes to (wife assault in particular) and respect for women in general, based in the principles contained in the Nairobi Forward Looking Strategies, the Convention on the Elimination of All Forms of Discrimination Against Women and on accurate information, rather than myths and stereotypes.

a) Research

The importance of research cannot be underrated. In many countries research into family violence has not progressed beyond the rudimentary. Where research has been undertaken the information has often been limited by the method or the research sample. Many studies, for example, use limited samples such as women in refuges, police statistics, samples from marriage counselling bureaux and divorce statistics. Conclusions from such samples are drawn, therefore from small groups and groups who are defined as being from troubled relationships. They are not random surveys of functioning relationships. There is a clear need for wider and deeper research so that wife assault can be understood more clearly so that appropriate strategies to confront can be formulated.

Research into existing strategies is also required. For example, the effect of shelters must be explored, as must the effectiveness of taking a criminal justice, rather than welfare, approach to family violence. Specific legal initiatives must be evaluated. For example, the impact of pro-charging policies, injunctions and protection orders must be explored. So also, the impact of programs for abusive men must be monitored.

b) The legal system

At the front line of response is the police. Police must develop adequate protocols and act to eliminate the existing ambiguities and gaps in the law that deprive women of adequate legal recourse. Police practice must be improved and there must be clear and explicit departmental policy which governs the treatment of domestic violence. Ideally, police policy should indicate that wife assault is to be treated like assault in any other context and arrest and charge should be considered. Police at all levels must be provided with special training so that they are aware of the dynamics of the issue and they are equipped with techniques of crisis intervention.

Women must have assured access to legal remedies should they wish to use them. Any legal provision which suggest that violence against women is excusable or tolerable must be repealed, as must any provision discriminating against women on the basis of sex. Access to the law must be simple and cheap. Any legal disability, such as legal minority, preventing women from bringing legal proceedings should be removed and any evidentiary discrimination, such as the non competence of spouses, should be repealed.

The attitudes of those involved in the law towards wife assault must be scrutinised. It is most important that if any legal strategy is available for women, all the actors involved - prosecutors, lawyers, judges and magistrates - should implement it in good faith. There must be no gap between the law in theory and the law in practice.

Although important, improvements in legal remedies and procedures will not provide a panacea for domestic violence. In some cases, a legal response may not be what the woman wants or be inappropriate. Each woman is different and each woman will require a different response. Some women may be seriously harmed by an over-legal approach to their situation. Flexibility is essential. A rigid approach will only cause further victimisation.

The ultimate goal of any short term strategy is to protect the individual woman. She will need safety, shelter, compassion and information. She may require financial help, housing, advice with regard to her immigration status[130], the services of an interpreter, help with her children, counselling and assistance with the law. The woman should be able to take advantage of an integrated and co-ordinated service. She should not be constantly referred from agency to agency, lost in a bureaucratic maze, shunted between the legal, health and social sectors. Countries should consider the introduction of services to serve as a link between the police, medical, social welfare, health and women's refuge services.

c) Education

Short term measures to confront violence against women in the home must merge with long term strategies. Education and training can provide this link.

Many commentators are of the view that domestic violence is supported by the social structure and it will only be when that structure changes that it will be eradicated. They believe, further, that long term social change can only come about through education. Education instils traditional norms and values and has played a crucial role in the maintenance of female and male stereotypes. It has had a key role in the continued victimisation of women. It can, however, be used as a positive force for change and progress. Education must be used at various levels in the fight against family violence.

Formal education in schools from the primary stage can be used to eliminate stereotypical attitudes to the social, economic and cultural roles of women and men. The subject of family violence should be part of the formal curriculum and peaceful methods of conflict resolution explored. Teaching materials have been developed for school teachers in Australia, Papua New Guinea and Canada to suggest how these issues might be approached in the classroom.[131]

Informal methods of education can also be used, first, to advise women of available options and support systems and also to convey the message to both women and men that family violence is to be deplored. Here attention should be paid to the particular national and cultural context so that appropriate strategies can be used. In some countries, it may be appropriate to produce simple booklets. In others, a poster campaign may be appropriate. Kenya, for example, mounted a national poster campaign with posters placed in buses, railway stations, schools and other public places. Poster displays have been used in Malaysia and Papua New Guinea. In some countries, videos and television advertising have been used. Where literacy is high, newspaper campaigns can be effective, as can public speaking and essay writing competitions. Papua New Guinea, for example, has mounted a multi-pronged education campaign, consisting of the dissemination of posters and leaflets to all aid posts, health centres, clinics, hospitals, schools, post offices, banks and churches and radio advertising and radio plays. To cater for the non-literate population, street theatre and video has been used, an approach which has also been taken in Jamaica. Other countries have relied on traditional forms of folk theatre. In India, for example, special puppet shows have been developed which deplore violence against women and the inferior position of women in the Indian family.

The crucial role of education in widest sense in the combatting domestic violence has been appreciated in Australia. There the Federal Government initiated a National Domestic Violence Education Program, which operated from 1987 to 1990. The aims of the Program were four fold: to raise awareness of domestic violence as an issue of community concern, provide accurate information on domestic violence, encourage widespread community participation in the campaign against domestic violence and change attitudes which cause such violence.

In the first year of the Program, a national survey was undertaken to provide information on community attitudes to abuse. This revealed that one in five of the respondents condoned the use of physical force by a man against his wife under some circumstances, one third of the respondents regarded domestic violence as a private matter, more than a quarter would ignore a case of domestic violence in their neighbourhood and nearly half personally knew either a victim or a perpetrator of domestic violence. In other words, the research revealed that the Australian community considered domestic violence to be a private, non-criminal matter.

The Program sought to address community attitude to domestic violence by a National Domestic Violence Month. Activities were co-ordinated at a local level as a lead-up to this month, so that there was a great deal of local activity and debate, with the preparation of information kits, posters and pamphlets. The Month was launched by the Prime Minister, thus testifying to Government commitment to the problems of battered women. Particular attention was paid to the development of materials for Aboriginal and Torres Strait Islander women, immigrant women, women living in isolated and rural communities and young women. Videos, booklets and radio programs were

developed for women in these groups. The Program concluded with a National Forum on Domestic Violence Training attended by over 500 people. The Forum stressed the need for training for those who work with or are in a position to assist domestic violence victims.

The Program testifies to Australian Government commitment to the eradication of domestic violence. It, further, established an important momentum which will affect any further domestic violence strategies. The Program used the written, spoken and visual media to great effect and did result in increased government funding for domestic violence programs. Most importantly, the Program indicated the need for co-ordination, not only at the government level, but at the local and service level. Certainly, the Australian community has been exposed to the issue of domestic violence and no longer views it disinterestedly.[132]

Education must also be aimed at specific groups who come into contact with domestic violence professionally. Training for teachers, social workers, doctors, nurses, paramedics, lawyers and the judiciary is crucial. This training must encompass and address attitudes, the dynamics of abuse, diagnosis, intervention, referrals and treatment.

The media is a powerful agent for education and social change. It has the capacity to preserve, record and define human culture and history. Currently, like education, it tends to project images of women and men that are stereotypical and it supports male values. It could be used as a powerful force to foster sexual equality and fight against spouse abuse.

Research has not proven concusively that there is a link between media representations of violence and violence against women generally and in the home in particular. It is clear that the media does reflect cultural values and reinforces ideologies of masculinity and femininity that suggest that while man is "naturally" aggressive, woman is the "natural target" for his aggression. The media can thus contribute to a cultural climate which regards violence against women as acceptable. The media must act responsibly in this context. Positive images of women, stressing female equality and worth, should be fostered and encouraged. Most importantly, incidents of violence against women should be deplored and not reported in such a way as to suggest that the woman deserved violence, nor should they be recounted sensationally or salaciously.

d) Structural change

Dobash and Dobash suggest:

> "In a way the entire community ... is responsible for the continued assaults on women and in some cases their deaths: the friends and the neighbours who ignore or excuse the violence, the physician who does not go beyond the mending of bones or the stitching of wounds, the social worker who defines wife beating as a failure of communication and the police and court officials who refuse to intervene. The violence is meted out by one man but the responsibility goes far beyond him."[133]

This responsibility must be accepted. Domestic violence must become an issue of public concern. It must be condemned in the most vehement of terms by those who lead and shape public opinion. Non-formal agents of support,

such as relatives, friends and neighbours must be encouraged to intervene on the woman's behalf. Governments must allocate adequate resources to strategies to combat such abuse.

Ultimately, as violence against women in the family and elsewhere is essentially the product of female inferiority, the inferior status of women as opposed to men must be addressed. Women must be assured of social, legal and financial equality and they must be guaranteed and equal place with men in intimate relationships.

Violence against women is the product of the subordination of women. Short term measures, such as protection orders and refuges, may have an important short term effect in the context of spouse abuse, but they will not address the root cause of domestic violence. In the long term, domestic violence will not be eradicated until there is a fundamental change in the social and economic structures that maintain the subordination of women within marriage and in society generally. Fundamental change is an ambitious and complex project. Perhaps it can be best initiated by respect and implementation of the ideals and goals of the Nairobi Forward Looking Strategies and the Convention on the Elimination of All Forms of Discrimination Against Women.

1. United Nations, Violence Against Women in the Family, New York, 1989, Sales No. E.89.IV.5 (hereinafter referred to as UN Report) 11; Davidson, "Wife beating: a recurring problem throughout history" in Battered Women: A Psychosociological Study of Domestic Violence, M. Roy, ed. (London, Von Nostrand Reinhold, 1977)

2. W. Blackstone, Commentaries on the Laws of England (1775)

3. (1890) 1 A.B 671

4. Edwards, "Male violence against women: excusatory and explanatory ideologies in law and society" in Gender, Sex and the Law S. Edwards, eg. ed. (London, Croom Helm, 1985) pp 189-191.

5. Edwards, loc. cit., pp. 191-192

6. See infra p. 78ff

7. The Subjection of Women (London, Virago Edition, 1983)

8. "Wife torture in England" Contemporary Review, April 1878 drew attention to the plight of working class wives in Liverpool and was indirectly responsible for the 1878 Matrimonial Causes Act allowing women who had been abused by their husbands judicial separation with maintenance.

9. The British activist Erin Pizzey is credited with bringing the problem to public attention in 1971 when she opened the first women's shelter. See, E. Pizzey, Scream Quietly or the Neighbours will Hear (London, Penguin, 1974)

10. The US campaign dates from 1975 with the establishment of a Task Force on Battered Women by the National Organisation for Women.

11. UN Report pp. 13-31

12. UN Report pp. 51-80

13. S. Toft, ed. Domestic Violence in Papua New Guinea, Monograph No 3 (Boroko, Papua New Guinea Law Reform Commission, 1986); The Papua New Guinea Law Reform Commission has produced three other reports: A Discussion Paper on Domestic Violence and Domestic Violence in Rural Papua New Guinea and Domestic Violence in Urban Papua New Guinea.

14. M.D.A. Freeman, "Doing his best to sustain the sanctity of the marriage" in Marital Violence, N. Johnson, ed., Sociological Review Monograph (London, monograph Routledge and Kegan Paul, 1985), p. 124

15. R.E Dobash and R. Dobash, "Wives: the "appropriate" victims of marital violence?", Victimology, No. 2, 1978, p. 426

16. See, for example, the Report of the New South Wales Domestic Violence Committee of 1985 which reported that a radio talk back show in Sydney revealed that four out of ten callers were mothers who had been battered by their sons: New South Wales Government, Women's Co-ordination Unit, 9 September 1985, p. 53.

See also, Domestic Violence, Report of the Secretary-General to the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, A/Conf. 144/17, 20 July 1990 which notes at page 7 "Abuse of the elderly, long hidden and ignored, partly because of society's ambivalence towards the aged, is just beginning to elicit the research necessary for more than paternalistic policy making."

17. See infra p. 129ff

18. S.K. Steinmetz, "The battered husband syndrome", Victimology, No. 2, 1978, p.499; S.K. Steinmetz, "Women and Violence: Victims and Perpetrators", American Journal of Psychotherpoy, No. 34, 1980, p. 334. Steinmetz's articles were so attractive to the media that Time Magazine, which had previously devoted only a few paragraphs to wife abuse, devoted a full page to the plight of "battered husbands" in their issue of March 20, 1978.

19. E. Pleck and others, "The battered data syndrome: a comment on Steinmetz's article", Victimology, No 2, 1978, p. 680; M.D. Fields and R.M. Kirchner, "Battered women are still in need: a reply to Steinmetz", Victimology, No 3, 1978, p. 216.

20. M. Borkowski, M. Murch and V. Walker, Marital Violence: the Community Response (London, Tavistock 1983), p. 11

21. See, for example, Borkowski, Murch and Walker, op. cit; J. Pahl, ed., Private Violence and Public Policy: The Needs of Battered Women and the Response of the Social Services (London, Routledge and Kegan Paul, 1985); L. MacLeod, Wife Battering in Canada: The Vicious Circle (Ottawa, Canadian Advisory Council on the Status of Women, 1980)

22. Delegates at the Third Meeting of Commonwealth Ministers for Women's Affairs held in Ottawa, Canada in October 1990 spoke movingly of the problem, indicating that it was a common concern of Commonwealth countries.

23. The studies undertaken by the Papua New Guinea Law Reform Commission (see note 13) reveal that domestic violence was more common in the lower and rural classes. See also, D. Marsden, "Sociological perspectives on family violence" in Violence in the Family, J. Martin, ed. (Chichester Wiley, 1978)

24. No comprehensive research has been undertaken in Nigeria into the problem, however, an unpublished paper by J O Akande prepared for the United Nations in 1987 revealed that police sometimes received complaints from women who came, in the main from poor and polygamous homes and the Social Welfare Department had similar cases on its files. Professor Akande did conduct an informal study amongst educated women and found that they too were susceptible to abuse.

25. P. Montgomery and V. Bell, Police Response to Wife Assault: A Northern Ireland Study (Northern Ireland Women's Aid Federation, 1986) p. 21.

26. R. E. Dobash, "Where non-sexist language is sexist", in Battered Women's Directory, B. Warrior, ed., 9th edition (Richmond, Earlham College, 1985) p. 198.

27. E. Wilson, The Existing Research into Battered Women (London, National Women's Aid Federation), pp. 5-6; Jan Paul in the Introduction to Private Violence and Public Policy: The Needs of Battered Women and the Response of the Social Services (London, Routledge and Kegan Paul, 1985) p. 5 remarks that describing violence against wives as the issue of "battered wives" is as though the "the problem of international terrorists hijacking aeroplanes was described as the 'problem of hostages'."

28. Lorna Smith in her Domestic Violence (Home Office Research Study 107, London, HMSO, 1989) at page 8 reports that with the exception of homicide, United Kingdom Criminal Statistics do not provide information on the sex of the victim nor is the relationship between the victim and the offender routinely recorded.

29. See, UN Report op. cit., pp.18-20 and Lorna Smith, op. cit. pp.9-14

30. L. MacLeod, Wife Battering in Canada: The Vicious Circle (Quebec, Government Publishing Centre, 1980) p. 21

31. Office of the Status of Women, Community Attitudes Towards Domestic Violence in Australia, Australian Government, Social Survey Report, Public Policy Research Centre, February 1988.

32. See note 13.

33. P. Jaffe and others, "Emotional and physical health problems of battered women", Canadian Journal of Psychiatry, No 31, 1986, p. 625.

34. E. Hilberman and F. Munson, "Sixty battered women", Victimology, No 2, 1978, p. 460 464-465.

35. E. Stark, A. Flitcraft and W. Frazier, "Medicine and patriarchal violence: the social construction of a private event", International Journal of Health Services, No 9, 1979, p. 461.

36. L. Bacon and R. Landsdowne, "Women who kill husbands - the problem of defence", paper delivered at the 52nd ANZAAS Conference, Sydney, 1982; K. O'Donovan, "Defences for battered women who kill" Journal of Law and Society, Volume 18, No. 12, 1991, p. 219.

37. E. Stark and A. Flitcraft, "Woman-battering, child abuse and social heredity: what is the relationship?", in Marital Violence, N. Johnson, ed., Sociological Review Monograph No 31 (London, Routledge and Kegan Paul, 1985), p. 147 at 159-160.

38. See note 43.

39. D. G. Fischer, Family Relationship Variables and Programs Influencing Juvenile Delinquency (Ottawa, Canada, 1985) p. 41

40. L. MacLeod, Battered, but not Beaten : Preventing Wife Battering in Canada (Ottawa, Canadian Advisory Committee on the Status of Women, 1987) p. 35; see also, G. Roberts, "Domestic Violence; costing of service provision for female victims-20 case histories", Beyond These Walls (Queensland Domestic Violence Task Force, Queensland, 1988) who indicates that the cost f service provision for 20 victims alone was well over 1 million Australian dollars.

41. UN Report, pp. 26-27; Lorna Smith, op. cit., p. 29-30.

42. UN Report, pp. 28-30.

43. UN Report, pp. 27-28; Lorna Smith, op. cit., p. 30.

44. R. Dobash and R.E. Dobash, Violence Against Wives: A Case Study Against the Patriarchy (Open Books, London, 1980)

45. Lorna Smith, op. cit., pp. 23-30; UN Report, op. cit. pp. 25-33.

46. L. A. Long, "Cultural considerations in the assessment and treatment of intrafamilial abuse", American Journal of Orthopsychiatry, no 56, 1986 p. 31.

47. A. Lazlo and T. McLean, "Court diversion: an alternative for spousal abuse cases", in the United States Commission on Civil Rights Consultation, Battered Wives: Issues of Public Policy (Washington D.C, January, 1978)

48. L. Sherman and R. A Berk, "The specific deterrent effects of arrest for domestic assault", American Sociological Review, No 49, 1985, p. 261; R. A. Berk and P. J. Newton, "Does arrest really deter wife battery?" An effort to replicate the findings of the Minneapolis spouse abuse experiment" American Sociological Review, No. 50, 1985, p. 253; A. Jolin, "Domestic violence legislation: an impact assessment" Journal of Police Science and Administration, No. 11, 1983, p. 451; E. Pence, The Law Enforcement and Criminal Justice System. An Intervention Model for Domestic Assault Cases (Duluth, Minnesota, Police Department, 1985); P. Jaffe and other, "The impact of the police laying charges in incidents of wife abuse", Journal of Family Violence, No. 1, 1986, p.37.

49. All Provinces and Territories of Canada have charging policies and in 1984 the Royal Canadian Mounted Police announced a policy instructing all officers to lay charges in cases of domestic assault. In Australia, the

Position Paper of the National Committee on Violence Against Women stresses the criminal nature of domestic violence and policies have been introduced to encourage the police to proceed in the laying of charges and the prosecution of offences.

50. Lorna Smith, op. cit., p.60.

51. UN Study p. 53 and p. 81, note 13.

52. Betsy Stanko, "Missing the Mark? Police Battering" in J. Hanmer et. al., Women, Policing and Male Violence (Routledge, London, 1989) p. 46 at 46.

53. Federal/Provincial/Territorial Report in Wife Battering to the Meeting Responsible for the Status of Women, Niagara on the Lake, Canada, 28-30 May, 1984.

54. Susan Hatty, "Policing male violence in Australia", in J. Hanmer et al., Women, Policing and Male Violence op. cit., p. 70.

55. L. MacLeod, Battered But Not Beaten (Ottawa, Canadian Advisory Council on the Status of Women, 1989) p.6.

56. R. Weiler and P. Drennan-Sewson, "Native crime victims research" (Ottawa, Canadian Council on Social Development, 1984, unpublished); Judy Atkinson, "Violence in Aboriginal Australia" Refractory Girl, Issue no 36, August 1990, p. 21 at p. 24.

57. See the essays in Jalna Hanmer et al., op. cit, which describe a number of jurisdictions where policy initiatives have been introduced at the top levels of police forces that have failed to affect the behaviour of operational police who refuse to arrest and charge and come to situations of domestic violence with stereotypical attitudes of male and female behaviour and family violence generally.

58. L. MacLeod, Preventing Wife Battering: Towards a New Understanding (Canadian Advisory Council on the Status of Women, 1989) p. 6.

59. Ibid. p. 8

60. L. MacLeod, Battered But Not Beaten (Ottawa, Canadian Advisory Council on the Status of Women, 1987) p. 87

61. Australian Law Reform Commission, Domestic Violence, Report No. 30 (Canberra, AGPS, 1986) p. 14.

62. V.G. Binney and others, Leaving Violent Men (Women's Aid Federation, 1981); N. Oppenlander, "Coping or copping out", Criminology No 20, 1982, p. 449; D. Bell, "Domestic violence: victimisation, police intervention and disposition", Journal of Criminal Justice, No 13, 1985, p. 425; Report of the Committee to Investigate the Response of the London Metropolitan Police Force into Domestic Violence, 1986, unpublished; Edwards, S.S.M., The Police Response to Domestic Violence in London (Central London Polytechnic, London, 1986); Lorna Smith, op. cit., pp. 39-62.

63. This was made clear by participants at the Third Meeting of Commonwealth Ministers for Women's Affairs held in October 1990 in Ottawa, Canada.

64. Police often allege that they are reluctant to take a law enforcement role in cases of domestic disturbance because the woman is more than likely to withdraw her complaint and thus they will not be able to get a conviction. While certainly, complaint withdrawal by the woman presents the police with severe practical difficulties in pursuing an action, recent research suggests that there is no greater withdrawal in domestic violence cases than in other actions, or if there is, the police have been instrumental in the withdrawal: Lorna, Smith, op. cit., pp. 56-58; F. Wasoff, "Legal protection from wife-beating: the processing of domestic assaults by the Scottish prosecutors and criminal courts", International Journal of the Sociology of Law No. 10, 1982, p. 187.

65. Justices Act s. 1959 (Tas) 106F; Crimes Act 1900 (NSW:ACT) s349A; Crimes Act (NSW) s. 375F. It is to be noted that the legislation in Tasmania and the ACT is more general than that in NSW, which specifically caters for domestic violence cases, and that of NSW appears to provide greater safeguards for integrity of the premises in that entry is prohibited where the occupier expressly forbids entry unless the victim of violence invites the officer to enter or the officer secures a warrant.

66. Crimes Act 1900 (NSW) s. 357F(4).

67. Julie Stubbs and Diane Powell, Domestic Violence: Impact of Legal Reform in NSW (NSW Bureau of Crime Statistics and Research, Attorney General's Department, Sydney, 1989) p. 38.

68. K. Waits, "The criminal justice system's response to battering; understanding the problem, forging the solutions", Washington Law Review, No. 60, pp. 267 at 308.

69. 396 NYS 2d. 1974 (Supreme Court of NY County)

70. P. W. Gee, "Ensuring police protection for battered women: the Scott v Hart suit", Signs, No 8, 1983, p. 554.

71. Bail Act 1978 (NSW) s. 37; Bail Act 1980 (Qld); Bail Act 1985 (SA), s.11; Bail Act 1982 (WA); Domestic Violence Ordinance 1986 (ACT) s.24. Evaluation of the NSW bail legislation between 1983 and 1987 indicates that police grant usually impose conditions on bail: Julie Stubbs and Diane Powell, op. cit., p. 15ff.

72. Victims of Offences Act 1987, s.10.

73. Lorna Smith, op. cit., pp. 40-42

74. Islamic Family Law Acts (1985); Law Reform (Marriage and Divorce) Act (1982)

75. A. Phillips and H. P Morris, Marriage Laws in Africa (Oxford University Press, 1971); T. W Bennett and N.S. Peart, "The dualism of marriage law in Africa" in Family Law in the Last Two Decades of the Twentieth Century, T.W Bennett, ed. (Cape Town, Juta, 1983) p. 145

76. S. C. Bradley, "Attitudes and practices relating to marital violence among the Tolai of East New Britain", in Domestic Violence in Papua New Guinea, S. Toft, ed., Monograph No. 3 (Boroko, Law Reform Commission of Papua New Guinea, 1985) p. 34

77. See, for example, with respect to Zimbabwe, E.G. Bello, The Status of Women in Zimbabwe (Harare, 1985) pp. 12-14; See also J. O. Akande, Law and the Status of Women in Nigeria (UN, 1979)

78. See, for example, A. Ibrahim, Family Law in Malaysia and Singapore (University of Malaya, 1978) pp. 206-222; Islamic Family Law Acts (Malaysia) 1985, s. 52.

79. An example of the first model is the Sierra Leone, Matrimonial Causes Act (Cap 35); the second, England and Wales, Matrimonial Causes Act 1973 (which is currently under review) and the third, Barbados, Family Law Act No 29, 1981.

80. Divorce Act (Uganda) 1964, s. 5. Evidence exists to indicate that informal separation is far more common in Uganda than formal divorce proceedings. See L.E.M. Mukasa-Kikonyogo, presentation delivered at the International Federation of Women Lawyers, Sydney, Australia, 26-31 August, 1984. Ms. Mukasa-Kikonyogo indicated that there are rarely more than 100 divorce petitions to the High Court each year.

81. Some countries have abolished judicial separation. See, for example, Australia, Family Law Act (1975 (Cth) s. 8.

82. J. Giles-Sims, Wife Battering: A Systems Theory Approach (New York, Guildford Press, 1983) p. 128

83. Particular problems may face such a woman in jurisdictions where physical chastisement of a wife is enshrined in the law or accepted culturally. See, for example, Northern Nigeria, where S. 55(1)d of the Criminal Code justifies a "reasonable amount" of physical chastisement of a wife. See also, S. Atkins and B. Hoggett, Women and the Law (Oxford, Blackwells, 1984) p. 127 who cite a number of English decisions where divorce was not allowed even though the wife was the subject of cruelty.

84. Law Reform (Marriage and Divorce) Act 1982, s.103

85. Malaysia, for example, bars divorce, unless the circumstances are exceptional, until the marriage has lasted two years: Law Reform (Marriage and Divorce) Act 1982, ss. 53 and 54; Trinidad and Tobago for five years unless there are exceptional circumstances: Matrimonial Proceedings and Property Act Cap. 45:51. In England and Wales the bar is absolute and is one year: Matrimonial Causes Act 1973, s. 3(1).

86. See p. 129ff.

87. In all Commonwealth jurisdictions, victims of crime have the options of pursuing private prosecutions where the police or state prosecutors fail to prosecute. In practical terms, this option is of little value to the victim of domestic violence. The victim of the crime must gather the evidence herself and be in charge of the conduct of the case. Many Commonwealth countries do not allow the legal aid scheme to aid a private prosecutor. Thus, such an action will be costly, emotionally taxing and fraught with the same difficulties that apply to public prosecutions.

88. The statutes establishing the crimes are different in each jurisdiction. Most do not provide for a specific crime of wife assault (an exception here is Malaysia: Islamic Family Law Act (Federal Territory) 1985, s. 127) but allow for prosecution of such an offence under the general statutory scheme. The English Criminal Justice Act 1988, s. 39 and the Offences Against the Person Act 1861 ss. 20 give an indication of the sort of provisions that are viable in the domestic context. Criminal provisions which aim to protect property or goods may be useful where the abusive spouse has damaged property or pets.

89. See p. 78ff.

90. See note 64

91. See p. 18ff

92. Police and Criminal Evidence Act (England and Wales) 1984, s. 80; Evidence Act (Canada) RSC 1970, CH E-10, s. 4; Crimes Act 1900 (NSW) s. 407AA; Crimes Act 1958 (Vic) s. 400; Evidence Act 1977 (Qld), s. 8(5); Evidence Act 1929 (SA) s.21.

93. NSW Domestic Violence Committee, Report April 1983 to June 1985 (Sydney, NSW, Government Printer) pp. 31-32.

94. L. MacLeod, op. cit., p. 87

95. Hawkins, Pleas of the Crown, Book 1, Ch 60; See, for example, Canadian Criminal Code, RSC 1970, s. 745; Scotland, 'law burrows'

96. Australian Law Reform Commission, Domestic Violence, Report No. 30 (Canberra, AGPS, 1986) para 85.

97. The first edition of this Manual describes the legislation on pages 21-23. See also, N. Seddon, Domestic Violence in Australia (Federation Press, Sydney, 1989), Chapter 5 and Country Report on Violence Against Women, presented to the Commonwealth Ministers Responsible for Women's Affairs, Ottawa, 9-12 October 1990 by Helen L'Orange, Office of the Status of Women, Department of the Prime Minister and Cabinet, Canberra, p. 14 ff.
The relevant legislation is Crimes Act 1990 (NSW) Part XVA; De Facto Relationships Act 1959 (Tas) s. 106; Domestic Violence Ordinance 1986 (ACT); Justices Amendment Act (No 2) 1988 (NT) ss.99-100.

98. N. Naffin, Domestic Violence and the Law: A Study of s.99 of the Justices Act (South Australia) (South Australia, Women's Adviser's Office, June 1985), p. 127

99. NSW Domestic Violence Committee Report, April 1983-June 1985 (Sydney, Government Printer, 1985) p. 21.

100. N. Naffin, op. cit., p.116.

101. Julie Stubbs and Diane Powell, Domestic Violence: Impact of Legal Reform in NSW (Sydney, NSW Bureau of Crime Statistics and Research, Attorney General's Department, 1989), p. 29ff.

102. N. Naffin, op. cit., p. 116: "According to this survey group the chief advantage of the orders is that they deter persons who are normally law-abiding from engaging in further acts of violence. To a limited extent, the orders are effective. The main problem with the orders - their principal disadvantage - is that they fail to deter persistent offenders who have developed cynical attitudes towards the law. It follows that the attitude of the respondent is all important. The extent to which the respondent takes the order seriously is the extent of its effectiveness".

103. J. Stubbs and D. Powell, op. cit., Chapter 2.

104. This is the case with African women. R. Hirschon, ed., Women and Property, Women as Property (London, Croom Helm, 1984) Introduction. This has been changed in Zimbabwe by the Legal Age of Majority Act, 1982.

105. For example, England and Wales: Law Reform (Husband and Wife) Act, 1962. The court is allowed to stay proceedings if no substantial benefit would accrue to either party from the continuation of the proceedings.

106. Canberra Times, 22 May 1991.

107. s. 103 Law Reform (Marriage and Divorce) Act 1982.

108. See the first edition of this Manual at p.23 ff for a description of the legislation in various jurisdictions. Australia, Family Law Act, 1975 ss. 114, 70C; Hong Kong, Domestic Violence Order, 1986; Family Law Reform Act, RSO, 1980 (Ontario) Family Law Reform Act, 1980 (Nova Scotia) c. s 152, s. 45; Matrimonial Property Act, 1980 (Nova Scotia) S. 152, S. 45, c. 9, s. 12; Family Law Reform Act (Prince Edward Island) s. 34; New Zealand, Domestic Protection Act, 1982; United Kingdom, Matrimonial Homes Act, 1983 (England and Wales), Domestic Proceedings and Magistrates' Courts Act 1978 (England and Wales, s. 16ff, Domestic Violence and Matrimonial Proceedings Act 1976 (England and Wales); Matrimonial Homes (Family Protection) Act 1981 (Scotland); Domestic Protection Order (Northern Ireland) 1980; Jamaica, Matrimonial Causes Act 1989, s. 10; Magistrate Court (Domestic Proceedings) Ordinance 1986 (Turks and Caicos).

109. Atkin and others, "Protecting the victims of domestic violence - of the Domestic Protection Act", Victoria University Law Review, No. 14, 1984, p. 119.

110. Report of the New South Wales Domestic Violence Committee, (Sydney, New South Wales Government Printer, September 1985) p. 35.

111. Report of the Committee on the London Metropolitan Police, 1986, unpublished; Lorna Smith, op. cit., Chapter 7.

112. Lorna Smith, op. cit., p. 33ff.

113. Lorna Smith, op. cit., p. 33.

114. L. G Lerman, "The mediation of wife abuse cases: the adverse impact of informal dispute resolution on women", Harvard Women's Law Journal, No 7, 1984, p. 61.

115. J. Paul, "the general practitioner and the problems of battered women", Journal of Medical Ethics, No 5, 1979, p. 117; Lorna Smith, op. cit., Chapters 9 and 10.

116. E. Hilberman and K. Munson, "Sixty battered women", Victimology, No 2, 1977/78, p. 480, R. W. Swanson, "Battered wife syndrome", No 2, 1977/78,p. 480; R. W. Swanson, "Battered wife syndrome", Canadian Medical Association Journal, No 30, 1984, p.709.

117. Dobash and Dobash, op. cit., p. 181.

118. E. Stark, A. Flitcraft and W. Frazier, "Medicine and patriarchal wisdom: the social construction of a private event", International Journal of Health Services, No 9, 1979, p. 466.

