Tough Love

A Critique of the Domestic Violence, Crime & Victims Bill 2003

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policy exchange

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Abbreviations

FLA = Family Law Act 1996
PHA = Protection from Harassment Act 1997

Executive Summary

- Domestic violence is a serious problem in Britain but there is little consensus on its scale. Furthermore, there is no agreed definition of domestic violence, meaning there is a danger that the proposed legislation will not be applied consistently.
- The Bill will remove the flexibility of the current system to deal with the full range of domestic violence cases. Its measures include: criminalising breaches of non-molestation injunctions, and limiting the power of the judge to accept 'undertakings' from one or both parties.
- The Bill aims to encourage courts to take a tougher approach to defendants. In doing so, however, it limits the course of action available to the complainant and may in fact discourage victims from pursuing their case in court. The Bill reflects the worst aspects of a 'nanny state' that believes it knows what is best for the individual.
- The Bill raises hopes that victim support mechanisms will be greatly improved, but does not clarify exactly what the nature of this support will be, nor how the new system will work.

- The Bill entails significant additional spending on the police, the Courts and the prisons. The annual estimated cost put forward by the Government is £40.8m, plus an additional £84m for funding victim support initiatives. This may well be an under-estimate.
- Much of the Bill is concerned with addressing legal 'loopholes'. The proposed measures pose significant threats to civil liberties, including:
    - Making common assault arrestable (which can also be used by police to control public disorder and demonstrations).
    - Limitations to 'the right to silence' in cases involving the death of a child or vulnerable adult.
    - The possibility of a judge, sitting without a jury, deciding the guilt of the defendant on additional counts, after the jury has convicted on certain 'sample counts' – the thin edge of the wedge in the. abolition of jury trial.
- The author proposes the following alternatives:
    - An integrated court for civil and criminal hearings. This offers significant cost savings and advantages to the complainant.
    - A general strengthening of the civil court's powers, expanding the range of sentences it can impose such as curfews, attendance at perpetrator re-education programmes and drug treatment orders.
    - Special measures for vulnerable and intimidated witnesses in domestic violence cases.
    - Wider education to address attitudes towards domestic violence
    - A workable legal definition of domestic violence.

1. Introduction

The launch of the Domestic Violence, Crime & Victims Bill in December 2003, has raised expectations that genuine progress is going to be made in reducing domestic violence and providing more support for other victims of crime. The Government[1] has announced that the Bill reflects: "the fact that domestic violence is unacceptable, that victims must be protected and offenders punished."

This pamphlet looks at the scope of the problem of domestic violence; the current legal system; the Government's proposed changes; and, finally, evaluates the changes. This evaluation includes an assessment of the difficulties the Bill's provisions are likely to generate, and proposes alternative legislative action.

At the time of writing, the Bill is still passing through Parliament and numerous amendments and additions are being proposed. The text takes matters up to the conclusion of the third day of the Report Stage in the House of Lords on the 15th March 2004.

In looking at the Government's proposals in the Bill, it is

important to appreciate that there are many interwoven strands which require unravelling.

First, the Bill proposes some limited measures to tackle certain aspects of domestic violence. These seem to follow simplistic assumptions that only one party in a relationship will be at fault in domestic incident and that there are always readily identifiable victims and perpetrators. (That may be true at one end of the spectrum, where one party is obviously violent because of drink or drugs. But it is far less easy to attribute fault where both parties are arguing and fighting one another.) The proposed measures would criminalise breaches of civil injunctions and make arrest more likely[2]; would make common assault arrestable[3;] and would make restraining orders, prohibiting harassment, available in all criminal cases even after acquittals[4]. These changes will require much higher levels of funding for the police, the Courts, the prisons and the whole criminal justice system.

On a more political level, will these measures achieve real results and be tough on domestic violence? It is doubtful whether the criminal and civil justice systems alone can deal with the complex social problems of domestic violence. It is also unlikely that the underlying problems in human relationships can be solved by increasing levels of punishment. While it is hoped that individual difficult cases will be helped, the number of occasions where more arrests and longer sentences will really make a difference is likely to be small. The Bill makes no provision for social re-education to tackle underlying assumptions about domestic violence. The Government seems to wish to be seen to be applying the principles of zero tolerance to all forms of domestic violence, when that is not likely to be achievable or proportionate in every case.

Significant civil liberties changes are included in these domestic violence proposals, which will require careful analysis:

- Making common assault arrestable is being introduced without fanfare as a new tool for the police to control public disorder and demonstrations, as well as making arrest more likely in domestic violence incidents.
- It will be possible for a person to be sent to prison for breach of a non-molestation even if they do not know the general terms of what the original non-molestation order prohibited them from doing.
- Even if a person has been acquitted of a criminal offence, it will be possible for a restraining order to be made against them to prevent private harassment. But there is going to be no parallel provision for restraining orders to be made against unsuccessful complainants, who may well need to be restrained from harassment after an acquittal.

The second strand of thought in the Bill is driven by the relatively recent concern – victim centred justice – and aims to provide a legal framework for the support of victims and witnesses to replace the current ad hoc system. A huge array of 'new' ideas are being proposed: a Victims' Code, a Commissioner for Victims and Witnesses (presumably to be known as 'ComVict', Adult Domestic Homicide Reviews, a Victims' Advisory Panel, and Grants. An enormously wide definition of 'victim' is used. It may not be wholly wise for the Government to raise expectations of effective intervention in this sphere, when the costs are likely to be prohibitive. At the same time, the proposed measures appear to lack real teeth to tackle

failures by Government departments or other agencies to provide services reasonably expected by victims and witnesses.

The third strand in the Bill involves a number of specific criminal measures, loosely lumped into the Bill (as a passing Parliamentary bandwagon) and intended to close a number of loopholes in the current criminal law. Some of these appear to be reasonably uncontroversial, dealing with inadequacies already identified in last year's Criminal Justice Act 2003[5] and are outside the scope of this pamphlet[6]. There are two criminal measures, though, which are highly controversial and have profound civil liberties and juridical implications[7].

One is an attempt[8] to deal with the problems of not being able to identify the killer of a child, or vulnerable adult, when one or more persons in the same household are implicated, and all refuse to identify the person actually responsible. The proposed measures do not follow the recommendations of a recent Law Commission report and introduce significant attacks on the defendant's right to remain silent and on the requirement that it is for the prosecution in any criminal case to prove the charge beyond reasonable doubt.

The other is an attempt[9] to deal with those criminal cases in which the defendant is alleged to have committed so many separate offences of a similar kind that it is not convenient for all to be considered by the jury in a single trial. The proposal is that if the jury convicted on the sample counts, then the judge alone could decide guilt on the remaining counts. The measures, similarly, do not follow recent Law Commission recommendations and are widely regarded as an attack on the concept of jury trial in all serious cases.

2. Historical Background and the scale of the problem

To understand the motivation for this Bill in relation to domestic violence and victims, it is important to examine the historical attitudes in this country towards victims of domestic crime and violence and the scale of the problem.

The history of providing support for victims: a largely private endeavour

It has historically been the case that the criminal justice system of England & Wales is more oriented towards meting out retribution to criminals and satisfying society's needs, than responding to the needs of the individual victim. Even now, the Audit Commission reports[10] that as many as a third of victims do not report criminal incidents because they do not feel the police will take action or that their intervention will be effective.

Where a criminal offence has been committed, whether in the context of domestic violence or otherwise, the criminal justice system works properly only if victims and witnesses of crime feel they can report crimes to the police and give evidence at court without fear or recrimination. For most, this is their first experience of the law and it can be bewildering. For some, the process of giving evidence can be frightening and deeply traumatic. Audit Commission research suggested that 40% of witnesses hoped not to repeat the experience. All reasonable efforts need to be made to reduce such stresses.

Concerns about the lack of assistance for victims and witnesses, both in cases of domestic violence and more generally in criminal cases, began to be properly articulated in the 1950s; mostly through voluntary or charitable effort, rather than government action. Pressure from individuals led to the introduction, for example, of the first Criminal Injuries Compensation Scheme in 1964. That made sure that those who had been injured because of crime[11] could receive financial compensation, even if the criminal was untraced or had no assets from which to pay damages. Later, in the early 1970s, victim support projects began to be established in courts around the country by voluntary groups to offer advice and assistance to witnesses of all types: a service that was otherwise lacking. These now operate in every criminal court to support both victims and witnesses and are run by a charitable organisation, 'Victim Support'. Although this is now funded substantially by the Home Office in respect of administration and training, 'Victim Support' could not staff its witness support schemes without 14,000 unpaid local volunteers.

Over the last few decades, there has been a proliferation of ad hoc schemes and special interest groups, to help those who are classified

as victims or who see themselves as being victims. Whilst some are limited to specific crimes, such as 'SAMM' (Support After Murder & Manslaughter), other groups have grown to concentrate on the specific issues surrounding domestic violence. Of these, some groups have attained national status, such as 'Women's Aid'; while others remain locally based: 'Southall Black Sisters', in West London; the 'Domestic Violence & Intervention Project' in Hammersmith & Fulham, London; and the 'Zero Tolerance Trust' in Scotland. Very recently, there has also been a growth in groups supporting men suffering from domestic violence: the 'ManKind Initiative' and 'UK Men & Father's Rights'. All depend crucially on voluntary support.

The literature produced by these groups is predominantly measured and well-argued, if blinkered by the group's own beliefs. But unfortunately some of the literature, particularly that available through the Internet, shows a great deal of demonisation of the opposite sex, with hysterical reiteration of individual instances of injustice. Against such a background, it is not surprising that policy-making has, in the past, concentrated on dealing with the results rather than the causes of domestic violence, in response to the noisiest of the outcries.

In the past few decades, successive governments have applauded voluntary schemes (providing victim support or refuges, for example), provided targeted funding and listened to recommendations. For the most part, though, schemes developed organically in response to perceived need. Most of the groundwork was put in by the voluntary organisations and often by those who care passionately about one particular aspect of the problem, perhaps from personal or family experience. This process continued haphazardly for many years. Some groups had to educate the public as they went

along: 'NASH' (the National Association for the Support of Victims of Stalking and Harassment) began seeking an anti-stalking law in 1994 and found the public believed they were involved in animal rights activism[12].

The Domestic Violence & Matrimonial Proceedings Act 1976 was an early statutory intervention in the domestic sphere. Calls for further Government action became insistent, though, and after long gestation and consultation, the first *Victim's Charter* was published in 1990, under John Major. It was revised in 1996, coinciding with the passing of the Family Law Act 1996. The Charters set out aspirations and guidance and were well received by the voluntary groups. But overall Government involvement has been patchy. Some local authorities have set up projects, only to see funding cut and the schemes wither[13]. Other projects have fallen victim to turf wars. 'Domestic Violence Matters' was a project set up in London, with civilians following up incidents reported to the police to support the complainants. However, it appears to have foundered on inter-agency disputes about the role of the civilians in policing domestic violence. In other places local government has taken a lead in co-ordinating the existing voluntary action, rather than running schemes themselves: in Coventry, some 22 voluntary organisations have been grouped together in a strategic partnership called the 'Domestic Violence Focus Group'.

There is much debate about the role which central Government should play in providing a framework that would apply across the country. Some regard it as better to allow individual organisations to develop in response to local factors. Others, particularly the national organisations like Women's Aid, regard the absence of consistent standards and availability across the country as meaning that some

communities are missing out. Both viewpoints are valid, but difficult to reconcile.

Research that has been sponsored by Government and carried out in the Home Office, the Lord Chancellor's Department and, more recently the Women & Equality Unit, has provoked discussion about whether or not it is wise to establish national standards. A series of research papers[14] were commissioned between 1999 and 2000 by the Home Office and these assessed the effect of the existing criminal and civil jurisdictions, as well as commenting on a range of treatment programmes and other types of intervention. They highlighted the fact that a very wide range of responses is needed for all the different aspects of domestic violence. The White Paper "*Justice for All*" followed in July 2002. "*Safety and Justice*" was published in June 2003, and considered issues of supporting victims in addition to general themes of domestic violence. The current bill has resulted following fairly widespread consultation.

Assessing the scale of the current problem of domestic violence

Many agencies and voluntary organisations concerned with domestic violence have asserted that it is a huge problem and that Government needs to do a great deal more to tackle it. Is it possible to provide a clear assessment of the scale of the problem of domestic violence in this country (in England & Wales, where this law will apply)? Greater involvement will, of course, lead to greater costs. Can that be justified by savings in policing costs, social services costs, housing costs and the health service? What public money would need to be spent in order to achieve those greater savings?

Unfortunately, only limited answers can be given to those questions. There is an enormously wide range of 'statistical' material about domestic violence employed by academics and special interest group commentators. Much of it appears to be so all-encompassing that almost any proposition seems capable of being 'proved'. This does not come as a surprise. It is difficult to apply consistent measurements across the full gamut of human behaviour. At the most serious extreme it involves murder and, at the least serious, just angry words, soon forgotten.

The curious thing which emerges from an extensive examination of this 'evidence', presented by various authors and groups in papers and on websites, is that there is really no agreed or statistically significant assessment of the scale of the problem or of the way in which costs should be calculated. Some cautionary points need to be kept in mind in looking at this 'evidence'.

First caution: The absence of an agreed definition of 'domestic violence'

Part of the difficulty is that there is no single agreed definition of what precisely constitutes 'domestic violence'. At the most serious end it is easily defined and recognised, so it is probably not surprising that Government commentators have almost universally taken to introducing the current debate by referring to the (fortunately) comparatively small number of domestic murders which take place. About 120 women and 30 men are murdered by their partners each year in a variety of different contexts. That number of murders is about a quarter of the total number occurring each year. Since most people would agree with a zero tolerance approach to

murder, the political argument extrapolates from that consensus to suggest there ought to be zero tolerance of all aspects of domestic violence. That is a desirable long-term goal, but it is unhelpful to the general debate because it suggests that the dividing lines in behaviour are clear at all levels of seriousness. It is like the parallel argument that because a very small number of parents have killed their children and themselves during contact visits, all contact visits with all children must be scrupulously policed so as to make it completely risk free. The range of human behaviour is much more complex.

That is not to say that individual organisations have not each adopted their own individual definitions, which then inform their own brand of thinking. The problem is that those definitions differ so widely. Even at the level where decisions are taken, amongst the judiciary and government, there is no consistency. The Judicial Studies Board, for example, which provides continuous training for judges, defines domestic abuse in a wide fashion as being:

> "…essentially a pattern of behaviour, which is characterised by the exercise of control and the misuse of power by one person over another person, often within the context of an intimate relationship, and affects the lives of children. It can be manifested in a variety of ways, including but not restricted to, physical, sexual, psychological, emotional and financial abuse, and the imposition of social isolation…"

The 10 Downing Street 'Fact sheet' on Domestic Violence fails to include the word 'violence' and defines the problem much more widely as:

> "Any form of physical, sexual or emotional abuse which takes place within the context of a close relationship"

By contrast, the Home Office definition is more limited in scope:

> "Any violence between current and former partners in an intimate relationship, wherever or whenever the violence occurs. The violence may include physical, sexual, emotional and financial abuse."