119. M. Borkowski, M. Murch and V. Walker, Marital Violence: The Community Response (London, Tavistock, 1982), pp. 157-165.

120. British Association of Social Workers, "Home violence - is there an answer?" Social Work Today, No 6, 1975, pp. 409-413.

121. Borkowski, Murch and Walker, op. cit., p.89.

122. N. Johnson, "Police, social work and medical responses to battered women", in Marital Violence, N. Johnson, ed. (London, Routledge and Kegan Paul, 1985), pp. 116-117; Lorna Smith, op. cit., p. 75 ff.

123. J. Paul, ed., Private Violence and Public Policy: The Needs of Battered Women and the Response of the Social Services (London, Routledge and Kegan Paul, 1985), p. 54.

124. R. A Berk, P. Newton and S. F. Berk, "What a difference a day makes: an empirical study of the impact of shelters for battered women" Journal of Marriage and the Family, No 48, 1986, p. 483

125. There are various handbooks for the establishment of refuges: Flora MacLeod, How to Establish a Refuge for Battered Women (Ottawa, National Clearing House on Family Violence, Minister of Supply and Services Canada, 1989)

126. J. Browning, Stopping the Violence: Canadian Programmes for Assaultive Men (Health and Welfare Canada, 1984); D. W. Currie, The Abusive Husband: An Approach to Intervention (Ottawa, National Clearinghouse for Family Violence, Health and Welfare Canada, 1988); National Clearinghouse on Family Violence, Canadian Treatment Programs for Men who Batter (Ottawa, Minister for Supply and Services, Canada, 1989)

127. E. W. Gondolf and D. Russell, "The case against anger control treatment programs for batterers", Response, Vol 9, No. 3 (1986) p. 2.

128. Browning, op. cit. P. 45.

129. M. Straus and R. J. Gelles, "Societal changes in family violence from 1975 to 1985 as revealed in two national surveys", Journal of Marriage and the Family, No 48, 1986, p. 465.

130. Guardian, January 9, 1991.

131. Ideas for Teaching about Non Violent Relationships (New South Wales, Department of Education, Personal Development Unit, Directorate of Special Programs, 1984)

132. Jenny Earle et. al., "The National Domestic Violence Education Campaign - A Commentary", Refractory Girl, No. 36, August 1990, p. 2.

133. R. E. Dobash and R. Dobash, Violence Against Women: A Case Against the Patriarchy (London, Open Books, 1980), p. 222.

6. BREAKING THE SILENCE

The roles ascribed to women and expectations of appropriate behaviour in specific societies, coupled with the fact that women are often dependent on men economically and in social status, make women particularly vulnerable to violence in the household. However, the violence is behind closed doors and there is a range of restrictions and controls of women which tend to make violence tacitly accepted. It is, therefore, the responsibility of people with a public/professional role in the community to break through this silence, in order to make heard the voices of women and girls who have been abused in a wide range of domestic contexts.

Health workers and those working in association with health care services have a particular responsibility to make themselves aware of the signs and signals that might indicate that violence is occuring in the home. They must also know what steps to take in order to help women who are being abused.

If a worker is to be effective in detecting domestic violence, it is vital that he or she recognises the extent to which violence is accepted, even by the woman at whom it is directed. Attitudes which justify violence towards women often include distinctions between women and men which are made on the basis of whom it is acceptable to abuse and whom not. People must examine the way women are treated in their own society and their own personal attitudes. We need to start with a belief in the right of all women to live free from violence or from the threat of violence.

This chapter describes basic guidelines for community health workers and medical helpers to enable them to recognise abused women and to help these women break the silence about the violence they are suffering.

The Contexts and Range of Violence

The stereotype of violence towards women in the household is of a drunken man beating up his wife. Whilst there is some truth in this, it is only one of a range of contexts and relationships in which violence takes place. Not all men are drunk when they attack women. In the same way, the class and standard of living of families in which violence takes place can vary widely. Many different kinds of men abuse women.

Domestic relationships are by definition private, and this is why, here, violence can be invisible. But it is not just husbands who beat up their wives; women and girls are also at risk from brothers, fathers and other male relations. Any woman who is confined in a household, (for example, a domestic servant), is at risk from male members of that household.

The type of violence women and girls might experience includes:

* physical assaults (ranging from punching the face and/or body to life-threatening use of weapons)

* sexual coercion and humiliation (ranging from sex under pressure to repeated rape and sexual torture)

* emotional and psychological torture (ranging from depriving the woman of sleep to forcing her to do things against her will through threats to herself or her children and relations)

Evidence from many countries demonstrates that violence towards women and girls in the household is much more widespread than is apparent. It is not noticed both because it is hidden and because people do not know the signs that might suggest abuse.

Why the silence?

Because abuse of women by those in power over them is so commonplace in so many societies, women often feel they have no right to complain. Violence is often seen as an acceptable way of controlling women in certain circumstances, and it is assumed that women must have done something to deserve it. There are two ways in which women are blamed for the violence they experience. Firstly, they are seen to have directly provoked the man, often by challenging his views or behaviour. Secondly, they are seen to have overstepped social limits for women's behaviour and the man, therefore, feels justified in using violence to control her future behaviour. Whilst many aspects of traditional behaviour are important to preserve, those which involve the abuse of large groups within any society must be questioned. There are a number of reasons why women might be reluctant to reveal the fact that they are experiencing violence:

* they may feel ashamed and/or worry about the shame and dishonour that telling someone may bring upon their family

* they may fear that they will be blamed for the violence

* they may feel that if they try to tell someone, that person will not want to listen

* they may be minimising the severity and frequency of the violence and its impact on their physical and mental health as a coping strategy

* they may be focussing solely on surviving from day to day

* they may be afraid because of threats made by the man about the consequences of telling anyone

* they may simply accept the violence as a right of discipline or authority over them

* they may realistically be concerned about the few options open to them if they do tell someone

The Conflicts Around Which Violence Emerges

The situations in which violence occurs often arise out of conflicts about particular issues. It is important that health workers in the community are aware of these. For example:

* conflicts over fertility including contraception, abortion, spacing of children, number and sex of children, infertility, or disputed paternity

* the increasing age of the woman and the decision by the man to take another wife

* conflicts over the possibility of divorce/separation

* the woman's separation from her relations or other support networks and/or her confinement within the household

* conflicts between younger and older women/members of the man's family

* the woman's inability to cope with children/housework/job/ relatives/husband

* conflicts about whether girls should be educated and/or whether the woman herself has access to education

* conflicts about the women's children from a previous relationship

* conflicts about the woman taking a paid job outside the household or her involvement in community or political activity

* conflicts over money, possessions and the allocation of resources within the household

* conflicts over expectations of women's role, particularly her performance of household tasks

* resistance by the woman to the sexual demands of her partner

* conflicts about alcohol use

This is not a comprehensive list and the form the conflicts we have highlighted take will vary between societies. We have included them to alert you to the range of issues that can precipitate violence and to enable you to think which are most applicable to your society.

Recognising the Danger Signs

Whilst health workers may come across evidence of violence in any setting, it is most likely that it will be encountered in one of these situations:

* hospital accident

* hospital outpatient clinics, especially gynaecology clinics, ante- and post-natal clinics, paediatric clinics, clinics for sexually transmitted diseases, psychiatric clinics and orthopaedic clinics

* family planning clinics

* maternal and child health centres/clinics

* mental health institutions

If you are in a junior position and a woman talks to you about the violence she is experiencing, you should seek her permission to tell a more senior colleague who can take appropriate action. If you suspect that a woman is being abused, you should express your concern to someone who you feel would be sympathetic and is in a position to do something about it. If you are in a senior position, you should make it clear to all the staff you work with that you want them to take the possibility of violence seriously and share any information with you. The staff must also know the steps they should take in such cases to preserve and ensure the woman's confidence and dignity, and to help her talk freely without fear or shame.

There a number of different kinds of situations in which you may be in a position to help or enable women to speak out about the violence they are suffering:

* You may be presented with a crisis situation in which there is clear evidence of physical injury. Even in this context women may explain their condition without referring to violence. If there are bruises or other injuries, they may say that they fell, walked into a sharp object, had an accident, or that something fell on them. Any one of the following physical indicators should lead you to take the possibility of violence seriously:

  - any external bruising
  - wounds from weapons (guns and knives)
  - marks possibly caused by whips, sticks or belts
  - hair pulled out
  - injury to the face
  - burns, especially those apparently caused by lighted cigarettes
  - broken limbs or ribs
  - head injuries possibly caused by banging of the head against floors or walls, or by a stone or hammer signs of possible internal injuries that could be the result of punching/kicking
  - unexplained vaginal bleeding
  - unexpected threatened or spontaneous miscarriage

* The woman may be in a state of acute emotional distress; the long term impact of living with a violent man may affect a woman's mental health. If she is very distressed, she may not be able to give a coherent explanation at all, or she may talk generally about not being able to cope with her life. Any of the following indicators should lead you to take the possibility of violence seriously:

  - long term depression
  - anxiety and fearfulness
  - suicide attempts
  - disturbed sleeping patterns

* The woman may be seeing you about a seemingly separate issue, but may talk to you about feeling very unhappy, feeling generally unwell, that she can't cope with life, that she is always tired, that she doesn't feel herself, or that there are money problems.

She may be using these general complaints as a way of talking indirectly about violence in order to get access to help and advice. In any situation where you suspect violence might be occurring you should look for evidence of previous violence like badly-healed fractures, old scars and physical disability (limping).

How to Break the Silence

We have noted some of the signs and situations which might indicate that violence is occurring in the home. Because of the pressures on women not to name the violence directly, it is important to create a safe context in which the woman can speak out. The first step in this process is to gain the woman's confidence so that she feels you will be sympathetic to whatever she tells you and that you will not betray her trust. She needs the security of knowing that you will not hold her responsible for the violence, so that she is able to describe humiliating experiences without feeling blamed or shamed. It is also your responsibility to have time to listen, to give advice and to take appropriate action where necessary to protect the woman from further violence.

Given that the violence women experience is invariably from men whom they felt they should be able to trust, a woman may feel unsure talking to a male professional about the violence. If you are male and feel that there is no possibility of a female colleague conducting the interview, you could offer the woman the possibility of another woman being present. This could be a female friend or relative of hers if someone has accompanied her or is nearby, or a female member of staff. Be careful to make sure that this is the woman's choice; she may in fact not want anyone else present.

During the interview, the woman should be treated at all times with respect and made to feel comfortable. It is important that you conduct the interview in a quiet and private place where you will not be disturbed. You should convey that you have time to listen to what she has to say and that you will be neither shocked or judgemental. You should indicate that your primary concern is for her, her health and her safety. If the woman is distressed, you must calm her down and support her before asking any direct questions.

The following are a few suggestions as to how you might raise the question of violence with a woman. We stress that these questions should always be asked in a respectful, but open and direct, way.

* If the woman has external injuries or bruising and you suspect her explanation is not the whole truth, you could ask, 'Is that really what happened?'

* If the woman has internal injuries that could be caused by punching or kicking, or has had mysterious miscarriages, you could say, 'These things are sometimes the result of violence'.

* If the woman is expressing general distress but giving explanations that you feel are hiding something, you could say, 'Is that really what is worrying you, or is there something else that you have not told me yet?'

* If the woman is raising issues of conflict within the household you could say 'What is your husband's/father's attitude to these matters?'

The woman may open up as soon as she feels you have given her permission to talk, but you may have to follow up your initial questions. In some situations, however, whilst you still suspect that violence is occurring, the woman may refuse to confirm it. Her reticence may be because she doesn't yet trust you or because she is frightened of the consequences of telling anyone. In these situations, you should try to convey to the woman that if she wants to talk to you in the future about anything she can. She should know how and where she can contact you in confidence.

It may be possible in some circumstances to talk in private with the woman's children, if she has any. They often witness violence to their mothers and may, provided they are not too afraid of the man themselves, be able to help you find out if violence is occurring in their home.

If the woman or her children confirm that violence has occurred, or if you have strong suspicions, you should explain to the woman what is likely to happen next, such as:

* she may need to have a medical examination

* samples may have to be taken

* other tests may also have to be carried out

* it may be necessary to admit her into hospital so that further tests and treatment can be done

You should also raise the possibility of her taking legal action and discuss the implications of that. At this point, you should consider whether you should refer her to a social worker, a shelter or some other community support agency.

Any injuries should be recorded, and suspicions and findings regarding violence should be entered on the woman's personal and confidential health record. As well as being essential for the woman's health, this will both

help you to build up a picture of violence in particular cases and enable you to assess the prevalence of violence in your community. It will also be invaluable if you are required to give or provide evidence in a subsequent legal case.

A Safe Place

One of the ways to protect women and children from further violence is to enable them to find a safe place to stay where the violent man cannot contact them. The possibilities will vary according to the degree of injury and the available resources in your community.

If a woman comes to you in a crisis situation needing medical treatment and you suspect that she is the victim of violent assault from a member of her household, you could try to use your professional position to remove her temporarily from the violent situation, for example, by admitting her into a hospital or into clinic for tests. This time should be used positively to explore ways of protecting her and her children from future violence.

Where violence is confirmed, you should discuss with the woman the places where she feels she might be safe. These might include:

* the home of members of her family, or friends
* a shelter for abused women
* a religious institution, for example, a convent
* a hostel for the homeless

The Other Side of the Silence

All too often, the focus of professionals is on the women and, therefore, on the consequences of violence. Seldom is the perpetrator of violence made accountable for his behaviour. Where men are contacted by professionals, their denials and rationalisations are often too readily accepted. If violent men are not made to take responsibility for their actions we, to all intents and purposes, condone their behaviour. A direct challenge to a violent man may protect the woman in future. Even if the woman separates from the man and therefore is to some extent protected, if the man has not been challenged he may treat another woman in exactly the same way.

It is part of the responsibility of any professional who detects violence to ensure that someone focusses on the man in question. It is probably best if this person is also a man - it could be a health worker, social worker or community leader. Whoever it is must be prepared to challenge the perceived right of a man to use violence as a way of exercising control and authority over women and children in his household.

Moving On

Once you become sensitised to the occurrence of violence and the way in which women approach outsiders about it in your community, you will undoubtedly discover that it is much more prevalent than you had previously thought. Your skills in detecting it will improve and you will find ways of

raising the issue with women that suit your personality and the specific situation you work in.

In taking on this issue and helping to break the silence, your responsibility extends beyond intervention in particular situations. You must also, through your social and professional role, become part of a process in which the aim is to make violence an unacceptable part of personal relationships. The kinds of actions you could take involve sensitising others to the issues and supporting other individuals and groups who have similar aims. You could, for example:

* argue for policy and procedural guidelines in your area/country for dealing with domestic violence within health provision

* organise training sessions of other health professionals/colleagues to sensitise them and to train them so that they may recognise signs of violence and know how to deal with it

* organise educational events to sensitise others (for example, teachers and community workers) to the problem and to share experiences

* support and create a network with women's groups and community groups which are/intend providing alternative services like shelters or self-help groups

* develop strategies in your community for challenging violent men.

7. ALCOHOL-RELATED VIOLENCE

Research has shown that there is a close relationship between alcohol, the abuse of women and other forms of domestic violence, and that alcohol is often used as an excuse for such acts as beating and rape.

It is essential that careful research into alcohol abuse and its causes is undertaken, and that practical strategies are implemented to improve the position of women who victims of alcohol-related abuse.

Action to combat alcohol abuse and its related domestic violence is threefold:

(a) introduction of legislative measures to provide heavier penalties where alcohol is related to violence, and to supplement and strengthen existing laws for the protection of women and children.

(b) regular organisation of intensive education programmes/campaigns showing the results of alcohol abuse. This can be done through the Department of Health, through schools and through the broadcasting media.

(c) organisation and financial support for programmes which offer counselling, rehabilitation services and shelter to help both victims and offenders.

Alcohol-related violence is an issue of major concern in particular areas of the Commonwealth, most noticeably, in the Commonwealth Pacific. Women's groups throughout the Pacific have recognised the problems of alcohol abuse and have urged governments, church and non-governmental organisations to do research, educate people and develop programmes to deal with the rise in alcoholism. As a result of this concern, the South Pacific Commission and the World Health Organisation sponsored a joint Conference on Alcohol-Related Problems in Pacific Island countries in September 1985. The Conference produced the following specific **recommendations**, which may also be of value to other regions of the Commonwealth:

* a survey of alcohol-related domestic problems and violence should be sponsored by the appropriate government departments, non-government organisations and international and regional agencies; the information gathered should be made public.

* governments should promote awareness of alcohol-related violence amongst the population by holding meetings which include the use of audio-visual aids; the programme should be continued in small sessions in homes and villages.

* stricter legislation should be introduced for the protection of families against alcohol-related violence (e.g. imposing heavier fines and longer terms of imprisonment on offenders); offenders should also be encouraged to undergo counselling and psychiatric evaluation and treatment, as required.

* government should regard the fact of being under the influence of alcohol at the time of committing a crime or unlawful act as an exacerbating factor, and provide for stricter penalties in such circumstances.

* women's organisations (in parallel with their existing activities) should pursue the organisation of courses on alcohol-related violence; governments should provide the necessary structural, financial, and personnel assistance to enable them to achieve the above.

* governments should aid and assist the appropriate bodies (including religious organisations) to implement relevant activities towards enhancing family life for the prevention of violence.

* international and regional organisations should be utilised as a source of supplying the relevant information, expertise, skills and personnel in support of the above.

* governments should review, where necessary, existing legislation with respect to all forms of alcohol-related violence.

* SPC, WHO and governments should promote ideas, at all levels, which progress beyond the sexist antagonism that sustains violence in the home and in the culture.

* governments should promote mental health by support of counselling and methods that assist with the encouragement of dialogue between people at all levels.

* governments should support the establishment of rehabilitation centres that can provide counselling and maximum support services to the victim and to families who experience the effects of alcohol-related violence, as well as to the aggressor.

* governments should give financial aid to establish shelters for the victims of violence resulting from use of alcohol; and that the shelters should be staffed by specially trained personnel.

* governments should promote centres for preparing for marriage, and encourage action by marriage guidance counsellors to help couples who are experiencing difficulties.

* governments should cease to countenance the easygoing attitude of the authorities responsible for applying the law to offenders who commit alcohol-related crimes and unlawful acts, and ensure the effective and strict application of the law everywhere.

8. REFUGES AND SUPPORT SERVICES

The right to live one's life free from violence and intimidation is a basic human right. Yet, daily, millions of women throughout the world are totally denied that right by their partners, partners who should be a major source of love and support throughout their lives and who, if we are to believe the teaching of our society, are there to protect and defend their wellbeing.

This chapter looks at ways of providing practical support to abused women and their dependent children. It draws on the philosophy, structures and experiences of a feminist approach to the problem of violence against women in the home which defines it as a political rather than individual problem, needing political solutions. A major part of that political solution within the past 15 years has been the establishment of thousands of refuges and support services for battered women and their children throughout the world, based on the principles of self-help and collective action. This network is now an international movement which can be used to exchange ideas on ways of working and to provide support and information for new groups trying to develop services in their area. We look briefly at the sort of support services currently available to battered women and their effectiveness, and give some ideas on how to go about setting up these services. This is by no means a comprehensive study of the subject and it is certainly not a blue-print for action. In fact, many aspects of the support services detailed here may be totally inappropriate or unworkable in other circumstances, given the very different political cultural and economic barriers which face battered women worldwide. Individual responses to these problems will vary greatly; the needs of battered women and their children cannot be met without reference to the local community. This chapter is about providing a framework in which local responses may be developed. But it is also about recognising that women, worldwide, are victims of male oppression and that we are all part of that oppression.

In challenging male violence, we experience common problems and obstacles. The barriers which stop women leaving violent men may vary, but they are still barriers. Unwillingness to acknowledge domestic violence as a serious problem is worldwide; a lack of political will in governments to provide resources and support services for battered women and their children is commonplace. However, our most powerful asset as women is our ability to support each other; collective support exists within the refuge, safe house or phone network whether in Africa, Asia or Europe. This is the tool which denies men the right to abuse us.

Violence Against Women in the Home: A Worldwide Problem

The phenomenon of wife-abuse has, throughout history, been a commonplace feature of all known societies. It is often both socially and legally condoned. The abuse of women in their own homes, like the problem of violence against women generally, is on a worldwide scale affecting women irrespective of their age, class or religion. Even today in countries where legal protection for battered women and their children is fully available and where an official recognition of violence against women in the home has been obtained, the suffering of large numbers of women and children within the home is still largely ignored. In other countries, domestic violence is still a 'hidden' problem which goes unacknowledged both in public and in private, leaving thousands of women enduring systematic violence and brutality at the hands of their partners.

The Women's Aid movement

Until very recently, few women publicly admitted to being abused by their partners. Yet within the past 15 years the abuse of women has become an issue for both public and governmental debate. As well as media interest in the topic, there has been significant activity in academic research. The origins of the battered women's movement has direct links with the development of the women's movement in the early 1970s, when women began to come together to openly confront the oppression of women as a class. Many women's centres began to emerge as a result, and although they did not set out to give refuge to battered women and their children, it soon became the main focus of their work, this being a primary need of many women who contacted them. In the UK, groups which came to specialise in this work adopted the name 'Women's Aid'. Significant improvements have since been made in many parts of the world, and a number of choices are now available. In Belfast, for example, within a relatively short space of time, dramatic gains have been made, in addition to the comprehensive support network established there for battered women.

Why Women's Aid?

If a solution to the problem is to be found, effective alternatives must be offered to battered women and their children. This means alternatives which not only respond to the needs of battered women but which take into account the nature of the problem, so that women can make real choices in the decision about their individual situations. This chapter uses the Women's Aid model when looking at ways to establish support services for battered women and their children. Why? Quite simply, because within the last 15 years, Women's Aid has proved to be the most effective way to empower women to challenge male violence within their relationships. There are several reasons for this. Firstly, the vast majority of women will identify easily with the non-professional and non-hierarchical service models offered by Womens' Aid. Secondly, by using the method of self-help, individual women are given the opportunity to develop on a personal basis, which in turn also strengthens collective action. Thirdly, the emphasis on a flexible, non-judgemental approach in responding to individual women, and the right of each woman to make her own decisions and be supported in them, means that a large range of needs can be met within a Women's Aid environment. Finally, Women's Aid refuges are essentially about sharing experiences and ideas and about living together; many argue that a sharing community is the **only** context in which women can gain the lasting confidence and courage necessary to reduce their dependence on violent men.

Other forms of support services obviously do exist for battered women. These may be more hierarchical and more highly structured; a small number of women may need such support. Although the Women's Aid model may not be totally appropriate within all communities, many aspects of it will be; the model can be used to help clarify how support services should be structured and developed within particular areas. Indeed, the broad-based principles and objectives to be found within Women's Aid can culminate in a surprisingly wide range of aspirations, whether in terms of personal motivation of group members or in the political structures within a particular area. What is of crucial importance, whether or not the Women's Aid model is used, is that common principles and goals are identified from the beginning, so that a coherent response to the problem can be established.

In order to agree on what perspectives should be adopted by a group, some basic questions must be answered:

* Why are women abused in marital relationships?

* Why do men abuse women?

* What role does violence play in the oppression of women generally?

* How should women organise to stop male violence?

* Do men have a role in this?

To assist in the process of developing a response to the questions proposed above, a brief summary of the perspective of Women's Aid and the methods of working follows.

Women's Aid: Philosophy, Principles and Practice

From its inception, Women's Aid had viewed violence against women in the home as directly related to the pressures that women face generally in society. For the organisation as a whole, this has meant making choices from the very beginning. These are choices about how groups and refuges should be structured: that they should be women only, that they should operate along the lines of self-help and mutual support and that structures should be non-hierarchical, giving women who have experienced violence direct control over decision-making processes and therefore over the development of the organisation. The choices that have been made are validated by the thousands of women who continue to come to Women's Aid each year, whom we **know** are being offered a real alternative to their violent domestic situation.

The aims of Women's Aid are:

1. To provide temporary refuge to women and their children suffering mental or physical harassment

2. To encourage a woman to determine her own future whether this involves returning home or beginning an independent life.

3. To recognise and care for the emotional needs of the children involved.

4. To offer support and advice to any woman who asks for it, whether or not she is in a refuge, and to offer supportive aftercare to any woman leaving the refuge.

5. To educate and inform the public, the media, the police, the courts, social services and other authorities, always mindful of the fact that the battering of women is a direct result of the general position of women in our society.

Self-Help

Self-help has been proved to be the most effective way of providing support to battered women both as a method of working and as a political strategy. Women's Aid recognises that women who have experienced violence in their relationships are often best equipped to help others in the same situation. The importance of helping women to take control of their own lives, of encouraging self-determination, and of giving power to women whose experience has mainly been one of powerlessness is crucial in Women's Aid.

Women who have been abused, degraded and have all but lost their self-respect can build this up in themselves each other by learning skills or management of the refuge and by taking part in group activities and policy planning. The care and support received through this method of work we believe to be crucial to the women themselves. It allows development and personal growth beyond the period spent in the refuge; many women choose to remain part of the group, working as volunteers. They join with those who came into the group because they wanted to help women discover that working for change brings change. Changes benefit not only abused women and their children but have the potential to transform the community beyond the refuge when women take these skills and attitudes back into the community.

Why Women Only?

Women's Aid groups operate a women-only policy for two reasons. Firstly, to ensure the mental and physical wellbeing of women and children coming to use our advice centres and refuges. Physical and mental fear of men which many women understandably feel as a result of their experiences cannot be underestimated. It is only by providing a women-only environment that Women's Aid can offer complete protection to women and children. The second reason is linked to the political perspective in which Women's Aid views male violence. By operating on a women-only basis we are giving women the opportunity to develop skills and confidence and to rely on each other and thus help redress the imbalance of inequality between men and women in our society.

How Refuges Work

A refuge is a house where women who have experienced violence in the home can live with their dependent children. The definition of violence given by Women's Aid includes mental, physical and sexual violence.

The availability of refuges is only one step in ending violence against women but it is a crucial one, strengthening women both on an individual and collective basis, allowing some women an escape from violence and others a means of stopping it, through the threat and action of leaving home.

In a refuge, women are guaranteed protection from violent partners. They can gain peace of mind and a particular type of support and understanding which acknowledges the needs of battered women. There is no

limit to the length of stay; women can stay as long as they need to in reorganising their lives. The most important function of the refuge is to give women the opportunity to assess their situation without pressure, and to decide about the future of their relationships. In refuges it is strongly felt that only the individual woman has the right to make the decision about her future; whatever decision is made, whether it involves returning home or starting a new home elsewhere, she will be supported in this.

Structures within a Refuge

A sense of community and co-operation is encouraged in refuges, enabling women to share tasks rather than to exist in isolation. Mutual support is stressed as an important step towards women gaining self-confidence and being able to cope when they leave the refuge. Each woman has responsibility for her own children, but many facilities such as cooking and laundry are shared on a communal basis. Although it is not always possible, we try to give each woman her own bedroom so that she has some degree of privacy. Most support groups meet weekly and all women living in the refuge are encouraged to attend. This is where the work of our group is discussed. There are also weekly house meetings where women living in the refuge get together to discuss the general running of the refuge and any problems that may have arisen during the week.

Paid and Unpaid Workers in Refuges

The emphasis of involving women who are living in the refuge or who have lived there has led many groups to opt for unpaid workers rather than to run a refuge with permanent staff. Other groups have decided to employ permanent staff, arguing that women should be properly paid for the work being done within refuges and that self-help can exist within this structure. Most refuges do not have night staff, so that women living in the refuges are given direct responsibility in running them.

Women have been socialised to be dependent and often go from dependence on parents to dependence on a man. To arrive at a refuge which is highly structured and which has a warden would allow the women to become dependent once again. Women living in refuges are therefore encouraged to run the refuge and to work collectively with other women to take control over their own lives.

Alternatives to Refuges

Refuges are unique. In contrast to 'homes for battered wives' they offer a lot more than accommodation and also offer different solutions. Such structures also tend to be more restrictive, for example there may be a time limit on how long women and children can stay or more rules and regulations about the day-to-day running of accommodation; the place may be more hierarchically structured in terms of staffing. There may also be emphasis on a particular solution to the problem, for example, reconciliation. It would be wrong to deny that the need for such provision exists but it should be stressed that it is totally inappropriate for the majority of battered women in terms of offering a long term solution to their problems.

The value of refuges is that they enable women to relate to each other as women, irrespective of their religious, cultural or class differences; what unites them is their experience of male oppression.

Establishing Local Support for Battered Women

There are many ways in which support may be established for battered women and their children. Several factors should be taken into consideration when thinking about appropriate action:

* It is important to remember that it is **men's behaviour which is the problem.** It is only when men learn that violence/threatening behaviour towards women is totally unacceptable that the problem will abate. Since we are still a **long** way from that position, priority must be given to the victims of men's behaviour, to women and children. For the majority of women and children this means first and foremost **physical protection** either by getting the woman away from the violent situation i.e. into a refuge, or by removing the violent man and effectively keeping him away whether on a temporary or permanent basis.

* Geographical location - a very rural or isolated community with poor transportation and communications networks will offer a very different service to battered women than one in an urban setting.

* What support systems if any, presently exist to deal with domestic conflict? Are support systems within the family or religious structures effective in responding to the needs of battered women? Or do they in fact prevent women from finding solutions? How can existing support systems be made more effective in terms of offering women support and condemning the man's violence?

* What about more formal networks, for example, social welfare organisations? Do they offer any support at present to battered women and their children? How can that help be made more effective?

* What about provision for protection for battered women within the law? (See chapters 3, 8 and 9).

Getting Started

Once you have taken local factors into consideration, you can decide on what service you can offer. Be **realistic** about what can be achieved. For example, if there is virtually no awareness about the abuse of women within the family, a lot of groundwork in terms of raising and debating the issues involved will have to take place before much can be achieved.

The overall objective of any group or individual should be to provide support for women and to make men realise that the use or threat or violence against women is **both** unacceptable and illegal. The ways in which that objective may be achieved should be outlined in order to make a choice about what priorities you wish to concentrate on in your area. The list below is by no means comprehensive!

Direct Support Services for Battered Women and Their Children

Informal Support and Advice Networks

It may be that the practical options open to you are so limited that no formal service as such can be established. However, there is a growing awareness about the problems faced by women generally, even in very rural areas, so some attempts should be made to raise awareness on the problem. Perhaps as a topic it could be raised publicly and women may begin to come forward. Even at an informal level, if there is some focus for support (not necessarily public), it will be of great value. If one or two women are identified within a group, this will be important in breaking down the sense of isolation and guilt many women experience. This can also be the basis on which a more elaborate support system may be developed in the future.

Formal Support and Advice Networks

* Telephone line: a confidential telephone number is required (day and night if possible) which can be operated by volunteers on a rota basis.

* Advice and support centre: you will need to acquire premises (ideally they should be your own, but perhaps you would have use of existing premises once or twice a week). Women can then either ring up or visit the centre.

* Safe house: this is like a short term refuge. A group of people will offer their homes to individual women and children in a crisis situation for them to stay on a short term basis. It is crucial that people who are offering their houses should have some awareness of the needs of battered women and their children.

These facilities may be interim measures whilst trying to get a refuge established, or may be more permanent if establishing a refuge is not feasible. In addition to providing a public focus, they can offer women emotional support, practical help and information on legal and other rights. As with all direct services, a caring, empathetic, non-professional approach is one which will be most effective. Building up a sense of trust and confidentiality will be important if women are to use services and if services are to gain credibility not only amongst women but with other agencies. Some basic information and training for volunteers and workers running these facilities may be necessary. The suggested areas for training are: understanding the needs of battered women and children, self-help counselling, and women's legal rights.

Refuges

By offering women individual support whether through a phone line, an advice centre or safe house you are enabling women to reject their partner's behaviour. For many women, whether they have had months or years of abuse, this will simply not be enough. These women need help, not just so as to reject their partner's behaviour, but to cope with all the implications that that decision brings: the break-up of a marriage or long-standing relationship; the break-up of the family; bringing children up alone; securing economic independence; finding somewhere to live; building up a home - and these are only the initial steps.

In a refuge, the individual experience can be transformed to a collective one where women, through mutual support, regain their strength, self-respect and ability to cope with whatever decision they make. Refuges should be homes. They are the homes of women and children who live there; this should be respected at all times. In a refuge the atmosphere should be a friendly, caring and positive one in which women and children feel safe and secure. This does not always happen automatically; it has to be worked at by the support group and by women living in the refuge.

Running a Refuge

Living in a refuge is not easy. Lack of privacy, lack of resources and overcrowding are all constant problems within refuges. Women and children initially coming to the refuge may be very distressed. It may be their first experience of communal living. It is important that refuges offer women and children real alternatives; they should offer a safe, warm, clean environment and should operate on democratic lines. Committed workers, whether paid or unpaid, who work directly with battered women and children must have a full awareness of their needs. They themselves as workers will need support.

To establish a refuge, several factors should be taken into consideration - the design, size and location of the property; the features that must be included; safety; and security measures.

The Property

The refuge property should be of a high standard, located near to essential services (schools, doctors, shops, etc). It should be of adequate size so that overcrowding will not be a problem. Most refuges would not exceed accommodation for more than fifteen families. The refuge design should allow for a degree of privacy; each family should have its own bedroom if possible. There should also be a degree of communal facilities such as kitchen, laundry, and children's playroom.

Essential Features

* well-equipped playroom

* adequate cooking and laundry facilities (durable equipment is essential)

* office/sitting room space where women can talk privately

* adequate washing and toilet facilities

* adequate fire precautions

* furnishings, furniture and play equipment should, if at all possible, be new and be replaced regularly

* a garden, if possible

Making a Refuge Safe and Secure

The physical appearance and upkeep of a refuge is essential. With such large numbers of women and children, maintaining the refuge to a suitable standard is no easy task. But a clean, warm, safe environment is crucial for the mental and physical wellbeing of the women and children living in a refuge and can also ensure that the refuge has credibility as a facility. This is important both in terms of women needing to come in to the refuge and for liaison with outside agencies.

A high standard of **hygiene** is essential for the physical health of all women and children, particularly for the health of young children and infants. Physical safety is also an important factor in refuges. Not only is it important to be aware of the normal risks such as fire and accidents, but these is the added danger from husbands and boyfriends looking for women and children. Particular attention should be given to the outside of the house so that it is totally secure i.e. reinforced glass in windows; strong doors and locks on doors. **No children should be allowed to answer the door at any time. The address of the refuge should also be kept as confidential as possible and everyone coming in and out of the refuge should respect this.**

House Meetings

Working democratically - this means involving women in the decision-making processes of the group and in the work of the refuge, giving advice, participating in discussion, and so on. A democratic, self-help structure minimises the risk that women will become dependent on a particular worker/volunteer; it also enhances the smooth running of the refuge. It means that women are much more able to cope after they leave the refuge in terms of making decisions and leading independent lives, whether this means returning home or starting a new home up elsewhere. The function of regular house meetings in running the house democratically is crucial. House meetings can discuss the day-to-day running of the refuge, any problems within the house, the sharing of practical tasks, babysitting arrangements and the general work of the refuge.

Outside Agencies

The majority of refuges do not offer formal counselling to women. Women will mostly get support from other women living in the refuge, from workers or from volunteers. If the need for more formal counselling arises, then a woman can be referred to an outside agency. Developing

good working relationships with outside agencies is crucial if women and children within the refuge are to be effectively supported. Where possible, liaison should be made with police stations, social services departments, health workers, doctors, child-care agencies, solicitors and housing agencies.

Children

Children coming into refuges have a lot to cope with - leaving their fathers, their schools, their home and friends, as well as encountering a new and confusing situation. The majority of children adapt extremely well and generally settle down to enjoy life at the refuge. It is important to be aware that a mother needs time to settle down and to think about the future, but it is of equal importance that workers should not take over total responsibility for her children. Particular features should be noted in responding to the needs of the children: the need for space of their own i.e. a playroom, stimulating play materials, organised play sessions and good child care workers. It will be important for the child care workers to realise the special needs of the refuge. At a refuge, families will be frequently arriving and leaving, so it may be difficult to establish the usual routine operated in other playgroups. Older children attend local schools but the under fives seldom get a break from the refuge environment. On some occasions, both mothers and children coming into the refuge feel very depressed or upset as a result of their experiences at home. In such cases, the role of the childcare worker to both mother and child will necessitate much care and patience.

It is important for children to understand as far as possible the reasons why they are living in a refuge and the decisions being made that will affect their future. If workers talk to children and make themselves available to them, and if the children have lots of discussion and chats with their mother, the children will have the opportunity to work through any problems or fears that they may be experiencing. There are many misconceptions about the needs of children in refuges - with love, patience and understanding, children's needs as well as women's can be mostly fulfilled in the refuge. Many children will look back on time spent in the refuge as extremely happy.

Funding

Once you have some evidence of the needs of an area and you have decided upon the extent of the service you wish to establish, you should identify possible sources of funding. You will need an estimate of the costs involved and you should have your arguments for the need and extent of the service clear before approaching any such bodies. Possible sources include: charitable bodies, trusts, government voluntary agencies, central and local government funds and, of course, fund-raising events. You should decide what the long term funding of the service should be and put your efforts into developing good working relationships with that body.

Education and Research

Some education and publicity will be necessary not only for reaching battered women but also in building up credibility with agencies involved. Education work with different agencies such as police, social workers, doctors and hospital workers will be useful in developing more effective agency response to the problem. Public education in terms of going out to give talks to youth groups, community groups, women's groups, and so on, is also useful.

It will be important to do some research on the extent and nature of women locally. This is not only in order to produce evidence for funding bodies and other agencies, but also to help assess what services should be provided. A questionnaire could be circulated to relevant agencies in order to gain the relevant information or a research worker could be commissioned to do more in depth studies.

Conclusion

The needs of battered women and children wanting to leave violent men can be met at a relatively low cost. This cost must be weighed up against the misery and unhappiness of thousands of women and children throughout the world today who are trapped in violent relationships in the home. It is only through initiatives to provide physical safety and real support for women and children, through legislation that will criminalise violence in this context, and through social condemnations of male violence towards women that the cycle of misery can be broken.

PART II: SEXUAL ASSAULT, SEXUAL HARASSMENT, CHILD SEXUAL ASSAULT

1. SEXUAL ASSAULT

A. INTRODUCTION

In most countries of the Commonwealth, sexual violence against girls and women is emerging as an increasing problem. There is no clear reason for this and it is similarly unclear whether the incidence of offences of this nature has increased or whether there has been greater recognition and reporting of violence that has always occurred.

This part of the manual contains a survey of how legal systems throughout the Commonwealth deal with sexual assault. It does not seek to indicate how often sexual assault occurs, nor why women are attacked in this way. Further, it does not describe how the prevalence of sexual assault affects both individual victims and women in general[1]. Part I contains an examination of Commonwealth legislation pertaining to sexual offences, while Part II comprises the sexual assault kit developed by the Royal Canadian Mounted Police, which is used by them in the investigation of sexual assault crimes. This kit has been included as an example of a strategy which has been introduced in one Commonwealth country to facilitate prosecution of sexual offenders and to alleviate some of the unpleasantness that the complainant faces when she complains of such an offence.

B. THE LEGAL FRAMEWORK

a) Introduction

All Commonwealth jurisdictions criminally sanction sexual offences against women in legislative offences which are variously entitled abduction, defilement, indecent assault, procuration, unlawful detention for immoral purposes and rape[2].

Over the last decade, most Commonwealth countries have witnessed demands for the reform of the law relating to these offences, particularly the offence of rape. These demands have addressed both substantive and procedural issues. Accordingly, some countries shave comprehensively reformed the law in this area, while others are considering proposals for such reform. In general terms, however, the crimes are defined and the procedural rules are formulated as they were last century.

A number of common issues for debate have emerged throughout the Commonwealth in this reform process. Much of this has surrounded the crime of rape and it will, thus, be concentrated on here. The major areas of controversy have been:

* The scope of the offence.
* Whether sexual assault within marriages is a crime.
* The question of the consent of the complainant.
* The related issue of the accused's perception of the complainant's consent.
* Evidentiary requirements, including evidence as to fresh complaint, past sexual history and corroboration.
* Amelioration of court procedures.
* Sentencing.
* Whether related support systems can be established to make the treatment of sexual assault more effective and sympathetic.

b) The scope of the offence

Most Commonwealth countries model their definition of rape upon that of the English law. Most, thus, define rape as sexual intercourse by a man with a woman which is unlawful and which takes place without her consent in such circumstances that the man knows she is not consenting or he is reckless as to that fact[3].

This section will consider the definition of sexual intercourse for the purpose of rape, whether the crime should remain in its blanket form, or whether different degrees of seriousness should be specified in legislation and, finally, whether the term "rape" itself should be retained.

(i) Sexual intercourse

In general, Commonwealth jurisdictions consider sexual intercourse for the purposes of rape to exist where there is the slightest penetration by the penis of the vagina. Ejaculation is not necessary[4]. Throughout the Commonwealth, the offence of rape, like the offence of buggery, is considered to be extremely grave and thus carries severe penalties. In most jurisdictions, the rapist can be convicted of up to life imprisonment.

Victims of sexual assault are usually subject to various forms of violation. Frequently, the offender is unable or chooses not to penetrate his victim with his penis, but may force her to perform acts of oral sex, penetrate her with this fingers or an object or demean her in other ways[5]. Activity such as this, although as demeaning and distressing as rape, usually falls within the definition of "indecent assault", penalties for which are considerably lower than rape or buggery.

A number of Commonwealth jurisdictions have taken the view that concentration on penile penetration as a particularly heinous form of misconduct is misplaced. Accordingly, they have widened the definition of sexual intercourse to encompass penile penetration of the anus and mouth and to penetration of the vagina or anus with any object. Thus, South Australia defines sexual intercourse to include the introduction of the penis of one person into the anus of another and the introduction of the penis into the mouth of another[6]. Victoria and New South Wales go further and include the insertion of objects into the vagina and anus, while New South Wales and New Zealand also cover cunnilingus[7]. All of these jurisdictions moreover, have made these offences gender neutral, so that both victims and offenders may be either male or female.

Canada has similarly replaced the crime of rape with a gender neutral offence which is called "sexual assault". Unlike in the Australian jurisdictions and New Zealand, however, the legislation does not define the conduct encompassed by the offence in a way that sets it apart form non-sexual assault. In other words, there is no indication in the legislation to indicate factors that will transform an assault into a sexual assault[8]. As a result, the legislation has left significant

scope for different interpretations of the meaning of sexual assault which has resulted in numerous cases in which courts have been asked to determine whether an assault is sexual. For example, the New Brunswick Court of Appeal has decided that sexual assault is limited to an assault on the sexual organs or genitals and does not include touching a woman's breasts. As one of the judges stated: "The problem in this case is that the contact was not with the sexual organs of the victim but with the mammary gland, a secondary sexual characteristic", which was equated with contact with other secondary sexual characteristics, such as touching a man's beard [9].

Other courts have refused to follow this narrow interpretation. Thus, the Ontario Court of Appeal, faced with the argument that the accused's actions of trying to kiss a woman, lying on top of her and biting her breast did not constitute a sexual assault as there was no interference with her primary sexual organs, concluded that in the determination of whether such an assault had taken place all the facts were material. The Court commented further that "to hold that an assault involving such a patently sexual symbol as mammary glands is not a sexual assault is simply an unacceptable construction of the new offence"[10]. Other decisions have determined that assault with intent to have sexual intercourse without consent, assault for the purposes of sexual gratification, acts of force, including acts intended to degrade and demean for sexual gratification, assault with sexual motivation and assault in an "aura of sexuality" all come within the offence of sexual assault[11].

The Canadian definition of proscribed activity has lent itself to both a narrow and liberal approach. It was originally hoped that by leaving the definition to judical interpretation a definition would emerge which reflected the growing knowledge and understanding of women's perspectives of sexual conduct[12]. Unfortunately, the cases indicate that the statutory formulation has led to uncertainty in the law.

Jurisdictions who have redefined rape in gender neutral terms and to include acts beyond the penetration of a vagina by a penis seek to stress the demeaning and violent aspects of rape, rather than its sexual nature. The new definitions acknowledge that violation may occur in the absence of penile penetration or violations such as forced oral sex and sodomy often accompany forced intercourse. The definitions are in line with the modern understanding of rape as a means of humiliation, degradation and violation, rather than a means of sexual satisfaction.

Commonwealth countries do not unanimously support redefinition, however. The English Criminal Law Revision Committee[13], for example, strenuously supports the retention of rape in its present definition and recommended that the penalties for indecent assault be raised from imprisonment for two years to ten years[14]. The view of the Committee rests on two grounds. First, it argues that "the concept of rape as a distinct form of

criminal misconduct is well established in popular thought and corresponds to a distinctive form of wrongdoing" and second, it states that the risk of pregnancy is an "important distinguishing characteristic of rape"[15].

Neither of these reasons is particularly compelling. The first suggests that reform of any area of the law is impossible where the public has had a particular view of the law[16], while the second ignores the fact that pre-pubertal, menopausal and sterilised women are all covered by the law of rape. Further, it is inconsistent with the Committee's view that non-consensual anal intercourse of a man or woman was an offence which similarly, demanded special condemnation.

The views of the English Committee are worthy of serious consideration, but it may be suggested that it sees sexual violation in very narrow terms. Penetration of a vagina by a penis or a bottle is similarly degrading and it may be that the latter involves a degree of sadism likely to cause the victim greater pain and damage than ordinary intercourse. Non consensual oral sex may be far more disturbing than penile penetration.

(ii) Gradation

In a number of Commonwealth jurisdictions, such as Canada, new South Wales and Western Australia[17] rape has not only been defined in gender neutral terms and in such a way as to stress the assaultive, as opposed to sexual, nature of the crime, but also, degrees of sexual assault have been created[18]. Penalties for sexual assault escalate in accordance with the gravity of the offence, such gravity being judged by the violence or other means used to gain the victim's submission to the unwanted sexual connection. The gradation schemes in Canada and new South Wales, which exhibit certain differences will be described here[19].

The Canadian legislation creates three levels of sexual assault. Grade I penalises "simple" sexual assault, grade 2, sexual assaults involving bodily harm, the threat or use of a real or imitation weapon, threats to a third party or where sexual assault is carried out with another person, while grade 3, "aggravated" sexual assault which occurs where the offender wounds, maims, disfigures or endangers the life of the complainant. Penalties range from a maximum of ten years imprisonment for "simple" sexual assault to life imprisonment for "aggravated" sexual assault.

New South Wales penalises four categories of sexual assault. Category 1, the most serious category, establishes a penalty of 20 years for inflicting grievous bodily harm either on the complainant or a third person with intent to have sexual intercourse. Category 2, which is defined as established where actual bodily harm is threatened or inflicted on the complainant or another person with intent to have sexual intercourse, by the

offender either alone or accompanied by others, carries a maximum term of 14 years imprisonment. Category 3, sexual intercourse without consent, which is defined as including sexual intercourse without the consent of the complainant, in circumstances where the lack of consent is known to the offender, a situation that is deemed to exist where the complainant is under 16 or where the complainant is under the authority of the offender, where the offender acts alone or in company, is punishable by up to 10 years imprisonment.

Finally category 4, indecent assault and act of indecency, committed by the offender, either alone or in the company of others, on the complainant or in her presence, carries a maximum penalty of six years imprisonment.

Gradation schemes have a number of aims. First, just as in the case of redefinition of the offence to encompass behaviour beyond conventional sexual intercourse, they seek to stress the violent rather than sexual nature of the crimes. Second, they seek to improve prosecution and conviction rates.

The provision of a series of offences instead of a single offence with a maximum of life imprisonment is believed to encourage some accused to plead guilty. Certainly conviction rates in New South Wales and in other non-Commonwealth jurisdictions where gradation schemes have been introduced have improved.[20]

Nevertheless, graded formulations should not be approached without reservation. One serious concern is that the more serious grades of assault are defined by the level of violence that accompanies the sexual attack, rather than by the sexual attack itself. Sexual assault that occurs where the victim submits for reasons other than actual or threatened violence usually comes low in the grade. This may lead to the misconception that sexual aggression per se is trivial in comparison with sexual aggression accompanied by violence, a perception that may affect judges and juries who may prefer to sentence unwanted sexual intercourse lightly.

Here the comments of the New Zealand Department of Justice and the Institute of Criminology are pertinent:

> "The stress upon the violent rather than the sexual component of the offence in determining its seriousness, especially in the New South Wales and Canadian models, is not in keeping with the way in which most victims described their rape experience in this study. They saw it as an act of extreme humiliation and degradation which was qualitatively different from other types of assaults. Victims who had been beaten felt that the act of sexual intercourse rather than the assault was the primary injury. Some felt that the beating and bruising they received assisted them in the criminal justice process, while the rape itself wasn't accorded the centrality it

deserved. Any legislation highlighting the violent component of the offence at the expense of the sexual violation involved, would therefore seem to be at odds with the perception of many victims. As the Auckland Rape Crisis Centre pointed out, it would punish the associated physical violence and still ignore the violence of rape"[21].

(iii) Labelling the crime

An issue which is closely associated with the question of whether rape should be redefined to acts other than penetration of a vagina by a penis and whether the offence should be graded in levels of seriousness is whether the offence should continue to be termed "rape". Certainly, a number of Commonwealth jurisdictions, including Canada, New South Wales, Tasmania, Western Australia and the Australian Capital Territory have rejected the term "rape" in favour of a more neutral term to over all offences, which are distinguished only by a number indicating the gravity of the assault. At the same time, the term is specifically maintained in jurisdictions such as Victoria and England and Wales, while New Zealand takes the unusual step of prohibiting "sexual violation" which it defines in terms of "rape".

The principal reason advanced for maintaining the term "rape" is that it carried with it the special opprobium and condemnation that should be reserved for the act of forced sexual intercourse. It is suggested that to discard the term would be to "water down" the special character of rape and trivialise the offence in the public mind[22].

A number of serious objections can be raised to the continued use of the term. First juries have preconceived notions about the crime of "rape". They consider it to be a violent and destructive crime and may be loath to convict in circumstances where these preconceptions are not fulfilled, such as in circumstances where the victim and the accused are past lovers and the submission is gained without brutality. Second, defence counsel exploit these known preconceptions and are inclined to suggest that the events under consideration are not particularly bad, the victim has lost little and thus the heinous crime of "rape" can hardly be said to have occurred. Third, the term carries with it a social stigma for the victim, particularly in view of the popular view that most rape complainants have "asked for it", while finally, as the word is a fixed term covering a range of violations, it may militate against securing conviction[23].

c. Sexual Assault Within Marriage

In most Commonwealth countries, sexual assault by a husband on his own wife is not regarded as unlawful sexual intercourse and thus is not a crime.

This rule is held to originate in a statement by Sir Matthew Hale, an English judge who remarked: "The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife has given up herself in this kind unto her husband which she cannot retract"[24]. Hale provided no authority for his statement and it has been suggested that English courts convicted men for raping their wives before he made his remark[25]. Nonetheless, Hale's statement has proved critical and since the case of Clarence[26] in 1888, except where specific legislation has been enacted, until 1991 a wife has been considered to have no right or power to refuse her consent to intercourse with her husband.

It is possible, however, for a husband to be convicted of assault upon his wife, in those cases where violence has been used to gain her submission[27]. Further, where parties are separated by agreement or by order of the court or where there is a non-molestation order, a husband can be convicted of rape[28].

The same would, it would seem, apply to a magistrate's order excluding the husband from the home, but not to a personal protection order which prohibits only violence or its threat. The marital immunity does, however, apply in circumstances where a husband and his wife are living separately without any form of separation order or agreement.

Those who are in favour of the retention of the immunity raise a number of arguments which, on the whole, tend to trivialise the importance of rape within marriage. They argue that rape within marriage would be difficult to prove and that the threat of unjustified proceedings could be used by a vindictive wife against her husband. They assert, further, that the criminal law should not intervene in marital relationships, the wife being, at all events, adequately protected by her matrimonial remedies. They formulate arguments on the lines of the English Criminal Law Revision Committee which in 1980 stated:

> "Spouses have responsibilities towards one another and to any children there may be as well as having rights as against each other. If a wife could invoke the law of rape in all circumstances in which the husband forced her to have sexual intercourse without her consent, the consequences for any children could be grave, and for the wife too.[29]"

Arguments such as these appear to be based on the view that rape within marriage is infrequent or, if it occurs, it is not as serious as rape where the offender is not the victim's husband. There is little research into the issue of marital rape. Studies which do exist, however, suggest that there is considerable unwilling participation by wives in sexual activity and that the injuries such women suffer, be they physical or psychological, can be serious[30].

A number of Commonwealth jurisdictions have examined the important questions of policy that surround the marital immunity. Some jurisdictions have seriously curtailed the immunity, others have abolished it completely and still others are in the course of questioning it.

South Australia has partially removed the immunity so that a wife can complain of sexual assault by her spouse where an assault occasioning actual bodily harm is threatened or inflicted, an act calculated to seriously and substantially humiliate her is threatened or inflicted or there is the threat of the commission of a criminal act against any person[31]. Victoria, New South Wales, Western Australia, Queensland, Tasmania, Canada and New Zealand have completely abolished the immunity by statute[32], while recent decisions in Scotland suggest that the immunity, if it ever did exist in that jurisdiction, no longer does so[33].

It is now clear that the marital immunity no longer exists in England and Wales. The Law Commission recommended its abolition[34], Simon Brown J. refused to apply it in a case in the Crown Court[35], a course not followed by Rougier J., who although disapproving of the immunity, felt bound by it until legislative intervention[36]. In March 1991, the Court of Appeal decided unanimously, in a special five judge sitting, that the rule that a husband cannot be guilty of raping his wife if he forces her to have sexual intercourse against her will is an anachronistic and offensive common law fiction which no longer represents the position of a wife in present-day society and should no longer be applied. Accordingly, the Court determined in convicting a husband who had forced his wife, who was then living with her parents, to have sexual intercourse, a rapist remains a rapist irrespective of his relationship with his victim[37]. This decision was confirmed by a unanimous ruling by the House of Lords in October 1991. Lord Keith remarking:

"Marriage is in modern times regarded us a partnership of equals and no longer one in which the wife must be the subservient chattel of the husband... on grounds of principle, there is now no justification for the marital exception in rape".

The question of rape within marriage remains a controversial one. Unwanted sexual activity is just as offensive to a wife as to any other woman. Difficulties of proof may confront such a charge, but this does not appear to be a valid reason to deny a spouse the ultimate sanction of the criminal law. Many other crimes are just as difficult to prove and others are capable of being used vindictively. These objections usually do not provide sufficient reason not to condemn and criminalise objectionable behaviour. It is up to the woman to decide whether to complain of her husband's activities. The immunity as it stands, may have the distinction of preserving the privacy of the family, but it removes from the wife autonomy over her own body and relegates her to the status of a chattel.

d. <u>The Complainant's Consent</u>

The central issue to be addressed in the context of the law of rape is consent. A present, in most Commonwealth countries, consent is the crux of the crime. Here consent is material in two ways. First, rape is defined as sexual intercourse without the consent of the complainant. Second, consent, or more properly, the lack of it, determines the guilt of the accused, as not only must he perform the act of penetration, but he must have the required <u>mens rea</u> or mental element. In most jurisdictions, the offender must be aware that his

victim is not consenting or, at least, he must be recklessly indifferent as to whether she is or not. Thus, consent becomes the all-important question in the interaction between accused and victim. Lack of consent is the only thing that distinguishes rape from lawful sexual intercourse.

The problems that arise from consent will be discussed under two heads. In this section we will consider problems which relate to the issue of whether the victim consented. In the succeeding section we will examine issues which arise form the belief of the accused as to the victim's consent.

In most Commonwealth countries, rape is defined by statute or by common law as sexual intercourse without the consent of or against the will of the victim. Originally, the law dictated that the threat or application of force by the accused was essential. This changed with time, so that intercourse with a sleeping, drunk or drugged woman was deemed to be rape, as was consensual intercourse where consent was induced by fraud, for example, where the man impersonated the woman's husband[38]. Further, in cases where the man deceived the woman as to the nature or quality of the act of sexual intercourse, it was said to occur without her consent[39].

Although Commonwealth countries shifted from the view that force is required to render sexual intercourse unlawful, research from all Commonwealth jurisdictions indicates that any woman who wishes to prove that she did not consent will face enormous difficulty unless she shows overt signs of fairly serious injury. She will face particular difficulty if she knows or has had a sexual relationship with the man in the past[40].

The reasons for this are varied. Fundamentally, the woman is fighting traditional stereotypes of how women behave in the context of sexual relations generally and sexual assault in particular. Women are believed to be passive in sexual relations, requiring seduction. It is commonly believed that women pretend to be uninterested in, or behave negatively to sexual relations, even in those cases where they are deeply interested[41]. At the same time, women who are forced to have sexual relations are expected to behave in a conventional fashion: screaming, crying and fighting for their virtue.

These stereotypes colour police, prosecutor, judicial and jury reaction to rape complainants. A complainant who is uninjured and behaves calmly and rationally will inevitably run the risk of being labelled a consenting party. The assumption of consent will be even stronger in cases where the complainant and the accused have some form of relationship or where the rape occurs in a social context such as a "date"[42]. Even if the complainant is injured, perhaps seriously, the prosecution will nonetheless frequently suggest that she consented, hoping that the jury will give the offender the benefit of the doubt[43].

A number of jurisdictions, recognising the difficulties that confront the complainant in this context, have attempted to shift the emphasis of the crime from her consent. Most takes as their inspiration the Michigan Criminal Sexual Conduct Act which eliminated consent as an element of crime, focussing on the conduct of the offender, rather than the consent of the victim. Thus, "Criminal sexual conduct" is committed when sexual intercourse occurs where the accused uses force or coercion

or in circumstances where the victim is deemed to be incapable of giving consent. Force or coercion receives a wide statutory definition and includes situations where the victim is overcome by the threatened or actual use of physical force or violence, where she is coerced into consent by threats of future retaliation against herself or any other person, such retaliation against herself or any other persons, such retaliation being defined to include threats of punishment, kidnapping or extortion when the offender medically examines or treats the victim in a manner, or for purposes, which are recognised as medically unethical or unacceptable and when the accused, by concealment or surprise, is able to overcome the victim. The victim is deemed incapable of giving consent if she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct, where she is temporarily incapable of appraising her conduct because she is under anaesthetic or under the influence of any other substance administered to her without her consent and when she is asleep, unconscious or unable physically to communicate unwillingess to do an act for any other reason.

In New South Wales, the consent of the victim is not material in sexual assault category 1 and 2 where, as in Michigan, the focus of attention is on the actions of the defendant. Under this legislation, where the offender maliciously inflicts grievous bodily harm, actual bodily harm or where he threatens to inflict actual bodily harm with a weapon, all that need be proven further is that he intended to have sexual intercourse. However, sexual assault category 3 is defined to occur where sexual intercourse takes place without the consent of the victim.

The Michigan statute and the New South Wales provisions go some way to address the fact that in charges of rape and sexual assault attention is usually focussed on the victim's state of mind, but evidence suggests that in those jurisdiction, her consent remains a material factor. Thus, in New South Wales, sexual assault category 3 is the most common sexual assault offence[44] and it has been held in Michigan that consent is available as a defence, a situation which no doubt is the case where the New South Wales category 1 and 2 sexual assaults are concerned[45].

Thus, for example, where sexual assault category 3 is concerned, New South Wales deems consent to be absent where the victim consents under a mistaken belief as to the identity of the other person or under a mistaken belief that she is married to the offender or where submission to intercourse is gained as a result of threats or terror, whether or not these threats are against the victim or a third person. Consent is further deemed not to exist where the victim is under the age of 16 years or under the authority, whether generally or at the time of the sexual intercourse only, of the offender[46]. Canada provides that consent does not exist where submission occurs because of the application of threats or fear or the application of force to the victim, or to someone other than the victim, such as, for example, her child, fraud or the exercise of authority[47].

Provisions such as these attempt to spell out the behaviour the law regards as non-consensual. To a certain extent, this relieves the factfinder of a major decision. Such provisions are of assistance in an

area which is nebulous and surrounded by prejudice and assumption. it is essential, however, that provisions of this nature should be clear and flexible, so as to allow the courts to recognise a wider range of circumstances that may negate consent[48].

The current provisions, in effect, merely codify and clarify the existing law, rarely going further. A case certainly exists for such clarification, however. The jury or factfinder is provided with a clear legislative guideline and the enactment of such a provision carries with it condemnation and criminalisation of acts of intercourse submitted to because of force or fear.

The important question, is however, whether such a provision should go beyond the current law. Naffin in South Australia[49] suggested a more detailed provision indicating that consent which is grudging or elicited following substantial pressure being applied should be inoperative. She proposed, further, that consent should be vitiated where it is gained by the imposition of the other person's position of authority over, or professional or other trust in relation to the victim, by the detention, whether lawful or otherwise, of the victim or by the exertion of the offender's influence over the victim in circumstances where the victim is under the age of 18 years and is living in the family home of the offender, who is her parent or step parent.

The provision proposed by Naffin recognises pressure which a woman may suffer and acknowledges that consent in these circumstances is unlikely to be real. A number of Commonwealth countries have considered the occurrence of sexual intercourse in circumstances such as described by Naffin and have preferred to condemn such intercourse by establishing specific offences. Thus, India criminalises sexual intercourse between a public servant with a woman in his custody, between a superintendant of a gaol, remand home etc, and the inmate of such an institution, hospital and intercourse by a member of the management of staff of a hospital with any woman in that hospital[50]. New Zealand has introduced the crime of "inducing sexual connection by coercion", which occurs where sexual activity takes place when the offender knows that the complainant consents because of the offender's position of power. Thus, sexual activity consented to because of an express or implied threat by the offender or some other person that he will commit an offence punishable by imprisonment, that does not involve actual or threatened force, an express or implied threat that the offender or some other person will make an accusation or disclosure, whether true or false, about the misconduct of any person, whether living or dead, in circumstances where that disclosure is likely to damage the reputation of the person against whom or about whom the accusation or disclosure is made or an express or implied threat by the offender to make improper use of any power or authority arising out of any occupational, vocational or commercial position he may hold, to the victim's detriment, is criminalised[51]. The offence, which carries a possible penalty of 14 years imprisonment, is based on the view that people who are in a position of vulnerability, be it psychological or commercial, should be protected from sexual activity that they do not want and to which they grudgingly consent. New South Wales, similarly, provides that where consent to sexual intercourse is obtained by virtue of a "non

violent threat", defined as intimidatory or coercive conduct or other threat, not involving a threat of physical force, in circumstances where the victim could not be reasonably expected to resist the threat and where the offender is aware that submission is gained because of the threat, the offender is liable to six years imprisonment[52].

e) The Accused's Mental State

To establish the crime of rape, the prosecution must prove not only the occurrence of the unwanted physical act, but also that the accused had the requisite mens rea or mental state. Accordingly, the prosecution is required to prove, beyond all reasonable doubt, either that the accused knew that the victim was consenting or he was recklessly indifferent as to her wishes[53].

Except in a very few Commonwealth jurisdictions, which include New Zealand and some Australian states, the tribunal of fact - the jury - need not consider whether the accused's belief concerning the complainant's wishes was reasonable, although it may consider this in attempting to discern whether the accused actually believed that she consented[54]. In short, whether the accused is guilty depends on his honest and genuine belief, not on what a reasonable person in his position may have believed. This means that if he can show that irrespective of what a reasonable person would conclude from the behaviour of the complainant at the time, he honestly and genuinely believed that she was consenting to his activity, he must be acquitted.

The mental element required for the crime of rape has been scrutinised by a number of Commonwealth law reform bodies and, generally, there has been no recommendation of change in this aspect of the current law[55]. Nevertheless, the area continues to be the subject of intense debate. Naffin, for example, argues that the current formulation confronts the prosecution with a task which is too formidable. It must seek to prove two subjective elements: the state of mind of the victim and the accused's perception of her state of mind. This, she argues leads to unfair weighting of the case in favour of the accused. This leads to low conviction rates in rape trials and opens the complainant to suggestions that, notwithstanding evidence which would indicate her dissent to any reasonable person, the accused believed that she was consenting to his actions[56]. A good example of the latter point is provided by the defence in Morgan[57]. There the three accused claimed that they believed Mrs Morgan was consenting to intercourse because her husband had told them that she was "kinky" and was likely to struggle to get "turned on".

Those who support the current formulation argue that rape is not a singular crime and there is little evidence to indicate that many guilty rapists are unjustly acquitted. They then suggest that the formulation is a statement of the general and principled position, which exists throughout the criminal law, which posits a subjective test of intention to allow an accused to be judged according to the facts as he or she believed them to be, rather than as they actually were. In other words, they argue, the mens rea required for rape is merely a particular example of the general view of the criminal law that offenders should be punished for what they are, rather than what they should be[58].