Many organisations, such as the Equal Opportunities Commission, have commented unfavourably on the omission of a formal definition from the Bill. The House of Lords[15] debated the addition of a particularly ponderous definition to the Bill, based on a model from New Zealand. They discovered how tricky it was to come up with a definition which covered the whole range of human behaviour which can be identified as domestic abuse or violence. They have returned to the issue at Report Stage, again without conclusion.[16]

It is suggested by Government that to define the problem of domestic violence in a statute would be too prescriptive. It is immediately easy to come up with examples of general human unpleasantness, which most people would regard as domestic violence or abuse, but which do not obviously fit into those definitions. For example: an elderly person being abused in their home by a relation supposedly caring for them; or a young woman[17] forced into marriage against her will by parental pressure and coercion from other members of her community.

While it may be difficult to formulate a definition, the continued absence of a formal definition is going to leave individual

Government departments and other organisations each operating on subtly different wordings. The prospect of a coherent strategy being introduced is thereby reduced. It would be better to have a single and established definition, even if some groups fell outside it or the problem changed with changes in society.

Second caution: The risk of a partisan bias in commentary

The assessment of the scale of the problem is also hampered by partisan bias amongst those who investigate and write about domestic violence. Perhaps that is because they are too closely involved with individual cases, where they perceive flagrant injustice. This does make rational debate difficult.

Such partisan bias can skew Government perception if particularly vocal interest groups only see one narrow tranche of domestic violence complainants and assume that what will suit those complainants should necessarily have wider application. At a time when individual rights seem to be subordinated to collective rights, it is difficult to achieve recognition unless you are part of a group, and each group expresses its views pungently to prove that it is taking the interests of its members seriously. It frequently appears that in order to be noticed the group feels it has to express extreme views, whereas those that are moderately content with current arrangements seldom feel the need to make so much noise.

The desire to influence debate by adopting extreme positions can be self-defeating. Views which may well contain elements of validity can be expressed in such an extreme way that they are bound not to be taken seriously. Consider a recent example (in which the truth of

the propositions is unknown) where the pressure group's views seem incredible in context. *The Times*[18] reported that a woman had murdered her husband in a hotel room, where she had stabbed him with a cheese knife she had taken with her. She had then spent the afternoon with her lover, who she had later tried to blame for the attack. The Judge gave one picture of her as a 'calculating and devious' woman who had 'no regard or remorse', and he said she was a 'cold-hearted and ruthless killer'. Yet an organisation called 'Justice for Women' was also reported, in the same article, to have put out a statement on her behalf saying she was:

> "…not a murderer, but a woman who having survived years of child sexual abuse, domestic violence and marital rape, acted out of fear and desperation when her husband… threatened to tie her up and rape her again…"

Even organisations like Women's Aid are not immune from making absurd generalisations. Marriage and relationship counselling, of the respected type provided by Relate, may assist where relationships have faltered, to rebuild families. Yet Women's Aid has sweepingly stated that "couple based interventions in situations of domestic violence are ineffective, victim-blaming, dangerous, and potentially fatal"[19]. Such views do not assist rational debate.

Third caution: Relying on self-selected subjective evidence

Assessment of the scale of the problem is also sadly affected by poor statistical sampling techniques, which lack validity. Close analysis of

much of the 'evidence' reveals an unscientific reliance on subjective questioning of small numbers of self-selected victims. Generally the research has been conducted amongst groups of women only. Although lacking any intellectual rigour, such studies are claimed to provide proof positive for a particular contention. If the investigation is slanted, the results cannot avoid being skewed. Even the British Crime Surveys are not immune. A widely quoted paper[20] was based on such a self-completed questionnaire.

A clear example of the use of unsound statistics to provide spurious proof of a specific proposition occurred recently in the debate on the Bill by Baroness Gould[21]:

> "…. the evidence shows that about 26 per cent of children who were not properly supervised at contact centres were either abducted or involved in an abduction attempt…."

This alarming claim was demonstrated, a little later in her speech, to be based on the slimmest of 'evidence':

> "…In 1999, a survey of *130 abused parents* found that 76 per cent of the 148 children who were ordered by the courts to have contact with their estranged parents were said to have been abused in the following ways as a result of contact visits. Ten per cent were sexually abused during contact; 15 per cent were physically assaulted; … 36 per cent were neglected during contact; and 62 per cent suffered emotional harm…." [italics added].

Such a small sample of potentially biased individuals cannot give statistical validity to the results. The danger demonstrated by that

example is that where high emotion is concerned, and a paucity of genuinely statistically significant research exists, those types of 'facts' are frequently clutched at by commentators, one after another, until the 'facts' develop, within the literature, a spurious authenticity due to repetition alone.[22]

Fourth caution: The different possible bases for calculating costs

Without a comprehensive definition of domestic violence, assessing the actual scale of the problem, calculating the 'cost of domestic violence' is extraordinarily difficult. This is partly because commentators cannot agree how far down the scale of human behaviour the concept of zero tolerance should be applied. Should, at some lower specific point on the scale of seriousness, the State cease to interfere at all with some categories of bad behaviour? Obviously so, but drawing the line is not easy.

In addition, it is hard to decide which cost categories should be included. The costs of the health service treating injuries can be roughly estimated. The costs of extra housing provision and refuge places can be guessed. Should there be a trade-off between the differential costs of intervening in domestic violence and the costs of not intervening? Policing costs and court costs, for example, will occur in either event and can be roughly estimated. Other costs, such as social services costs, may be more difficult to separate out, where there is so much overlap with the other problems of poverty. Beyond those sorts of calculations, there are the much less tangible costs: the lost earnings of both perpetrators and victims, the notional value of child care and household running costs. How do you balance out

intangible benefits for the individual against expenses sustained by the State? Without general agreement on what is to be included in a calculation, it becomes impossible to compare the various studies which have attempted the exercise.

One approach has been simply to estimate what proportion of public service efforts are taken up in dealing with problems arising from domestic violence. Self-reported data on 'The Day to Count'[23] allowed Stanko (2000) to assert that the police were involved in 12% of the incidents; social services and housing departments were contacted in 3% of the incidents; and nurses or doctors in 10% of the incidents. Estimates of the cost of such intervention were then made and extrapolated across the population. That was based on a large sample, but its validity must be questioned since the sample was self-selecting.

On top of the existing possible categories of cost, there will be other substantial costs in dealing with domestic violence if the Bill becomes law and is implemented. At the very least, there will be the expense of training counsellors and police officers, and of running programmes of treatment and therapy for victims and perpetrators. There will be higher accommodation costs in providing separate accommodation, whether in prison or elsewhere. The various Victim support programmes, through the grants and the ComVict will also be costly.

A practical suggestion about how to define domestic violence

The problems of calculating the extent of domestic violence and its cost, may be better assessed by recognising formally that there are different degrees of domestic violence, which require different levels of public intervention. That approach does not lend itself to glib or

simple sound bites, but is much more likely to achieve lasting results in terms of public policy. A 'one solution fits the entire problem' approach is likely to be insufficiently severe on the worst cases and unnecessarily prescriptive on the least serious. A belief that a 5-year sentence will apply to all levels of domestic violence is bound to create false expectations and subsequent disappointment.

There are already a number of useful dividing lines which could be used to separate out different levels of seriousness:

- Domestic violence involving actual violence as opposed to domestic abuse without physical harm.
- Domestic violence where both parties contribute to the strife to some extent; as opposed to domestic violence which is wholly one sided.
- Domestic violence which is triggered when a person is drunk or influenced by drugs.
- Domestic violence fuelled by the immediate breakdown of a relationship.
- Domestic violence as a long term personality trait of an individual.

By separating these different areas, it is possible to see that different responses can be applied. Greater refinement would make it much clearer to everyone which punishment was going to fit which crime and what other approaches might be more productive still.

Some tentative statistics

Expressing so much caution about the difficulties of assessing the scale of domestic violence might lead to the conclusion that it is

impossible to rely on any of the existing statistics. Despite that, society increasingly accepts that domestic violence is a real and entrenched problem. For all the reasons set out above, it is difficult to be confident about the authoritative use of statistics which appear to have been derived without rigour and which, because of their methods of extrapolation and the vagueness of their definitions of domestic violence, rapidly descend into speculative numbers which appear meaningless.

Almost every current study or politician's speech on domestic violence announces that one in four women will experience domestic violence at some stage during their lifetime[24]. It is assumed that these bald figures accurately assess the current scope of the problem, but in fact they are practically meaningless. One in four women have experienced domestic violence at varying degrees *at least once* in their life. Also, few of the same studies and speeches mention the parallel figure for men, which is that one in six men will similarly experience domestic violence at some stage during their lifetime[25]. That is because there is a strong general bias in the studies against men. It remains true that the preponderance of reported domestic abuse is still by male partners against female partners, but there is both hard and anecdotal evidence (especially from those who deal with cases at Court) that there is a substantial amount of under-reported violence and abuse against men by their female partners.

Of considerable concern for the long term future is a research finding[26] that 10% of young women and 20% of young men think it acceptable to hit their partner. Such domestic violence are apparently at a peak between the ages of 16 and 24[27]. Repeated incidents between the same couple are common.

Set against that background, judicial statistics provide a starting point for identifying the most serious instances of domestic violence[28]. It is not always clear from the published judicial statistics, though, which crimes arose in domestic circumstances. In 2002 for example, Crown Court cases resulted in 59,648 convictions for all offences. Those which might possibly have had an element of domestic violence included 324 convictions for murder; 255 convictions for attempted, threatened or conspiracy to murder; 299 convictions for manslaughter; 1,559 for wounding with intent to endanger life; 10,050 for other wounding; 651 for rapes; 1,668 for indecent assaults and 883 for common assault.[29] Commentators claim domestic violence is involved in between 20% to 30% of the total, so somewhere between 3,100 and 4,700, of those specific offences may have arisen from domestic violence. Mirrlees-Black (1999) suggested domestic violence accounted for 25% of incidents of violence reported in 2000; broken down as 10% of violent incidents reported by men and 40% of violent incidents reported by women.

Beyond those specific very serious crimes, resulting in criminal convictions, incidents of domestic violence are also officially recorded in the County Court statistics in the numbers of non-molestation injunctions being sought in the family courts each year. At present these are running at about 22,000 per year[30]. Adding those figures to the undertakings and the Crown Court convictions, that would appear to give an approximate figure of 31,000 domestic violence incidents per year, which are serious enough to go to the Courts.

Many commentators argue that beyond those recorded judicial statistics, there is an enormous amount of under-reporting of

domestic violence, predominantly in cases where a serious criminal offence has not been committed, so that the true scale of the problem is much greater. The pressure group Liberty has suggested that: "One of the central problems in tackling domestic violence is that existing powers are under-utilised". It is estimated[31] that only 1 in 3 incidents of domestic violence is actually reported to the police (although, inevitably, that proportion does depend on the breadth of the scope of the particular definition of domestic violence being used). A recent report suggested that even where incidents were reported to the police, only half the correct total were recorded as crimes.[32] Just because an incident is recorded it does not mean it appears in the judicial statistics.

On that basis, the numbers of reported incidents of domestic violence, even allowing for repeat incidents between the same persons before proceedings are taken, and excluding incidents which involve criminal trials, would seem to be far higher than the number of injunctions being sought or obtained. For example: the 1998 statistics for the Metropolitan Police District, alone, gave over 38,000 reported incidents of domestic violence[33]: as against a total of 19,000 non-molestation orders that year, across the whole of England & Wales.

Does this get us any closer to the true numbers? Without a proper definition of domestic violence to work with, it probably does not. Even the Government is not sure which figures it is relying upon. For example, on the 3rd March 2004, they quoted the British Crime Survey for 2002-03 estimate that there were 501,000 incidents of domestic violence in England and Wales and that only 35% were reported to the police, (which would have meant that only 175,000 reports would have been made)[34]. By contrast, on the 15th December

2003 the Government had claimed there was a report of a domestic violence incident to the police on average every minute, implying 525,600 reports per year.[35]

Those figures represent about a 10 or 20 fold increase on the number of court cases, and seem surprisingly high. Yet at the upper end of the extrapolation scale, from self-reporting surveys within the British Crime Survey 1996, Mirrlees-Black claimed that 6,600,000 incidents of domestic assault occurred in 1995, with 40% (2,640,000) resulting in some injury. Is that credible on any viable definition of domestic violence? Could there really be 250 times more incidents than court cases? If this is the true extent of the problem, then radically different solutions are going to be required. The police and the Courts are simply not going to be able to cope with meting out tougher punishment to such numbers.

The author believes that the only way of making sense of these very different scales of figures is to separate out the very serious criminal cases from the cases where lesser violence is used, and the cases where the abuse needs to be stopped but does not require draconian intervention by the Courts, and deal with each differently.

3. The present legal system for dealing with domestic violence

It may be helpful, at this point, to provide an outline of the current way the Courts deal with domestic violence, in circumstances where the domestic violence has not been so serious as to involve criminal proceedings for specific crimes against the person, such as murder, manslaughter, rape, and grievous or actual bodily harm.

The Courts' attitude has moved on since the 1980 case of *Lacey v Lacey* [36]in which violence within marriage was described by a Judge as 'not serious'. True, it has only been in the last few decades that progress has been made, but various different Acts[37] provided the basis for domestic violence injunctions of one type or another to be made, and Judges diligently made orders where they were needed. That particular system had a number of complicated procedural rules and it was eventually decided that a unified system, under one statute would be preferred. The Family Law Act 1996 was the result.[38]

The purpose of an injunction is to keep the peace in the future, rather than to punish past behaviour. It allows a breathing space

while other proceedings, perhaps the divorce or sale of a house, go through and is designed to ban a repetition of bad behaviour during a specified period.

Non-molestation injunctions under the Family Law Act 1996

The Family Law Act 1996, was derived from the 1992 Law Commission Report on "*Domestic Violence & Occupation of the Family Home*". Its Part IV allows civil courts to make 'non-molestation' orders, a type of injunction. Various categories of 'associated' persons may apply for an order against another associated person, linked by an intimate relationship or by being a member of the same family.

The police need not have been involved in investigating the bad behaviour which is the basis of a non-molestation application. Frequently they are not, because the complainant may not wish to involve them and will have chosen just to consult their own solicitor after an incident or when a course of bad behaviour has become unacceptable. The solicitor may be already acting for them in the divorce or in other proceedings concerning the parties' finances or their children's residence. There is comfort in choosing the representative. For very many people, the idea of having to involve the police in their private lives is anathema. Provided there is sufficient other evidence, police evidence is not essential.