In essence, opponents of the current law suggest three models of reform[59]. The first, which is only a slight variation on the current law[60], requires the prosecutor to prove that the intercourse occurred without the victim's consent. The accused would then be able to lead evidence that he genuinely believed that the woman was consenting. The Crown would then carry the burden of persuading the jury, beyond all reasonable doubt, that the accused knew, either that the victim was consenting or that he was recklessly indifferent to her consent.

The remaining proposals substantially vary the current law. Both require the prosecutor, in the first instance, to prove that the intercourse took place without consent. Both then provide that it is a defence for the accused to argue that he honestly believed that the woman was consenting, a belief that he must convince the jury of, on the balance of probabilities. One proposal then goes further and requires the accused, not only to show this belief, but also that, on the balance of probabilities, this belief was honest and reasonable.

Both these proposals, to a certain extent, shift the onus of proof in a rape trial from the prosecution to the accused. The third model, however, involves a complete reworking of the mental element involved in the particular crime and, moreover, goes against many of the fundamental principles of criminal law. It thus deserves close scrutiny.

At present, the jurisdictions where an objective element enters into the assessment of the alleged rapist's mental state are Tasmania, Western Australia and Queensland, where the codes require that the defence of honest mistake be reasonable[61], and New Zealand.[62]

In New Zealand, the prosecution must prove that the accused had sexual connection without the consent of the complainant. If it is then able to show that there were no reasonable grounds upon which the accused could base an allegation of consent, it has fulfilled its task and the man must be convicted. The requirement of reasonable grounds should mean that the complainant will cease to run the risk of the accused suggesting that he honestly and genuinely believed that al women fought and screamed when having sexual intercourse. Whether this is the case will require research as the provision is new, having commenced on 1 February 1986.

Essentially, the questions of whether the accused's mental state should be judged subjectively or objectively or whether he should be required to give an account of himself by discharging a burden of proof are political ones. They resolve themselves into whether rape should be regarded as a singular crime deserving of special treatment and whether the rights of the accused in a criminal trial should be modified. The questions are serious ones and answers to them should not be reached without serious consideration or in undue haste. For example, it may be appropriate here to distinguish between classes of offenders. There may be, for instance, a stronger argument of the reversal of the burden of proof in certain fact situations. It might well be that a police officer or gaol superintendent should be required to give an account of himself in cases where he rapes a woman in his custody[63]. Whether every accused should be given such a burden is another question. It may be argued that in attempting to extend the law's protection to the

complainant in the definition of the offence, the legislature is unwisely whittling away the rights of the accused. Close observation of the New Zealand provision and its effect on the rate of conviction and the trial process is a clear priority.

f) Evidence

During the trial of the accused, the complainant in a case of sexual assault undergoes an ordeal which differs from that of other victims of crime. Like other crime victims she must relive the crime and withstand cross-examination designed to discredit her story. Like them she may have had to experience a long time lapse between the alleged offence and the trial. The accused may have been allowed bail and the complainant may have come into contact with him in the community. She does, however, have special problems which do not confront other crime victims. She is very often the sole witness; the success of the prosecution will depend on her evidence, particularly where it concerns her consent. The events described in court will be intimate and, very often, the details described will be humiliating. Defence attempts to discredit her as a credible witness will inevitably touch on her past sexual history, something she will wish to keep secret, or the fact that she did not complain of the assault immediately or that there is no evidence to corroborate her complaint. There are, thus, a number of aspects of a sexual assault trial which are worthy of consideration.

Traditionally, the trial testimony of the sexual assault complainant has been treated with suspicion. It is often claimed that the woman feels as though she, not the accused, is on trial[64]. Three aspects of the trial process particularly highlight this: first, the requirement that the victim provide evidence of "fresh complaint" of the assault, second, that her evidence should be corroborated and third, the fact that her evidence can be impugned by evidence which reveals her past sexual history. Each of these requirements will be considered below.

(i) Fresh Complaint

A rape complainant is entitled to give evidence that she complained, voluntarily and without prompting, of the rape to a third party at the earliest reasonable opportunity. This rule is an exception to the general evidentiary rule that previous statements of a testifying witness are inadmissible of the facts stated and is allowed in order to combat the assumption that would otherwise be made that her testimony is false[65].

Although the fresh complainant rule can provide advantages to a complainant, generally it acts negatively, because any delay in reporting the offence raises the implication that the complaint has been fabricated, which defence counsel has, traditionally been quick to exploit[66]. Further, many judges find it appropriate to instruct the jury that, in evaluating the evidence of a woman who complaints of rape, they should take into account, to her disadvantage, the fact that she made no complaint at the earliest reasonable opportunity.

Many studies indicate that for a variety of complex social and psycological reasons, women may delay complaining of sexual assault[67]. Both the Canadian and New South Wales sexual assault legislation contain provisions which are intended to address the problems raised by fresh complaint evidence. Thus, the Canadian Criminal Code provides in s. 246.5 that the rules relating to evidence of recent complaint in sexual assault cases are hereby abrogated. New South Wales, on the other hand, provides that the judge must warn the jury that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false and inform the jury that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making a complaint about the assault[68].

The Canadian provision appears to be less satisfactory than that of New South Wales as it appears not only to prohibit the judge from drawing adverse attention to that fact that the victim failed to complain, but also to prevent the prosecution or the judge from raising the fact that she did complain immediately, which given current prejudice, may assist her. Moreover, defence counsel is not precluded by the provision from drawing attention of her failure to complain in cross - examination[69]. The New South Wales provision, on the other hand, allows any complaint to be used to the victim's advantage.

(ii) Corroboration

The requirement of corroboration is of long standing, stemming from the fear, often articulated by trial judges, that rape and related sexual offences are easy to allege, but difficult to disprove. Where most crimes are concerned, the accused can be convicted on the testimony of one individual, but where the crime is sexual, the evidence of the victim alone is insufficient and it is essential that it is corroborated in some way. The principle justification for the rule is the view that women have a tendency to make false allegations of sexual assault, perhaps because they are inherently unreliable or because they wish to hide consensual sexual activity of which they are ashamed[70].

Doubts have been raised as to the justification and the value of the corroboration requirement and these deserve serious consideration.

First, it is doubtful whether sexual assault is ever an easy crime to allege. Certainly, there are many disincentives to reporting the crime and research has shown that the current system deters or certainly weeds out any shaky stories. Secondly, false allegations can be made with respect to any other crime, particularly crimes where insured property is involved. Further, the trial process with cross examination and the penalties for perjury should act as sufficient disincentive to false allegation. Finally, no evidence exists, beyond received wisdom, that women are particularly prone to hysterical or malicious allegations of sexual interference.

While there appears to be little justification for the requirement of corroboration, indications exist that it may seriously impede the conviction of sexual offenders. Where the victim has submitted to intercourse through fear, or in those cases where she is not seriously injured, or if she delays in complaining of rape, the prosecution will be unable to adduce sufficient evidence to corroborate her account. This will seriously affect the jury and further, may lead to failure to prosecute at the outset[71].

In a number of Commonwealth jurisdictions, corroborating evidence is not specifically required. However, it is a rule of law that the judge must tell the jury that it is unwise to convict on the uncorroborated testimony of the complainant[72]. Such a rule amounts, in effect, to a requirement of corroboration; it gives judges the opportunity, of which they unfortunately take advantage, to cast aspersions on the victim's honesty. Such warnings range from complete impartiality to remarks such as "It is known that women in particular and small boys are liable to be untruthful and invent stories"[73].

Some Commonwealth jurisdictions have abolished both the requirement of corroboration and the judges warning of the dangers of conviction on uncorroborated testimony. Canada, for example, provides that no corroboration is required for conviction and the judge shall not instruct the jury that it is unsafe to find the accuse guilty in the absence of corroboration[74], while in New South Wales the warning remains in the discretion of the judge[75]. It remains to be seen how judges will approach the question of corroboration in those jurisdictions where the requirement has been modified, but evidence from New South Wales indicates that in the majority of cases the corroboration warning is not given[76].

(iii) Past sexual history

The corroboration requirement is not the only method of testing the credibility of the complainant. In many Commonwealth countries, legislation provides that the complainant's character in can be brought into question in the trial, while in others, the common law provides that the complainant may be asked questions about her past sexual relationships with men other that the accused. Where the common law rule prevails, this evidence as to her past sexual history with men other than the accused can be introduced either to prove that the woman is of "notoriously bad character", for example, a prostitute or highly promoscuous and thus likely to have consented to intercourse, or to prove that she is unreliable and thus her evidence is suspect[77].

In general, the law as it exists, whether enshrined in statute or in the common law, allows examination of the complainant's past sexual history in fairly narrow circumstances. However, in practice, the complainant faces a barrage of questions in cross-examination about her past sexual, social and medical experience. The aim of these questions is to

protect the defendant and denigrate the character of the complainant. Certainly, any complainant who is promiscuous or a prostitute will be unlikely to be classed as a victim: she will always be considered as a willing participant, even in cases where violence has occurred. Even if the complainant has very little experience, or was a virgin before the assault, cross-examination can be savage, destructive and completely demeaning and leave her with the impression that it is she, not the accused, who is on trial.

Again, Commonwealth countries have introduced reforms which seek to limit the introduction of evidence of the complainant's past sexual history[78]. It is useful to consider the provisions in England, Canada and New South Wales in this context.

In England, such evidence may be admitted only if application to do so is made to the judge in the absence of the jury and the judge is satisfied that it would be unfair to the accused to refuse to allow the evidence to be adduced or a question to be asked. The Canadian provision is much more specific. Evidence as to the complainant's past sexual activity with the accused may be freely admitted, but no evidence may be adduced as to the complainant's past sexual history with any other person, unless it is evidence which falls within three categories. These are, evidence that rebuts evidence of the complainant's sexual history or absence thereof that was previously adduced by the prosecution, evidence of specific instances of sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge and the evidence relating to the consent that the accused alleges he believed he was given by the complainant to the sexual activity that is the subject matter of the charge. Even if the evidence falls within one of these categories, it is admissibile only after reasonable notice in writing has been given to the prosecutor of the evidence and its particulars and the judge has conducted a closed hearing, after which she or he decides that the evidence falls within one of the allowed categories[79].

The legislation in New South Wales absolutely prohibits evidence of sexual reputation, while evidence of sexual experience is inadmissible except in specific circumstances. These are where it is evidence of sexual experience or a lack of sexual experience or sexual activity or a lack of sexual activity taken part in by the complainant at or about the time of the alleged offence or evidence which are alleged to form part of a connected set of circumstances in which the alleged prescribed sexual offence was committed; where it is evidence relating to a relationship which existed between the accused and the complainant which recently existed or existed at the time of the offence; where the accused denies that intercourse took place and the evidence is relevant to the presence of semen, injury, disease or pregnancy; where there is evidence of a disease in the accused or the complainant and its absence in the complainant or

accused; where the complainant only alleged sexual assault after the discovery of pregnancy or disease; where the prosecution alleges the complainant has or has not had previous sexual experience and where evidence is given by the complainant in cross-examination by or on behalf of the accused person and its probative value outweighs any distress, humiliation or embarassment which the complainant might suffer as a result of its admission[80].

The provisions limiting evidence of the complainant's past sexual history have had differing effects. The absence of specific guidelines in the English legislation has resulted in uneven interpretation of the discretion conferred on the judge by individual judges. Zsusanna Adler, who studied 40 contested rape trials, found that 40% of the defendants applied to introduce evidence of the complainant's past sexual experience and in many cases such evidence was admitted[81]. Even in cases where there was no solid evidence or valid grounds for an application to adduce such evidence, defence counsel did, in some way, attempt to attack the woman's past[82]. In New South Wales, on the other hand, the operation of the prohibition and exceptions appears to have reduced the admission of sexual experience and narrowed the scope of the material and its use. This means that the New South Wales amendments have been successful in reducing the personal trauma for the complainant[83].

No matter what approach is taken to the issue by the legislature, it is rare for the complainant's past sexual history to have any bearing on the particular complaint. Prostitutes are as susceptible to sexual assault as virgins, but any indication, at trial, that the woman is a prostitute or promiscuous will affect a jury and almost inevitably lead to the acquittal of the accused. It is a priority, therefore, that ways are found to limit the introduction of irrelevant evidence about the complainant's sexual activity.

It may be suggested that evidence of prior sexual activity with the accused stands on a different footing to evidence of past sexual activity generally. It is to be noted that the New South Wales provisions prohibit introduction of such evidence, unless it falls into one of the stated exceptions, while Canada allows the introduction of such evidence. Automatic introduction of such evidence allows a jury to conclude that because the complainant may have consented once to sexual activity with the accused or, indeed, have lived with the accused, she continues to consent. Such an assumption has the effect of denying the woman the right to determine how she will use her body.

The reforms described do not address other court practices which degrade and humiliate complainants. No restriction, beyond the requirement of relevance, is placed on questioning about dress, alcohol consumption or general behaviour. Legal practitioners and judges must exhibit greater sensitivity as to the other ways a woman's reputation can be ipugned at trial.

The complainant is a unique witness. Her testimony is essential, and within the adversary system, the defence must destroy her testimony to succeed. There is a difference, however, between destroying the complainant's testimony and the complainant herself. Suggestions have been made that complainants be independently represented at the trial, so that they can be shielded from irrelevant and harassing questions which seek to exploit stereotypical attitudes[84]. Ideally, separate representation should be unnecessary, as the judge should protect the victim from such examination and indeed, defence counsel, should not put such questions. Experience shows, unfortunately, that judges do not always fulfil this function and may themselves ask harassing and irrelevant questions and that defence counsel, routinely, cross-examine brutally[85]. The question that remains is whether further legislative restriction should be placed on cross examination or whether the behaviour of the bench and bar in rape cases can be addressed adequately by education and other strategies.

g) Court proceedings

Current court practice and procedures can exacerbate the complainant's ordeal during trial. These include long time lag between incident and trial, lack of information about the progress of the case and the whereabouts of the offender and the demeanour of prosecutors, judicial officers and other persons with whom she may have to deal.

It is important that the delay between incident and trial should be as short as possible. In Britain, it is usually more than a year before the offender is brought to trial. This impedes the victim's recovery, preventing her from resuming normal life as soon as possible.

Victims and their families often complain that they are given little information about the proceedings. They are frequently not informed about the progress of investigation, the charges laid or the reasons for not laying charges, the role of the victim as chief witness for the prosecution, the date and place of the hearing of the proceedings and other aspects of the case. Complainants and their families find this extremely disturbing. They are usually unfamiliar with legal proceedings and even where they are they are unlikely to be very familiar with sexual assault proceedings. In this context, it has been suggested that a carefully worded, explanatory statement could be sent to the complainant[86]. Most importantly, the complainant and her family should be told of the whereabouts of the offender. Bail should be denied unless there are very exceptional circumstances, the victim's views as to bail should be a material matter in any bail application and victims should be protected against unlawful intimidation. Where the accused is released or escapes, the victim should be informed.

Attention must be given to the physical aspects of the court. Separate waiting rooms and other facilities should be arranged so that the complainant does not meet the accused or his family and friends in the court precinct. She should be protected in the courtroom also. Thus, the victim and accused should not be in close proximity. Indeed, courtrooms could be arranged so that the complainant does not have to

see the accused at all. Arrangements could be made, further, so that a complainant who wished to sit through the entire trial could enter the court and sit in an area where she would be undisturbed.

A number of Commonwealth jurisdictions have legislated with these points in mind. In New Zealand, for example, the Victims of Offences Act 1987 directs prosecutors, judicial officers, counsel, officials and other persons who deal with victims to treat them with courtesy, compassion and respect for their personal dignity and privacy. Victims are to be informed of the services and remedies available to them and the conduct of proceedings. They should be protected from intimidation, their views on bail and any fears they have about the offender are to be imparted to the court deciding any bail application and they are to be notified of the release or escape of the offender.

In some countries, provisions have been introduced to limit the numbers of persons who can be present at the trial. Some provide for in camera proceedings[87], some provide that the court is to be closed to all except specified persons when the complainant gives her evidence, and others allow for her to give evidence in written form[88].

Anonymity of the victim of sexual assault is essential both as protection for the individual victim and to encourage other victims to report such attacks. In criminal cases, it is usual for a witness to state her or his name and address and the press and others are at liberty to publish these. Many Commonwealth countries have, however, introduced statutes that protect the complainant from the revelation of information which may lead to her identification[89]. These provisions take various forms. Some are flawed because, for example, they do not provide protection until a charges is laid or do not cover cases of indecent assault. Some allow the publication of the offender's name, which, given that most rape offenders know their victims, allows for identification of the woman. Most allow the judge a discretion to allow publication[90]. While such a discretion can be justified in order to balance the need to make the complainant's position as tolerable as possible and the need to ensure fair trial, exercise of the discretion must be responsible. Where the discretion is exercised, the judge must indicate that this is a serious decision and that the press will bear a heavy responsibility to act with sensitivity and compassion.

h) Sentencing

Light sentences in sexual assault cases not only trivialise the experience of individual victims, but also carry the wider implication that female sexual victimisation is unimportant.

Most Commonwealth countries provide a significant maximum penalty for the offence of rape, but serious penalties are uncommon. Many factors lead to the mitigation of an offender's sentence. For example, victims may be perceived of as "contributing" to the assault or the court may consider that the woman did not suffer significantly[91].

Criticism of sentencing practice in cases of sexual assault has led some jurisdictions to set minimum tariffs in legislation[92] or set judicial guidance for sentencing. In the United Kingdom, for example,

the Lord Chief Justice laid down specific guidelines for rape offenders in the case of Billam[93]. These proceed on the basis that the offender should receive a custodial sentence, unless the circumstances were most exceptional and that the starting figure, in the absence of mitigating factors, should be five years. Particularly dangerous offenders, such as serial rapists, should receive at least fifteen years, while in some cases, for example, where the offender is a psychopath, he should be imprisoned for life. The policy of the Chief Justice's guidelines was underlined by an announcement by the government that parole would normally not be granted where the offender was sentenced to more than five years imprisonment[94].

Other jurisdictions have introduced complementary strategies to ensure appropriate sentencing. New Zealand, for example, provides that the sentencing judge should receive an oral or written statement from the prosecutor about the physical or emotional harm that the victim has suffered[95], while Canada and a number of Australian states allow the prosecution to appeal against sentence.

i) Supports

Rape victims are usually ashamed, guilty and afraid of how people will react to them. Some are humiliated, ridiculed, scorned and stigmatised by police and social workers, and treated with hostility and suspicion by their family and friends. indeed, the victim is often stigmatised more than the rapist.

Negative responses to victims stem from attitudes to women, rape victims and rape which can be traces to myth and prejudice. Women are believed to provoke rape by the way they dress, where they go, the way they move and behave. They are considered to be responsible for their own protection and must ensure that they do not arouse male sexuality, which is traditionally portrayed as an uncontrollable force. Women are also believed to desire rape subconciously. These myths stem from the belief that any woman can avoid rape if she wants to, a belief which is difficult to support, in view of the fact that most men are significantly stronger than women. Rape has also been portrayed as the vindictive cry of the woman scorned or the girl who regrets intercourse.

Evidence from most parts of the Commonwealth indicates that the police are particularly at risk of being misinformed by these stereotypes. The police are often suspicious of complainants, particularly if there is no sign of injury, if the woman knows the offender, if she delays reporting the rape or if she appears unnaturally calm or unemotional. If the woman is seen as morally dubious, as she will be if she is living with her boyfriend, is sexually experienced or is a prostitute, the allegation will be completely in doubt.

Police suspicion manifests itself in various ways. Firstly the initial complaint may be totally disbelieved and the woman discouraged from pursuing her complaint at the outset. Secondly, police investigation may consist of insensitive, bullying interrogation of the victim. This may involve a succession of officers interviewing the woman or a medical examination in unpleasant or threatening surroundings. Further, she may not be supplied with basic information,

let alone helpful information that might lead to agencies which offer comprehensive victim support services.

Police stations are the traditional rape reception agencies. Police response to complainants of rape and assault requires priority attention. Here, again, education and training are essential. Police at all ranks must be educated so that prejudices are eliminated and practical approaches to a complaint are imparted. All police officers require training in this area, as do police surgeons, although it may well be that specialised teams should handle cases of sexual assault.

Throughout the Commonwealth, it is common for police offices to receive basic training in the law and practice relating to sexual assault. in most countries this training is brief and underresourced. Recently, however, a number of countries have turned their attention to specific training and education of police personnel at basic initial course level and refresher and advanced level. This training has concentrated on sensitising police to "rape trauma syndrome", behaviour the woman may exhibit after rape, which departs from expectations held about victim behaviour, and educating officers about appropriate procedures for the collection of evidence of the offence. In Canada, a critical part of the training and education process has been the Sexual Assault Examination Kit, which is included in this Manual.

This inexpensive Kit is used in the examination and treatment of a rape complainant, its aim being to collect and preserve evidence in the most sympathetic manner possible. It cannot be used until the victim completes a consent form and it contains an information guide for her, which explains legal procedures, medical examinations, the trial and victim services. It also contains guides for the police officer and the examining physician, as well as various forms to be completed by the examining physician and receptacles for the collection and preservation of physical evidence, such as fingernail scrapings, swabs, hair and clothes. All the guides and forms are in the two official languages of the country.

The introduction of the Kit required the education of officers as to its contents and use. Use of the kit continues the work of training and educating officers, making them meticulous in their evidence collection techniques and directing their inquiries in ways which are less heavy handed than in the past.

Other Commonwealth countries have introduced devices like the Kit to alleviate the ordeal of the complainant. In the United Kingdom, police have developed "rape suites". These are specially designed interview rooms, equipped with a bathroom and examination couch. The victim is interviewed and examined in the "suite", which is separate from the main station interviewing area and provides pleasant and comfortable surroundings. It is not uncommon for initial police examination to last up to eight hours and the introduction of "suites" has meant that the complainant is less threatened and, certainly, more comfortable than previously.

Many countries do not have the resources to introduce facilities such as the "rape suite" and even those countries that do will be unable to ensure that there are sufficient suites throughout the country. It

is unlikely, for example, that remote rural areas will have such a service. It is possible, however, for all countries to improve police attitude and training. All countries can increase the number of female police officers, allow the complainant to be accompanied by a supportive individual during police questioning and examination and seek to provide a female medical examiner, if the victim would prefer this. All countries can ensure that the questioning and examination of the victim take place in a discrete area, so as to reduce her distress and humiliation.

In many countries of the Commonwealth, voluntary groups have established what are sometimes called "rape crisis centres". Some of these operate a telephone advice line or a short term residential facility for victims. Most provide sympathetic and knowledgeable support for complainants. Their activities have been invaluable in educating the police and public to the reality of sexual assault and many individual victims have found their support critical. Where these centres exist, they should be encouraged and funded by the government. Further, close liaison with such centres and the police often provides a better service for victims, which leads to better evidence and, ultimately, greater conviction rate.

C. A LEGAL ALTERNATIVE

The criminal process is not the only way for victims of sexual assault to gain redress. Sexual assaults are civil wrongs and it is possible for a woman to sue the offender in tort or seek redress from the criminal compensation scheme which may exist in the particular country.

For the purpose of a civil suit, the woman need only prove that the assault occurred on the balance of probabilities and she may recover substantial damages. She may proceed civilly whether or not the man is prosecuted.

Civil proceedings in cases of sexual assault have been pursued in Canada, Australia and the United Kingdom. They are not common and frequently are pursued where the authorities have decided not to prosecute[96]. Successful criminal compensation proceedings allow the victim to receive compensation and also provide an indication that the attack is regarded seriously by society[97].

1. For discussions of this nature see M. Amir, Patterns in Forcible Rape (Chicago, University of Chicago Press, 1971); C. Boyle, Sexual Assault (Toronto, Carswell Co. Ltd., 1984) S. Brownmiller, Against Our Will: Men, Women and Rape (New York, Bantam Books, 1976); L. Clark and D. Lewis, Rape: The Price of Coercive Sexuality (Toronto, the Women's Press, 1977); A.N. Groth, Men who Rape: The Psychology of the Offender (New York, Plenum Press, 1979); R. Gunn and C. Minch, Sexual Assault (Winnipeg, University of Manitoba Press, 1988).

2. For example, Antigua, Offences Against the Person Act, Cap. 58 (as amended); Bahamas, Penal Code, Cap. 48; Barbados, Offences Against the Person Act, Cap. 141; Belize, Criminal Code, Cap. 21; Trinidad and Tobago, Sexual Offences Act, 1986; New Zealand, Crimes Act, 1961, ss. 127ff (as amended by the Crimes Amendment Act (No. 3 1985); India, Penal Code, ss. 302, Botswana, Criminal Code, s. 141ff.

3. Sexual Offences (Amendment) Act, 1976, England and Wales.

4. Hughes (1941) 9 C & P 752.

5. L. Holmstrom and A. Burgess, "Sexual behaviour of assailants during reported rapes", Archives of Sexual Behaviour, Vol. 9, 1980, p. 427.

6. Criminal Law Consolidation Amendment Act, 1976, s.3.

7. Victoria, Crimes Act 1958, s. 2A(1); NSW, Crimes Act, 1900, s. 61A; New Zealand, Crimes Act 1961, s. 128.

8. Criminal Code, RSC 1970, s. 246 1-3.

9. Chase v The Queen (1984) 40 CR (3d) 282, 13 CCC (3d) 187.

10. The Queen v Gardynik (1984) 40 CR (2d) 282.

11. R v Alderton (1985) 44 CR (3d) 254; R v Taylor (1985) 44 CR (3d) 263; R v Thorne (1984) 13 WCB 261; R v Ramos (1984) 42 CR (3d) 370; R v Cook (1985) 46 CR (3d) 129.

12. C.M. Boyle et. al., A Feminist Review of Criminal Law (Ottawa, Minister of Supply and Services, 1985) p.58f.

13. Criminal Law Revision Committee, Sexual Offences, Working Paper (London, HMSO, 1980); Criminal Law Revision Committee, Sexual Offences, 15th Report, Cmnd. 9231, (London, HMSO, 1984).

14. Sexual Offences Act, 1985 (England and Wales)

15. Criminal Law Revision Committee, Sexual Offences, op. cit, para. 45. The first argument is a quotation from the Advisory Group on the Law of Rape (The Heilbron Committee) Cmnd. 6352 (London, HMSO, 1975) para. 80.

16. J. Temkin, Rape and The Legal Process (London, Sweet and Maxwell, 1987), p. 30.

17. Criminal Code, RSC, 1970, (Canada) S.246. 1-3; Crimes Act 1900 (NSW) s. 61B-E; Acts Amendment (Sexual Assaults) Act 1985 (WA); See also, Crimes (Amendment) Ordinance (No. 5) 1985, ACT

18. The inspiration for grading sexual assault is the Michigan Criminal Sexual Conduct Act 1974.

19. Other jurisdictions such as Tasmania have graded sexual assault, while still others, such as South Australia, Malaysia and Victoria are considering such proposals of this nature.

20. H. L'Orange and S. Eggar, "Adult Victims of Sexual Assault" in Proceedings of the Institute of Criminology, (Sydney, NSW, 1987) p.12, p. 29f; J. Temkin, op. cit, p. 96ff.

21. Department of Justice and the Institute of Criminology, New Zealand, Rape Study, Volume 1, A Discussion of Law and Practice, 1983, p. 109.

22. Women's National Commission, Violence Against Women, Report of an ad hoc working group (London, HMSO, 1985) p.37.

23. H. L'Orange and S. Eggar, op. cit, p. 29f.

24. Sir M. Hale, History of the Pleas of the Crown, (1736) p. 636.

25. M.D.A. Freeman, "But if you can't rape your wife, whom can you rape?" Family Law Quarterly, 1981, p. 1.

26. [1888] 22 QBD 23. In reality this case is slender authority for the proposition it is used to support. The remarks pertaining to marital rape were obiter dicta and two judges pointed to the inconsistency of convicting a husband for assault, but not rape.

27. Miller [1954] 2 QB 282.

28. O'Brien [1974] 3 ALL ER 663; Steele [1977] Crim. L. R 290; Clarke [1949] ALL ER 448; see Act No. 9 of 1987 of Tonga which provides that a man can be convicted of raping the woman from whom he is separated or divorced by due process of law.

29. Criminal Law Revision Committee, op. cit., para.33.

30. D. Finkelhor and K. Yllo, "Rape in marriage: a sociological Hedlund (Stockholm, 1985) p. 57, p. 57ff; Dr Russell, Rape in Marriage (New York, Collie Books, 1982); Guardian, September 20, 1989.

31. Criminal Law Consolidation Act (SA) s. 73(5).

32. Crimes Act 1900 (NSW) s. 61A(4); Crimes Act 1958, (Vic) s. 62(2); Criminal Code (Qld) s.347; Criminal Code (Tas), s. 185; Criminal Code (Canada) s. 246.8; Crimes Act 1961 (NZ) s. 128(4).

33. HM Advocate v Duffy (1982) SCCR 182; Stallard v HM Advocate (1989) SCCR 248.

34. Rape within Marriage, Working Paper No. 116 (London, HMSO, 1990).

35. R v C (1990) 140 NLJ 1497.

36. R v J (1991) 141 NLJ 17.

37. R v R (1991) 141 NLJ 383.

38. J. Temkin, op. cit., pp. 61-76. Note, in Scotland the use of force has been traditionally emphasised. There the offence is not made out where the woman is unconscious or sleeping, drunk or drugged, unless the alcohol or drugs are given to her in order to make her insensible for the purposes of intercourse: H.M. Advocate v Logan (1936) JC 100.

39. R v Flattery (1877) 2 QBD 410; R v Williams [1923] 1 KB 340.

40. S. Edwards, Female Sexuality and the Law, (Oxford, Martin Robertson, 1981) Chapter 4; Z. Adler, Rape on Trial (London, Routlege and Kegan Paul, 1987) Chapters 3, 4 and 7.

41. S. Edwards, op. cit., Chapter 4; J. Temkin, op. cit., pp. 1-16. Temkin quotes the infamous remarks of Wild J. in the Crown Court at Cambridge in his summing up to the jury in a 1982 case which exemplifies these stereotypes:

> "Women say no do not always mean no. It is not just a question of saying no, it is a question of how she says it, how she shows and makes it clear. If she doesn't want it she only has to keep her legs shut and she would not get it without force and there would be marks of force being used."

42. "Date", "petty" or "acquaintance" rape is the most common form of sexual assault and the most difficult to prove. Incidents of this variety of sexual violation will inevitably increase as women and men continue to have contact with each other in the workplace and elsewhere and traditional taboos separating the lives of women and men disappear. See the Editorial, Independent on Sunday, 16 June 1991.

43. Note the suggestions of defence counsel in the notorious case of Morgan [(1976)] AC 182.

44. H. L'Orange and S. Eggar, op. cit., p. 33.

45. J. Temkin, op. cit., p. 109ff; People v Khan (1978) NW 2d. 360.

46. See the legislation in Tasmania, Western Australia and New Zealand which also provide a general list of circumstances where consent will be deemed to be vitiated.

47. Criminal Code, Canada, s. 244(3).

48. K. Warner, "The mental element and consent under the new "rape" "laws" Criminal Law Journal, 1983, Vol. 7, p. 245.

49. N. Naffin, "An Inquiry into the Substantive Law of Rape" (Adelaide, 1984) p. 35.

50. Penal Code, s. 376A-D.

51. Crimes Act 1961, s. 129A (NZ).

52. Crimes Act 1900, s. 65A (NSW).

53. Temkin, op. cit., 76ff.

54. The mental element for rape was considered in the English case of Morgan [(1976)] AC 182. It is now codified in the Sexual Offences Act 1976 s. 1 (England and Wales). The test in Morgan appears to apply throughout the Commonwealth with the exception of some Australian states and New Zealand. See, for example, Scotland: Meek v H. M. Advocate (1982) SCCR 613; Canada:

Pappajohn v The Queen (1980) 52 CCC (2d) 481; M. Good, "The mental element of rape: the Naffin Report and other questions: a defence of the common law" Criminal Law Journal, Vol 9, 1985, p. 17; P.K. Menon, "The law of rape and criminal law administration with special reference to the Commonwealth Caribbean" International and Comparative Law Quarterly, Vol. 32, 1983, p. 832.

55. The Heilbron Committee, op. cit.; Royal Commission on Human Relationships, Final Report (Canberra, AGPS, 1977) Volume 5, Annexe VIIB.

56. N. Naffin, op. cit; See also, C. Boyle et. al., op. cit., p. 59ff; Consumers' Association of Penang, Memorandum in Amendments to Rape laws (Penang, CAP, 1985) p. 16-17.

57. [1976] AC 182.

58. M. Goode, op. cit, p. 17, p.22ff.

59. N. Naffin, op. cit; T. Pickard, "Culpable mistakes and rape: harsh words of Pappajohn" University Law Journal of Toronto, Vol. 30, 1980, p. 415; C. Boyle et al., op]. cit, p. 59ff; C. Wells, "Swatting the subjectivist bug" Criminal Law Review, 1982, p. 209.

60. M. Goode, op. cit., at p 24f. suggests that this is, in fact, how the current law operates in practice.

61. M. Goode, op. cit, p.39ff.

62. Crimes Act 1961 (NZ) s. 128.

63. Indian Penal Code, s. 376.

64. Z. Adler, op. cit., Chapter 7.

65. J. Temkin, op. cit., p. 144ff.

66. Z. Adler, op. cit., p. 119.

67. C. D. Woods, Sexual Assault Law Reforms in New South Wales (Sydney, Government Publisher, 1981) p.25ff; B. Toner, The Facts of Rape (London, Hutchinson, 1979)p. 676.

68. Crimes Act 1900, s.405B(2).

69. J. Temkin, op. cit., p. 146f.

70. J. Temkin, op. cit., p. 133-143; S. Edwards, op. cit., Chapters 3, 4 and 5; Z. Adler, op. cit., p. 161ff.

71. C. E. Legrand, "Rape and rape laws: sexism in society and law", California Law Review, Vol. 61, 1973, p.919.

72. G. Williams, "Corroboration and sexual cases", Criminal Law Review, 1962, p. 662.

73. Sutcliffe J., in 1976 quoted in S. Edwards, op. cit, p. 164.

74. Criminal Code, s.246.4.

75. Crimes Act, 1900, s. 405(2).

76. New South Wales, Bureau of Crime Statistics and Research, Interim Report, No 3 (Sydney, Government Printer, 1987).

77. J. Temkin, op. cit., p. 119ff.

78. Sexual Offences Amendment Act 1976, s. 2 (England and Wales); Sexual Offences Order 1978 (NI); Evidence Act, s.102A (Tas); Criminal Law (Sexual Offences) Act, 1978 (Qld.); Criminal Code, RSC 1970, s. 246.6 (Canada). Other jurisdictions include the Northern Territory, New South Wales, Victoria, New Zealand and Trinidad and Tobago.

79. Criminal Code s. 246.

80. Crimes Act, 1900, s. 409B.

81. Z. Adler, op. cit., 73ff.

82. Z. Adler, op. cot, Chapters 6 and 7.

83. H. L'Orange and S. Eggar, op. cit., p. 19-26.

84. Women's National Commission, Violence Against Women (London, 1985) p. 44; See also, J. Temkin, op. cit, p. 162ff.

85. S. Edwards, op. cit., Chapters, 4, 5, 6.

86. Women's National Commission, op. cit., p. 44. The Commission relied on the advice of a barrister complainant.

87. India, Code of Criminal Procedure s. 327; Canada, Criminal Code s. 442; NSW, Crimes Act 1900, s. 77A.

88. New Zealand, Crimes Act 1961, s. 375A; Summary Proceedings Amendment Act (No. 4) 1985.

89. See, for example, England and Wales, Sexual Offences Amendment Act 1976; Tasmania, Evidence Act, s. 103; India, Penal Code, s.228-A; New Zealand, Evidence Amendment Act, 1977, Crimes Amendment Act (No 3) 1985, s.2; Trinidad and Tobago, Sexual Offences Act, 1986, s. 32; Canada, Criminal Code, s.442.

90. J. Temkin, op. cit., p. 190-198.

91. J, Temkin, op. cit., p. 16ff.

92. India, Penal Code, 1860, s. 376.

93. [1986] 1 All ER 985.

94. Home Office News Release, March 13, 1986. See, C. Lloyd and R. Walmsley, Changes in Rape Offences and Sentencing, Home Office Research Study, No. 105 (London , HMSO, 1989).

95. Victims of Offences Act, 1987, s. 8.

96. J. Temkin, op. cit, p. 202pp. For an example of an English case see Miles v Cain, the Independent 26 November 1988. Ms. Miles was successful at first instance, but the decision was overturned on appeal.

97. Canberra Times, 22 May 1991 reported that an incest victim was awarded $A50,000 for the effects of two years of repeated sexual abuse.

2. SEXUAL ASSAULT KIT

INTRODUCTION

This kit, prepared by the Royal Canadian Mounted Police, contains four parts:

* **sexual assault examination kit** for the attention of the physician/nurse
* **patient's guide** for female victims explaining procedures adopted by doctors, the police and legal and support services
* **police officer's guide** on handling evidence collected during examinations
* **physician's guide** for use in conjunction with the sexual assault examination kit

SEXUAL ASSAULT EXAMINATION KIT

Attention: Physician/Nurse

This envelope contains all the instructions and forms to be used with the Sexual Assault Examination Kit.

THE KIT SHOULD BE USED ONLY:

* for the collection of specimens and clothing from a patient who is being treated for the trauma of sexual assault.
* when the occurrence is being reported to the police, and
* if the security seal on the kit has NOT been broken.

DO NOT OPEN THE KIT UNTIL:

* the patient, guardian or relative of the patient has read and signed the Consent Form,
* the Sexual Assault History form and the Medical History form have been completed.

THIS ENVELOPE CONTAINS:

* One Police Officer's Guide.

* One Patient's Guide, containing information for female victims.

* Separate English and French versions of the Physician's Guide, containing all the necessary instructions for the physician and nurse using the kit.

* FORM 1 - Patient Consent (bilingual).

* Separate English and French versions of the Physician's Guide, containing all the necessary instructions for the physician and nurse using the kit.

* Separate English and French versions of the following carbonless forms:

  FORM 2 - Sexual Assault History
  FORM 3 - Medical History
  FORM 4 - Forensic Evidence Record

* Separate English and French versions of the Specimen labels

USE ONLY "ONE" SHEET OF LABELS AS THE PATIENT REFERENCE NUMBERS MAY NOT BE THE SAME.

FORM 1 - PATIENT CONSENT FRANCAIS AU VERSO

1. CONSENT TO MEDICAL EXAMINATION AND TREATMENT FOR THE EFFECTS OF A SEXUAL ASSAULT.

2. CONSENT TO MEDICO-LEGAL INVESTIGATION OF THE SEXUAL ASSAULT.

3. CONSENT TO DISCLOSURE OF THE RESULTS OF THE MEDICO-LEGAL EXAMINATION AND INVESTIGATION.

To: _____

_____

and to: _____ and all physicians and other persons associated with said Hospital.

I, _____ hereby authorise you to:
(Name of person giving consent)

1. Examine and treat _____ for the effects of a sexual assault.

2. Conduct a medico-legal investigation for the purpose of assisting the police in apprehending and/or prosecuting the person(s) who committed the assault. This investigation will include a physical which may involve an examination of the mouth, vagina, anus and rectum; in addition it may include the removal and isolation of articles of clothing, scalp hair, foreign substances from the body surface, saliva, public hair, samples taken from the vagina, anus and rectum, and the collection of a blood specimen.

3. Inform the police that the sexual assault was committed, and provide them with any substances collected during the course of the medical investigation and any information and observations that might assist them in apprehending and/or prosecuting the person(s) who committed the assault.

I understand that I am free to consent to all or any part of the above, I also understand that my refusal to consent to either or both of Items 2 and 3 above will in no way result in denial of treatment for the effects of the assault.

I also understand that I am free to revoke all or any part of this consent at any time during the examination.

_____ _____
(Witness) (Signature of Patient)

_____ _____
(Date) (Signature of guardian or relative of patient where patient is under 16 years of age or is unable to consent by reason of mental or physical disability).

THIS FORM IS RETAINED BY THE HOSPITAL

3. SEXUAL HARASSMENT

Introduction

Sexual harassment in the workplace and elsewhere has attracted increasing attention throughout the Commonwealth during the last ten years. Initially, the problem was perceived as a trivial, or even amusing one, but recent reports have indicated that the phenomenon is widespread and it frequently can have serious and disturbing effects.[1] Indeed, reports indicate that sexual harassment in the workplace frequently and easily destroys a productive working environment and damages the confidence and self-esteem of those who experience it.

One of the major difficulties encountered in introducing effective strategies to deal with the issue of sexual harassment is defining behaviour which comes within the term. This has been compounded by the fact that for many women sexual harassment is such a familiar problem that they have come to accept it as a hazard of the workplace. Behaviour which falls within the definition ranges from what may appear to be trivial and inoffensive activity, which borders on normal social intercourse, to acts which are extremely serious and offensive and may fulfil the definition of rape. Definition is complicated by the fact that men, as well as some women, are unable to construe apparently innocuous, but inappropriate behaviour, such as sexual jokes, suggestions and innuendo, as conduct amounting to harassment.

One useful, but perhaps conservative, approach is to define sexual harassment in terms of what a woman in a particular situation will perceive as threatening. Viewed this way, the position of power or authority that the man has over the woman is extremely relevant. Thus, sexual harassment within the workplace or in an educational establishment will be more readily identifiable than harassment elsewhere and will encompass any form of sexual importuning by a man in a position of superiority in the workplace or educational institution. In these circumstances, importuning a woman, even on an apparently trivial level, carries with it an implied threat that she will be disadvantaged if she fails to respond to the advances or if she reports what she perceives to be offensive behaviour to the man's superiors.

In less formal employment situations, such as domestic service, any form of sexual suggestion by a man to a domestic servant in his or his family's employ will fall within the definition as here the man is in a position of authority and the implied threat of disadvantage will be very clear.

The approach to definition of sexual harassment based on the power or authority of the harasser is of limited use where the offender is equal, or junior, to his victim. In this context harassment involving co-workers, which creates an unpleasant working environment, incidents occurring outside the workplace or after hours, become difficult to categorise. This is particularly so where the harassment is offensive, unpleasant, but unthreatening. Examples of this might include catcalls in the street, "eve teasing" (see below) and the exhibition of "girlie" calendars or soft porn materials in the workplace, conduct which helps to perpetuate the subordination of women in the workplace and elsewhere, reinforcing their traditional role in society.

The search for an adequate definition to sexual harassment is likely to be a protracted one. There are two vital ingredients of the conduct, however. First, it is conduct which is unwanted by the recipient, in other words, unwelcome sexual attention. Second, it is conduct which from the recipient's point of view, rather than the point of view of the offender is offensive. This means that although the offender may be of the view that he is joking, being friendly or persistent, this is irrelevant. If the recipient finds the conduct unwelcome and offensive, it is sexual harassment. It follows that conduct which is sexual harassment in one context, may not be in another and conduct which may be acceptable to one woman, may, again, be sexual harassment to another.

Perhaps the best approach to the definition of sexual harassment is to consider examples of conduct which have been seen as falling within the term. Any unwanted physical conduct of a sexual nature, such as unnecessary touching, patting, pinching or brushing past another's person's body, as well as more serious activity including assault or coercing sexual intercourse is clearly sexual harassment as is verbal conduct of a sexual nature, such as unwelcome sexual advances, propositions or pressure for sexual activity, persistent suggestions for social activity outside the workplace, after it has been made clear that such invitations are unwelcome and suggestive remarks, jokes and innuendoes. Sexual harassment can also consist of non-verbal communication which has a sexual content. This may include the display of erotic pictures, soft toys and printed matter, anonymous letters and telephone calls, gesturing in a sexually suggestive manner, whistling and leering. Quite clearly, the examples outlined above do not provide an exhaustive account of conduct which falls within the definition of sexual harassment and it must be remembered that what is acceptable behaviour in one cultural context may not necessarily be acceptable in another, so that it is likely that some forms of conduct will be regarded as sexual harassment in some Commonwealth countries, while this conduct may well be perceived as inoffensive in other Commonwealth jurisdictions.[2]

Legal Strategies

The legal strategies currently available to a victim of sexual harassment are governed, first, by whether the conduct is perceived as falling within the definition of sexual harassment and second, by the circumstances within which the harassment occurs. Different legal approaches must be taken, for example, by a woman who has been harassed in the workplace than one who has been harassed in the street.

Although the perpetrator may perceive his activity to be harmless behaviour, some examples of sexual harassment fall within the definition of the crimes of rape, sexual assault, indecent assault or common assault. Where this is the case, each Commonwealth jurisdiction allows the woman to complain to the police, who may choose to institute a criminal prosecution against the offender. If the police choose not to institute such an action, the woman can prosecute privately.

The woman also has the option, regardless of whether a criminal action is instituted either publicly or privately, to pursue a civil action against the offender in either tort or contract, depending on the circumstances in which the harassment occurred.

The pursuit of a civil action in this context carries certain advantages for the woman. She need only prove that the offensive behaviour falls within a civil wrong on the balance of probabilities. This is a lower standard than that required in a criminal court where the offence must be proved beyond all reasonable doubt. Proving the offence beyond all reasonable doubt is often difficult for the woman. The offender will suggest that the victim consented and she will be forced to refute this allegation, often by her own uncorroborated evidence alone, as it is unusual for such harassment to be public. Here her problems may not be purely evidentiary, but may be coloured by the attitude of the bench which may not be sensitive to the issue of sexual harassment, nor take into account factors such as inequality in employer/employee relationships.

Successful outcome in a civil suit has another advantage for the woman. She will receive compensation, which may be substantial, either from the offender or his employer if his conduct makes the employer vicariously liable, and she may also ask the court for an injunction to prevent the offender repeating his behaviour.

In some Commonwealth countries, specific legislation prohibits sexually offensive behaviour. In India, for example, certain sections of the Penal Code establish the offence of insulting the modesty of a woman, whether by word, gesture or act.[3] Further, the Delhi Metropolitan Council has criminalised "eve teasing", which is defined as words, spoken or written, or signs or visible representations or gestures, or acts or reciting or singing indecent words in a public by a man to the annoyance of a woman. This crime is punishable by a minimum of seven days imprisonment.[4] Again, in England and Wales legislation proscribes "kerb crawling", defined as soliciting women, for the purposes of prostitution, from a motor vehicle.[5] To a certain extent, this discourages harassment in the street, although commentators have suggested that its aim is not to protect women, but rather, to penalise working prostitutes.[6]

Where sexual harassment occurs in the workplace, other legal remedies may be available. In a number of Commonwealth jurisdictions, legislation prohibits discrimination in employment on the grounds of sex.[7] Tribunals and courts in these jurisdictions have been prepared to interpret discrimination in employment on the grounds of sex as encompassing sexual harassment, concluding that this amounts to less favourable treatment for the complainant because of her sex.[8] For example, the United Kingdom Sex Discrimination Act 1975, while not specifically prohibiting sexual harassment, proscribes sex discrimination, defined as treating a woman less favourably than a man, and makes it unlawful for an employer to discriminate against a woman by dismissing her or subjecting her to any other detriment. Here, courts have concluded that sexual harassment is sex discrimination and that proven harassment may render an employer liable in damages.

Thus, in the first sexual harassment case to reach appallate level in the United Kingdom, Strathclyde Regional Council v Porcelli[9], where the complainant had been subjected to a deliberate campaign of vindictiveness, which included sexual behaviour, by two male colleagues, the Scottish Court of Session concluded that discrimination on the ground of sex exists where a woman is treated unfavourably and if any material part of the treatment includes a significant element of a sexual character to which a man would not be vulnerable. The Court also indicated that sexual harassment is a

"particularly degrading and unacceptable treatment which it must be taken to have been the intention of Parliament to restrain". Similarly, in the later decision of Wileman v Milenic Engineering Ltd[10], the Employment Appeal Tribunal stated that although the words "sexual harassment" do not appear in the legislation, the phrase is legal shorthand for activity which subjects the woman to "any other detriment" within the formulation of the Act.[11]

Remedies for sexual harassment in the workplace are also available under employment protection legislation which exists in some Commonwealth countries to protect workers from unfair dismissal.[12] Tribunals have held that sexual harassment may amount to constructive dismissal for the purposes of this legislation and thus allow the victim the remedies of damages or compensation.[13] The English Court of Appeal in Western Excavating (ECC) v Sharp[14] concluded that "persistent and unwanted amorous advances by an employer to a female employee would be conduct leading to a breach of contract" giving the victim remedies for constructive dismissal.

Recently, specific provisions aimed at discouraging sexual harassment in the workplace and elsewhere - such as educational institutions - have been enacted in a number of Commonwealth jurisdictions. For example, in Canada, the Federal Human Rights Act prohibits sexual harassment in employment and in the provision of goods and services where these come within the jurisdiction of the federal government. This legislation is complemented at federal level by the sexual harassment provisions of the Canada Labour Code which requires employers to issue a sexual harassment policy which condemns sexual harassment, indicates that disciplinary measures will be taken against transgressors and provides for procedures to deal with instances of harassment and informs employees of their rights under the Human Rights Act. Further, a number of provincial Human Rights Codes specifically address the issue, prohibiting sexual harassment in the workplace and other situations where a woman might be vulnerable, providing a complaint and compensation procedure.[15] Similar legislation is to be found in a number of Australian States.[16] Thus, for example, the Western Australian Equal Opportunity Act establishes a legislative regime to deal with sexual harassment by employers, fellow employees, those in educational posts and landlords. As in Canada, Australian federal legislation also provides remedies for sexual harassment, the Sex Discrimination Act 1984 providing that it is illegal for an individual employer to sexually harass a person seeking, or in his or her, employment, or for an individual who is a member of staff of an educational institution to harass an actual or potential student of that institution.

The legislation which specifically proscribes sexual harassment which has been enacted in the Commonwealth follows a fairly similar pattern. There are differences, however, in the definition of employment covered, the Federal and Western Australian Acts, for example, extending the definition to cover contract workers and commission agents in an attempt to protect women in less formal sectors of employment. Again, while each Act is broadly similar, the definition of conduct which falls within sexual harassment varies from statute to statute. Most statutes, however, establish a process for the resolution of disputes which is conciliatory, rather than judicial in nature. Thus, in Australia, commissioners, who work in conjunction with the Human Rights and Equal Opportunities Commission at the federal level or the Equal Opportunities Commission at the state level, are appointed to act as the tribunal under the legislation. These commissioners have the responsibility of examining complaints and endeavouring, through conciliation, to reach a settlement of

the matter. Where complaints cannot be settled through conciliation, the matter can be referred to the relevant Commission which will, in turn, attempt to conciliate. Both the commissioners and the Commissions are entitled to call for information and summon witnesses who are obliged to attend. The Commissions can issue declarations or determinations at the end of the inquiry, which a woman can seek to have enforced in a court, to the effect that the man who harassed her behaved unlawfully, that he should redress any damage suffered by her, that he should re-employ her, that he should promote her, that he should pay her damages or any other action that is appropriate.[17]

Resolution of complaints of sexual harassment is similar under Canadian legislation. For example, under the Federal Human Rights Act, an independent human rights commission investigates complaints of discrimination, including sexual harassment. After investigation, the commission decides whether the complaint should be heard by an independent tribunal. The commission has powers to appoint a conciliator before the case goes to tribunal. As in Australia, the tribunal can order remedies such as compensation and reinstatement. As in the Australian statues, the Canadian legislation makes it an offence to intimidate or victimise a complainant.

In a number of Commonwealth jurisdictions, the liability for sexual harassment in the workplace extends beyond the individual offending employee and renders the employer vicariously liable.[18] This has two advantages for the complainant. First, she is assured of adequate compensation if she is successful, because the employer is usually financially viable. Second, the threat of imposition of vicarious liability often results in employers taking positive steps to ensure that offences of this nature do not occur.

Other Strategies

In the context of sexual harassment, perhaps more than any other area of violence against women, women have concentrated less on legal remedies and more on less formal methods of complaint. These strategies have ranged from workplace campaigns and the establishment of organisations concerned with sexual harassment to enlisting the aid of trade unions to develop preventative strategies or assist with specific complaints.

Organisations concerned with sexual harassment have been established in a number of Commonwealth countries. In the United Kingdom, Women Against Sexual Harassment (WASH) publicises the issue, provides training for employers and support and advice for complainants of harassment. In Canada, the Women's Legal Education and Action Fund (LEAF) whose brief is to conduct test cases which explore the meaning of s.15 of the Canadian Charter of Rights and Freedoms which provides that "every individual is equal before and under the law and has the right to equal protection and equal benefit of the law, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability", has provided assistance in claims of sexual harassment, as has its United Kingdom sister organisation, the Women's Legal Defence Fund.

Throughout the Commonwealth, trade unions have issued guidelines and protocols to raise awareness and address the issue. In 1981, for example, the United Kingdom National Association of Local Government Officers (NALGO), the largest white collar union, issued guidelines for members on combatting sexual harassment at work, in a leaflet called "Sexual Harassment is a Trade Union Issue". NALGO's lead has been followed by other trade unions both in the

United Kingdom and elsewhere, while various universities throughout the Commonwealth have developed codes of conduct concerning sexual harassment.

Codes of conduct and protocols dealing with sexual harassment have also been issued by Commonwealth human rights commissions. The New Zealand Human Rights Commission, for example, issued "Eliminating Sexual Harassment - A Guide for Employers", which suggests strategies for approaching workplace harassment and provides a guide for those in charge of the management of the problem, in 1986. Similar guides have been produced by the Canadian and Australian Commission, while the Report of the Commission of Inquiry (Integrity Commission) in Guyana, issued in 1987, suggested the formulation of a code of conduct for persons holding positions in public life.

Other strategies have also been used to discourage sexual harassment. In some jurisdictions, unions have negotiated collective agreements for their members with employers which address sexual harassment, so that by 1985, for example 18.6% of all major collective agreements in British Columbia contained either a policy statement or a complaint measure concerning the issue. Some employers have gone so far as to draft contracts for employees and independent contractors which ban harassment. Thus, all building contracts issued by one New Zealand university bans catcalls, wolf whistles, insulting or objectionable language and gestures directed at staff, students and other campus users. The contract goes on to state that the university may ask the contractor to refuse any offender access to the building site.

Problems with Current Strategies

Perhaps the major obstacle to the legal strategies that can be employed to confront sexual harassment in the workplace or elsewhere is the fact that it is frequently considered to be a trivial matter or the figment of a woman's imagination. Many employers and their advisers have yet to be persuaded that sexual harassment robs the workforce of valuable female talent and productivity.

In so far as the current legal strategies are concerned, it remains difficult for a woman to find a legal adviser who recognises sexual harassment as creating a cause of action. Women are loath to complain of harassment to the police, even in serious cases, because they fear, just as in the case of domestic assault, that the complaint will not be taken seriously.

If police response is negative, and in most places under consideration this is likely to be the case, women, although they have recourse to private prosecution, do not take this route as it is fraught with difficulty. The woman is responsible for the case and is not, in many jurisdictions that have provision for legal aid, entitled to such assistance. She may thus have to pay some or all of the costs. Moreover, a criminal process, be it private or public, is difficult. The offence must be made out and proved beyond reasonable doubt. In this context, it is crucial that the prosecutor show that the victim did not consent to the conduct that has been complained of. This raises the familiar problems faced by women in trials for sexual offences.

A civil process is similarly complex. Certainly, the burden of proof is lower, but a successful case may result in substantial damages[19] and is thus likely to be seriously defended and protracted. The woman will require expert legal advice which will be costly in the absence of a group such as WASH which may be prepared to carry the action as a test case. Many Commonwealth jurisdictions do not have a legal aid service or if they do it may not cover such an action.

Where sexual harassment occurs in jurisdictions where there is unfair dismissal, sex discrimination or sexual harassment legislation, women are at an advantage. Nonetheless they still face obstacles.

In some jurisdictions, the process established by the legislation is complex and may only be available if the employment meets certain criteria. The United Kingdom Sex Discrimination Act, for example, only applies where the complainant's employer employs six or more employees. Again, legal aid may be unavailable, even where the legislative scheme is complex. Further, the compensation awarded by the special tribunals or boards may be inadequate, either because the arbitrator does not perceive the harassment to be serious[20] or because the legislation sets an upper limit. This is a particular problem as most victims choose to leave the employment where the harassment occurs.

Throughout the Commonwealth, women's work is carried out, in the main, in the informal sector. Unfortunately, it is in this sector that cases of sexual harassment appear to be most common. This is the most substantial obstacle to effective use of legal and other strategies to counter sexual harassment. Women in the informal sector are usually unable to take advantage of employment legislation and are usually powerless to negotiate with their employers on work conditions in general and sexual harassment in particular. The informal sector is not unionised and women are thus unable to take advantage of any available trade union support and assistance.

Conclusion

Sexual harassment of women in the workplace, educational institutions and elsewhere defines the role of women in sexual terms and serves to perpetuate their subordinate role in society. It causes harm to the individual woman, diminishes the effectiveness of an organisation and is wasteful of human and economic resources. Accordingly, it should be treated as a serious and important issue.

The public must be made aware of the issue of sexual harassment and its serious short term and long term implications. Specific efforts must be made to educate men to appreciate the nature and effect of such offensive conduct. At the same time, women themselves must be educated, both with respect to the issue and with respect to the procedures that they can use to counter the behaviour. For example, women in the workplace could make use of information which is available explaining how to conduct workplace campaigns or surveys and how to develop codes of conduct for the treatment of harassment.[21]

Government bodies can do much to increase awareness of the seriousness of sexual harassment and the procedures that can be invoked to confront it. Arresting pamphlets have been issued in Australia, Canada, New Zealand and the United Kingdom which could be used by other Commonwealth countries in developing strategies to deal with harassment. The Australian Human Rights and Equal Opportunity Commission, moreover, conducted a major campaign about sexual harassment in 1990, which was effective in sensitising the community about the issue. This campaign, entitled SHOUT (Sexual Harassment is Out), which consisted of a poster, magazine and radio advertising campaign, with the facility of a toll free telephone line for women who wished to provide information about harassment, was aimed at younger women in vulnerable occupations, such as in the catering sector and office workers. Women responded very favourably to the SHOUT campaign and its effects are continuing, although the main campaign has now come to an end.[22]

The value of trade union action activity should not be underrated. Women's groups and governments could assist unions to take a leading role in the regulation of workplace harassment. It must be remembered, however, that representation of women at the senior levels in trade unions is not high and that, often, unions are geared to the needs of male workers and marginalise the needs of women workers. Unions, thus, need to be educated in the area of sexual harassment and must be encouraged to develop specific protocols to address the issue, which they might seek to have incorporated in contracts of employment. Union activity might assist in setting standards for non-unionised employment. Finally, women should be encouraged to become active in trade unions.

Although legislation should in no way be regarded as the solution to the problem, it does provide a benchmark indicating conduct that is regarded as repugnant, and does provide remedies for those wishing to be able to take advantage of them.

To be effective, however, legislation must be accessible and provide appropriate remedies. Those who are responsible for the administration of the legislation must be sensitive to the issue of sexual harassment, so that women are not further victimised. Procedures must be straightforward and assistance must be available to encourage women to bring complaints. A machinery to provide for representative actions and trade union carriage of complaints is essential to protect women who do not wish to proceed unaided.

Any legislation must include vicarious liability of the employer so as to encourage employers to be vigilant about the occurrence of harassment. Further, legislation must provide for compensation and have adequate safeguards to protect the complainant from further victimisation.

Unfortunately, women most vulnerable to sexual harassment are workers in the non-formal, non-unionised sector such as domestics. Their vulnerability is frequently compounded by the fact that they may have limited working rights. They may, for example, be on a working visa that ties them to a particular employment and employer.[23] Indeed, they may be in illegal employment. Special strategies may need to be developed to provide assistance for these women who are particularly powerless. These women must be informed of their legal rights. It is essential, therefore, that information be disseminated to all immigrant and guest workers in all appropriate languages at point of entry to a country.

Ultimately, however, the eradication of sexual harassment will occur only when the importance of individual human dignity and autonomy are respected and when women are perceived to be as valuable as men. This requires significant social change, which can be facilitated by concerted government, trade union and employer action. In this context, it is heartening to note that the European Economic Community Council of Labour and Social Ministers, the decision-making body responsible for social affairs, employment and labour adopted a Resolution in May 1990 concerning sexual harassment in the workplace. The Resolution, although having no binding effect on member states is highly persuasive, sets out a definition of the term sexual harassment which will be effective at the European level, describes it as an "intolerable violation" which creates an "intimidating, hostile or humiliating work environment" for the worker. It calls on member states to initiate information campaigns, to remind employers of their duty to ensure that employees are free from sexual harassment, encourages the

formulation of appropriate clauses in collective agreements to guarantee a work environment free from sexual harassment and calls on the European Commission to continue campaigning around the issue.[24]

1. E. Collins and T.B. Blodgett, "Sexual harassment-some see it ... some won't" Harvard Business Review, (March-April, 1981) p. 76; C.M. Phillips, J.E. Stockdale and L.M. Joeman, The Risks in Going to Work (1989, London School of Economics and Political Science); M. Benn, "Isn't sexual harassment really about masculinity?" Spare Rib, No 156, 1985, p.6 which describes the notorious London firefighters case; Ethnic Identity and the Status of Women, Report on International Workshop held in Colombo, Sri Lanka, September 9-11, 1984, International Centre for Ethnic Studies, Sri Lanka, pp. 14-15; N. Hadjifotiou, Women and Harassment at Work (1983, Pluto Press) pp. 7-25; M. Rubenstein, Preventing and Remedying Sexual Harassment at Work: A Resource Manual (London, Industrial Relations Services, 1989) Chapters 1 and 8.

2. See, for example, the remarks of Chairman Shime in the Canadian case of Bell and Korczak v Ladas and the Flaming Street Steak House Tavern Inc. (1980) 1 CHRR D/155 where he cautions "an invitation to dinner is not an invitation to a [legal] complaint." He is, however, of no doubt that social contact which is coerced, wither expressly or impliedly, is sexual harassment. In some Commonwealth countries a dinner invitation may well amount to harassment.

3. Indian Penal Code, s. 509; see also Southern Nigeria, Penal Code, s. 360; Botswana, Penal Code, s. 143, 144, 146; Singapore, Penal Code, ss. 354 and 354A.

4. Delhi, Prohibition of Eve Teasing Bill, reported in Women's International Network News, Summer, Vol. 10, No 3, 1984.

5. Sexual Offences Act, 1985

6. S. M. Edwards, "Prostitution: ponces and punters, policing and prosecution", New Law Journal, 1985, 928 and "The Kerb crawling fiasco", New Law Journal, 1209

7. See, for example, Sex Discrimination Act (UK) 1975; Anti-Discrimination Act (NSW) 1977; Human Rights Commission Act (NZ) 1977

8. Bell and Korczak v Ladas and the Flaming Steer Steak House Tavern Inc (1980) 1 CHRR D/155 (Ontario); O'Callaghan v Loder and the Commissioner for Main Roads [1983] 3 NSWLR 89; Crockett v Canterbury Clerical Workers Union (1983) 3 NZAR 435; R v EO, ex parte Burns [1984] AILR 316; see, further, D. Pannick, "Sexual harassment and the Sex Discrimination Act", Public Law, 1982, 42 and S. Goundry, "Sexual harassment in the employment context" University of Toronto Faculty Law Review, 43 (1985) 1.

9. [1986] IRLR 134

10. [1988] IRLR 144

11. For further information on the United Kingdom Act see M. Rubenstein, Preventing and Remedying Sexual Harassment at Work, (Industrial relations Services, Eclipse Publications, London, 1989), chapter 4.

12. For example, Employment Protection (Consolidation) Act (UK) 1978

13. N. Hadjifotiou, Women and Harassment at Work (Pluto Press, London, 1983) 157ff.

14. [1978] 1 ALL ER 713, 719-20

15. See, Manitoba, Human Rights Code; New Brunswick, Human Rights Code; Ontario, Human Rights Code; Yukon, Human Rights Act.

16. Equal Opportunity Act (Vic) 1984; Equal Opportunity Act (SA) 1984; Equal Opportunity Act (WA) 1984.

17. See, F. Marles, Workplace Approach to Sexual Harassment, (Canberra, Australian Government Publishing Service, 1991), pp 17-19.

18. For example, Sex Discrimination Act (Cth) 1984, s. 106. For cases indicating how difficult it is for an employer to escape vicarious liability in these circumstances, see Boyle v Ishan Ozden & Ors (1986) EOC 92-165 and Aldridge v Booth (1988) EOC 92-222.

19. Sally Meurhing, an English publishing executive sued her former employers, Emap, for breach of contract, assault and battery and malicious falsehood. She accepted £25,000 from Emap in settlement of her claim in February 1989 and it was estimated that the employers spent in excess of £70,000 in legal costs defending her action. See, Sally Hughes, "New territory in a man's world", New Law Journal, 1989, p. 1675.