The type of evidence needed to justify the making of an order can vary greatly. It can be in the form of personal testimony, statements, photographs, doctor's reports and so forth. The Judge has to be satisfied that the evidence justifies the making of an injunction on the civil standard of proof, the balance of probability, which

amounts to being satisfied that it is more likely than not that something happened. This is a considerably lighter test of evidence than the criminal standard of proof, which requires the evidence to be proved beyond all reasonable doubt.

The Act does not give a definition of 'molesting' or 'molestation', but courts interpret it as including prohibitions on being violent or threatening violence as well as prohibitions on less serious matters such as pestering, harassing and general interfering. There is an assumption in the Bill's explanatory notes that 'violence' will necessarily have been involved in each case, but this is by no means so in very many cases. There is no set format for such an order: its terms can be individually tailored to the specific problems being faced. Sometimes there is a general prohibition against violence or threatening violence; or from pestering, harassing or interfering with the other person, or various specific prohibitions may be included. For example, a ban from going into a specific room in the house; from going within a certain distance of a property; from making telephone calls other than at specified times; from rifling through a handbag; from installing a mistress in the same home as the wife and family; from filling car locks with superglue; and from going to the other person's place of work. It can be anything classified as 'molestation', although, oddly enough, the potential embarrassment of having ones private life discussed in the newspapers will not be restrained by a non-molestation injunction.[39]

There is no punishment or recompense available under the FLA in the civil court for the past behaviour which forms the basis for the non-molestation order, however serious it may have been. All that the non-molestation injunction is designed to do is to prevent further confrontation in the future. Punishment for past behaviour

would only be available in criminal proceedings, if a specific crime had been committed or in civil proccedings under Section 3 PHA.

Ex-parte non-molestation injunctions

A useful feature of the system is that an order can be obtained 'ex parte'[40]; that is, without the alleged perpetrator being given advance notice of the proceedings until after the order has been granted. This can be done if sufficient good reason can be shown for taking this course, such as the anticipated reaction of the respondent on being served with the papers. As the table below shows, the majority of the non-molestation applications made in the last 2 years were sought in this way. This does not necessarily mean there is a very high level of fear on the part of applicants, it is just that it is a swifter process for obtaining an injunction. Such an order then has to be served on the respondent, or its terms specifically communicated, before it has protective effect for the applicant.

Figure. 1 Non-molestation applications: ex parte and on notice[41]

	2001	2002
County Court non-molestation applications made ex parte	11,520	12,555
County Court non-molestation applications made on notice	5,737	4,996
High Court injunction applications	56	?
Magistrates' court injunction applications	277	?

Undertakings: an alternative to non-molestation injunctions

A further important feature of the current system is that an applica-

tion for a non-molestation order can be settled by one party (or sometimes both) giving undertakings, which are written promises regulating their future behaviour. These are solemn promises made to the Court concerning future behaviour, which do not require admissions or judicial findings about the past behaviour. This process has the beneficial effect of avoiding the need for oral evidence to be given at great length before a judge, and frequently reduces the temperature of the dispute between the parties. The hearings are less expensive, both in terms of lawyers' costs, and court time. However, some special interest groups such as Women's Aid have criticised the system of undertakings, claiming that women are pressurised into accepting them and then find themselves with less protection than if they had 'gone for' the full order. This may be valid in some cases, but generally undertakings are constructive. This can particularly be the case where the applicant has embroidered their complaints in their statement, as does sometimes happen, since undertakings enable there to be protection in the future, without humiliating the applicant by having their evidence rejected as being unsatisfactory.

If undertakings are accepted, that means there is not a 'non-molestation' order. The fact that undertakings are given means that there has been no adjudication of the original complaint. This is important in the context of the proposals under Clause 1 of the Bill. Roughly 20%-25% of the applications in any year appear to be dealt with in this way (see Fig.2 below).

The FLA makes it clear[42] that undertakings should not generally be accepted if violence or threats of violence are alleged or there is a risk of significant harm resulting to a child. In such a case, a power of arrest must be added to a formal non-molestation order in relation to the clauses dealing with those matters, unless the Judge is

satisfied that the complainant or any child will be adequately protected without it. This is because a power of arrest cannot be attached to an undertaking.

A power of arrest

A 'power of arrest' enables a police officer to arrest without warrant a person reasonably believed to be in breach of any clause of the non-molestation order to which the power of arrest is attached. Powers of arrest are generally only attached to those clauses of the order which relate to violence or threats of violence. It is rare for them to be attached to the whole order.

At present, the Judge has discretion whether to attach a power of arrest. In some non-molestation cases, particularly those with a long history of counter- accusations, Judges have exercised their discretion[43] and have specifically declined to add powers of arrest because they fear that accusations may be manufactured in the future to engineer an arrest of the other person.

Where a power of arrest is attached to any of the clauses of a non-molestation order, a copy of the order is lodged with the local police station, so that the local officers are, hopefully, familiar with the people who have such protection.

There is an impression given that an arrest and a night in the cells are not particularly dreadful things to happen to a person, even if they are unjustified; but for many people such an experience is the height of humiliation and could make a difficult family situation even worse. The police may also face actions for false imprisonment if they do not have the precise material on which to base their arrest, and may be reluctant to arrest without clear authority.

The current law concerning the power of arrest is that if a respondent is in breach of an order and is arrested, they must be brought before the civil court within 24 hours and will be dealt with for the breach, if it is proved. That is generally much quicker than for a criminal hearing or for enforcing a breach of an undertaking in the civil court.

Police response on breach of a non-molestation order or of an undertaking where there is no power of arrest

If there is no power of arrest or an undertaking has been given, then a police officer will still be likely to respond to a report of a domestic incident and can arrest if satisfied that an arrestable criminal offence has been committed, but cannot arrest purely on the basis of a complaint that there has been a breach of the injunction. It is suggested by the opponents of the current system that this puts police officers in a dilemma about how to deal with reports of domestic incidents. But if there is no clear evidence of a breach justifying arrest, it is inappropriate for the officer to make a snap decision about the fault of both parties so as to arrest just one.

Court retribution for breach of a non-molestation injunction or undertaking

If it is alleged that there has been a breach of a non-molestation order or an undertaking, proceedings can be taken for contempt of Court against the alleged defaulter, irrespective of whether there has also been an arrest. The hearing is in open Court, unless there is a

particular reason for imposing secrecy (perhaps due to the involvement of children). Unlike the standard of proof at the initial hearing, any breach has to be proved beyond reasonable doubt. The reason for the criminal standard is that if the allegation is proved, the respondent may be sent to prison for up to two years or fined for contempt of Court. That might be by a prison sentence of up to two years or a fine. For minor infringements, a sentence of 7 to 28 days is usually passed, and that can be suspended and only activated if there is a further proved breach of the original order. For repeat defaulters, it is common for sentences to be 3 or 6 months, sometimes even longer.[44] The author has been involved in obtaining at least one 2 year sentence.

Government Judicial Statistics on the numbers of non-molestation orders:

Fig. 2 sets out the numbers of non-molestation orders made in 2001 and 2002. Not all had powers of arrest attached. Undertakings were regularly accepted.

Fig.2 Non-molestation orders, powers of arrest, undertakings and breaches[45]

	2001	2002
Non-molestation injunctions made	20,968	Not published
Orders with power of arrest attached	17,201	19,198
Orders with no power of arrest attached	3,524	2,855
Cases where undertakings were accepted	4,212	4,073
Contempt remands into custody	368	512
Contempt remands on bail	449	444
Contempt remands for medical reports	32	26
Warrants for arrest (breach without power of arrest)	111	89

The figures for contempt orders may not give the full picture, since they do not indicate how many contempt applications were made, but were then refused because the breach could not be proved. The numbers are, on any basis, strikingly low, compared with the numbers of non-molestation orders being made. The possible reasons for this will be further considered below.

The present system under the Protection from Harassment Act 1997

In addition to cases involving domestic violence in the civil courts, the Protection from Harassment Act 1997 allows the criminal courts to deal with certain types of domestic violence cases, particularly those involving 'stalking' offences. This Act was originally intended for those people who might not come under the FLA definition of 'associated' person because they had not been in a specified relationship, but it can also be used where criminal sanctions are sought in situations where harassment is a problem. It defines specific criminal offences of 'harassment' and 'causing fear of violence'.

Offences of 'Section 2' harassment and of 'Section 4' causing fear of violence:

Criminal proceedings can be taken under Section 2 PHA in relation to harassment in the Magistrates' Court, with a punishment of up to 6 months prison. Proceedings under Section 4 PHA in relation to fear of violence can be taken in either Crown Court or Magistrates' Court, with punishment of up to 5 years in prison

in the Crown Court. A case presented to either Court under these Sections will be one in which the prosecuting authorities must have deemed there was sufficient evidence to proceed with a prosecution. Unlike the application for a civil non-molestation injunction, the decision to pursue the case is not in the hands of the complainant or their legal advisers. The criminal standard of proof is required, with evidence proving the case beyond reasonable doubt.

When the Act was first introduced it was anticipated, from the known information about stalking cases, that about 200 cases a year might be brought. In fact, rather higher numbers have come before the Courts (although very limited information is published on the actual numbers). Interestingly, despite these cases having been pre-vetted by the prosecuting authorities, the conviction rate has been generally low, especially in the Magistrates' Courts, where the majority of them are heard.

Fig.3 1 Sections 2 & 4 Magistrates' Courts & Crown Court statistics 1998 [46]

Section 2 PHA proceedings brought in Magistrates' Courts (both sexes) total	4,298
Section 2 PHA proceedings in Magistrates' Courts: (both sexes) 50% found guilty	2,165
Section 2 PHA proceedings brought in Crown Courts (both sexes) total	57
Section 2 PHA proceedings in Crown Courts: (both sexes) 98% found guilty	56
Section 4 PHA proceedings brought in Magistrates' Courts (both sexes) total	1,505
Section 4 PHA proceedings in Magistrates' Courts: (both sexes) 28% found guilty	420
Section 4 PHA proceedings brought in Crown Courts (both sexes) total	167
Section 4 PHA proceedings in Crown Courts: (both sexes) 61% found guilty	102

It is also interesting that the offence is currently not solely committed by men:

Fig.4 Section 2 orders Magistrates' Courts 2002 (no Crown Court statistics)[47]

Section 2 PHA proceedings brought in Magistrates' Courts against men total numbers	4,811
Section 2 PHA proceedings in Magistrates' Courts against men 49% found guilty	2,368
Section 2 PHA proceedings brought in Magistrates' Courts against women total	782
Section 2 PHA proceedings in Magistrates' Courts against women 40% found guilty	314

Even though these numbers are higher than the 200 originally anticipated, they are very small compared with the suggestion from the British Crime Survey 1998[48], that 880,000 adults are stalked each year. If that estimate is correct then it is most surprising that more cases are not pursued in the Courts under the PHA. It may well be that the BCS estimate is an over-estimate, based on self-selecting individuals' responses. It is also possible that Court proceedings are not found helpful or accessible for the majority of cases.

'Section 5' Restraining orders on conviction under Sections 2 or 4

A person who is convicted under Section 2 or 4 of the PHA can immediately be made the subject of a restraining order in the criminal Court. This bans further conduct which amounts to harassment or which causes a fear of violence. Effectively, the restraining order is equivalent to a non-molestation order, but the procedure saves the 'victim' from having to go to the civil court for an injunction. Such an order is not available on acquittal under the current system. Although the Government has not, as yet, published the latest figures for restraining orders, the Attorney General has said[49] that such orders are made in 'more than half the cases where a

person is convicted' for a PHA offence. That would suggest somewhere round 1,000 to 1,500 Section 5 restraining orders are made each year.

Breach of such an order, "without reasonable excuse", is a criminal offence, with up to 6 month sentences in the Magistrates' Court or 5 years in the Crown Court. Current figures for breaches of restraining orders have not been published by the Government (claiming that the cost of producing them would be disproportionate). The figures available for 1998 showed relatively modest numbers of orders made on breaches of Section 5 restraining orders:

Fig.5 Section 5 breaches in Magistrates' Courts & Crown Court 1998[30]

Section 5 PHA breach applications in Magistrates' Courts (both sexes) total numbers	357
Section 5 PHA breach proceedings in Magistrates' Courts: (both sexes) 70% found guilty	252
Section 5 PHA breach applications brought in Crown Courts (both sexes) total numbers	29
Section 5 PHA breach proceedings in Crown Courts: (both sexes) 76% found guilty	22

A civil 'non-harassment' injunction can also be obtained using Section 3 PHA. Unlike the Section 2, 4 & 5 PHA orders, a Section 3 order is not pre-vetted by the prosecuting authorities and is obtained direct by the complainant. It does not matter whether the respondent has been convicted of an offence, since Section 3 allows an injunction where there is either an actual or an apprehended breach of the law prohibiting harassment. The order is very similar to an FLA non-molestation order but with the added advantage that an award of damages can be made "for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment". This could be a

significant benefit in cases where the respondent was financially able to pay.

Curiously, this form of order has been exceptionally little used by applicants to the courts in the last 3 years. The Government has published figures for applications, rather than orders granted, which are likely to have been fewer still.[51]

Fig. 6 Applications for Section 3 orders in all courts in England & Wales

Section 3 applications in 2001	392
Section 3 applications in 2002	499
Section 3 applications in 2003	576

If a complainant alleges the civil Section 3 non-harassment injunction has been breached, there are two ways of dealing with the breach, spanning both civil and criminal jurisdictions. Section 3(3-5) PHA allows that person to apply for a warrant for the arrest of the respondent: akin to contempt proceedings. The alternative route, in Section 3(6-9), provides that breach of a Section 3 injunction, "without reasonable excuse", is a criminal offence punishable by a fine or up to six months imprisonment on summary conviction or a fine and up to five years' imprisonment on indictment. There are no current figures for enforcement of such breaches, whether in the civil courts or the criminal courts. The figures available from 1998 showed extremely modest numbers of criminal orders made on breach of Section 3 non-harassment orders and no details of civil orders. There is no reason to suppose there has been any substantial change in the numbers year on year, given the comparable figures for other orders for which there are up to date details.