20. Note the decision of the Australian President of the Human Rights and Equal Opportunity Commission in Hall & Ors v Sheiban where sexual harassment was held to have occurred, but there was no compensation for humiliation, pain or suffering because the President was of the view that the harassment, which included touching and lowering the zips on the complainants' uniforms, was trivial. This decision was ultimately reversed by the Federal Court: (1989) EOC 92-250.

21. N. Hadjifotiou, op. cit. Chapter 5.

22. The SHOUT posters and pamphlets are available form the Human Rights and Equal Opportunity Commission in Sydney, Australia. The Commission is, at present evaluating the effects of the campaign.

23. Cases of this nature have been revealed in the United Kingdom recently. It is possible to arrange for the immigration of domestic servants who are tied to a particular family. These servants are not permitted to remain in the United Kingdom if they cease to work for the family. Cases of serious abuse of these powerless individuals, who are often unable to speak English and whose passports are frequently confiscated by their employers, have emerged.

24. Resolution No 6015/90

4. SEXUAL ABUSE OF CHILDREN

Introduction

The maltreatment of children by their parents or other caretakers is not a modern phenomenon. Children have been neglected and the victims of physical, emotional and sexual abuse since the beginning of history. They have been abused in the name of discipline and education, maimed to conform with ritual and set to work in horrifying conditions. Almost every culture has practised infanticide as a method of birth control, one commentator going so far as to suggest that infanticide has been responsible for more childhood deaths throughout time than any other cause, except perhaps, bubonic plague.[1]

Although child abuse in its various forms is not a modern phenomenon, it has raised serious public concern only in the last twenty years, although intermittent concern, resulting in the establishment of the various societies for the prevention of cruelty to children, which exist in most countries, has been manifested for over one hundred years.[2]

Modern concern about child abuse can be traced to the work of the American paediatrician, Henry Kempe and his colleagues in the early 1960's, who, with the help of the new science of radiology were able to conclusively assert that a large number of children who had been diagnosed as accidentally injured were, in fact, deliberately injured, usually by their caretakers.[3] Kempe's research was replicated in other countries, including the United Kingdom, Australia, New Zealand and Canada and the same results emerged. As a result, various of the jurisdictions of the United States, Canada and Australia introduced "reporting statutes" which oblige those who have professional dealings with children to report to the authorities any suspicion that a child is being abused. Other jurisdictions, such as the countries of the United Kingdom, chose not to pass legislation, but rather create administrative processes, including "child protection registers" so that the details of any child thought to be at risk could be recorded officially and information passed to the appropriate agencies.

Recognition of the numbers of children who were subject to physical violence resulted in revelations of other abuses suffered by children. During the 1970's, authorities began to become aware of child sexual abuse and this prompted individuals to begin research in this area. Studies revealed that incest and child sexual abuse were far more frequent than had been recognised and that sexual abuse in childhood was often associated with psychiatric and personality disorders later in life.[4] Researchers also challenged the widely held view that children fantasise about sexual activity, so that it is now widely accepted that if a child complains about sexual abuse, the complaint is likely to be well founded. Indeed, the major conclusions of the now considerable volume of written material which exists exploring the various aspects of child sexual abuse can be best summarised by the Cleveland Report[5] which states:

> "We have learned during the Inquiry that sexual abuse occurs in children of all ages, including the very young, to boys as well as girls, in all classes of society and frequently within the privacy of the family. The sexual abuse can be very serious and on occasions includes vaginal, anal and oral intercourse. The problems of child sexual abuse have been

recognised to an increasing extent over the past few years by professionals in different disciplines. This presents new and particularly difficult problems for the agencies concerned in child protection."

We do not intend in this Manual to provide a comprehensive account of the research and strategies which exist throughout the Commonwealth concerning child sexual abuse. All we seek to do is point to a number of concerns that the problem raises in the context of the legal process. We are aware that, as in the case of domestic and sexual abuse against women, the law has only a small part to play in the prevention and treatment of child sexual abuse and that attention must be devoted to difficulties of diagnosis, the education and training of professionals and community campaigns to raise awareness about child sexual abuse. Some Commonwealth countries, including the countries of the United Kingdom, Canada, New Zealand and Australia, see the issue of child sexual abuse as a pervasive and serious one and these governments, individuals, organisations and treatment specialists have initiated various prevention and treatment strategies.[6]

The Legal Process

In all Commonwealth countries, serious penalties are provided by the criminal law for the sexual abuse of children. Further, sexual assault is a tort and, theoretically, a child could initiate civil proceedings against the perpetrator which would result in compensation or seek compensation from the criminal injuries compensation board, if such a system exists in the jurisdiction.[7] Finally, the sexual abuse of a child amounts to neglect or ill-treatment which, in most Commonwealth countries, allows the initiation of care proceedings by child welfare authorities, which can lead to the removal of the child from the family.[8]

Ordinary criminal law can do little to prevent child sexual assault. Except where a community has been particularly sensitised to the existence of the problem, very few cases come to the notice of the authorities and of those that do, many are not persued because the child may not be believed, there may be insufficient evidence to prove the case beyond all reasonable doubt or it is feared that the child may be harmed to a greater extent than the initial assault by the criminal process, which will involve her or his oral testimony. Of those few that are pursued, unless the case is perceived as particularly heinous or the offender is a known paedophile, the perpetrator may receive merely a short prison term or even a non-custodial sentence.

Despite the drawbacks of the current criminal process as it operates in most Commonwealth countries, it is essential that child sexual abuse continues to be viewed as criminal behaviour. It is only where conduct is labelled and sanctioned as criminal, that is is clearly condemned by society and offenders are told that their acts, for which they alone are responsible, are legally and morally reprehensible. Some researchers argue, moreover, that a criminal prosecution is essential in the treatment of offenders and can lead to change in behaviour, Giaretto, the Co-ordinator of the Santa Clara Child Sexual Abuse Treatment Program concluded: "the authority of the criminal justice system has proven to be absolutely essential in beating incest".[9] In the context of child sexual abuse, however, the criminal justice process poses difficulties, many of which have been perceived and confronted by Commonwealth jurisdictions.

i) Preliminary investigation

Throughout the Commonwealth preliminary investigation in cases of sexual assault is hampered by the fact that there are few professionals who have specialised knowledge of the issue. Child sexual abuse is difficult to diagnose and it is generally accepted that no one professional can be responsible for making the diagnosis. It is a multi-disciplinary process.

Special training, protocols and checklists to aid in the diagnosis and investigation of cases of child sexual abuse have been introduced in the United Kingdom, New Zealand, Canada and Australia. Further, in some areas these countries have established special units with particular expertise in the field. In this context, caution must be taken that the knowledge and techniques required to diagnose and investigate child sexual abuse is not confined to members of special units. Child sexual assault is pervasive and all those who have professional contact with children and their families - midwives, health visitors, teachers, doctors, welfare and social workers and police - should have some knowledge of its manifestations so that children at risk are not ignored.

ii) Interviewing the victim

In most jurisdictions, the child may have to repeat her or his complaint to several people: the doctor, the social worker and the police. This is difficult and traumatic for an adult victim of crime. A child suffers even more, becoming confused, upset and bored.

In a number of Commonwealth countries new techniques have been introduced to humanise the process of investigation of child sexual abuse. In most cases the child is interviewed by a multi-disciplinary team of experts, who frequently include child psychiatrists. The team sometimes uses special equipment, such as anatomically correct dolls and child oriented questioning skills, in order to elicit evidence which may confirm suggestions of abuse and identify the perpetrator. These interviews are frequently recorded on video to avoid the need for repeated interviews.[10] Some countries use a "child advocate": a person experienced in child welfare and the prosecution of child sexual assault, who carries out the initial interview with the child and provides a report or tape of that interview together with any background material, to police and prosecutors. The "child advocate" then proceeds to represent the child's interests throughout the investigation, trial and post-trial phases. Finally, others have taken the approach first used in Israel, where an experienced child interviewer obtains the child's testimony and submits a written report.[11]

iii) Court proceedings

Adult victims of sexual assault find criminal court proceedings distressing and have indicated that the process has added to their feelings of victimisation. Small children must suffer even more. The physical surroundings of the court, the conventional courtroom itself, the appearance and demeanour of court personnel and the proximity of the offender can only exacerbate the confusion and distress that the child is already suffering. In most jurisdictions, the child is further victimised by the trial process, which by the rules of evidence and burden of proof may appear to protect the accused at the expense of the child.

Careful measures must be taken to reduce the impact of court proceedings on the child victim.

First, judges and lawyers must be educated so that they understand the nature of child sexual assault and incest and the varying reactions children can have to such abuse. They should be made aware particularly of the effect a child's age and level of development can have on her or his capacity to report on events and to deal with questioning.

Second, as in other cases of sexual assault it is a priority that the child and the accused do not come in contact with each other during the hearing. In cases of child sexual assault this is even more important given that the accused is most likely to be the child's father or step-father, elder brother or other close male relative. Separate waiting rooms and toilet facilities must be provided to avoid the likelihood of the accused confronting the child in any way.

Third, the courtroom itself may prove to be particularly daunting for a child. It is essential that child witnesses be familiarised with the physical surroundings of the court and the likely events that will occur during the trial. Films, puppets, fascimile courtrooms or specially written children's guides could be used for this purpose. A very good example of the latter is the Canadian child's guide to testifying as a witness in child abuse cases entitled "So, you have to go to court"[12], which is designed to be read by an adult to children of approximately five to eight years. Although explanations can go some way to relieve the anxiety a child may experience due to the close proximity of the accused in the courtroom, physical modifications of the courtroom in such cases may be appropriate. It is hardly likely that allowing the child to give evidence behind a screen or in the judges chambers or in a specially designed child-oriented evidence room would supply the prosecution with an advantage, which might deprive the accused of a fair trial.

iv) Evidence

The chief witness for the prosecution is likely to be the child. As we have seen, the legal system and, in particular, the rules of evidence can make the ordeal of the adult rape victim intolerable. The distress, humiliation and confusion of a child victim, usually abused by a close and trusted relative, can only be greater.

Most Commonwealth countries require that the competency or understanding of the child be tested before the child's evidence will be accepted by a criminal court and, in the event that the evidence is accepted, require that it be corroborated in some way. Hence, in general terms, a child may not give evidence on oath unless she understands the importance of telling the truth and the particular importance of telling the truth in a court of law. However, she may give unsworn evidence if it can be demonstrated that she has sufficient intelligence to justify the reception of her evidence and if she understands the duty of speaking the truth. In the event the child's unsworn evidence is heard, the court is forbidden to convict without corroboration, while where evidence on oath is received the court is usually directed to warn of the danger of convicting without corroboration. Some countries, moreover, add a blanket restriction on the reception of evidence of children below a certain age.[13]

Recently a number of countries have relaxed both that requirements of competency and corroboration where the evidence of children is concerned. Canada, for example, enacted major reforms of the law relating to the evidence of children in 1987, following the report of the Badgley Committee in 1984,[14] which had stated:

> "The Committee is strongly of the view that Canadian children cannot fully enjoy the protections the law seeks to afford them unless they are allowed to speak effectively on their own behalf at legal proceedings arising from allegations of sexual abuse. Accordingly, the Committee recommends that there be no special rules of testimonial competency with respect to children; a young person's testimony should be heard and weighed by the trier of fact in the same manner as the testimony of any other witness in the proceedings."[15]

Accordingly, a child's sworn evidence, or evidence under oath can be accepted, in which case it is not essential to have additional corroborating evidence[16]. In the event the child is unable to understand the meaning of an oath, but is able to communicate, she can testify after making a promise to tell the truth. This evidence is as persuasive as any other evidence and need not be corroborated.[17]

The various states of Australia have relaxed the competency requirement and the rules concerning corroboration, to a greater or lesser degree. The Queensland Evidence Act as amended in 1988 requires the court to receive the evidence of a child unless it is satisfied that the child does not have sufficient intelligence to give reliable evidence. In this determination, the court is allowed to receive evidence about the child's level of intelligence, powers of perception, memory, expression and any other matter that may be relevant. Where the child has sufficient understanding, the court will allow her to give evidence on oath, but the probative weight of evidence on oath is no greater than unsworn evidence. South Australia goes even further. There the unsworn evidence of a child under 12 is equal to sworn evidence if she promises to tell the truth and appears to understand this promise. Neither sworn nor unsworn evidence need be corroborated. Where a child is too immature to be able to promise to tell the truth or understand this promise, the evidence may nonetheless be received, but it must be corroborated and evaluated in the light of the child's level of cognitive development.[18] In New Zealand children over the age of 12 must give evidence on oath, while those below that age may give unsworn evidence if they formally promise to tell the truth. In neither case is there a formal requirement that the evidence be corroborated, but it is the practice of judges to give a warning. Finally, the rules concerning the corroboration of children's evidence have been significantly altered in England and Wales, where s. 34 of the Criminal Justice Act, 1988 removes the rule that there can be no conviction on the unsworn evidence of children and allows the unsworn evidence of one child to corroborate that of another. It does not, however, remove the requirement that there be a warning from the judge that to convict an offender of a sexual offence on the uncorroborated evidence of the victim is unsafe.[19]

Some jurisdictions have also considered alternatives to the usual requirement that witnesses give live evidence at trial. Most of these have involved the use of video technology. Thus, in Canada, in cases where the complainant was under 18 at the time of the alleged offence, a videotape made within a reasonable time after the offence in which the complainant describes the acts complained of, is admissible in evidence if the complainant adopts the contents of the tape while testifying.[20] This means that the tape supplements, but does not replace, the child's appearance as a live witness at the trial, but there the court has a discretion to allow the witness to give evidence from behind a screen or by means of live video link.[21] This discretion is exercised where the court finds it necessary so as to obtain a full and candid account of the acts complained of by the child.

Videotape and video link evidence is now under consideration in the states of Australia, New Zealand and the United Kingdom. Thus, in Western Australia legislation is in place which allows child witnesses to give evidence at trial by a live video link, as it is in Queensland which also provides for testimony behind screens and in court with the defendant in an adjoining room watching the child by live link. Live link is also being experimented within the New South Wales and the Australian Capital Territory. Only Queensland allows for video dispositions, whereby the child's entire evidence is taken in advance, in those cases where the court grants leave, thus relieving her from court attendance entirely.[22] The English Pigot Committee[23] made similar recommendations in its report in 1989, suggesting that the initial interview with the abuse victim would be videotaped and that later, in an informal setting, away from the courtroom, the video would be shown and the child cross-examined, with only the judge, counsel for the prosecution and defence, child and child supporter present. This cross-examination would be taped and the tape and that of the initial interview would be shown to the jury during the trial, which the child would not need to attend. While these recommendations received widespread support, they were watered down so that the Criminal Justice Bill will allow for videotaped interviews of the child by police or social workers to be admissible as evidence at the trial, although the child will still have to undergo cross-examination by defence counsel in the court building in a room linked to the court by television.[24]

v) Court closure

The general principle that exists throughout the Commonwealth is that cases are to be heard in open court so that justice is seen to be done. In the usual course of events, few people beyond those immediately concerned with the matter will be present at court. In the case of a trial for child sexual abuse, however, unusual interest, resulting in greater court attendance, could be aroused. In particular, this might occur in a small town where the spectators could well include the child's school friends or neighbours.

In most jurisdictions there are general statutory powers which allow judges to exclude persons from courts, while some have gone so far as to enact special legislation which provides for in camera proceedings for both civil and criminal cases where children are involved.

vi) Publication

Limits on publication are as important for the victim of child sexual abuse as for the adult victim of sexual assault. It is essential there is no publication of information that could lead to the identification of the child. A number of jurisdictions, such as Canada, provide for orders restricting the publication or broadcast of any information that could disclose the identity of the child victim or witness. Most provisions of this nature restrict the publication of the identity of the accused as well as the child as revelation of his identity usually identifies the child.[25]

Even where provisions exist limiting publication, the press has a heavy responsibility, especially in small communities, where the revelation of any information may lead to the identification of personalities.

Conclusion

Although the criminal law has a central role to play in the area of child sexual abuse, it alone cannot be relied on to confront the issue. While better criminal response is critical, it is even more essential that close attention should be given to the prevention of child sexual assault and the treatment and long term management of victims and offenders. Much must be done to ensure that children are secure from sexual violation, no matter how mature they appear to be and irrespective of the justification offered by the perpetrator, regardless of whether it is perpetrated by a stranger or a relative.

Public opinion must be mobilised against the sexualisation of children generally. Here public campaigns, such as the five year campaign conducted in New South Wales, which began with a public inquiry into sexual abuse and entailed, among other things, an arresting and continuous poster campaign, should be considered. A clear and consistent message must be given that sexual abuse is unacceptable and the offender alone carries the blame. Here mixed messages must be avoided. Sentences for abuse should be significant and it should be impossible for an offender to argue, as has been done, unfortunately successfully, that a child has not suffered because of sexual abuse or has provoked it in some way. The child should be the centre of concern, thus sentences should not be lowered in order to limit the impact imprisonment of the offender might have on the family unit. Moreover, sentences should be consistent. It is inconsistent, for example, for a legal system, such as that in England, to place a man on two years probation for sexually abusing his twelve year old daughter and convict a woman who pours boiling water on a man who rapes her five year old daughter, to two years imprisonment.

What is required is sympathetic and informed courts, better public and professional education, an informed judiciary and opposition to sexualisation of young people generally and in the media in particular. Moreover, abused children need treatment and support and their needs must be approached professionally and funded appropriately. Finally, treatment and therapy for child sex offenders is important. Persecuting perpetrators goes no way towards stopping abuse generally. However, care must be taken to ensure that the perpetrator is punished as well as treated. Punishment clearly relays society's disapproval, indicates that the victim is the priority concern and, to some extent, provides short term protection for the victim and other children. Treatment must occur during and after punishment, but never instead of it.

1. J. Solomon, "History and demography of child abuse" Pediatrics, Volume 51, 1973, p.773.

2. J. R. Spencer and R. Flin, The Evidence of Children: The Law and the Psychology (London, Blackstone Press, 1990), p.p.3-6.

3. H. Kempe et. al., "The battered child syndrome", Journal of the American Medical Association, Vol. 181, 1962, p.17.

4. D. Glaser and F. Frosh, Child Sexual Abuse (London, Macmillan 1988)

5. Department of Health and Social Security, Report of the Inquiry into Child Abuse in Cleveland 1987, Cmnd 412 (HMSO, London, 1987) This publication is the report of the committee set up to investigate whether there had been any mismanagement in Cleveland in England where 126 children had been diagnosed as sexually abused over a period of two months.

6. A. Bentovim, et. al., Child Sexual Abuse Within the Family: Assessment and Treatment John Wrights, Bristol, 1988); D. Finkelhor, Child Sexual Abuse: New Theory and Research (Collier Macmillan, London, 1984); D. Geddis, A Private or Public Nightmare: Report of the Advisory Committee on the Investigation, Detection and Prosecution of Offences against Children (New Zealand, 1988); Rix Roger, An Overview of Issues and Concerns Related to the Sexual Abuse of Children in Canada (Canada, October 1988). Most of these contain comprehensive bibliographies.

7. Child victims of sexual assault can proceed by the "next friend" process or sue on attaining majority. There is evidence from Britain that some victims are taking this approach: see, Guardian, June 12, 1991.

8. See, for example, Children Act, 1989 (England and Wales) s. 31; India, Juvenile Justice Act, No. 53 of 1986; Lesotho, Children's Protection Act, 1980. All Commonwealth jurisdictions have child protection legislation which allows for the removal of children from their families on a short or long term basis. It is unusual, however, for such legislation to specifically prescribe "sexual abuse" as a ground for protection proceedings. In this context, the Children Act, 1989 is unusual as it does define "ill-treatment," which can lead to child protection proceedings, as including sexual abuse.

9. H. Giarretto, Integrated Treatment of Child Sexual Abuse (Palo Alto, California, 1983)

10. See, for example, the Bexley Project, Metropolitan Police and Bexley London Borough, Child Sexual Abuse: Joint Investigation Programme Bexley Experiment. Final Report (London, HMSO, 1987).

11. Law of Evidence Revision (Protection of Children) Statute 1955 sets up a system of "youth examiners" who interview the child and submit the record of evidence to the trial.

12. W. Harvey and A. Watson-Russell, So you have to go to court" (Butterworths, Toronto and Vancouver, 1986)

13. J. R. Spencer and R. Flin, The Evidence of Children (Blackstone Press, London, 1990) Chapters 4 and 8.

14. Badgley Committee, Sexual Offences Against Children: Report of the Committee on Sexual Offences against Children and Youths (Canadian Government Publishing Centre, 1984)

15. Ibid, p.371-2.

16. Canada, Evidence Act (RSC, 1970, C. E-10) s. 274.

17. Canada, Evidence Act (RSC 1970, C. E-10) s. 16.

18. Australian Law Reform Commission, Evidence, Report Number 38 (HMSO, Canberra, 1987) suggests that a child should be permitted to give evidence provided (a) she is capable of understanding that in giving evidence there is an obligation to tell the truth, and (b) she has the capacity to give a rational reply to the questions that may be put.

19. J. R. Spencer and R. Flin, op. cit., p. 174.

20. Canada, Criminal Code, s. 643.1.

21. Evidence Act, s. 486 (2.1)

22. J. R. Spencer and R. Flin, op. cit., p.311ff.

23. Home Office, The Use of Video Technology at Trials of Alleged Child Abusers (Home Office, London, 1989)

24. J. Temkin, "Doing Justice to Children" New Law Journal, March 8, 1991, p. 315.

25. Evidence Act, s. 486 (3) and (4).

5. GUIDELINES FOR INTERVIEWING CHILD VICTIMS OF SEXUAL ABUSE

These notes and guidelines, prepared by the Royal Canadian Mounted Police, contain six parts:

* introduction
* beginning the interview
* obtaining the child's statement
* use of aids (drawings & dolls)
* concluding the interview
* common problems - effective tactics

Introduction

- Comment of child anxiety and possible trauma of more than one interview
- Important factor: it should be presumed if child reporting sexual abuse, she or he is telling the truth

The following list of information should be obtained in the first interview:

1. Age
2. Family relationship
3. Maturity or immaturity
4. Cultural background
5. Child's understanding of sexuality and the functions of various parts of the body
6. Name of the offender
7. Relationship of child to the offender
8. The duration and seriousness of the abuse
9. What happened <u>in detail</u>, when it happened, where, and how often
10. Names of anyone else having knowledge of the abuse
11. Names of anyone else involved in or observing the abuse
12. Has the child been threatened?
13. Has the child been bribed not to talk or to take part in the activity?

14. Names of anyone the child has told

15. If the child has not told the mother, is the child able to say why not?

Beginning the Interview

1. Remember:

   (a) children less verbal than adults

   (b) often communicate non-verbally through behaviour, play or art

   (c) before a child will talk to the interviewer a sense of trust, safety and freedom from threats should exist.

2. Location - should be neutral and away from where alleged abuse occurred.

   Consider the following:

   (a) where and how disclosure occurred

   (b) reaction of the non-offending parent(s)

   (c) location of the alleged abuse

   (d) whether siblings are involved

   (e) where the victim will feel safe

   (f) where the interview can be conducted without interruptions

   (g) the location of the alleged <u>offender</u>

3. If the non-offending parent or parents are supportive it may be reassuring for one or both to be present (interviewer's discretion).

4. Arrange seating in non-threatening manner. Try to avoid more than one person facing the child. Others may sit alongside.

5. Begin interview with as much previous information as possible, i.e.

   (a) Names and nicknames of parent(s), brothers, sisters, pets and friends, school grade, etc.

   (b) Be informed about such things as: physically handicapped, sickness or recent trauma in family such as a death or divorce.

(c) Tell child your name, job (i.e. police officer, social worker, doctor). Give reassurance about your purpose is to help. (Children often respond well to request for help from an adult).

(d) You may wish to introduce the idea of an audio-tape recording. Show child how it works and let it play back before interview. (Periodically child may wish to sing into or talk into tape. Permit this so long as the tape is not turned off).

Obtaining the Child's Statement

1. Remember at all times you cannot suggest or ask the child leading questions.

(a) You may wish to start by making a statement. "We have been told that (the alleged offender - give his name) may or may not have done something to you that you do not feel quite right about. We need to talk to you about what may or may not have happened." Then return to concrete information that is non-threatening.

- remember the days of occurrence
- school day or holiday, etc
- when she or he got up
- what clothes she or he was wearing
- what she or he had for breakfast
- activities for the day

(Lead questions up to the time of offence gradually).

(b) Relation of time. Children relate time by birthdays, seasons, night and day, television programs, special events etc. Dates, hours or other measurements are seldom known.

Ask the child:

(i) where she or he was then alleged incident occurred

(ii) who else was present

(iii) who may be have been nearby - in the house

(iv) ask if something happened - can the child talk about it, (provide encouragement by saying it is alright to talk and make reference to other talks with other children and that some had things happen - others didn't. If something happened the interviewer can help, etc.)

(c) Allow the child to tell story in own words.

(i) Young children may use street words (may be embarrassed).

(ii) Tell then their own words are okay.

(iii) Adolescents may use formal or technical words.

(iv) Ask questions to assure yourself the same meanings are attached to the words as the child. e.g. make love (do not assume this means having intercourse).

(v) When the child talks - nod your head - repeat same words the child uses.

(vi) Ask for precise information in terms of:

placement

use of hands

penis

vagina

enlargement of penis

semen emerging, etc.

(vii) When the child pauses you may wish to encourage continuation by saying, "and then what happened" or "you have told me he touched you, can you show me where he touched you". Only after the child has begun talking and is describing an incident, should you press for clarification.

- Where were his hands?

- Where were your hands?

- Were your clothes on?

- Were his clothes on?

- Who took them off?

- Was he saying anything?

(Let the child know they are doing well by giving you complete information).

Use of Aids

Drawings: If possible have drawing materials available on a table in the interview room. (Bright coloured felt pens are ideal).

- Child may initiate drawing

- Other interviewer may start drawing if little progress is being made

- Stick to concept of less threatening matters. (Yourself, police station, house, school, interviewer and child). Invite child to fill in faces. Encourage child to take over drawing. Respond to the kind of expression you see. Then start to ask for specific persons, brothers, sisters, mother. Respond to the drawings and ask the child for names, meaning of expressions. Generally, child depicts sexuality abstractly. Use drawings as a springboard to talk about facts of the abuse.

Dolls: Anatomically complete dolls can be useful tools. (Diane Switzer - Family Dolls, 2019 West 36, Vancouver, British Columbia, U6M 1L1, 263-7575 - approximately C$250.00)

- Out of sight - fully clothed

- Introduce by pointing to them - holding in lap. (Remember the dolls symbolize the child). They should be held gently and cuddled. If that makes you uncomfortable place on a nearby chair. Allow child to hold them - undress them, etc. Do not hand the dolls to the child but allow them time to adjust and make their own approach. If the child does not want to touch the dolls go back to the drawing.

- If the child wishes to use the dolls allow her or him to explore the dolls for a few minutes with no comments except approving nods. Child may show embarrassment or laughter at genitals. Use dolls to identify child's name for various parts of body.

- Child may depict sexual acts by placing one doll on top of other. Tell the child what you see - "The man dolls is on top, the girl doll is on the bottom - they are doing something." Do not interrupt beyond this point. If the child says or does more listen carefully then ask more questions until the child says that is all.

- You may wish for clarification of names, meanings, things said, etc.

- The doll should be reclothed and put away before the interview finishes.

  Note If the child has been physically abused she may hit one doll against another or throw them around. (Sometimes the abused child will symbolically beat their abuser by having the child doll beat the adult doll).

Concluding the Interview

1. A child disclosing sexual abuse is disclosing her/his deepest, most confusing and frightening thoughts. The child needs praise, reassurance and protection. Give the child as much information as possible about what will happen next. Ask the child what they would like to see happen. Try to agree to at least one request, (i.e. talk to mother, father, have drink of water, etc).

2. If the decision is to apprehend the child, tell her/his you want them to be safe, will be staying with friends, will be talking to a judge who is concerned with child's safety, etc. Tell the child there will be follow-up with concern and help for the child's protection. Ensure there is follow-up. If it is likely the child requires further interviewing tell the child about it. (Remember the interview, hostility, revulsion, anger and all emotions other than caring, love, concern, help, etc. are potentially causing further injury to the child).

Summary

It is possible to obtain complete information even from reluctant children, very young children and children with poor verbal or mental ability. Keep in mind that the child's anxiety may be a block. Move in gentle but firm progression from the less threatening to the more threatening issues. Move as you sense the child becoming more comfortable with you. Listen carefully, and encourage the child to continue until you are sure you have the whole story. Aids such as drawing and dolls can be valuable to depict what children are unable to express verbally. Verbal labels can be attached to what the child has depicted or demonstrated.

Conclude the interview carefully and let the child know she/he is finished at that stage. Give assurance your interest in them will continue and she/he is cared for.

CHILD ABUSE INTERVIEWS

Common Problems	Effective Tactics
shock crying restlessness	reassurance, go slow, take time, talk about things until the symptom diminishes, have food and drink on hand, if possible, ask child if she/he needs to go to the bathroom
embarrassment	reassurance, demonstrate your own comfort in talking, tell child that other children you have talked with were embarrassed too
withdrawal refusal to talk repression (active forgetting)	use of drawings - draw yourself and child, let child fill in faces, draw building you are in, car you came in, keep it neutral and non-threatening and child will eventually approach you and begin to engage in the activity with you at her/his own pace - then proceed slowly, gently, firmly.
guilt - child fears she/he is bad, it is her/his fault, she/he shouldn't have talked	tell child that children often feel it is their fault - it isn't, do they really have any choice? - it is time it stopped
very young child who is blase about what happened	do not alert the child as to how seriously adults perceive the molestation, the innocence of the young child protects her/him from emotional trauma

PART III: VIOLENCE RELATED TO TRADITION OR CUSTOM

Introduction

In a number of Commonwealth countries women are subjected to violent or harmful conduct because of practices which are regarded as traditional, customary or prescribed by religion. This section describes four such instances: violence related to dowry, widowhood rites, sati and female circumcision.

Any adverse treatment of women which has a traditional, customary or religious basis is controversial and raises deep contradictions. This is because criticism of the results of such traditional, customary or religious practices is frequently construed to be criticism or of traditions, customs and religion or even castigation and condemnation of an entire cultural or societal system. This is often complicated by the fact that criticism of adverse treatment of women arising out of tradition, custom or religion is frequently made by individuals who do not share, or even purport to understand the particular culture or society.

In the case of the four practices which are considered in this chapter, criticism, in some cases resulting in legal strategies, of their consequences has come from "inside" and "outside" the groups who subscribe to the traditions and customs. Nevertheless, there are many women and men prepared to defend continued practise of these customs despite the fact that they have patently harmful consequences for women.

In the four instances which are considered here, specific legal strategies have been introduced to criminalise the particular custom in the hope that this will result in the eradication of the practices. Here, however, more than in any other issue concerning women, law alone cannot be relied on to change practices which are rooted deeply in culture and society. They will be changed only when there is fundamental societal change which will occur with attitudinal change at all levels. This can be achieved by a combination of short term and long term measures which aim to place women on an equal plane with men in all respects. These measures include education, both formal and informal, effective use of media and clear commitment from government, which is prepared not only to condemn such practices legislatively but also ensure that such legislation is implemented in good faith. It is crucial, further, that clear, comprehensive and simple legal protection is available for women and that they are afforded maintenance rights. These legal rights, moreover, must be accompanied by social services, such as short term accommodation, so that there is no gap between women's legal rights and their practical options.

Violence Related to Dowry

a) The nature of the problem

Women, particularly in Commonwealth South Asia, have been shown to be at increasing risk of violence because of the custom of dowry.[1] Evidence exists, moreover, that Asian women living in countries outside Asia are also at risk of abuse because of dowry.[2]

Dowry is an essential part of some marriage arrangements[3], but many marriages in South Asia are governed by customs which do not include dowry. For example, the custom of dowry is foreign to Muslim marriages. For various reasons, however, South Asian parents, irrespective of their religion or the traditions which govern marriages, have come to accept that if they wish their daughters to be married, they must provide a dowry. They accept, further, that it is their parental duty to find appropriate husbands for their daughters and that the amount of dowry available will be a crucial factor in attracting a husband of suitable quality.

In an alarming number of instances, dowry and its adequacy have proved to be a life and death matter for women, reports of brutal maltreatment of brides by their husbands and their husbands' families appearing regularly in the Indian and Bangladeshi press.[4] Women are physically and mentally maltreated in the hope that their parents will be induced to part with more money and possessions, even though the original dowry has been paid. Many women are driven to suicide, while others are actually murdered by the husband or his family, thus freeing him to remarry and thereby acquire another dowry. These deaths are usually explained as "cooking accidents", a convincing excuse given the use of kerosene stoves and flowing sarees in the kitchen. It is for this reason that deaths by suicide or murder arising out of dowry demands are frequently called "bride burning". It must be remembered, however, that although most of these deaths do occur by burning, victims of dowry violence also die in other ways.

b) Legal strategies

In India and Bangladesh, the payment of dowry has been outlawed. In India, the Dowry Prohibition Act was passed by the Central Government in 1961, but it had little effect in reducing the practice of offering and accepting dowry. The Report of the Committee on the Status of Women in India described it as "signally" failing to achieve its purpose,[5] as by 1984 there had been only eleven prosecutions[6] and no convictions [7] under its provisions.

There were three main factors which led to the failure of the 1961 legislation. First, the definition of dowry: "any property or valuable security given or agreed to be given either directly or indirectly by one party to a marriage to the other at or before or after the marriage as consideration for the marriage", effectively excluded gifts given or demanded after the marriage without any agreement prior to the marriage[8], while the explanation appended to the definition also excluded gifts not made in consideration of the marriage given at the time of the marriage. Second, the Act punished equally not only those who demanded or took dowry, but also those who gave dowry, even though payment of dowry occurred primarily because of fear or force.[9] Finally, the enforcement mechanism of the Act, requiring the complaint to be made within one year of the offence and rendering all offences under the Act non-cognizable, bailable and non-compoundable, thereby limiting those prosecuted to cases sanctioned by the state government[10], was defective.

Evidence of the increase in dowry related violence and the patent failure of the 1961 Act resulted in the passage of amendments to its provisions in 1984 and 1986. The 1984 Act amended the definition of dowry to include property or valuable security given in "connection" with, rather than "as consideration for" the marriage, omitting the explanation which had

excluded gifts given at the time of, but not in consideration for, the marriage, while the 1986 Act explicitly condemned continued demand for dowry by defining the relevant time frame to include "at any time after the marriage". Certain types of presents given under certain conditions are excluded from the definition of dowry. They are presents given, in the absence of any demand to the bride at the time of the marriage, presents entered in a list maintained in accordance with prescribed rules and presents of a customary nature made by or on behalf of the bride, the value of which are not excessive having regard to the financial status of the person by or on whose behalf they are given.

The Amendments also increased the penalties in the 1961 Act, imposing a minimum of five years imprisonment and a fine of Rs. 15,000 for the giving or taking of dowry, while demanding dowry, liability which ensues when the demand is made, is punishable by imprisonment from six months to two years and with a fine of Rs. 10,000. Those who advertise or circulate advertisements offering property or money as consideration for marriage are liable to imprisonment of not less than six months and a fine of up to Rs. 15,000.

In order to facilitate the enforcement of the legislation, the dowry offence is made cognizable on a police report, the complaint of a person aggrieved and also on the complaint of a recognised welfare institution or organisation. Complainants who give dowry are immune from prosecution under the Act and the burden of proving that an offence has not been committed under the Act lies on the person prosecuted for taking or abetting the taking of dowry. Enforcement is also encouraged by the introduction of Dowry Prohibition Officers to ensure compliance with the Act, prevent dowry related offences and collect evidence for prosecutions and the establishment of advisory boards consisting of five social welfare officers, two of whom must be women.

The Amendments of 1984 and 1986 testify to the seriousness with which dowry related violence has come to be viewed in India. This is echoed in the related amendments to the Indian Penal Code 1860, the Criminal Procedure Code 1973 and the Indian Evidence Act 1872 made by the Criminal Law (Amendment) Act 1983 which sets out in its statement of objects and reasons that the increasing number of dowry deaths is a matter of serious concern. Accordingly, the Criminal Law (Amendment) Act inserts two new offences in the 1860 Penal Code. The first, the offence of dowry death, punishable by between seven years and life imprisonment, is defined to occur where a woman, subject to cruelty or harassment by her husband or his relatives in connection with any demand for dowry, dies within seven years of marriage.[11] The second offence, cruelty to a woman by her husband or the relatives of her husband, which is punishable by imprisonment of up to three years and a fine, is defined as any wilful conduct which is of such a nature to be likely to drive the woman to commit suicide or to cause her grave injury to life, limb or her physical or mental health. Cruelty also includes any harassment of the woman where this is intended to coerce her or any of her relatives into parting with any property or valuable security or any harassment which occurs because of her failure or the failure of her relatives to meet such a demand.[12] The prosecution of both offences is facilitated by accompanying amendments which, in the case of the offence of dowry death, presume that if the ingredients of it are made out, the husband or her relatives caused her death[13], a presumption reinforced by a further presumption which assumes that a person who harassed or was cruel to a woman before her death in connection with dowry, caused her death.[14]

Where the offence of cruelty to a woman by her husband or relatives is concerned the complaint must be made by the woman who has been subjected to the cruelty or by a person related to her by blood, marriage, adoption or, where she does not have such a relative, by any public servant belonging to such class or category as may be notified by the state government as having this capacity.[15] It is presumed where the woman has committed suicide within seven years of her marriage that her husband and his relatives subjected her to cruelty and aided and abetted her suicide.[16]

The powers of the police in cases of deaths of women which occur in unusual or suspicious circumstances have also been strengthened. Thus, where a woman commits suicide within seven years of her marriage, dies within that time in suspicious circumstances or where there is doubt as to the cause of her death or where she dies within the seven year period and a relative requests an investigation, the police must arrange for a post-mortem examination.[17] In these circumstances, furthermore, magistrates have the power to order an inquiry into the woman's death in addition to, or instead of, the police investigation.

These comprehensive, substantive and procedural provisions aiming to facilitate the punishment of those involved in dowry related violence exist at the federal level. In addition, several states, such as Himachel Pradesh and Punjab, have introduced provisions, such as those banning displays of presents given at the time of marriage to discourage dowry even further.[18]

Bangladesh, like India, plagued by the problem of dowry related violence, has introduced legislation on the pattern of the 1961 Indian Act which provides substantial penalties for the giving or taking of dowry. Its legislation, the Dowry Prohibition Act No XXV of 1980, came into force on 1 October 1986 and was modified in 1982 and 1986.

c) Other strategies

The enactment of legislation has not been the only strategy used to counter dowry related violence. In India, a number of special police units, usually headed by women officers, have been established, public lawyers have been appointed to assist women in the prosecution of dowry related matters[19] and many women's organisations, such as Manushi, have actively campaigned on the issue.[20] The Government has also instituted a television and cinema advertising campaign which relies on uncomprising commercials to discourage the practice.[21]

d) The strategies assessed

Legislation introduced to outlaw dowry and facilitate the prosecution of those who demand it has not met with outstanding success. In both India and Bangladesh there have been very few prosecutions under the Acts and those that have been pursued have been unsuccessful or have attracted light penalties. Certainly, some blame for this in India must be laid at the door of the defectively drafted 1961 Act and it is expected that prosecutions will be more successful under the amended legislation.[22] Recent cases have shown the judges at the Supreme Court level to be more aware, but judges at lower levels have yet to show similar enlightenment.[23] The provision of special police units to deal with dowry cases - dowry cells - legal aid and special prosecutors has helped, as has the support and campaigning strategies of women's groups, but again, the impact of these measures has been limited.

The major obstacle facing the strategies introduced to deal with dowry and its related evils is that they address the symptoms of the problem, not its causes. Although dowry has proven to be a greater threat to women recently because of consumerism and materialism, fundamentally, the root of the problem lies in the subordinate position of South Asian women, contributed to by the joint family system, the values of a male dominated society and the traditional economic dependence of women upon men. Historically, dowry was the only way a Hindu woman acquired any part of her family's property, as family property could only be inherited by her brothers alone, if she had any. Although the current law does provide that a daughter may inherit even if she has brothers and, indeed, has a right to such inheritance, very few women do inherit, nor do they enforce their rights. Furthermore, the provision of a substantial dowry is seen by many women as the only means by which they can better their social positions and ensure respectful treatment by the families of their husbands.

Ultimately, the success of any measure to combat dowry depends on fundamental change of public attitude. When dowry is no longer perceived as functional, customary or traditional and is viewed as unacceptable, serious eradication will eventuate. This will only occur when women achieve social and economic independence. In the short term, a number of measures may be effective.

Evidence exists which indicates that, in general, the public is ignorant of the fact that dowry is illegal. Moreover, it appears that the public does not have a proper appreciation of the extent and measure of dowry demands and the violence associated with them. This ignorance is particularly problematic where it is shared by the police and the judiciary and it appears that the police are sometimes unwilling to investigate cases of domestic maltreatment or too willing to treat suspicious cases as suicide, particularly where the husband's family is wealthy and influential.

Research and its dissemination are priorities and must be sponsored at the highest levels. Specialised training for the police and the judiciary is essential. Here it is crucial that the illegality of dowry be stressed and the important role of the media as a disseminator appreciated. As the role of the media is critical, it also must be sensitised and educated. Further, while Governments are to be applauded for establishing specialised units or cells to deal with dowry associated violence, they must do more. More policewomen are needed for such work and as the report desk is the first place that a woman will have contact with the police and this may be staffed by a junior male officer, it is important that male officers, too, are sensitised to the problems, particularly those associated with dowry, that women face.

Finally, legal, provisions allowing women protective orders and the right to claim maintenance from their husbands must be simplified, made accessible and published, while, at the same time, it is essential that women at risk have a safe place to go. Thus, a place of refuge which is adequately funded, staffed and which can provide some legal and medical help is a central tool in the protection of women.

Widowhood Rites

In some Commonwealth countries, it is customary for a woman to undergo some form of ordeal or perform a traditional ceremony of purification on the death of her husband. These rites of widowhood differ from group to group. Some involve innocuous practices such as remaining in a room with the body of

the deceased spouse for an extended period of time or the shaving of the widow's hair, but others are oppressive and even violent.

These practices have attracted little attention beyond that of anthropologists. In Ghana, however, the legislature, in an attempt to discourage more unpleasant rites, has specifically addressed them in the Criminal Code. Thus, any person who compels a bereaved spouse to undergo any custom or practice which is cruel, in that it falls into the definition of assault within the Code, or immoral or grossly indecent is guilty of a misdemeanour.[24] In 1965, the Zambian High Court considered the widowhood customs of the lala, known as akamutwe, which involve a purification ritual and payment to the natal family of the deceased husband. The Court, while not commenting directly on the ritual, was unprepared to enforce the payment, concluding that an obligation of payment in such circumstances was repugnant to natural justice, equity and good conscience.[25]

Sati

Historically, in some parts of Northern India, it was customary for a widow to immolate herself upon the funeral pyre of her dead husband.[26] This practice, called sati, resulted in glorification of the immolated woman and came to occupy an important part in Indian mythology.[27]

The practice was outlawed by the British colonial government in 1829, but it persisted, so that since 1947 there have been twenty-two reported cases of sati and it is certain that there have been a larger number that have gone unreported.

Until 1987, only women's groups paid much attention to sati. In that year a young, well educated woman, who had been married for three weeks immolated herself on her husband's pyre in front of a large audience. The voluntariness or otherwise of her actions was matter for debate and the incident provoked national and international controversy. Indian opinion was divided. Women's groups were outraged by the event and pressurised the state and federal governments to act to criminalise sati further and to prevent activities geared to the glorification of the immolated woman. A writ was filed in the state high court which resulted in a ban of the thirteenth day celebration of sati and, indirectly, caused the Chief Minister of State to appear on television to condemn the incident. At the same time, other pressure groups justified sati in the name of religion or custom and demonstrations occurred during which the government and others condemning the practice were accused of interfering in religious freedom which is guaranteed by the Indian Constitution.

Despite significant pressure against interference in the custom, Parliament assented to The Commission of Sati (Prevention) Act 1987 in early January 1988. This Act, which in its preambular section asserts that sati, defined as the burning or burying alive of widows, is revolting to the feelings of human nature and is nowhere prescribed by any of the religions of India as an imperative duty, seeks to introduce more effective measures to prevent the commission of sati and its glorification. Thus penalties are introduced which punish the would be sati or anyone who abets her directly or indirectly, abetment being defined to include offering inducements, making her believe that the commission of sati will result in some spiritual benefit to

her or her deceased husband or the general well-being of her family, encouraging her to remain fixed in her resolve to commit sati, participating in any ceremony connected with sati at the place where the act is to be committed, participating in any procession or taking her as sati to the burial or cremation grounds in the company of her husband's body, preventing her from saving herself and interfering with the police where they seek to prevent sati. Penalties have also been introduced for those who do anything to glorify the practice or any particular sati and powers have been introduced to authorise removal of any place of worship where sati or a particular sati is venerated.[28]

Passage of this legislation indicates that the Indian Central Government views sati seriously and with disapproval, but there remain vociferous groups prepared to defend the custom. These groups frame their objections in terms of tradition, custom and religion, but closer examination of the modern practice of sati reveals that certain advantages accrue to the deceased husband's family if the widow is also dead and that the organisational structure surrounding the worship of sati depends on its continuance to support a lucrative cult. As in the case of dowry, it may well be that modern forces of consumerism are combining with tradition to justify a customary practice which is patently harmful to women.

It would seem that all legal strategies available to the government have been deployed by the government. Legal strategies alone will fail to eradicate the custom. They must be accompanied by fundamental change i social attitude which can be encouraged by education, both formal and informal, at all levels.

The Circumcision of Women

The circumcision of women and young girls, which takes various forms, including excision and infibulation[29], is widely practised in a number of the Commonwealth countries of Africa and South East Asia. Evidence exists, moreover, which indicates that immigrant groups in other Commonwealth countries, such as the United Kingdom, also subscribe to the practice.[30]

Continuation of the custom is justified on various grounds, including religion, but it is clear that the practice is not confined to any religious group.[31] The issue has been the focus of controversy, some commentators arguing that it is a practice that can be understood only within the context of rituals and traditions that play an important role in the lives of women of certain cultural groups[32] and as such a practice which should be maintained, while others advocate the introduction of any measure, no matter how stringent, to discourage the custom.[33]

Although discussion of the issue of female circumcision has been controversial, the health risks to girls and women resulting from the practice are undisputed. They include haemorrhage, septicaemia, keliod scarring, adverse sexual, gynaecological and obstetrical consequences and increased vulnerability to contraction of the acquired immunity deficiency syndrome (AIDS).[34]

A number of strategies have been introduced in Commonwealth countries to discourage female circumcision. Most of these have taken the form of education, information and consciousness raising campaigns, aimed at the transformation of the social, religious and cultural bases of the practice.[35] Although some suggest that ultimate eradication of the practice will be achieved only by legislation which criminalises it, imposing severe penalties on those who perform such operations or arrange for their female children to be circumcised, most commentators in countries where the practice is endemic and rooted in culture and tradition consider that strategies of this nature are, at best, unhelpful, as they fail to confront the traditions justifying the custom and, at worst, counter-productive, as they drive the practice underground.

Nevertheless, some countries, particularly those where female circumcision is not traditional, but rather, the practice of immigrant groups, have introduced specific criminal legislation to prohibit it. In the United Kingdom, for example, it is a criminal offence, punishable by fine or imprisonment or both, to excise the whole or any part of the labia majora or labia minora or clitoris of another person or to aid, abet, counsel or procure another to perform such an act. An offence will not be committed where it is proven that the operation was necessary for the physical or mental health of the person on whom it was performed and where it is carried out by a medical professional. In establishing this defence it is not open to the defendant to allege that the operation was necessary for the mental health of the circumcised woman because of the effect on that person of any belief she, or anyone else, may have, that the operation is required as a matter of custom or ritual.[36]

Like the issue of female circumcision itself, this legislative measure has proven to be the subject of intense debate. Some argue that its introduction was an essential tool to discourage the practice, others suggesting that it was too heavyhanded.[37] Certainly, there have been no prosecutions under its provisions and evidence exists which reveals that young women are still circumcised in the United Kingdom, while substantial numbers of women resident in the country are circumcised outside the country and then return.[38]

The questions of the value and appropriateness of legal strategies to confront customs such as female circumcision, are the same as the questions surrounding the value and appropriateness of legal measures in the management of customs which confront women generally. Certainly, stringent legal measures may have the effect of driving the practice underground or, indeed, encouraging it. Clearly, moreover, legal measures alone cannot eradicate deeply rooted cultural and traditional norms. Legislation may, however, indicate minimum standards to which a country aims and provide protection in extreme cases. Legislation may, further, prove to be an essential tool in education programs which aim to discourage the practice because of its undeniable health consequences. In this context, it is of interest to consider the prosecution of Dalla Fofana Traore, a Malian woman in Paris in 1988. Traore was charged with complicity in the mutilation of a minor, an action which arose out of the excision of her newborn daughter, Assa, in 1984, which left the child with residual disabilities. While Traore received a suspended sentence only, she did state that she did not have her four younger daughters circumcised because had come to learn of the illegality of female circumcision in France.[39] This admission suggests that a combination of legislation and well designed information and education measures may go a long way in the eradication of the practice.

1. L. Akanda and I. Shamin., "Women and Violence: A Comparative Study of Rural and Urban Violence in Bangladesh" in Women's Issue 1, Dhaka, November 1984; J. Huq, "Status of Women in Bangladesh" in Women and the Law, F.R.P Romero, ed. (UP Law Centre, 1983) 12; U. Sharma, "Dowry in North India" in Women and Property-Women as Property, R. Hirshon, ed. (London, Croom Helm, 1984) p. 62.

2. Readers Digest, September 1988, "Dowry: Our National Shame"; Sunday Observer, 13 December 1987

3. S. Kothari, "The Social, Economic and Legal context of Dowry in Modern India", Unpublished Thesis (SOAS, London, 1988) 24-35.

4. See, for example, M. Karkal, "How the Other Half Dies in Bombay" Economic and Political Weekly, August 24, 1985

5. Towards Equality, Report by the Committee on the Status of Women (New Delhi, 1974) p. 115

6. R. Palriwala, "Suicides under Scrutiny", Inside Asia, 15 April 1984, p. 16.

7. India Today, 15 April 1984, p. 16

8. Inder Sain v State 1981 Criminal Law Journal p. 116

9. Joint Parliamentary Committee on the Working of the Dowry Prohibition Act, August 1982, states: "The giver of dowry is more a victim than a criminal. The parents do not give dowry out of their free will but are compelled to do so".

10. Except in West Bengal: Dowry Prohibition (West Bengal Amendment) Act 1975

11. Penal Code 1860, s. 304B

12. Penal Code 1860, s. 498A

13. Penal Code 1860, s. 304B

14. Evidence Act s. 113B

15. Code of Criminal Procedure s. 198A

16. Indian Evidence Act s. 113A

17. Code of Criminal Procedure s. 174

18. N.R.M. Menon, "The Dowry Prohibition Act 1961" in Social Audit of Dowry Legislation, Delhi, 1988, Chapter 3, pp. 19-20.

19. A. Malhotra, "Public Interest Litigation - My Own Perception and Solution" Punjab University Law Review, XXXV, 1983-84, 83 at 89.

20. Manushi, January 1979; Nos 7 and 8 of 1981 and No 3 of 1983

21. C. Bowen-Jones, "Burning Brides", Marie Clarie Magazine, London, December 1988.

22. State (Delhi Administration) v Laxman AIR 1986 (SC) 250

23. S. Kothari, op. cit. p. 76ff.

24. Criminal Code (Ghana) 1960, s. 88A and 278A

25. Kaniki v Jairus [1967] ZR 71

26. M. Anderson, "Law as knowledge, law as control: sati in colonial India, c. 1770-1840" (1988, unpublished)

27. L. Das, "Violence against women: an Indian view" in Report of International Women's Aid Conference (Welsh Women's Aid, Cardiff, Wales, 1988) p. 8

28. Legislation on acts concerned with sati has also been introduced at the state level in Rajasthan.

29. O. Koso-Thomas, The Circumcision of Women: A Strategy for Eradication (Zed Press, London, 1987) p. 15ff.

30. Sunday Observer, London, 5 March, 1989.

31. S. Maclean (ed), Female Circumcision and Infibulation (London, Minority Rights Group, 1980)

32. K. Mansaray, "Female Circumcision, Fertility control, women's roles and patrilineage in modern Siera Leone: a functional analysis", International Journal of Sierra Leone Studies, No 1, 1988, p. 114; A. D. Renteln, 'Relativism and human rights", Human Rights Quarterly, vol 7, 1985, p. 515 at 531 ff.

33. Recommendation to Seventh Session of the Committee on the Elimination of Discrimination Against Women, New York, February-March, 1988. Note, General Recommendation 14 from the Ninth Session of the Committee on Elimination of Discrimination Against Women (1990) recommends that States Parties to the Convention report on measures to eradicate the practice of female circumcision in their periodic reports under the Convention.

34. Effects of the Acquired Immunodeficiency Syndrome (AIDS) on the Advancement of Women, United Nations, Commission on the Status of Women E/CN. 6/1989/6/Add. 1, 17 February 1989, paras 38-41.

35. Female Circumcision: Strategies to Bring About Change, Proceedings of the International Seminar on Female Circumcision, 13-16 June 1988, Mogadisho, Somalia.

36. Prohibition of Female Circumcision Act, 1985.

37. E. Graham, "Female mutilation: unsettled issues" Spare Rib, April 1989, p. 44; A. Whyte, "An act of love, not cruelty" Community Care, 7 September 1989

38. Sunday Observer, London, 5 March, 1989

39. Time Magazine, October 16, 1989, p. 35; Guardian Weekly March 24, 1991.

PART IV: THE MEDIA AND VIOLENCE AGAINST WOMEN

There are three different types of questions to be asked about connections between the media and violence against women.

1. Do the media contribute to the incidence of violence, either directly by stimulating violent attitudes and behaviour, or indirectly by sustaining popular myths and misconceptions? Sections I and II lay out the evidence on these points and relate the problem of violence to the general representation of women in media content.

2. How can we formulate a counter-response to these media messages? What information do we need? What actions can we take? Sections III, IV and V offer some suggestions.

3. How can we use existing media channels to encourage better coverage of violence against women, in terms of context, causes and effects? The basic components of a media strategy are outlined in Section VI.

Finally, Section VII contains a listing of audio-visual resources on this subject.

I. Violence in Media Fiction

Does the fictional portrayal of violence in the media cause aggressive behaviour in people who are exposed to this type of content? For more than fifty years this has been one of the most heavily6 studied topics of communication research. Probably no other question of media content has been such an important political issue.

By the later 1970s the accumulated research evidence suggested that children and adults of all ages, all social class backgrounds, and all personalities can become more aggressive by exposure to large amounts of media violence. The likelihood that people will imitate aggressive behaviour which they see in the media is increased when:

1. The violent person is **rewarded** or not punished.

2. Violence is portrayed as **justified** or glorified.

3. Violence can be related to the **actual problems** of the audience.

4. Violent persons are portrayed as **attractive** individuals, with whom audience members can identify.

5. Presentations of violence highlight the clear **intention** to be malevolent and to injur someone.

6. The presentation seems more **real than** fictional or fantastic.

7. Violence communicates **pleasure** in the act or is calculated to please the audience.

8. Violence goes **uncriticised.**

A recent exhaustive review of laboratory and field research, as well as short-term and long-term correlational studies concludes that 'all four types of study coverage on one conclusion - heavy viewing of televised violence increases the likelihood of acting aggressively towards others... There is no convincing evidence that watching violence has any positive effects, such as reducing subsequent aggression (the catharsis hypothesis).[1]

Over the past decade researchers have devoted an increasing amount of attention to studies of sexual violence in media content: the use of physical force and violent imagery in a sexual context, in music and music video 'clips', horror films and videos, advertising and commercials. The results of this research can be divided into three broad categories:

1. Measurement of **attitudes towards women.** Findings consistently show that exposure to violent sexual content in the media increases men's (but not women's) acceptance of violence against women and strengthens men's belief in rape myths (for example, 'women have an unconscious wish to be raped and may then unconsciously set up a situation in which they are likely to be attacked').

2. Self-reports and observation of **sexual behaviour.** Various Canadian and American studies have revealed a sizeable proportion (between 20% and 30%) of men who admit they might carry out a rape if they could be sure of not being caught. This group also exhibits greater sexual arousal if shown material in which the woman is portrayed as first resisting, and then becoming sexually aroused, in rape.

3. Measurement of **behaviour towards women.** The research shows that an acceptance of violence against women (as well as an acceptance of rape myths and an acknowledgement of some likelihood to rape) is a good predictor of aggression against women; and that men who see aggressive pornography are subsequently more aggressive towards female, but not male, targets.

The conclusion of the most comprehensive review of research evidence so far is that 'the overall pattern of the data ... strongly supports the assertion that the mass media can contribute to a cultural climate that is more accepting of aggression against women'.[2]

Yet the same review goes on to say that hoping for improvement by simply publicising this conclusion in a world in which 'strong economic and structural-institutional factors ... resist such changes' will bring no benefits. Certainly, the media industry almost universally continues to claim that there is no conclusive evidence of serious social harm a result of media portrayals of violence, whether in a sexual context or not. Researchers maintain, with considerable justification, that these critics are demanding the impossible. Short of successful incitement to crime, research in this field has gone as far as society might wish or expect in establishing facts and relationship.

What is actually at issue is, on the one hand, a highly lucrative industry and, on the other, dominant social values. As a parallel, think of the way in which tobacco manufacturers and advertisers have continually rejected as 'inconclusive' the research findings on the hazards of cigarette smoking. What eventually forced governments to introduce certain restrictions on tobacco sales and advertising was not the evidence of research, but the highly organised lobby of consumer and health associations which successfully mobilised public opinion around the issue of exploitation of various images in the sale of a product which damages people's health. Certainly, this lobby made use of the existing research rather than the 'indisputability' of the research findings.

One thing is clear: decisions about media content - whether taken at an institutional or a political level - are based on assumptions about the current state of social and cultural values. In all of our societies, such values incorporate certain definitions of 'manhood' and 'womanhood', of 'masculinity' and 'feminity'. These are replayed to us daily by the media in the overwhelming outpouring of images in which we see ourselves as 'the gentler sex': passive, weak, needing protection, subservient, scatter-brain, dependent, comforting, nurturing, caring, beautiful; mother, wife, sex-object. And in which we see men as forceful, strong, capable, aggressive, demanding, independent, successful; tycoon, hero, playboy. It is these images - more subtly, but just as surely as representations of overt sexual violence - which feed into general definitions of sexuality, reinforcing ideologies of masculinity and feminity, demonstrating that while man is 'naturally' aggressive, woman is the 'natural' target for that aggression.

A great deal of media imagery - based on a view of the world in which women depend on men for economic, social and sexual status - perpetuates the notion of women as property, or commodities, 'available' for sexual and other use. Pornography provides the most extreme example of representations which connect sexuality, the objectification of the female body and the accentuated power of the voyeur. But the messages it contains about female passivity and availability can also be found in 'mainstream' media imagery. And the visual codes it uses - pouting female lips glistening and parted, eyes fixed invitingly on the camera, body displayed and embellished for the pleasure of the onlooker - can be seen on advertisement hoardings in city streets, in newspapers and magazines, on television and in the cinema. The presentation of women to themselves, and to men, in this way produces a situation of immense potential tension and conflict. In media fiction at least, this is often dramatically resolved through the goddess-whore dichotomy: 'good' girls may suffer temporarily, but always get their reward (a man) in the end. In real life, the dramatic resolution is often more violent.

Clearly then, to 'take up' the issue of the media in relation to violence against women means much more than to try to establish a straightforward connection between explicity violent content and the development of aggressive attitudes and behaviour - although, as we have seen, this in itself is difficult enough. The broader task is to understand, and to demonstrate, the values underlying <u>all</u> sexist representations of women - whether in advertisements, sexist cartoons, fashion photography, pornography, romantic fiction, traditional stereotypes in drama and film - which depict women as responsive to men, not as responsible in their own right; which depict men as the initiators, the source of active desire. The challenge is to lay bare these values, to illustrate their role in explaining and defining actual and fictional male-female relationships, and to propose alternative values and media representations which redefine these relationships.

The advantage of this approach is that it moves the debate from the level of social engineering ('the media can/should be doing this/that'), with its overtones of censorship from which the media industry is all too easily able to retreat, to the level of political philosophy ('what kind of culture is being reflected/created by the media? what kind of values are at stake? what kind of society do we want?'). Within this strategy research evidence based on monitoring of media content is certainly necessary. But at least as important is an analysis of the political, economic and cultural factors influencing the present situation, a vision of an alternative future, and an awareness of the most important pressure points within not only media institutions themselves, but the economic and political systems of which they are a part.

II. Media Coverage of Violent Events

In theory, there are important differences between fictional portrayals and news reports of violence. In terms of **intention**, we can assume they are dissimilar. While the news report sets out to provide an accurate description and/or explanation of a violent event, fictional constructions generally have more dramatic aims: for example, to stimulate a particular audience response, or to develop the identity of a character. In terms of **appeal**, therefore, we should also be able to assume that they address different human faculties. If the news report is directed at the intellect, the fictional account is primarily intended to stimulate the senses and the emotions. This is the theory. In practice, however, there appear to be important similarities underlying both forms of presentation.

This is an area in which very little systematic research has been done. However, the criticisms which have been directed at news reports of violence can be grouped under three main headings:

1. Descriptions of the **motivations** of offenders.

   Media reports almost always cite the reasons given by the defending counsel or the judge. Rarely is the victim's or the prosecuting counsel's reasoning reported. This means that motivations which are put forward with the specific intention of getting an acquittal or a more lenient sentence are reported as the motivations, giving these the status of legitimate and reasonable explanations of violence. Thus many reports reproduce a vision of the offender as 'driven' by 'uncontrollable' urges brought about by frustration, an excess of alcohol or drugs, sexual abstinence, the 'unreasonable' or 'provocative' behaviour of the victim. Such accounts perpetuate the belief that violence (whether in rape, battery or some other form) is an isolated, exceptional event with no relationship to other social phenomena or to the general character of male-female relationships.

2. Descriptions of the **characters** of offenders and victims.

   These vary considerably, depending on the type of crime. For example, in cases of multiple rape, gang rape, or where the victim is very young or very old, the offender tends to be described in **moral** terms - as a 'beast', 'monster' or 'fiend'.

Parallel descriptions of victims stress their blamelessness - 'decent', 'helpless', 'mother' - except where the victim is a prostitute, whose 'loose morals' will be said to have put her at risk. When the attack does not easily correspond to the conventional stereotype of sexual violence as 'perversion', descriptions concentrate on the **psychological** make-up of the offender - as 'emotionally inadequate', 'frustrated', 'jealous' or 'under stress'. In these cases there is a tendency to shift the blame onto the victim, by referring to her appearance ('stunning', 'pretty', 'attractive') or her behaviour ('nagging', 'two-timing', 'frigid', 'demanding'). This pattern of descriptions has the effect of defining violence against women as **either** an act of gross deviance or a minor aberration. In both cases the responsibility of the offender is limited: he is either a 'maniac' or a 'normal, healthy male' responding to unbearable provocation.

3. Selection of cases based on **sensationalist** appeal.

Only a tiny proportion of violent attacks against women is given media coverage. Rape crisis centres and shelters for battered women complain that attempts to draw the attention of the media to the cases which they handle often draw the response that these are 'run-of-the-mill' or 'unnewsworthy'. On the other hand, in many of our countries sex is used by the media to attract an audience. This means that reports which are carried often dwell on lurid details, accompanied by titillating photographs or illustrations. A rape crisis centre is described as a 'Sex-Call Hot Line' on which women 'confess' that they have been raped. In some cases there is calculated juxtaposition of rape reports with pictures of provocatively posed pin-ups, as if to imply that women invite and enjoy sexual violence. 'Run-of-the-mill' wife-beating, if covered at all, is downplayed in the journalistic euphemism 'domestic dispute'. Sexual harassment, still a 'novelty issue' for the media, tends to be treated as a joke. 'Newsworthy' violence - usually involving old women, very young girls, gang rape, or rape by strangers - is given eye-catching coverage, often with an air of moral indignation but rarely with any analytical depth. The overall result is two contradictory media definitions of violence. In some cases ('domestic disputes', sexual harassment) it is seen as **normal** behaviour. In others ('newsworthy' accounts) it is portrayed as **abnormal**, something which has nothing to do with 'people like you and me'. Consequently the reality of women's experience of violence - its seriousness and pervasiveness - is glossed over.