Fig.7 Section 3 breaches in Magistrates' Courts & Crown Court 1998 [52]

Section 3 PHA breach proceedings in Magistrates' Courts (both sexes) total numbers	23
Section 3 PHA breach proceedings in Magistrates' Courts: (both sexes) 48% found guilty	11
Section 3 PHA breach proceedings brought Crown Courts (both sexes) total numbers	3
Section 3 PHA breach proceedings in Crown Courts: (both sexes) all found guilty	3

There is nothing to prevent applications being made under both Section 42 FLA for a non-molestation order and under Section 3 PHA for a non-harassment order concurrently. Such applications can be consolidated in the civil court proceedings. There is an assumption[53] that breach of the Section 3 PHA order is not arrestable. In the event of Clause 1 (see below) making breach of an FLA non-molestation order arrestable, it should be noted that there is no equivalent proposal for change for Section 3 orders. It would be sensible if breaches of both types of injunction were treated the same way, given their other similarities.

What does the low level of proceedings indicate?

If the numbers of domestic violence incidents are really as high as the millions or half millions per year, as estimated by commentators, then the fact that only about 27,000 injunctions are made or undertakings accepted each year, and no more than about 5,000 PHA cases, calls for an explanation. Why are there not more Court cases? Is the estimated figure of incidents wrong, or is the court route not popular?

It is argued, by some, that this discrepancy in numbers reflects fear on the part of victims or witnesses. Certainly there is fear of

provoking further difficulties within a problematic relationship, by taking court proceedings. There are often economic constraints: a bread winner who goes to prison stops financially supporting a family. Many complainants have such equivocal feelings towards the perpetrator that they find it difficult to initiate proceedings in the first place. Large numbers reconcile after an order has been made; others separate permanently. For some that reconcile, there are further incidents of domestic violence, but not for all. The problem of a reluctance by witnesses and victims to appear in Court proceedings remains widely cited as a serious bar to dealing with domestic violence properly.

Some commentators have additionally argued that civil judges are too lenient in domestic violence cases. Since most civil court judges and magistrates also sit as criminal judges, this is unlikely to be correct. The Court of Appeal has recently reiterated advice to judges to ensure as far as possible that there is no manifest discrepancy in sentences between FLA injunction breaches and offences under Sections 3, 4 or 5 PHA[54].

An alternative view is that Court proceedings are not very popular because they do not solve the problems at the root of domestic violence. Complainants want the other person's behaviour to change and they may still feel emotion for that person. Many see punishment as completely counter-productive in that process. It may be that programmes of re-education or treatment for offenders are a better way of changing behaviour in the long term. Such programmes are, however, in extremely short supply, expensive to run and mostly taken up with 'serious' criminals. For female perpetrators of violence, such programmes are apparently non-existent in the public sector. Access to such programmes cannot be enforced

through the civil courts, at present, which may be a further disincentive to seeking injunctions.

The particularly low level of contempt proceedings under the FLA, and for breaches of Section 3 PHA injunctions and Section 5 PHA restraining orders, can be interpreted in a number of ways. First: that the current system of non-molestation injunctions keeps the peace in most cases and there are few breaches. Second: that if a serious criminal offence is committed during a breach, it is unusual for both contempt and criminal proceedings to occur, so there will be no separate contempt proceedings. Third: that it is impossibly hard to prove a breach of an order under the criminal standard of proof, in circumstances where it is generally the word of one person against the other about what happened.

Of those explanations, the suggestion that the criminal standard of proof is responsible for the low numbers of contempt proceedings leading to imprisonment is lent support by the low rate of successful prosecution of Section 2 PHA offences in the Magistrates' Court. (It is less likely with PHA cases that the complainants failed to give evidence against the stalker, out of intimidation or fear of repercussions, since a personal relationship in a PHA case is unlikely, by the nature of the offence.)

The Government has said that the current civil route for pursuing breaches of orders "has been found not to be the most ideal way of dealing with the matter"[55] and has suggested that the Bill is needed "to try to give women better protection and the orders more teeth so that they can operate smoothly". Yet there is no political consensus that the current system is failing. Lord Thomas of Gresford[56] has provided an extremely eloquent description of the current system and its advantages over moving to a system based in the criminal

courts. They include the following key points: the civil procedure is not a substitute for the criminal law where crimes are committed; not all complainants wish to criminalise their partners and send them to prison; civil procedure rules on giving evidence are more favourable to the victim; the civil court procedure is often quicker than the equivalent criminal procedure; civil applications can be dealt with in an emergency in a matter of hours; civil judges have wider discretion to do justice between the parties; there is a risk of papers being lost if a litigant starts proceedings in the civil court and then is transferred to the criminal court; there is a better prospect of the same judge hearing both the initial proceedings and the breach proceedings in the civil court.

The Government insists though that the current system is not working properly. They claim that people are dissuaded from taking injunction proceedings and that that situation is contrary to the interests of justice and of society as a whole.

Yet there has existed a means of relieving that difficulty since 1996, which has not been used. The Government could have implemented Section 60 of the FLA, which would have allowed third parties, such as the police, to make applications for civil injunctions on behalf of a victim of domestic violence.[57] There is no reason given for the failure to implement this section[58], which would have gone much further than the proposals in the Bill to help complainants, since they would not have been required to obtain their own non-molestation order at the outset. Many victims of domestic violence at present have not enough ready money to afford to take legal proceedings, but are above the financial limits for public funding assistance from the Legal Services Commission, and would have benefited from the police obtaining a non-molestation order on their behalf.

4. Domestic violence: proposed changes in the Bill

Despite the flexibility of the existing system, which has been in existence in its present form barely 8 years, the Government feels that the legislative framework must once again be re-shuffled. People need better protection, they say, from domestic violence. Before examining whether the Bill fulfills that laudable aim, the individual Clauses need consideration.

Criminalisation of Breaches of Non-Molestation Injunctions[59]

Clause 1 would insert a new Section 42A into the Family Law Act 1996, which would make all breaches of non-molestation injunctions into criminal offences to be tried in the criminal courts. The maximum prison sentence would be 5 years, which would make any breach of a non-molestation order arrestable. Judicial discretion

over the addition of a power of arrest would be removed and a power of arrest would effectively apply to clauses of a non-molestation order which have nothing to do with violence or threat. Technically, a complainant could still take civil contempt proceedings in relation to the breach, as an alternative to criminal proceedings.

The likely effects of the automatic arrest provision

The changes cheer those who labour under the belief that the civil/family courts do not treat domestic violence as seriously as the criminal courts. Given the tariff system of sentencing, though, this is probably only likely to happen when some other crime, such as grievous bodily harm or rape, is also part of the case against the individual, or there have been repeated breaches of an order. For most breaches of non-molestation injunctions, in the absence of aggravating violence, the provision of a 5 year maximum sentence is likely only to give rise to unrealistic expectations about the likely levels of punishment. Creating unrealistic expectations generally results in undue disappointment with the policy when the expectations are not realised in practice. Prisons are already practically full and, if choices have to be made in such circumstances, society would probably prefer to see dangerous criminals imprisoned.

The reason given for making the 'offence' punishable with a maximum 5 year sentence is that all breaches of non-molestation orders would become arrestable, irrespective of whether or not a Judge may have thought the circumstances required there to be a

power of arrest. It is thought this will lead to speedier court proceedings, but those concerned with criminal proceedings know they generally take much longer than civil contempt proceedings.

One of the reasons for the delay is the greater extent of paper work required in criminal proceedings, in terms of the taking of formal statements and fulfilling PACE requirements. Although civil contempt proceedings require the same criminal standard of proof, the evidential requirements are much more relaxed and are controlled by the Judge.

A second reason for the delay is that the decision to prosecute a criminal offence is not in the hands of the complainant and their solicitor, but in the hands of the police or the Crown Prosecution Service. An extra tier of bureaucracy inevitably adds delay and cost.

Baroness Scotland, for the Government, has suggested[60] one reason for making the whole order arrestable is that police officers sometimes have a problem, if people have moved away from the area of the local police force where an order with a power of arrest is registered, of knowing to which part of the order a power of arrest is attached. She suggested the solution to this dilemma was to attach the power of arrest to the whole order in order "to ensure the immediate safety of the applicant and any children" so that the police "will know what powers they have when called to incidents of domestic violence where a non-molestation order is in place". She clearly accepted the anecdotal assertion that police officers are sometimes reluctant to carry out the instructions of one party on the doorstep. However, she failed to consider that this might not be due to lack of police powers but rather because the story being presented by a party is not convincing. She appeared to believe that a police

officer should be able to go to a house and 'remove the person from the site', saying that that is sometimes 'the most important part of the security for the woman'[61]. This is a very draconian and unbalanced approach.

Making breach of any clause arrestable may be especially harsh where the non-molestation order relates to non-violent prohibitions, such as not going into a room or not pestering by telephone. At present, a Judge can reasonably decide not to attach a power of arrest to such clauses in an order. Under the proposed changes, such discretion would be removed. As can be seen from the tables in Chapter 3, roughly 40% of applications are dealt with at present by accepting undertakings or by making no power of arrest.

There is also going to be a new obligation[62] on a Court, when making an FLA occupation order (the current name for 'ouster' order), to consider whether to make a non-molestation order as well. Even though the Government has properly declined to make breach of an occupation order into a criminal offence, on the basis that the initial occupation order would not necessarily have been preceded by any violence between the parties, by proposing this amendment, they are introducing the possibility of such a means of enforcing an occupation order by the back door.

These changes may make it more likely, in the view of the author, that where a Judge feels the complainant may misuse the arrest provision to attempt to get the respondent arrested on a pretext, perhaps to get them out of the home or to embarrass them with their employer, that there may be reluctance to make any non-molestation injunction at all, leaving the complainant bereft of suitable and proportionate protection. This would water down the range of options available.

The source of the proposed changes: Section 3 PHA orders – a bad comparison

The proposed wording in Clause 1 mirrors the wording of Section 3 PHA[63], which allows breach of a civil non-harassment injunction to be enforced either by civil contempt proceedings or as a criminal offence. The Government accordingly argues that there is an existing statutory precedent for such changes, and that what is proposed is just an extension of an existing system to other types of civil injunction.

That is a fallacious argument. First, there is a real distinction between the two types of order. Section 3 non-harassment orders are designed to prevent future instances of harassment, which is, in itself, a criminal offence[64]. By contrast, a non-molestation order does not need to be designed to prevent any breach of the existing criminal law. Molestation is not a criminal offence and all many types of human behaviour are encompassed within it.

Second, the limited judicial statistics which exist[65] for PHA orders strongly suggest that Section 3 non-harassment orders are so infrequently granted that it cannot be said that the system of having two different methods of enforcement has been properly tested.

Notifying the respondent about an ex parte order

There are other respects in which the proposed new Section 42A FLA goes far beyond the parallel provisions of Section 3 PHA orders, and – it could be argued – breaches natural justice. Section 42A(2) proposes that a person could be arrested for breach of a non-molestation order which had been made ex parte, without the terms of the order having been served on them or notified to

them. The person must simply be 'aware of the existence of the order'. A person might be told that the other has 'got an order', so they were aware of the existence of an order, but that would not give them an idea about what specifically the Court was preventing them from doing. Since there is no set wording for a non-molestation injunction and all manner of clauses could be added, it is not enough to say that an order has been made. The prohibited actions need not, unlike with the Section 3 non-harassment injunction, be actions which are contrary to the existing criminal law. It is not true to say that "non-molestation orders generally only prevent someone from undertaking behaviour that the respondent knows would be unacceptable, such as harassing the victim"[66]: since the orders can be far wider and, indeed, that is part of their current usefulness. An individual would find it difficult to infer each and every possible prohibition from the simple fact of an order 'existing'. It would be contrary to Article 6 of the European Convention to put someone at jeopardy of a prison sentence in such circumstances, and contrary to principles of natural justice, as well.

There is a considerable amount of existing case law on the extent of notification of an ex parte order which is necessary for the purposes of committal proceedings in the civil courts. Baroness Scotland was incorrect when she asserted[67] that a hard copy of the order had to be personally served, and that a person could avoid being served by refusing to open a door. That stopped being the only method of service some years ago The current requirements[68]. are that if personal service has not been achieved, provided the person has "been notified of the terms of the … order whether by telephone, telegram or otherwise" the contempt proceedings can go ahead. (E-mail or text are probably not

adequate because there is no proof of receipt.) There appear to be no circumstances in other areas of the law where some similar form of service of the 'contents' or 'terms' is not required. Other groups agree that this proposed change to the law is unacceptable. The Family Law Bar Association does not support the criminalisation of breaches of orders that have been made 'without notice' and which have not been sufficiently served upon the respondent. 'Liberty' is equally critical although they would like to see the 'contents' as opposed to the 'terms' being notified to the other party.

The Government has suggested there is a valid reason for making the wording so draconian. They want to deal with the sort of person who knows perfectly well that an injunction has been taken out and who uses every trick to avoid actually being served. Such a person, they argue, could try to rely in the subsequent criminal court proceedings on having a 'reasonable excuse' for an 'inadvertent' breach of an order, to avoid conviction. But, by that time, the person will have been arrested; statements and paperwork will have been completed; Court time will have been set aside and other expenses incurred and wasted. It does not seem that the mischief is sufficiently serious to justify breaching Article 6 (the right to a fair trial) by such a provision. An excellently drafted form of words was rejected at Report Stage[69], but something similar is still needed to amend the proposed Section 42A(2).

Undertakings and breach of undertakings under the new system:

A new restriction on the current discretion of Judges to accept undertakings instead of making non-molestation orders is

proposed[70]. If it is asserted in a statement (which will not have been tested under cross-examination) that threats of violence have been uttered then the Judge will be prevented from accepting undertakings, whatever the other circumstances of the case. The direct consequence is that it is likely that a substantial number of cases, which could have been dealt with expeditiously, will be prolonged with contested evidence having to be heard. It is possible that the applicant's evidence will not be accepted as sufficient and they will not have any protection after the hearing. This will put added pressure on Court time and increase overall costs quite unnecessarily. The temperature in the relationship may be raised, reducing the possibility of reconciliation.

This new restriction appears to be designed to protect female complainants from 'pressure' to accept undertakings[71]. It may be appropriate in some cases, but is not necessary in all. Undertakings and non-molestation orders will only differ, in terms of enforcement, over whether immediate arrest for unaggravated breach is available and over the maximum sentence for breach. The concern is that this reduction in judicial discretion is simply pandering to those lobbyists who have a particular view of the effectiveness of civil justice, and may leave some complainants with less protection than the current system.

The Government says it is retaining undertakings in order to retain the choice of as many options as possible[72]. If choice is important, it is curious that they are proposing to take away the choice of the complainant, who may just want to be protected by an undertaking against a recurrence of the behaviour, without having to go through the evidence in Court, and without making the respondent a criminal. Further, the Government claims judges will

always take the views of complainants into consideration before accepting undertakings[73], but scope for such consideration is not currently explicit in the FLA and will be specifically denied by this mandatory clause. It is a little patronising to suppose that all complainants in domestic violence cases are incapable of weighing the relative merits of different types of response; and it absurd not to leave them the possibility of an undertaking if they want it, even when set against a history of past violence.