Set in the overall context of portrayals of women in media fiction, news reports of violence against women illustrate various conflicts and contradictions. One is the way in which women are encouraged by a great deal of media output to dress and behave in ways which are expected to 'please' men, but are then held responsible when this results in sexual violence. Another is the implication that women will be safe from violence if they withdraw to the traditional shelter of the domestic sphere and the protection of their men, when the fact is that all forms of

violence - including rape - are at least as likely to take place in the home, among family and friends, as outside among strangers. Rather than increasing public awareness of the nature and causes of violence against women, the cumulative effect of media representations in fictional content and news coverage is thus to reinforce prevalent stereotypes, perpetuating these as sources of socialisation and social control over women.

III. Media Depiction of Violence Against Women: Some Guidelines

The following list was developed by the Women's Group of the U.K. Campaign for Press and Broadcasting Freedom[3]. It encapsulates many of the above points in simple terms. You might be able to use the guidelines as the basis for a discussion session with media people. In your discussion, make the point that you are offering these as suggestions, in the interests of good journalistic practice.

Problem 1: "Sex Maniac"

DON'T	focus on 'exceptional' cases of male violence - i.e. the more sensational ones - portraying the men as 'maniacs', 'beasts' or 'perverts' whose sexual urges are uncontrollable
DO	make the connection between violence and sexual abuse and the relative positions of men and women in society
DO	highlight the fact that there is no particular type of man who commits these offences - they are 'ordinary' men from all backgrounds and are most frequently known to the women

Problem 2: Titillation/Sensationalism

DON'T	report violence, including sexual abuse, in a titillating or sensationalist manner
DON'T	place reports of violence next to pin-ups and other items which heighten their titillating value
DON'T	highlight and sensationalise the rape of white women by black men, using it as an excuse for racism
DO	be aware that sensationalising violence puts other women more at risk from those stimulated by this type of presentation
DO	report violence and rape in a factual manner, treating it with due gravity and without revealing the victim's identity in any way

Problem 3: Trivialisation

DON'T	trivialise any kind of violence against women - including sexual harassment
DON'T	make any form of violence against women the subject of a cartoon or any kind of comedy
DO	reflect the fact that violence - no matter how mild it may seem to a male media worker - is extremely distressing for the women concerned
DO	treat campaigns to counteract violence with the seriousness and respect they deserve

Problem 4: "Asking For It"

DON'T	imply that the victim of violence or sexual abuse in any way 'asked for' or deserved the offence
DON'T	include irrelevant descriptions of her clothing or her appearance, which suggest this
DON'T	publish details about the women's sexual present or past, or imply that acts of violence against prostitutes are less shocking than those against 'respectable' women
DON'T	give greater prominence and validity to the man's point of view when reporting a court case, or exonerate his actions on the grounds of the women's 'unreasonable', 'taunting' or 'immoral' behaviour
DO	always reflect the fact that NOTHING excuses male violence or sexual abuse towards women

IV. Common Questions About Violence Against Women in the Media

In any activity or campaign that you organise to highlight the problem of violence against women as presented in the media, you will be faced by scepticism about the seriousness of the issue. It is important that you try to anticipate the kinds of questions that you will be asked, so that you can have convincing answers ready, backed up by as much evidence as you can find. The following questions and answers are very loosely based on a publication[4] by Women Against Violence in Pornography and Media - a US group which has been in operation since 1976. They will not precisely correspond to your own situation and concerns, but they should illustrate in general way the opposition you are likely to meet and set you thinking about the counter-arguments you will need to prepare.

Q: What is your basic objection to media content in which violence against women is shown?

A: An essential ingredient of many media images of women is the 'objectification' of the woman. This is not just rhetoric. It means that women are portrayed as things, not as human beings. Consequently, we can distance ourselves from scenes of women being beaten or raped. Add to this the fact that women are shown actually enjoying this kind of treatment, even begging for it. When men come to think of women in these terms, it leads to a situation in which violence against women seems not just acceptable, but something that women actually expect from men.

Q: What makes you think that people are bothered by these images in the way that you are?

A: If it doesn't bother people to see women being beaten or raped or tortured then something is wrong. This is exactly the point: as we see more and more of these images of women, we accept them as normal. Psychoanalysts have pointed out that as media portrayals of rape become more common, rapists stop seeing themselves as abnormal.

Q: But surely a lot of the images you're talking about are not in common circulation? You have to go to special bookshops and cinemas, or certain parts of town, to see them. Aren't you being puritanical in trying to prevent people having access to this kind of material, if they want to, and if it is properly controlled?

A: You can see extreme examples of the images we are talking about on the sleeves of record-albums for sale in any department store, in fashion photographs in many widely available magazines, in advertisements on television, in the press and on street hoardings. Pornographic magazines and videos are on public display in high street shops. Even if it actually was possible to make sure that the worst of this material was only available in certain controlled settings, this is <u>not</u> the answer. Can you imagine what an outcry there would be if we had shops or cinemas in our towns where you went to find films, videos and magazines showing one section of the community systematically dominating another (for example, whites and blacks, Christians and Muslims)? Then why is it prudish to object to materials which show the relationship between women and men in this way?

Q: But there isn't any proof that this kind of material really affects people, is there?

A: There is plenty of proof. Most people don't realise that there is now a substantial body of research which shows that both children and adults behave more violently after being exposed to violent media content. Don't forget that research on this subject has been going on now for fifty years. Some of the first studies were certainly inconclusive, and many people still refer to these to try to show that there isn't a problem. But recent research has concluded that there is a definite relationship between violent content in the media and violent behaviour. Let me give you just one example. In 1972 a very big study of

television and violence - known as the Surgeon General's Report - was published in the United States. Its conclusion were inconclusive. But an equally big follow-up study - the National Institute of Mental Health Report6 - appeared in 1982. Its conclusion was that 'after 10 more years of research ... a casual link between televised violence and aggressive behaviour now seems obvious'. You can quote other examples, for instance the conclusions of Harold Fisbein's recent review.[2]

Q: **But that's violence in general. Surely there's nothing to show that women are particularly at risk from aggressive behaviour as a result of violence in the media?**

A: This idea - that various forms of violence in the media act as a kind of safety valve - was very influential in the 1950s and 1960s and many studies were carried out to investigate the possibility. In fact, the research did not support the catharsis hypothesis, which has now been discredited and is no longer considered a useful theory of behaviour. It was always a very dubious idea. For instance, do you think that parents who feel an urge to beat their children should be encouraged to look at scenes in which adults are shown taking pleasure in beating and torturing children, and in which some of the children are enjoying this treatment? Do you really think the widespread availability of this kind of material would be a safety valve against child abuse?

Q: **But women choose to take part in these videos and films, to model for the kind of photographs you're criticising. They earn a lot of money from it. How can you say that this is exploitation of women?**

A: First and foremost, we are concerned with the implications of these images for all women, not just the small number of women who are involved in their production. Secondly, many of these women are coerced in various ways into this kind of work. Some are sold by their parents. Others are kidnapped and kept in captivity, where they are broken down by violence and sometimes drugs into 'agreeing' to participate. Thirdly, only a tiny proportion of women in this business ever earns the kind of money which guarantees an adequate living. The majority work sporadically, for a very short period of time, for agents who deduct up to 50% of their earnings. The media are full of glamorous images which encourage women to think that their bodies can - indeed, should - be used to gain male approval and reward. In reality, women's 'reward' for this kind of work includes serious health risks, various kinds of humiliation, as well as subjection to physical abuse and sexual violence on the job.

Q: **But aren't you jeopardising people's freedom of speech in objecting to this kind of material? Doesn't this really amount to censorship?**

A: The widespread circulation of these images is an abuse of the right to freedom of speech. Our society does not tolerate material that condones or promotes violence against children, or old people, or ethnic minorities, or particular religious groups. Why are different criteria used for material which is harmful to women? Our aim is not to limit freedom. On the contrary, we want a society in which people automatically object to any use of language or imagery which degrades women, in the knowledge that this perpetuates a system of inequality in which women can never be free from fear.

V. Taking Action to Improve Media Content

There are various actions you can take to make media people aware that you are disturbed by the way in which the media - either in fictional content or in news reports - represent the issue of violence against women.

1. **Telephone or write to the offending publications, station or channel.**

   If you telephone: do it straight away. Don't harangue the person who answers the phone, but be assertive. Make sure that you complaint is written down, so that it can be passed on to the appropriate programme department.

   If you write: keep the letter brief. Concentrate on the main gist of your complaint rather than giving too many details or going into your entire philosophy on sexism. Try not to use jargon. Be assertive, not abusive.

2. **Complain about offensive advertisement.**

   Write to the publication, the television/radio channel, the manufacturers of the product, and if possible the advertising agency. Say that you intend to organise a boycott of the product. Encourage as many other people as possible to write and say the same thing.

   If your country has a regulatory body to oversee the content of advertisements write to it too, if possible sendig a copy of the advertisement or else giving full details about where you saw it. Encourage others to write too.

3. **Use any existing channels for audience/reader feedback.**

   These may include letters to the editor, radio phone-in programmes, 'access' programmes (where community groups are given facilities to produce a programme), radio or television programmes which include audience feedback.

4. **Consider various kinds of direct action.**

   These could include graffitti on advertisement hoardings; pickets outside shops, cinemas, television/radio stations, offices;

demonstrations and marches; public meetings; sit-ins; petitions; lobbying your local or national government representative; poster or leaflet campaigns. All these methods have been used, with varying success, by women.

5. **Build up groups and networks.**

Put the question of sexual violence and the media on the agenda for discussion in existing women's groups. If necessary form a group to deal specifically with this problem. Organise a series of meetings with invited speakers to talk on various aspects of the issue. Plan a media monitoring project, publish your report and hold a meeting to discuss your results. Send details of your activities to the local and national media. Issue invitations to individual media people to attend and speak at your meetings.

VI. Getting Your Message Across in the Media

Changing the way in which the media represents the issue of violence against women requires activity of different kinds. First, you must analyse and review past and current coverage. Second, you must decide in what ways this is inadequate or inaccurate. Third, you must register your dissatisfaction in some of the ways already described. Fourth, you must introduce media people to new ways of thinking about the issue, so that these can be reflected in media output. To do this successfully, you will need to develop a sustained and systematic media strategy.

1. **Get to Know and Undertstand your Local and National Media.**

To use the media to advantage, you must be familiar with them. Read, watch and listen as much as possible. Build up a file of press clippings. If available, an audio and/or video recorder will be useful: you can tape offensive sections of programmes; you can analyse whole programmes to understand media styles of presentation. Find out who is who in the organisational hierarchy: who makes the decisions about which stories will be covered for a newspaper or magazine, about what a television or radio programme will include? Keep a regularly updated file of data on media organisations and personnel. Start by buying any available media directories. Add to these, or if necessary create your own directory, by watching/listening to credits at the end of television and radio programmes, and by scanning newspaper and magazine by-lines.

2. **Target Your Audience and Your Media.**

Decide who you want to reach with your information, and which would be the most appropriate outlet for it. Remember that different media attract different kinds of audience. Are you most interested in reaching women, men, young people, policy makers? Audience research reports, if you can consult them, will give you information about the 'profiles' of readers, viewers, listeners for various media. But common sense will tell you a lot too. For example, magazines are usually intended for clearly

specified audiences. Day-time viewers and listeners of television and radio tend to be people who are not in paid employment (mainly women, children, the unemployed). Newspaper readers usually include more men than women; busy people (policy makers, legislators) are more likely to skim daily newspapers than to watch a lot of television. Local media - newspapers, or perhaps a radio station - may be more receptive to you than the big national papers and channels.

3. **Establish Good Media Contacts**

Don't wait for the media to contact you: this rarely happens. The onus is on you to make contacts, place stories and initiate media coverage. You will be a much stronger group if you can establish personal contacts with reporters, journalists, presenters and even programme producers. If you have information, or a s'story' which you think deserves media coverage, there is no substitute for being able to pick up the telephone and speaking to someone you already know well. For instance, in the case of news stories it is the newspaper editor and the television/radio news editor or director who finally decides whether a story will be carried, and who will cover it. But if you are promoting a story, you are likely to have more success if your first contact is with an individual reporter or journalist who has some understanding of the issue, and with whom you already have a good relationship. If convinced that your story is newsworthy, this person can try to 'sell' it to the news editor on your behalf. Although overall decisions about television and radio programmes are taken at senior management level, individual producers, directors and even presenters often have considerable autonomy to decide what will be included in a particular programme. If you can talk over your programme idea with a producer or presenter whom you know, your suggestion is more likely to be accepted.

4. **Selling Your Message**

Some of the best ideas for media coverage will occur to you be reading, watching and listening t the media, thinking about what you see and hear in relation to the issue of violence against women, and developing new points - or 'anles' - on stories which are already in the news. Remember that local slant on a national story. For instance:

A rape trial makes the national headlines. Contact the national and local media with facts, figures and information on the work of rape crisis centres in your locality.

A prostitute is found battered and murdered. Use this to bring attention to the problem of battery in general, presenting the media with statistics and background information, and publicising the work of shelters for battered women.

A police raid on the 'red light' district results in arrests. Suggest a feature or programme on the relationship between

pornography, other media images of women, and sexual violence.

Apart from stories in the news, you can capitalise on fictional content in the media:

A popular drama series features an episode in which a woman is battered by her husband. Call the presentation editor of the channel and suggest that the programme could be followed by an announcement giving the telephone number and address of the local women's shelter. Contact a journalist you know and suggest and interview with shelter workers and counsellors. A large circulation women's magazine is running a serial in which the heroine, following a quarrel with her boyfriend, walks home after dark and narrowly escapes rape by a psychopath. Call the editor and suggest a feature on the actual circumstance and incidence of rape.

You are not likely to find yourself short of ideas. Your success in getting them taken up will depend partly on how good your media contacts are, and partly on how convincing you are in your presentation.

5. Putting Your Ideas Across

Good media coverage doesn't just happen. You should be clear about exactly what information you want to convey, the points you want to stress, and the overall impression you want to give. Advance preparation and organisation of your ideas will improve your changes of getting them across to your audience. There are several basic methods you can use.

(a) The Press Release.

This should be short, sharp and to the point.

Short: a press release is an outline of facts and opinions, not an essay.

Sharp: use clear, strong every-day language. Use short sentences - one idea in each. And short paragraphs - one or two sentences only.

To the point: begin with **who, what, where** and **when** in your first short paragraph. In the following paragraphs, explain **why**. Short quotes give life to your message, but should be attributed. Avoid jargon, Cliches, unexplained abbreviations, confusing or misleading statistics.

Type, double-spaced, with wide margins on one side of paper only. Edit material tightly so that, if possible, you keep to one page: never use more than two. At the beginning put the date, and a simple explanatory heading. At the end put the name and telephone number of someone who can be contacted for further information or an interview. Make sure this person has a copy of the press release. It should be in the hands of the relevant

editor or reporter at least 24 hours before any event or activity you are publicising. Keep a copy of the release, together with a record of where and when you sent it. If the story is used, check it for accuracy.

(b) The Television or Radio Interview.

You will have to put your message across very concisely. Fin out in advance how long the interview is going to last. If it is to be a two minute interview, there is no point in preparing 10 minutes' worth of
material. Work out the main points you want to get across in the time available. Imagine what questions you are likely to be asked, and think about how you could use these questions to make your points. Remember that radio and television to make your points. Remember that radio and television are very ephemeral media: be prepared to repeat you main point several times in different ways. Try to watch or listen to tapes of your interviewer at work, and get an idea of her or his interviewing style. Watch and listen to interviews with experienced interview - givers, such as politicians, for ideas on technique. The following guidelines may help:

Send the interviewer some information beforehand, but be prepared for her/him to be badly briefed. If this is the case, be ready to push the interview in the right direction. Rehearse your most important points until they are on the tip of your tongue. Find a friend or colleague who can conduct a mock interview with you.

Try to relax. Wear comfortable clothes and get to the studio in plenty of time.

Don't bring along a script or a large bundle of notes. If you need cues, prepare a card or a small piece of paper with a few key words or figures on it.

Avoid 'yes' or 'no' answers. Build on your replies to make the points you want.

Be prepared for provocative questions, and don't let these make you lose your temper or get flustered. Even if you feel angry, you must stay in control so that you can make your points clearly and calmly.

Speak clearly, concisely and enthusiastically. Use short sentences and every-day language. Avoid abstractions, jargon, technical terms and anything that will make you sound pretentious. Illustrate your points with examples, anecdotes and comparisons.

(c) The Print Interview.

This may be of two types: a brief interview, perhaps by telephone, when a reporter wants a quick quote or material for a short news item: an in-depth interview, usually set up in

advance, to form the basis of an article or a news analysis feature.

Some advice about telephone interviews:

If you can avoid it, do not give off-the-cuff telephone interviews to a reporter who calls you without warning. Ask what aspect of the issue the journalist wants to discuss, in what context your comments will be used, and what the news deadline is. Then try to arrange a time for the reporter to call you back, once you have done your homework and prepared your remarks.

If there is no alternative to an instant interview', do not be pressured into making inaccurate statements. If you cannot answer a question, say so. Offer to find the necessary information and call your interviewer back as soon as possible.

Some advice about in-depth, fact-to-fact interviews:

Guard against being lulled into a friendly tete-a-tete in which you are tempted to divulge confidential information. Resist any encouragement to make personal attacks on individuals or other organisations, even if you do not agree with their ideas or approach. Be careful about how you phrase criticism: try to make it constructive. make sure your interviewer is clear about the status of any 'off-the-record' information you give.

(d) The Press Briefing or Conference.

Groups often think that these are the most efficient means of reaching the media. In fact, a successful briefing or conference takes a great deal of time and energy to organise. You may go to a lot of trouble arranging for speakers, contacting journalists, and sending out press releases, to find that only one or two reporters turn up. The experience can be depressing and defeating. It is probably best to avoid this kind of event unless you have really dramatic news to announce, or an extremely well-known speaker to answer questions. If you decide to go ahead, here are some points to bear in mind:

Arrange for a room which is large enough to hold the number of people you expect (not more than half of those invited), but not so large as to look empty.

Pick a convenient time: earlier in the day is better for most news deadlines.

Send out invitations, press releases a week in advance.

Contact key media contacts the day before, but don't pleased or wheedle.

Usually only one speaker should deliver statements; not more than two.

Being on time, even if attendance is sparse. Stop as soon as questions start to drag, or within 30 minutes.

Follow up. Offer interviews to those who want them. Distribute written announcements and background information to all who attend and to others who expressed interest but did not come.

6. **Develop Good Public Relations**

Just as you should register complaints about the media's inadequacies in presenting the issue of violence against women, you should make sure that praise is given when it is due. If you liked a particular programme, article or report, contact the person responsible. If you know the individual concerned, a quick telephone call can express immediate enthusiasm. A letter is a more permanent record of approval. These will often be pinned on the office noticeboard, and could gain your valuable support for programme suggestions which you might make in the future. Similarly, if you are invited to give an interview or take part in a discussion programmme and you feel happy with the way that your contribution was handled, write a note of thanks to the reporter, producer and/or presenter. You might also suggest to your friends and colleagues that they write letters of appreciation.

And remember: whether it was good or bad, what has already appeared in the media is never the last work. Keep working at it!

VII Audio-Visual Resources on Violence Against Women[5]

This listing of audio-visual resources from Commonwealth countries is divided into two parts. The first contains material about media imagery - in particular pornographic representations of women - which contributes to the general environment in which women experience acts of violence. The second part concentrates on material which is specifically concerned with the issue of violence against women.

1. Media Representations of Women

Soho (U.K., 1980)

16 mm film, 20 min., colour, English
Made by Jan Matthew
Distributor: Cinema of Women
27 Clerkenwell Close
London EC1R OAT
Tel: (01) 251-4978 or 251-4878

This film looks at what is hidden. 44% of the British workforce is female but women are not seen as workers, only as commodities. Shows how images of women are constructed and what effect this has on our lives.

Watching Looking (U.K., 1980)

Film, 20 min., colour, English
Made by Caroline Sheldon
Distributor: Cinema of Women (address above)

The camera watches a porn shop from and the comings and goings of customers. Women's voices talk about the use of pornography as a weapon against women. Aims to cut through women's feelings of powerlessness when confronted by degrading images. No pornographic images are included.

Reclaiming Ourselves: a Feminist Perspective on Pornography (Canada, 1979)

Slideshow, 30 min., colour, English
Made by Women Against Violence Against Women
Distributor: Women in Focus Arts and Media Centre
Suite 204-456, West Broadway
Vancouver, British Columbia V5Y 1R3
Tel: (604) 872-2250
Contact: Gillean Chase or Brenda Ingratta

Looks at the ways pornography and other sexist media portray womens and the resulting messages on the nature of sexuality and power relations between women and men. Examines connections between the objectification of women in sexist advertising and films, and the glorification of rape, mutilation and murder of women for male titillation.

Not a Love Story (Canada)

16 film (also video), 68 min., colour, English
Director : Bonnie Sher Klein
Distributor: National Film Board of Canada
P-43 P O Box 6100
Montreal, Quebec H3C 3H5
Tel: (514) 333-3265

Examines pornography as a woman-hating ideology and not merely an industry that exploits women. It is a documentary, an expose and also a personal journey, following a Canadian strip-teaser through a process of self-examination.

A Respectable Lie (Canada, 1980)

3/4 in.video, 30 min., colour, English
Made and distributed by Women in Focus Arts and Media Centre (address above)

Examines the imagery and messages of pornography and its connections to violence. Opens with a fast montage of common sexist visual and audio images, followed by discussion about effects of pornography on women.

2. Violence Against Women.

Id Katha Mathramena? (India)
(Is This Just a Story?)

16 mm film, 23 min., b/w, Telugu and other Indian dialects
Made by Yugantar
Distributor: Yugantar
4 Jairam Avenue
Shastri Nagar, Madras 600 020

Using a fictional style the film examines the nature of marital violence and the roles women are expected to play to keep the family 'harmonious' at all costs.

Come On (Australia, 1978)

16 mm film, 8 min., b/w, English
Made by Elizabeth McRae and Joanne Horsburgh
Distributor: Sydney Filmmakers Co-operative
179 Harris Street
Pyrmont, New South Wales 2009
Tel: (02) 660-8999
Contact: Jennifer Scott

Tackles the issue of socially sanctioned sexual harassment and assault.

It's Just a Compliment, Luv (Australia, 1981)

Video (VHS & U-Matic), 27 min., colour, English
Made by Amanda King
Distributor: Cinema of Women (U.K.: address above)

Documentary about sexual harassment at work, as experienced by Australian women.

Violence Against Women (Australia, 1980)

16 mm film, 6 min., colour., English
Made by Red Heart Pictures
Distributor: Development Education Centre (DEC)
427 Bloor Street West
Toronto, Ontario M5S 1X7, Canada
Tel: (416) 964-6901

About domestic violence. Questions romantic notions of love and marriage.

Give us a Smile (U.K., 1983)

16 mm film (also video), 13 min., colour, English
Made by Leeds Animation Workshop - A Women's Collective
Distributor: Leeds Animation Workshop
45 Bayswater Row
Leeds 8, West Yorkshire LS8 5LF
Tel: (0532) 484997

Shows the constant harassment with which women live - from 'street humour' and sterotyped media images to physical violence; also harassment of assaulted women by the police and legal system; finally ways in which women fight back.

Marion's Story (U.K., 1976)

Film, 10 min., b/w, English
Made by Nicci Crowther
Distributor: Cinema of Women (address above)

A personal account of one woman's struggle against violence in marriage - rape, incest and battering.

The Issue is Rape (Trinidad & Tobago)

3/4 in. video, 60 min., colour, English
Made by Star Productions Ltd.
Distributor: Star Productions Ltd.
95 Par 3 Lane Fairways
Maraval, Port of Spain

Talk-show series exposing discriminatory laws, and medical and police procedures surrounding the crime of rape.

Tous les Jours ... Tous les Jours (Canada, 1982)
(Day In, Day Out)

3/4 in. video, 57 min., colour, French
Made by Johane Fournier and Nicole Giguere
Distributor: Video Femmes Quebec
10 rue McMahon, Quebec G1R 3S
Tel: (418) 692-3090
Contact: Nicole Bonenfant

Docudrama on sexual harassment, and examples of how to organise against it.

A Common Assault (Canada)

Slideshow, 35 min., colour, English
Made by Peg Campbell
Distributor: IDERA Films
2524 Cypress Street
Vancouver, British Columbia V6J 3N2
Tel: 738-8815

Portrays a situation of wife battering through various stages. Documents effects of sex-role stereotyping on children and adults. Critically examines popular myths about battered women and the men who assault them.

A Sign of Affection (Canada)

Slideshow, 25 min., b/w, English
Made by Peg Campbell
Distributor: IDERA Films (address above)

Surveys attitudes and opinions on wife battering. Examines relationship between alcohol and wife battering.

Sugar and Spice (Canada, 1983)

16 mm film, 20 min., colour, English
Made by Dan Perry
Distributor: Canadian Filmmakers Distribution Centre
299 Queen Street West, Unit 204 A
Toronto, Ontario M5V 1Z9
Tel: (416) 593-1808
Contact: Lori Keating

Uses firsthand accounts of rape victims to examine contributing social factors, prevalent attitudes and misconceptions about the nature of rape.

Centre le Viol: des Alternatives a Developer, des Mentalities a Changer (Canada, 1980)
(Against Rape: Alternatives to Develop, Attitudes of Change)

Video, 30 min., French
Made by Nicole Giguere
Distributor: Video Femmes Quebec (address above)

Documents different actions developed within the women's movement to combat sexual violence against women.

Chaperons Rouges (Canada, 1979)
(Little Red Riding Hoods)

Video, 43 min, b/w, French
Made by Helen Doyle and Helen Borgault
Distributor: Groupe Intervention Video (GIV)
718 Gildford
Montreal, Quebec H2J 1N6
Tel: (514) 5241-3259

Starting form an analysis of the fairy story, the video describes the meaning of rape and other forms of violence - including harassment in the street and at work - for women: fear, humiliation and frustration. Awarded second prize for short films at the 1981 International Women's Film Festival in Sceaux, France.

Can you Hear Us? (Malaysia, 1984)

Video (VHS), 60 min., English, Malay, Chinese, Hindi
Made by Asian Cultural Forum on Development
Distributor: Asian Cultural Forum on Development
P O Box 2930
Bangkok 10501, Thailand

Three Malaysian womenspeak about their daily struggles: in the family, the violence they suffer, and their work. Accompanied by an illustrated booklet including script, dialogues, questions for discussion and action, background information.

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1. See 'Socialization and Television' by Harold Fisbeing, pp.299-318 in Media, Knowledge and Power, edited by Oliver Boyd-Barrett and Peter Braham, London, Croom Helm, 1987.

2. See Pornography and Sexual Aggression by Neil M Malamuth and Edward M Donnerstein, New York, Academic Press, 1984.

3. See Women in Focus: Guidelines for Eliminating Media Sexism, by Julienne Dickey and CPBF Women's Group, London, CPBF, 1985.

4. See pp. 9-15 in Take Back the Night: Women on Pornography, edited by Laura Lederer, New York, Bantam Books, 1980.

5. Extracted from Powerful Images: A Women's Guide to Audiovisual Resources, Rome, ISIS International, 1986.

GLOSSARY OF LEGAL TERMS

accused: the person charged with the offence, the defendant.

acquittal: the deliverance and release of the accused by a finding of not guilty.

affidavit: a written statement to be used as evidence. The maker of the statement swears or affirms its truth before a commissioner of oaths, a solicitor, or a court official, who then witnesses the person's signature.

ancillary: action incidental to some pre-existing cause of action. The pre-existing action is called 'principal relief'.

bail: release from prison or prison custody, pending trial. Bail is sometimes given on certain conditions. Failure to appear for trial after bail is a criminal offence.

barrister: the person who receives instructions from the solicitor and appears in court on behalf of the client to put the client's case.

burden of proof : the obligation of proving the case. The burden in civil cases is on 'the balance of probabilities', while in criminal cases, the burden is 'beyond all reasonable doubt'.

civil law: the law administered by the non-criminal courts whereby individual grievances between citizens are settled.

civil wrong: wrongdoing by one individual against another, in which an individual can gain compensation in the civil courts.

competent witness: a person who is legally able to give evidence in a trial.

compellable witness: a person who is legally compelled to give evidence in a trial. A wife may be a competent witness, in the sense that she is legally able to give evidence, but she may not be compellable.

compensation schemes: a scheme providing monetary compensation for a criminal wrong.

complainant: the person who complains of a criminal wrong, used here to describe the woman who reports a sexual crime to the police.

common law: the law made by virtue of the decisions of the courts.

conciliation: a method of dispute resolution by means of discussion and settlement without resort to the courts.

contempt: acting in disregard of a court order. Contempt is a criminal offence.

corroboration: confirmation of a statement by evidence as corroborative evidence.

counsel: a barrister who may be prosecution or defence counsel.

crime: an unlawful act or default which is an offence against the public and which makes the person guilty of the act liable to legal punishment.

cross-examination: the practice of questioning and cross-questioning by both sides of the court.

custody order: an order which allows a parent to have the right to guardianship of his or her child.

defence: the defendant's case or the legal personnel who act for the defendant.

defendant: a person who is sued or prosecuted or who has court proceedings brought against him or her.

decriminalisation: the rendering of an act as non-criminal, a civil wrong rather than a criminal offence.

delict: the term for a civil wrong or tort in Roman Law.

discretionary, discretion: a decision left to the judge

estate: an interest in land.

estate holder: one with an interest in land.

evidence: events and statements produced to substantiate a legal action.

evidentiary requirements: the body of rules which governs the introduction of evidence in court.

equitable interest: an interest in land recognised by virtue of fairness.

ex parte: an application to the court by one party to the proceedings without the other party being present.

exclusion order: an order requiring someone to vacate a house; also called an ouster order.

general law: that body of law, as opposed to customary law, modelled on the English legal system.

in camera: evidence which is not heard in open court.

injunction: a court order requiring someone to do or refrain from doing something.

inter se: between them.

interdict: the Scottish term for injunction.

interest, joint interest: a right to land or property.

interim: in the meantime. An interim order in an action is made prior to the full hearing of the case, when a final order will be made. The hearing for an interim order will be an **interlocutory proceeding.**

judicial separation: similar to divorce in that it makes both husband and wife single persons again for all legal purposes. Unlike a divorce, it does not allow either party to remarry. It is also called **legal separation.**

legal right: right recognised at law; often distinguished from an **equitable right** (see above).

legal separation: see above, **judicial separation.**

legislation: that body of law made by the parliamentary process, also called **statute.**

magistrate: the judge in the lower or magistrates' courts.

maintenance order: order against a person requiring him or her to pay a sum suitable to maintain another; usually awarded against one spouse for the benefit of the other and the children.

mandatory: no element of choice or discretion; to be contrasted with discretionary.

mens rea: the criminal intention to commit a crime: the **mens rea** and the **actus reus** (or criminal act) together make the crime.

non-molestation order: an order to compel someone to stop harassing or molesting another.

obiter dictum: a statement of opinion by a judge which is not relevant to the case being tried; a statement which is not of the same authority as if it had been relevant (to be distinguished form **ratio decidendi**).

originating summons: a legal document commencing proceedings in a court.

ouster order: see **exclusion order.**

petitioner: the person who presents a petition or case to court; the plaintiff.

personal property: all property except land.

plaintiff: the person who sues, brings the civil action.

plenishings: improvements to property.

perjury: a false statement made under oath during a trial. Perjury is a crime.

prima facie: as it first appears.

principal claim: the main claim in a court action; to be contrasted with **ancillary relief.**

private: a criminal process brought by a private citizen.

procurator fiscal: a Scottish professional prosecutor.

prosecution: the side in a court case whose function it is to prove the guilt of the accused to the satisfaction of the jury

public defender: the individual employed by the state to act as defence counsel.

quasi-criminal: an action midway between the criminal and civil law.

rape trauma syndrome: a term used to describe the response of a victim of sexual assault which appears unusual. Typically, the victim of the syndrome behaves coolly and dispassionately after the attack rather than in a stereotypical fashion. See, further, Rowland, J., Rape: The Ultimate Violation, Pluto PRess, 1983.

ratio decidendi: the reason for the judicial decision.

separate representation: representation of a witness or a person interested in a trial by someone other than the defence or prosecution counsel.

statute: see **legislation**

summary court: magistrates' or lower court.

summons: document issued by the court to the accused in a criminal action.

testimony: spoken evidence given under oath.

tort: a civil wrong, other than a breach of contract, which gives rise to the right to bring an action in the civil courts.

vicarious liability: liability which is imposed because one person is responsible for the actions of another. For example, an employer is vicariously liable for the actions of his employees.

warrant: document issued by a magistrate or other legal official, allowing the police to take certain actions.

writ: a document issued to commence a legal proceedings.

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