If undertakings are given, the resulting order is not a 'non-molestation order', so a breach of an undertaking will not lead to criminal proceedings under the proposals[74]. The Government accepts[75] that the only method of dealing with such a breach will continue, as at present, by civil contempt proceedings. Unaggravated breach of undertakings will continue not to be arrestable. This has to be the right course of action, since giving an undertaking is not the equivalent of an admission or Court finding that someone had behaved in a way which would have justified a non-molestation order. It is merely a promise about future behaviour. But how will a police officer, called to a domestic incident, know whether a non-molestation order or undertaking is involved. Will paperwork have to be examined first?

The register of domestic violence orders or offenders

Much of the publicity surrounding the introduction of the Bill dealt with a proposal in "*Safety & Justice*" that there should be a Register of Civil Domestic Violence orders or of offenders, which would warn future partners of their tendencies. There is no such provision in the

Bill, however, because the Government has discovered it does not need legislation to introduce a nationwide single database register, open to police forces. Clearly, it did not need to wait for this Bill, although nothing has been done before now.[76]

It would certainly be very helpful to have a central record of the contents of every civil non-molestation order. Unless a person alleging an order has been breached is able to produce a copy, how else is a police officer to know the contents of the original order? There has, though, to be some doubt that a central police computer will be adequately programmed with details of the precise behaviour which is barred by an order, given other experience of the patchy operation of such databases. Courts, at present, frequently have difficulty correctly typing names, addresses and the details of the order which the court has made. The costs and administrative burden relating to more than 22,000 orders a year will be high, especially as many orders are quite long, with specific prohibitions. It is not clear how extensive the register would be: for example, whether an order would be removed from the register when its terms lapsed or should remain on the file. Nor is it clear whether undertakings would be noted on a register.

The Government's plan is that their national register will only be open to police forces. That is rather different from the type of register being contemplated by such organisations as the Women's National Commission. They want members of the public to be able to look at the register, to see whether the name of their proposed or current partner is on as having been previously involved in domestic violence litigation with another partner. That would, however, be of extremely limited value, since non-molestation orders do not record, as a preamble, the nature of the behaviour which led to the making of the order in the first place. It is difficult to see how, without such

detailed information, a register could be both fair and effective. The Solicitors' Family Law Association has pointed out that if such a register came to be regarded in the same light as the sex offenders' register, then sufferers might be deterred from taking proceedings because they would be tarred with the same brush of being connected with such an offender, and that might drive domestic violence 'underground'.

The risk of the vindictive complainant

One feature of the proposed changes that causes disquiet arises from the fact that the existing sanction of civil contempt of court proceedings will remain available when a breach of a non-molestation order is alleged. It is proposed[77] that if a person is convicted of an offence of breach, then they cannot be punished by contempt proceedings; and vice versa. But if a person is acquitted of the criminal offence or found not in contempt of court, there is nothing in the Bill to stop a vindictive complainant getting two bites of the cherry, even though both hearings would consider evidence on the same criminal standard of proof[78].

The scope for this may be greater than first appears. Proposed Section 42A(4) prevents a person being convicted of an offence for a breach of a non-molestation order where they have already been 'punished' for that conduct by way of contempt of court proceedings. But would a 'failed' contempt hearing, where the breach was found not proved to the criminal standard of proof, still allow the prosecuting authorities to pursue the respondent in criminal proceedings? Is a person really going to face potential double jeopardy in two court hearings (with doubled costs to the

respondent, or to the state, if in receipt of public funding), even though both those hearings would be on the same standard of proof and, presumably, the same evidence? Further, suppose the civil court, in contempt proceedings found a technical breach proved, but imposed no punishment and simply ordered the respondent to pay the wasted costs: would that leave criminal proceedings open? Is a costs order a punishment? Not on the current wording of the Bill.

This potential difficulty could be avoided by re-wording both the Bill and the PHA, by adding the phrase: "which has been punished 'or otherwise dealt with' as a contempt of court". The Government has resisted such a change on the basis that the Crown Prosecution Service are 'unlikely' to bring a criminal case after failed contempt proceedings[79]. However, just because something is 'unlikely' does not mean it should not be carefully ruled out in a statute, where there is the opportunity to do so, if that is the intention of Parliament. They have not considered the reverse situation, where the criminal proceedings come first, and the choice to pursue contempt proceedings is subsequently with the complainant. Provided the vindictive complainant has funding, there is currently no bar on secondary proceedings being pursued.

It should be noted that both the Bill and the PHA, in potentially allowing contempt proceedings to be taken after an acquittal at a trial for the offence of breaching an injunction, or vice versa, seem to be at odds with the strong recommendation expressed in the case of *Hunter v Chief Constable West Midlands Police*[80] that when a final decision has been made by a criminal court of competent jurisdiction, it is a general rule of public policy that the use of a civil action

to initiate a collateral attack on that decision is an abuse of the process of the court. Such attempts at collateral attack still frequently occur, and it would be helpful to place a restriction through statute, where the opportunity arises, to restrict that abuse.

Changes to the range of persons able to obtain occupation and non-molestation orders[81]

These very simple provisions introduce, without much fanfare, a substantial extension of 'occupation orders' under the FLA, and are to be welcomed. Occupation orders, previously known as 'ouster' orders, prohibit or enforce peoples' rights to occupy a particular home. Same sex cohabitants will be entitled to such orders and also to non-molestation orders. The Bill in its initial form did not take account of the Civil Partnership Bill, with its proposal to introduce registered civil partnerships, but this and other deficiencies are being corrected at Report Stage.[82].

Changes to the range of persons able to obtain non-molestation orders:[83]

It is proposed that certain new classes of non-cohabiting couple should be able to apply for FLA non-molestation orders as 'associated' persons. Unfortunately, the proposed wording used in Clause 4 is extraordinarily woolly. People have to show they have or have had 'an intimate personal relationship' … 'which is or was of significant duration'. Much Court time will be taken up in trying to apply those words to particular circumstances. It might well be argued that the disputes of a 'non-cohabiting' couple are better dealt with under the existing PHA.

Baroness Scotland has indicated a desire to avoid bringing relationships based on a 'one night stand' into the FLA, but it is not clear why people in those situations should not be protected by non-molestation injunctions. Many very intense relationships may be very short in duration, yet if there is violence or the threat of violence, one partner may require protection from the other, regardless of the actual duration of the relationship. The refusal to include short relationships flies in the face of the avowed rationale for the Bill to help such victims.

The Government is confused about the scope of the clientele for the two main types of order available under Part IV of the FLA: the non-molestation order and the occupation order. It is only occupation orders that need to involve relationships of 'standing', of a quasi-matrimonial nature. The proposed extension of the Act to non-cohabiting couples would not allow them to apply for occupation orders, so there is no need to insist on relationships of significant duration. Non-molestation orders, by contrast, can be obtained by the far wider class of 'associated' persons. Indeed, there does not have to be a 'domestic relationship', if the parties are related. All manner of categories of relative, (apart from cousins, at present[84]) who may never have lived together, are included. In addition, even now, a one night stand relationship could lead to a non-molestation order, since if it leads to the birth of a child, proceedings under the Children Act 1989 can be started. Those proceedings then allow that brief relationship to be classified amongst the list of 'associated persons'[85].

One change to the list of associated persons is not included in the proposals, but really should be. Given the substantial likelihood of a furore over a similar child of a fleeting relationship where a claim

for Child Support is being pursued, it is curious that there is no right to obtain a non-molestation injunction when such a claim is being made. There should be an amendment, to add to the list of 'family proceedings' in Section 63(2) FLA 'a claim under the Child Support Act'.

The introduction of Domestic Homicide Reviews[86]

At present there can be a serious case review[87] when a child under the age of 18 dies, although these generally only happen where there has been a history of abuse. But there is no similar multi-agency review when an adult dies (other than a current pilot project in the Metropolitan Police area). The Bill would introduce adult death reviews, the Government arguing[88] that a death due to domestic violence is frequently preceded by other attacks and contacts with a range of statutory agencies: the police, schools, social services and healthcare services. They propose the reviews would not apportion blame or 'name and shame', but would give a chance to learn lessons and better identify risks so as to prevent future deaths.

The wording of Clause 9 is extremely vague: with no indication who is to lead the review and collate the 'lessons'. It now appears[89] that the reviews will not wait until after a criminal process has concluded, even though there would be a risk of prejudicing the outcome. It is said by the Government that this vagueness will be solved by the issuing of Guidance, although no draft has yet been produced[90]. The only indication is that the various persons and bodies in subsection (4) will, of their own volition, institute such reviews as appear to them proper and consistent with the number of deaths that occur in their area, with the Secretary of State retaining

the ultimate power to order a review. That looks like a recipe for confusion.

The problem with setting up these adult reviews is that the statutory provision for the over-16s is not likely to dovetail with the existing extra-statutory provision for children's reviews. Not all child deaths are dealt with by serious case reviews at present. It seems consideration of child deaths would be excluded from the proposed reviews, even if there were a related adult death under consideration. The risk is that this laudable proposal, to try to learn from and prevent the worst domestic violence cases, will founder, either with the bureaucracy of setting up a further tier of administration, or because there will be no clear indication about who initiates a review.

What is actually needed is to bring both the new adult and the existing child reviews under a single umbrella of domestic homicide review. If there are adult and child deaths in the same family, why not avoid the complications of having one body conducting a serious case review after the child death and another body conducting a domestic homicide review in relation to adult death? That will be the result if the system is not tied together in one statutory framework.

Making common assault arrestable[91]

Common assault is an offence which has never been arrestable on its own. It has a very technical legal definition[92] and does not need to involve any actual physical violence: it is sufficient for there to be a threat of an assault, if the person who is threatened also apprehends they will be struck. Is that really something which ought to be subject to the very serious threat of arrest?

Baroness Scotland, on behalf of the Government, has presented a

highly charged case in favour of this change[93] suggesting that if those who disturb wild birds or are in possession of certain wild animals or plants, can be arrested, then women and children in a similar situation should not be deprived of "a similar amount of succour".

In fact, the Government has admitted[94] another agenda in making common assault arrestable, with very profound ramifications for civil liberties. They accept that the change will have general application and that police officers, dealing with public disorder, will be able to arrest demonstrators if someone (possibly a police officer) feels threatened or fears violence. No actual assault or violence need occur: the police could just take the view a crowd was turning nasty and arrest those shouting the loudest. Is a fundamental change in the management of public order really going to be brought in on the basis that it will provide succour for women and children?

So far as domestic violence is concerned, it is not clear why this extension of police power is necessary. The Government[95] has suggested that police officers need to be "more confident in putting positive policing policies into action" at a domestic incident. But they have those powers already. Assault occasioning actual bodily harm[96] is already an arrestable offence, as is threatening such an assault. A police officer can arrest[97] if they have reasonable grounds for believing that step is necessary to protect a child or other vulnerable person. They have to suspect the person they are arresting of having committed or having attempted to commit an offence, but that will usually be the case after any serious domestic altercation. The Government has suggested this is not enough[98] and that this additional power of making common assault arrestable is necessary to "give the police an unequivocal power to act in cases of common assault." This is not wholly convincing.

In circumstances where the parties dispute what has happened, how is a police officer going to make use of such a wide power when the identity of the aggressor cannot be determined from their gender and must depend on their behaviour and what they say has happened? If one party has left the scene, it is suggested such a power to arrest is needed to prevent that person returning later, even though the only evidence of any past domestic altercation will be the alleged victim's complaints. Is the better actor on a doorstep going to persuade a police officer that threats have been uttered to the extent that the police officer rushes off to arrest the other individual? Such things are regularly attempted under the current law and generally fail. Will this power to arrest lead to more or less injustice? The auspices are not good for it being operated fairly. Just because common assault is arrestable it may not make it more likely that a police officer called to a domestic incident will arrest one or other party for common assault, particularly when it looks as if both parties have been indulging in the fight, or it has been the drunken woman threatening the man.

One issue relating to common assault does require legislation, and there is some prospect that it will be included in the Bill[99]. A decision of the Court of Appeal in *R v. Clifford*[100] recently confirmed that parts of the Criminal Justice Act 1988[101] were sometimes preventing a defendant from being convicted of common assault as an alternative when acquitted on charges of various aggravated assaults[102].

Restraining orders after acquittal and after any prosecution[103]

Clause 11 of the Bill proposes two very substantial extensions of Section 5 PHA restraining orders. First, they would be available in

relation to any offence at all, not just PHA offences, where it was felt by the tribunal that some person required protection from harassment by the Defendant.[104] Second, it is proposed restraining orders will be available even if the Defendant has been acquitted of the offence charged, if the court perceives a risk of some form of future harassment.

The Government has described this extension of restraining orders as allowing a 'Yellow Card' to be given to people to prevent them from committing further acts. But that is actually little more than window dressing to support the argument that the Government is being tough on domestic violence. The provisions will be of benefit in relatively limited circumstances, since a criminal offence will already have to be before the Court and the restraining order only prohibits acts which would amount to the offence of harassment or the offence of causing a fear of violence. The courts already have other substantial powers with which to restrict future behaviour.

One sensible change being made is to entitle those who are protected by a restraining orders to have a say at Court if it is proposed that those orders should be brought to an end. It is to be hoped that proper funding for legal representation will be available for that, as it may be too much of an ordeal for a complainant to attend alone.

Other existing powers to restrain after conviction or acquittal

The power to make an order which restrains future behaviour after a criminal trial already exists. The court has the power to 'bind over' any person where a breach of the peace is anticipated, and that

power can be exercised on acquittal as well as conviction. A bind over relates to public, rather than private peace, so there is not an exact overlap with PHA offences of harassment, but in most cases it would be close. In addition, there is a general power[105] to make an 'Anti-social behaviour order' after a conviction, if it is considered necessary to protect a person. The wording in Clause 11 is different from that for Anti-social behaviour orders, which may cause problems for the Courts in deciding which to apply.[106]

The effect of the extension of restraining orders to all offences

When an offence under the PHA is before the Court, it is currently well understood that a restraining order may be made if there is a conviction, in addition to any other punishment. If restraining orders are extended to any offence, it may not be obvious from the particular charge that a restraining order against harassment is under contemplation. Since evidence for a restraining order, on the civil standard of proof, may well not overlap with the evidence in the criminal case, a defendant may well be disadvantaged by not having collated the necessary evidence to deal with that issue at the same hearing. The potential number of offences where this might apply is huge and it is likely proceedings will take longer as a result.

Suppose, an irate defendant during a motoring offence trial asserts forcefully that it was the other driver's fault, that the other driver is lying and that he had better watch his back (meaning no more than that they may be prosecuted for perjury). Evidence of the irate defendant's previous spotless probity and the other driver's string of convictions for ferocious driving and of threatening behaviour would

not be relevant to the precise facts of the motoring offence, but would be vital in deciding whether a restraining order was actually needed. Is it right that the tribunal should just slap a restraining order on such a defendant at the end of the hearing without hearing proper evidence? Clearly not. The effect of extending this provision will be that proceedings will be prolonged while evidence is obtained.

The effect of the extension to all acquittals

Extending restraining orders to acquittals will also multiply the likely number and length of hearings. Not only will all the acquittals under Section 2 PHA (some 2,911 in 2002) be possible contenders for an order, but also those in thousands of other criminal cases where there is a complainant who claims to need further protection.

It does not seem to be being proposed that restraining orders will be limited to cases where a specific type of acquittal has occurred. Acquittals can involve a jury's 'not guilty' verdict after a full trial, with full evidence. They can also include a case where the prosecution dropped the case immediately after an indictment has been read to the defendant and a plea of not guilty entered. It might be argued that the latter case should not require the Court solemnly to consider a possible restraining order. Common sense would suggest it would not be appropriate, but it might well be desired if the prosecution alleged that their main witness was refusing to give evidence because of alleged threats by the defendant.

All this will slow down the progress of very many cases in the criminal Courts, because additional evidence will probably have to be heard before it can be decided whether such an order is needed.

This will be especially the case after an acquittal, where it can be assumed that the evidence presented to the criminal court did not justify conviction for the crime charged. Evidence which was not admissible in the criminal proceedings may have to be introduced, which would meet the civil standard of proof. The Government seems to think that a Judge's assessment of a person's demeanour or limited admissions during the trial may, on their own, be sufficient to allow the tribunal to make an order, but it is highly likely that there will be additional material needed for the civil part of the case.

Extending restraining orders to acquittals carries a substantial risk of miscarriage of justice. The problem could be most acute in a magistrates' court where a bench of lay magistrates will come to the conclusion that the evidence is insufficient for guilt on the criminal standard, but will then be required to consider whether an restraining order should be made on the civil standard of proof. There may be a temptation for the bench to 'fudge' the issue on this and to make some sort of order against the defendant, perhaps thinking that the CPS would not have brought proceedings in the first place without good reason. Things may be worse in the Crown Court where the Judge may regard the jury's acquittal of the defendant on the criminal charge as perverse and may decide to make a restraining order to redress the balance. It has been argued[107] that it not wise to let this power be exercised by the same tribunal. The appeal courts might be overworked as a result.

Saving money by preventing complainants from having legal representation

A motivating factor in pressing for the widespread extension of

restraining orders may be that they are seen as a method of saving the Treasury money, because the complainant needing protection after the criminal case will not have to hire their own lawyer to get the order. That is in contrast to their need for representation before the civil court when seeking a Section 3 PHA non-harassment order or an FLA non-molestation order.

The Government has suggested[108] that the extension of restraining orders is needed to avoid a situation where a 'victim' in a harassment case, after an acquittal, "has to have a police escort from the crown court to the civil court to obtain adequate protection". No evidence has been cited demonstrating that this is frequently the case at present, but if the change is being proposed to short circuit such a farce, it is remarkably short-sighted. After an acquittal, the 'victim' will not have any proper legal representation in a case where it has already proved difficult to persuade a tribunal to convict, and they may not be able to fight their corner without assistance. It is quite likely that protective orders, which would have been made in the civil court, upon appropriate and properly presented evidence, will simply not be made in the criminal court because the complainant may not have realised what evidence they should be putting forward. It is unlikely this measure is going to 'help victims'. They need proper legal representation more than a police escort.

Why not have restraining orders against certain unsuccessful complainants?

Some acquittals in cases under the PHA occur because the complainant is revealed during the trial to be a person who has, themselves, been indulging in a campaign of harassment. If there is

going to be a power to make a restraining order against an acquitted defendant, to save time and expense, why should there not also be power to make a similar order against an unsuccessful complainant on the same basis? And, why, if that is a good idea, not extend it to any sort of criminal case?

As the Bill is currently drafted, the Court cannot make restraining orders against anyone other than the defendant, although an indication was given[109] that such a power might be included at some future stage. Providing concerns can be dealt with about whether or not that person should be legally represented when facing the prospect of such an order, there seems to be no good reason why restraining orders could not be made where harassment from any person is anticipated arising out of a criminal case. Indeed, even now, the Court can bind over anyone before it, if a breach of the peace is apprehended, without waiting for them to get representation.

5. Victim and witness support: proposed changes in the Bill

As set out in Chapter Two, arrangements for victioms and witness support have developed in a haphazard fashion. It is now proposed that there should be a statutory basis for such provision. Baroness Scotland has said[110]:

> "..…We are trying to raise the bench-mark and the water mark …regarding how victims are treated. We are trying to emphasise to all agencies that victims have to be treated with propriety and responded to with care and consideration…."

It is unlikely that anyone would disagree with those sentiments. The question is whether the proposals in the Bill will really achieve that aim.

The difficulty of identifying the 'victim':

At the core of this issue is the difficulty of not always easily being able to identify the 'victim' in a given situation. The literature would have you believe that in any given relationship there is always one victim and one aggressor. Those who deal with real people know perfectly well that frequently both parties in a troubled domestic relationship will have hit one another or screamed at one another at different times. Similarly, an abused teenager can turn violent against the abusive parent. All those people can claim to be victims. How do you disentangle the full gamut of human behaviour so as to decide who is going to be entitled to support and assistance? At present, the Bill is silent on the issue, leaving it to other persons and bodies to determine the identity of the victim in any given case.

The Code will also apply, in its current wording, to persons who claim they are victims, even if they cannot prove a crime has been committed. They will merely have to convince someone else that they are a 'victim' to gain assistance. The definition of 'victim'[111] provides for the person to be 'a victim of an offence'. Further there is no geographical limit on the occurrence of the alleged offence, (although the ComVict will only be able to make recommendations about agencies within England & Wales). While this may enable those who have been the victims of crime whilst abroad on holiday to obtain services on their return; it may also entitle those who seek asylum in this country to make claims arising out of alleged offences abroad.

Is that the right way to plan for the expenditure of public money? It seems unduly wide.

The Victims' Code and the Parliamentary Commissioner[112]

If it was intended that provision of services made consistent across the country, then it would be wise to have a formal statutory framework. However, that does not appear to be the intention. Rather, the model planned is that of the National Criminal Justice Board, set up in April 2003, with Local Criminal Justice Boards, These are intended to "look in a holistic way at the delivery of criminal justice" and, at a local level, at a "holistic response to their areas' needs". Indeed, it is not even intended that all types of 'victims' will receive equal treatment under the Code.

A draft 'indicative' Code has been published by the Home Office, and stipulates that 'victims' and 'witnesses' will have of 'guaranteed levels of advice, support and information from the criminal justice agencies' with which they come into contact, and also from other 'organisations that deal with victims of crime'. It has clearly been drawn up with the best of intentions but its scope may be too wide. Baroness Scotland[113] claimed grandly that it formed, together with the appointment of the Commissioner for Victims & Witnesses: "…the first focused and holistic response to the all-round needs of victims"

To what, then, does the proposed Victim's Code amount? Clause 25(1) suggests it is not going to have much useful function at all, if a failure to perform a duty imposed under it does not make the person failing liable in any proceedings[114]. Where are the teeth? Clause 26 would enable complaints to be made to the Parliamentary Commissioner if a 'victim' feels the Victims' Code has been breached. The Parliamentary Commissioner would investigate and

write a report setting out what the failing organisation should do to remedy the situation: such as apologising to the victim or developing further procedures. If the organisation complained of fails to remedy the situation, the Parliamentary Commissioner can lay a report before each House of Parliament, but that is the end of the matter. It is, presumably, to be hoped that that will give the 'victim' some satisfaction. It is not easy to see how that would be achieved. Is the prospect of being criticised in an Ombudsman's report really such a sanction against non-compliance? The risk is that this is just window dressing to appease interest groups.

The legal status of the Victims' Code is also particularly problematic. It is a Code with no more than 'qualified legal efficacy'[115] with indeterminate status and lacking full legal weight. It only purports to deal with the criminal justice system[116], but its 'trigger' clause[117] renders it admissible, in both criminal and civil proceedings to determine 'any question'. Particular concern has been expressed about this[118]: fsuppose, or example, if a defendant in criminal proceedings claims to have been a victim of domestic abuse and further claims that insufficient support was given to them by organisations under the Victims' Code, such that they snapped and committed an offence. Would this be a mitigating factor in the trial? Is it really intended that the very fluid nature of human relationships should allow people to make use of their status, for however brief a time, as a victim in such a way?

In addition to those technical aspects, there are other problems with the wording. The Code does not spell out the 'rights' and 'expectations' which victims or witnesses of crime should have. Nor does it define the 'services' to which they are entitled. At the very least these should be enshrined as including such things as

"protection, personal support or information and explanation about the progress of a case"[119]. The majority of victims not involved in any criminal Court proceedings or claiming Criminal Compensation proceedings will also expect assistance with such things as health, housing, insurance, finance, employment or education issues. Rights to financial help are particularly to the fore of wish lists.

Commissioner (& staff) for Victims & Witnesses: ComVict[120]

It is not at all clear that there is any benefit for 'victims' in having their own separate ComVict. Is the Government simply spawning bureacracy so that it can put out a press release saying it id doing something? What will actually be achieved? The ComVict will have very few teeth, since it will only be able to 'recommend' or 'direct' action by others. How will such an individual, with a substantial staff, offer a "holistic and joined up service for victims" without proper powers? There are those, such as Victim Support, who would like to see the ComVict having the power to direct Government departments to have "pro-victim and witness policies and procedures" and to "develop new policies and procedures where none have previously existed", but that would plainly stray into the parliamentary realm and is inappropriate for a mere Commissioner, who does not have to consider a department's budget or countervailing policy considerations. Given it is not proposed that ComVict will have such powers, though, it is difficult to justify the expense of setting up the office and staff.[121]

It is worth noting that the Children's Bill[122], includes similar proposals for substantial expensive provision: a Children's

Commissioner in England & Wales[123]; a Director of Children's Services, and Local Safeguarding Children's Boards. There is to be yet another related quango: the Family Justice Council: to be introduced later this year. It is not clear how all these bodies are going to dovetail with the ComVict.[124] It seems inevitable that they will overlap in very many of their functions and may find themselves each separately investigating the same set of facts. Is this a sensible use of resources? Is the Treasury going to provide adequate funding for so many new bodies? In other areas, such as telecommunications, there has been a recent tendency to consolidate such Commissioners. It is perfectly possible that that will happen with all these individual Commissioners in the near future. Why not set them up in an amalgamated fashion at the outset?

Provision for information about victims to be disclosed[125]

The plan is to permit information about domestic violence cases to be shared between the relevant public authorities so as to enable the Victims' Code and the other provisions of the Bill to work. Such disclosure will still be caught by the Data Protection Act 1998, so there is a fear that information will not be effectively shared. Victim Support, for example, has complained of a reduction in referrals from the police since that Act came into force. Authorities and responsible bodies have seemed overcautious in retaining and sharing information.

The belief that great swathes of information cannot be shared under current legislation is mistaken. Most of the current arrange-

ments for passing information to Victim Support and such organisations do comply with the Data Protection Act. A Home Office circular has been put out to that effect, with the support of the Information Commissioner. This Clause may help, a little, by reassuring bodies that there is a duty to pass on information to make the Victims' Code work[126].

Victims' Advisory Panel[127]

This Clause simply turns a worthy non-statutory quango into a statutory one and requires the Secretary of State to consult this panel in a vague and unspecific way 'at such times and in such manner as he thinks appropriate on matters appearing to him to relate to victims of offences or witnesses of offences'. If the Panel has been consulted during the year, they must then prepare a report for Parliament. That is all that is expected at present.[128] The relationship between the ComVict and the Panel is not specified. It seems any Minister of the Crown can seek advice from the ComVict[129] but only the Secretary of State can consult the Panel[130]. Why the distinction between the two?

There is concern that the purpose of the Panel is not as positive as the publicity may suggest. It may be intended to replace a wider consultation procedure, by giving a lazy minister just one body to consult, rather than the myriad special interest groups which currently exist. Since there is no requirement for a person to step down from the Panel after a specific period of service, nor any limit to the numbers appointed, it is perfectly possible that one person from each of the major groups will be appointed and will then speak for that group. The potential lack of flexibility should be worrying for the smaller groups who may not be represented at all and for new

groups, developing in response to new social pressures, who may not have a voice. Is the minister going to decline to meet individual groups on the basis that the Panel is there to represent all the interest groups?

Grants to victims & witnesses[131]

Under this Clause, 'the Secretary of State may pay such grants to such persons as he considers appropriate in connection with measures which appear to him to be intended to assist victims, witnesses or other persons affected by offences'. It is claimed that this hugely wide set of provisions is designed purely and simply to remedy the fact that the Home Office, at present, gives annual grants to 'several voluntary organisations which help victims and witnesses' without having the formal authority to do so. If so, why make the wording so wide? Why provide no mechanism for determining those criteria?[132] The Government maintains that the wide wording is not intended to signal that more funding will be available or that currently unfunded specialist interest groups will receive additional funds[133]. But if so, why raise hope?

Clause 35 would give authority to the Secretary of State to give payments to 'persons', whereas the explanatory notes talk about 'bodies'. A 'person' can be a company limited by guarantee as well as an individual, but that need not include every voluntary organisation to whom funds are currently paid. It also suggests, to the lay mind, that individuals are going to be able to apply for grants, just because they are victims. Are we talking about 'persons', 'bodies' or 'organisations'? This imprecision of wording leaves an enormous amount of discretion with Government to pay public funds to their

pet favoured groups; creates no transparency; and may well generate huge amounts of perceived unfairness.

At present, it is not clear how large the available resources are going to be, so there is no indication what range of projects can be funded. It is said that the Clause is "consistent with existing Treasury best practice"[134]. The Government has trumpeted[135] that they are investing '£84 million' in a three stage strategy to tackle domestic violence and have started the spending by launching a national freephone 24 hour helpline with an online database of refuge accommodation and services, at a cost of £1 million from the Government and £1 million from Comic Relief.

A complication inevitably arises from this. If £84 million is available and only £1 million has been spent, expectations will be raised amongst many persons or bodies involved with victims that substantial funding will be available. If a helpline gets £1 million, why can they not get a few thousand pounds?

There are many bids for funding already, as a result of the Bill. 'Refuge' has suggested public funding for some victims of domestic abuse pay for refuge accommodation irrespective of apparent means. Others have pointed to the dearth of refuges for men or for ethnic minority women. Both women's and men's refuge organisations are seriously underfunded and all are bound to make similar bids for finance. The plight of such women is undoubtedly dreadful, but although discussions are going on about how such people can be assisted, serious funding is not likely to be forthcoming. The Government has maintained[136] that it "would be unfair for victims of one particular crime type to be singled out" for special attention. If that is their stance, why does the proposed Victim's code permit different treatment of different classes of victim in Clause 23(2)&(4).

And what about the source of funding? There has been outcry at a recent suggestion that there should be a 'victims levy' or 'surcharge' on speed camera fines, and all other criminal convictions[137], to provide funds for such a project. There has also been some confusion about this, since the proposals appear to be tied in with money to bail out the cash strapped Criminal Compensation Scheme. Whatever the origin of the funds, the Government seemingly takes the view that all offenders, including motorists, should pay into a fund for all victims[138]. All insured motorists, though, already make provision for victims of road traffic offences by having compulsory insurance, which funds the Motor Insurers' Bureau. The proposals on the surcharge and other measures, such as a recoupment of Criminal Injuries compensation monies, are out for consultation until the 29th March 2004. It is not clear that that time scale fits neatly in with this Bill, and so the identified source of finance for the Victims' Grants remains unclear as does the scale of funding involved.

6. Criminal measures: two proposed changes in the Bill

The offence of causing or allowing the death of a child or vulnerable adult[139]

In recent years, there have been many criminal trials which have unsuccessfully attempted to identify the killer of a child where one or more people, usually the two parents, are implicated, and they all refuse to identify the person responsible. Someone guilty of murder or manslaughter of a child should not be able to escape justice by remaining silent. The problem became particularly acute after *R v Lane and Lane*[140] which suggested that such trials should not proceed beyond a defence submission of 'no case to answer' at the end of the prosecution case.

Under current law, defendants hope to be found not guilty of murder or manslaughter and so avoid all punishment. The alternative criminal charge, when a child dies where someone has been in a

position of caring for them, might be the separate child cruelty offence, with a maximum penalty of 10 years. This carries few attractions as a lesser charge because a defendant convicted of that offence is still a 'Schedule 1' offender and would have great difficulty in being allowed to parent any other child in the family.

The Law Commission was asked to consider the difficulty and it prepared an authoritative report[141] with a draft Bill. The Law Commission proposals were not without controversy, but the Government has chosen to discard the carefully worded 13 Clauses of their draft Bill, and instead has come up with Clauses 5 & 6 to try to cover the same problem, with an offence of causing or allowing another person in the same household to cause the death. The Government has complicated matters by lumping into the same sections some very different considerations relating to deaths of vulnerable adults. This is an ill thought-out attempt at grabbing headlines. The Clauses are flawed and inadequate, and there is a real risk they will fail to achieve the laudable aim of preventing murderers from escaping justice.

The lack of rationale for limiting the offence to encompassing death

The Law Commission suggested the offence should not be limited to the death of a child, but should include criminalising the neglect or complicity of family members or carers, where serious harm was caused to a child. That is a much more intellectually coherent approach than the Government's proposal which limits the crime to occasions when there is a death. Why should there be no similar protection for those who continue to live? If the child remains alive,

it can still go on to suffer further dreadful harm at the hands of the same person. The acts and inactions of carers are equally reprehensible whether death or serious injury results.

The Government apparently wants to take only a small step at a time, altering the law relating to the death of a child, and putting off until the future an extension of the law to include cases of responsibility surrounding serious injury. If it seeks to limit the scope of these provisions to death alone, it is incoherent to tack the measures concerning vulnerable adults onto those concerning children.

The inclusion of vulnerable adults as well as children

The Law Commission specifically limited its consideration to serious injuries and deaths of children. Children are easily identifiable by reference to date of birth. Identifying which adults are 'vulnerable', however, is far more difficult, particularly after their death. Presumably an additional pre-trial hearing would be needed. The Government has suggested[142] that evidence from neighbours would be admissable, which suggests a lack of understanding of the negligible value of such generally hearsay evidence in criminal proceedings.

The definition of a 'vulnerable' person is likely to be fraught with difficulties, given the extraordinarily wide wording of subsection (7). It is proposed such a person would be aged 16 or over (why not 18?) and their ability to protect themselves from violence, abuse or neglect would be 'significantly impaired' through physical or mental disability or illness, through old age or otherwise. It is clearly not just the old who will be included in the category: but how far does it go?

Is an 'honour' killing of a young woman by family members, who believe her sexual activity outside their culture has dishonoured the family, going to be covered? What level of physical disability to protect herself from a massed attack by stronger relatives is going to have to be proved after her death?

There has been remarkably little consultation of special interest groups on the proposed addition of 'vulnerable adults'. Baroness Scotland said[143] that 'Action on Elder Abuse' had 'commented' on the proposals; that the 'British Council for Disabled People' 'welcomed' the measures; and that no written response had been received from Carers UK, Mencap or RADAR. She took that silence to indicate assent. Yet these organisations may welcome a proposal to 'do something about' a problem, that does not indicate their detailed consideration of the wording or the ramifications of what is proposed.

The extent of the problem of vulnerable adults being killed within a household, and the perpetrator not being identified due to silence, does not appear to be documented. Baroness Scotland[144] referred to being aware of one case where all family members refused to speak about an incident and the prosecution could not proceed. However, that is just one case.

Once again, the closing of a straightforward legal loophole has been over-burdened with additional material to a point where the relation between the clause and the original problem has been all but lost. It is suggested that extensive guidance will be given to those dealing with prosecutions (although there is some doubt about what the guidance might contain or who might give it), but it is far better to have the wording of the statute properly drafted rather than to leave it to the Courts and juries to try to understand

the vague sentiments that it may inexactly contain. It is the opinion of the author that Clause 5 ought to be limited to child deaths.

The definition of 'reasonable steps' and the objective test

A person can be guilty of a Clause 5 offence of not protecting a child or vulnerable person if they fail to take "such steps as he could reasonably have been expected to take". The definition of this phrase is fraught with potential legal complications, as is the concept of whether the person 'ought to have been' aware of a risk to the vulnerable person, since that introduces an objective test to the offence and effectively makes people guilty of a crime when they have just been negligent[145].

Many people find themselves in terrible dilemmas and are likely to end up falling foul of this wording. If a person suffering domestic violence is aware that the other party is being violent and abusive towards a child in the household, they are often fearful of potential retribution if they attempt to leave that relationship. (It has been pointed out by Refuge that if the child is a boy of 16, he will not be able to move with the battered parent to a refuge, and it is likely he and the parent will stay within the household where they are being abused.) Similarly, a spouse who is brought from abroad by someone with a right of abode in this country cannot leave them for a period of two years if they are to obtain their own right of abode here, except under the very limited circumstances of a Home Office concession relating to domestic violence[146]: and that can have significant problems for their children.

If by staying in the household any of those persons were to be regarded as not having taken 'reasonable' steps to protect a child or vulnerable adult, they could well be convicted of the offence if that person is killed. Even if not convicted, at the very least they could be subjected to arrest, remand in custody and all manner of other indignities, with a long delay before acquittal. Fortunately some respite was granted at Report Stage in the House of Lords, where an opposition amendment was passed enabling the Court to take into account the prior occurrence of domestic violence in considering what reasonable steps could have been taken[147].

The definition of 'the same household'

There is a further limitation which waters down the potential effectiveness of the Clause 5 offence. The person charged must be a member of the same 'household'. This is a curious limitation[148]. Given that one of the unintended consequences of Clauses 5 & 6 may be a public clamour for mass prosecution by the CPS of carers and relatives, whenever a frail elderly person dies at their own home having sustained unexplained injuries, it is going to be difficult to explain why a similar prosecution would not be possible if a similar frail elderly person dies in similar circumstances, but in a residential home for the elderly. The Government claims such a home is not a 'household'. They argue[149] that special circumstances pertain when a person is within the 'sanctity' of their own home. But the distinction between vulnerable adults living in their own households and those living in accommodation provided by others seems artificial. Vulnerable adults are very frequently not the direct responsibility of their family, whereas children generally are.

Suppose the vulnerable adult owns their sheltered accommodation flat within a complex where carers and relatives come in and out to look after them. That is surely a household. Why should it be different if the vulnerable adult has a room provided for their use in a retirement home and the state pays the costs? This highlights the problem of adding provisions relating to vulnerable adults to those concerning children.

Should Clause 6 be deleted from the Bill?

The Government has said[150] that the aim of Clauses 5 & 6 is to persuade people who, at the moment, hide behind silence to avoid all criminal liability, to break ranks and give evidence about the person who actually committed the fatal act. The Government hopes to flush out the prime offender this way.

One of the ways in which the Law Commission report was problematic was that it proposed to water down the historic 'right of silence' by making it a statutory obligation to provide information (other than of a self-incriminating kind) about the events surrounding the death of a child. The Law Commission said this would send a clear message that those with responsibility for children had a duty to provide information where that child was the victim of a serious criminal offence, but nonetheless was widely criticised as running counter to the established principles of criminal law.

The Government has paid lip service to such criticism, by not including an equivalent statutory obligation, but at the same time, has built upon the existing statutory provisions, which allow certain limited adverse inferences to be drawn from a defendant's silence,[151]

with potentially draconian adverse inferences being drawn from silence at trial, to determine guilt on a charge of murder or manslaughter.[152]

Clause 6 has almost entirely been redrafted at Report Stage, but in similar terms to the original[153]. Lord Donaldson, former Master of the Rolls, has described the clause as a 'monstrosity' and 'contrary to every normal canon of law' and it remains so, even in its altered form[154]. It is said that it drives a coach and horses through two basic fundamental protections of the criminal law: the right to remain silent and the fact that it is for the prosecution to prove guilt[155]. It is also arguably in breach of Article 6.1 (the right to a fair trial) and 6.2 (the presumption of innocence) although the contrary has been certified by Parliament's Joint Committee on Human Rights. It is the expressed view of the Criminal Bar Association that a conviction which was 'decisively influenced' by the defendant's silence would be bound to be a violation of Article 6. The Government argue these inferences are important to put pressure on fellow defendants to break silence, but then go on to contend[156] they have only a very limited effect and do not breach the defendant's right to a fair trial under Article 6. The Government cannot have it both ways: either the provision has teeth or it does not.

It has been pointed out[157] that Clause 6 is not actually necessary to the smooth running of a Clause 5 offence trial. If the prosecution case is weak, then there is no reason why a submission of 'no case to answer' should not be made at the end of the prosecution case. If there is insufficient evidence, and the defendant could rely on not being convicted purely on inferences from silence[158], why is it necessary to wait until after the defence case before making a submission of no case to answer?

The Government maintains that if there is a possibility that one or other defendant will break silence and criticise the other, then that justifies the prolongation of such weak trials. They say they are only postponing the opportunity to make such a plea, not preventing it, so it is not in breach of Article 6. The chances of a murder or manslaughter verdict on such potentially self-serving evidence, realistically, cannot be high.

One compromise position has been proposed which has some merit. If during an investigation it became clear that Clause 5 proceedings relating to a death were a possibility, then a special mandatory caution about the inference that might be drawn from silence could be given before the person was formally questioned about such a death[159]. Any failure to answer at that stage might then be utilisable without human rights violations because the defendant would have been on notice. It remains the opinion of the author, however, that this extremely controversial Clause should be deleted from the Bill.

The introduction of sample counts for non-jury criminal prosecution[160]

These clauses are further examples of controversial criminal law loophole management which have been tacked on to the Bill. The same issue was considered during the passage of the Criminal Justice Bill 2003 and similar clauses were rejected.

The legal difficulty has arisen because there are some criminal cases where the offending behaviour of the defendant is repeated so many times before arrest that the number of offences is too great to be accommodated in a single jury trial. To make the trial manage-

able, the practice grew up for the indictment to charge offences that were regarded as specimens of the wider range of offending. Then, if the Defendant were to be convicted on the specimen counts, the Court would sentence the offender for the whole. A Court of Appeal decision: *R v Kidd & Others* in 1998[161], disapproved the practice because it involved sentencing an offender for offences to which there had been no guilty plea, no conviction and no agreement that the other offences be taken into consideration.

A system is needed which allows the totality of the offender's criminal behaviour to be properly taken into account when sentence is passed. All sides agree that the *Kidd* case created a problem requiring a solution to enable the criminal justice system to operate properly. The particular proposal put forward by the Government would allow the Judge, sitting without a jury, to decide the guilt of the defendant on additional counts, after the jury has convicted on certain 'sample' counts. It is widely seen as being the thin end of the wedge in the abolition of jury trial.

The Law Commission made a number of different recommendations in their report No. 277, "*The Effective Prosecution of Multiple Offending*". Some aspects of that report are now reflected in the tortuous wording of Clauses 13 to 16; of the Bill, others are not.

A number of alternatives have been proposed and rejected during the Committee stage in the House of Lords, involving the use of multi-count indictments or compound counts[162]. It is clear that there is a great desire to produce a solution, but these particular Clauses may not achieve that result.

Much further work is needed, if these provisions are to remain in the Bill. There is no precise definition of the 'sample' count and how it would be related to those other offences which it represented, so as

to make it fair that the remainder of the counts would be properly left to the Judge alone. There has been much discussion on whether a 'similar fact' test should be introduced for this purpose.

A further problem arises in considering what happens when a Defendant is acquitted on the sample counts. Could there is a subsequent trial on the particular counts which had been put to one side to await decision by the Judge alone? Should there be a presumption of an acquittal being recorded on those additional counts, or should the Court be required to record an acquittal? What if, for example, the main trial had been stymied by the illness of a crucial witness: should it be within the Judge's power to allow the prosecution to have a second attempt at getting a conviction from a different jury on the basis of the additional counts? The Law Commission[163] raised this difficulty, being worried that a Judge might allow the prosecution that second chance if it was felt that the acquittal by the jury was perverse or erroneous. To do other than to make it an obligation, rather than a presumption, for a directed acquittal on all counts would be to leave the Defendant facing effective double jeopardy.

There is a sneaking suspicion, naturally denied by the Government[164], that the sample counts offer a cost saving option by enabling courts routinely to shorten trials at the expense of giving each Defendant a fair hearing.

7. Evaluation:
Is the Bill going to be tough or ineffective on domestic violence? What are victims and witnesses going to gain?

The present system appears to many of those, such as the author, regularly involved in legal proceedings at courts, to be delivering a reasonable service to those suffering from domestic violence and to victims in general. Its strength is that it offers a great deal of flexibility to suit the many very different experiences of domestic violence. There is always room for improvement and perhaps not as many people benefit from the current system as could, but it may be that the concepts of prohibition and punishment are not ideally suited to some domestic violence cases where other forms of treatment and re-education might work better.

The clamour from a number of interest groups for the system to

be changed and to be made more punitive really needs to be carefully monitored, lest a system with less flexibility is put in its place. The impression being given by the Government in the House of Lords debates is that those suffering domestic violence do not know what is best for them and that they need to have a more rigid system imposed upon them. For a small proportion of 'victims' that may be correct: lawyers are frequently frustrated by clients who go back to an abusive partner after securing an injunction. But there is little to suggest that a more rigid system will deliver a better service across the entire range of people affected by domestic violence.

A number of key points emerge from the detailed consideration of the Bill's proposals set out in Chapters 4 and 5 above.

Does the Bill really extend the Courts' armoury against domestic violence?

The Bill has been widely publicised as a tool which will deliver real results for people suffering domestic violence. In fact, it makes very few significant changes, at all, to the law relating to domestic violence. Clause 1 would simply criminalise breaches of non-molestation orders and allow arrest for breach without a power of arrest. That is not the same thing as 'criminalising' all domestic violence, since a civil court still needs to have made a non-molestation order in the first place before the criminal procedure can be invoked. Police already have very similar powers of arrest in cases sufficiently serious to justify arrest. Clause 11 has been hailed as giving a 'Yellow Card' to non-harassment restraining order after convictions or acquittals in all criminal

offences, but this is unlikely to make a real difference, since the Court already has the power to bind over and to make anti-social behaviour orders. Clause 10 would make common assault arrestable: but it is not clear that that is going to encourage police officers to arrest any more than they do at present, with their existing wide powers.

Set against those small steps forward, there is a major step back. The proposed restrictions on the giving of undertakings will severely restrict the court's powers. The restrictions demonstrate one of the worst features of the current nanny state, which believes it knows best what an individual needs, having had forcible representations from just a few particularly motivated interest groups.

Is it sensible to lose the current flexibility of non-molestation orders and powers of arrest?

Because non-molestation orders deal with a very wide range of human behaviour, not all of which would fall within a formal definition of 'domestic violence'; and because a power of arrest has been regarded as a draconian way of dealing with an alleged breach, it has always been the case that the two did not overlap exactly. The Government propose to change that and will weaken the system of dealing with domestic violence in consequence.

Take the example of a non-molestation clause restricting the frequency of mobile phone text messages. Is it really going to be appropriate for a police officer to arrest someone who has clearly breached the order by sending ten text messages in the course of a morning, perhaps about contentious contact arrangements with

their child that afternoon? Should police time be taken up trying to sort out such alleged breaches of orders which do not involve serious criminal offences? If it should not, why make all breaches of all non-molestation orders arrestable?

The proposals in Clause 1 would sweep away that careful balancing mechanism and would replace it with an automatic criminalisation of a breach of non-molestation injunction. This seems to be done on the basis, as Baroness Scotland put it[165] that " many victims with whom we have spoken have stressed to us the disdain in which the offender holds the non-molestation order—even where a power of arrest is attached to that order. We are concerned that the sanction for breach of a non-molestation order must bring home to the respondent the seriousness of that breach." As a tool for tackling disdain, the introduction of criminal sanctions in place of the existing system is a fairly drastic step. The risk is that Judges may stop making the wide range of 'holding' orders which they do at the moment, and that could actually be to the detriment of those who suffer domestic violence.

The confusing choice of civil or criminal proceedings for breached orders:

The choice of remedy for breach of a non-molestation order will be either the current contempt proceedings in the civil court, or the new criminal proceedings in the criminal court. Baroness Scotland[166] has accepted the choice may well be a matter of chance. It would depend on whether the 'first person to arrive at the scene of a breach is a police officer'. She said the incident might then follow the criminal route. Alternatively, the complainant might go to their

solicitor and follow civil contempt proceedings, not wishing to criminalise the other party. Her view was that the criminal proceedings would be 'better' because:

> "… we should also take on board that the very abusive nature of domestic violence often erodes the will of the woman, who may need the greater support offered by the criminal court as well as that of the civil court, and that an intervention of that nature may prove necessary. … We will be assisted greatly by the way in which case management is currently dealt with and the fact that the CPS is working very closely with the police and the courts to get together protocols so that we have a holistic approach to domestic violence. …"

It is not clear how a person whose will has allegedly been eroded will find it easier to turn up in a Magistrates' Court, without a lawyer of their own supporting them, rather than attending the same County Court where they obtained the non-molestation order in the first place, with their own lawyer, to help them give evidence. It is more likely that the current problem of criminal trials in cases concerning domestic violence will persist: that many people will withdraw their complaint of breach of a non-molestation order rather than have to go through with a hearing or will simply decide not to give evidence at the last minute. It is difficult to see how enforcement of an injunction by a prosecution brought by third parties leaves the complainant in control of the proceedings. An amendment to give complainants the entitlement to choose not to have criminal enforcement proceedings, if they did not want to, was rejected at Report Stage by the

Government on the basis[167] that since some women were intimidated out of taking enforcement proceedings, no complainants should have the choice if the prosecuting authorities wished to go ahead ' in the interests of the public and the victim'. The civil court route has the advantage that very often the same County Court judge will hear the contempt proceedings as heard the original order and will be in a much better position to make the punishment fit the circumstances. There is also less chance that the papers will be lost if they do not have to be transferred between court buildings.

Without some clear determination of precedence between contempt proceedings and criminal action, there is going to be confusion about whose responsibility it is to pursue breaches, particularly where public funding is an issue. The civil route depends only on the complainant making an application to court, and being dependant on either public funding or personal means for legal costs. The criminal route requires prosecuting authorities to be satisfied there is a case, without the complainant having to bear the costs personally, and with all the legal costs being borne by the state.

Perhaps the hidden agenda of the Government's position on Clause 1 is that they expect all breaches of non-molestation injunctions to be dealt with through the criminal courts[168], with very few civil contempt proceedings, and that they will allow the Legal Services Commission will be allowed to stop granting legal aid funding to complainants to bring committal proceedings forward. It may be said that if the police will not pursue the matter then there cannot be a good enough case to take contempt proceedings. Rather than let complainants and their solicitors bring proceedings, often at public expense, it will be for the

prosecuting authorities to sift complaints and only to pursue those that have merit. That is probably not an outcome anticipated by those championing women's rights, but there is a real possibility there will be fewer successful actions for breach of non-molestation orders than there are at present under this system.

The vagueness of the costs of the proposals

As yet, the overall costs of implementing the Bill have not been identified properly. It is said the annual cost of the measure will be £40.8 million, together with set-up costs, but that is bound to be a serious under-estimate given the very wide scope of what is being proposed.[169] In respect of just Clause 1, the police, Prison Service and Probation Service, which are all already overstretched, will face extra burdens. The Law Society has pointed out that there will be very substantial increased costs implications for criminal courts, hearing an influx of offences related to the breach of non-molestation injunctions. Looking at implementing the Victim's Code, numerous voluntary agencies are going to face significant costs. There is also a prospect that even more substantial resource implications are going to be added to the Bill during its passage, depending on the progress of the Government's consultation document into Compensation & Support for Victims of Crime.

The Government has to decide where additional monies are coming from: whether it is a 'surcharge' on all criminal offences or from the £84 million they have already announced.

The training of police officers, Crown Prosecution Service officials and others who will have a close connection with the proposed new system will be a vital part of the efficient working of

the proposed changes to the Family Law Act. 'Guidance' is going to be issued about the training of those involved[170]. It is far from clear that the mere issue of guidance will suffice to secure the necessary funding for such training.

Is the Bill promising too much and giving too little to victims?

The Bill is widely represented as tipping the balance in favour of those classed as victims. Whether it will actually do so, given the extreme weakness of the powers vested in the ComVict, the Advisory Panel and the Victims' Code, appears unlikely. It makes many demands for action, responding with warm words and noble ideas. The draft Victim's Code uses similar language. There is bound to be disappointment when such wide aspirations are not attained because these bodies will not be able to enforce the provision of specific services.

The Government has talked in rosy terms about their 'holistic' and 'multi-disciplinary' plans with the involvement of the proposed Commissioner and the Panel. It is said that such bodies will "drive forward the understanding that this is a multi-faceted issue that deserves the attention of a number of different parts of government". That does not offer expectations of immediate action, merely that attention will be paid to the issue. It is not clear that it is an appropriate role for the state to formalise a third sector which is largely independent and substantially voluntary. Since the plan appears to be to continue to allow organisations to develop organically and at different paces across the country, the rosy expectations may swiftly be disappointed.

Unintended consequences: the wider social impact of raising awareness

Given that it is not planned for all types of victims to be treated in a similar fashion under the Bill – something which, in itself, gives rise to questions of fairness – why is it necessary to have a one-size-fits-all system from the centre to replace the existing organic systems? Who are the 'victims' within this structure? How wide a class within society should be classified in this way? The curious feature of the Victims' Code, so widely commended by the various government funded women's groups, is that the groups who will probably benefit the most from this legislation are the new groups supporting men's rights. They are the new protest movement. Numerous 'men's' groups are springing up: such as 'UK Men & Father's Rights'; 'Justice for Fathers'; 'Fathers 4 Justice' and it is highly likely that they will gain some of the current pool of government funding.

The charity ManKind Initiative recently opened Britain's first safe house for battered men[171]. Their magazine, Male View, complained that there should be at least 70 such houses, rather than 1, given the 426 shelters available to women, and the crime statistics. Whilst there is a certain amount of sniggering about this news, since it is often viewed in the media coverage that the men concerned must be wimpish or unable to stand up for themselves, it has to be remembered that similar sorts of social stereotypes were once used to force women who were being subjected to violence to stay with their man rather than seek refuge. We still face a situation where men feel it is a sign of weakness to admit that their partner has hit them and that they are not able to stop her doing it again. There is considerable under-reporting to the police by men, and they do not find that social

workers will listen to them. But there is a considerable movement underway, with increasing appreciation by police forces, Victim Support and other organisations, that men need the same sort of services that have been provided over the last 25 years for women.

8. Better responses to domestic violence

The Integrated Court:

The most sensible way of dealing with the cross-over between the civil and criminal jurisdictions, and allowing a flexible system responsive to individual cases in domestic violence, would be to have an integrated court. This was specifically recommended in the recent case of *Lomas v Parle*, by the Court of Appeal[172]:

> "… The appeal showed the unsatisfactory nature of the present interface between the criminal and family courts …. Other jurisdictions were attempting to solve the problem. The publication of the Domestic Violence Crime and Victims Bill was an opportunity to reconsider the present dual system and to look into the possibility of integrated courts."

All the building blocks are already in place. Integrated Courts are in operation in trial projects, where both civil and criminal hearings take place, with the obvious costs savings of one set of lawyers and before a single judge, while at the same time avoiding the need for the complainant to appear in two sets of proceedings. Trial projects are taking place in five such courts: at Leeds, Cardiff, Derby, Wolverhampton and West London. Local agencies in Croydon are establishing a specialist domestic violence court and are considering how it might develop into a more integrated system. The CPS and the Department for Constitutional Affairs are undertaking a full evaluation of specialist and integrated courts. The Women's National Commission has reported strong support for dedicated domestic violence courts commenting that the pilot specialist courts are considered to work well. (In the USA, there is already an integrated court in New York, in which both civil and criminal jurisdictions are merged.)

The possibility of establishing such integrated courts has, however, been resisted by the Government at this stage[173] on the basis that it is something merely under consideration at present. It is not clear why there needs to be any further delay. Very little additional legislation would be required. The Courts Act 2003[174] provides that every judge or deputy judge of the High Court, circuit judge or deputy circuit judge and recorder shall have the powers of the district judge magistrates' court in relation to criminal and family proceedings. There are common criminal procedure rules in the criminal division of the Court of Appeal, the Crown Court and the magistrates' court[175] and common family procedure rules in the High Court, county courts and magistrates' courts[176]. Why not proceed with that idea now, rather than attempt the difficult task of spanning two different court systems with this unwieldy legislation?

The Family Law Bar Association is strongly in favour of there being an integrated, specialist court to deal with domestic violence matters. They cite many advantages. There would be a streamlined process that would help to address delays in listing. A specialist court would be better placed to deal with issues of disclosure and publicity. The special jurisdiction would be better informed in sentencing for first offences and re-offending, and could also deal with breaches of civil orders. Such an holistic approach would be more likely to ensure the protection of the victim and family than is the case when different issues are assigned to different courts. Family judges are well able to deal with evidential issues arising between civil and criminal proceedings since almost all of them also sit in the criminal courts. Family courts are familiar with the kind of expert evidence presented in these circumstances about the impact of domestic violence on the victim and the family. Overall, such courts with special jurisdiction, if incorporated into the family court structure, could actually lead to a reduction in the number of hearings required.

These are commendable aims, and readily achievable. Such a proposal would provide the sort of 'joined-up' or 'holistic' approach which is widely commended these days. Why not move in that direction?

A general strengthening of the civil court's powers

In the author's view, the only really good argument for introducing the criminal offence of breaching a non-molestation order is that the criminal court has a very much wider range of types of

sentence it can impose: not just imprisonment or fine. The Government recognises[177] that many domestic violence offenders need other forms of management, at present only available in the criminal courts, such as anger management courses, drug treatments and many others. Attendance on a 'perpetrator' programme can be made a requirement of a suspended sentence. It is not clear why the range of possible orders available to the civil court when dealing with contempt of court for breach of a non-molestation injunction or upon a person having been arrested under a power of arrest, could not include orders such as curfews, exclusion orders, community rehabilitation orders, drug treatment orders[178] and the like.

Criminologists have a 'functionality theory' which suggests that abusers continue to abuse because their behaviour carries no seriously negative consequences for them, It is therefore postulated that a public criminal prosecution, with a criminal record, might operate as a brake and get the message across that the behaviour has to stop. But there would also be many cases where it would make matters worse. Many people do not want their partner in prison and no longer bringing in money to the household: they want them simply to stop being abusive. The opportunity to keep the balance right is important. In *Lomas v Parle*, the Court of Appeal specifically stated:

> "…Sentences of imprisonment for harassment did not necessarily deter repetition. For domestic violence, anger management programmes were widely available. More extensive emotional management programmes might prove effective in helping some offenders.

Cognitive behavioural and psycho-educational approaches in perpetrator programmes can help those who have learned to view violence as a normal and appropriate response to unlearn that view. That can have benefits for society as a whole, not just the families of those individuals. There do, however, need to be such programmes for women perpetrators as well as men.

Special measures for vulnerable and intimidated witnesses in domestic violence cases

If proceedings continue to be dealt with in standard civil or criminal courts, then there would be considerable advantages in extending the eligibility for the 'special measures' for vulnerable and intimidated witnesses which are currently afforded to victims of sexual offences[179], to victims of domestic violence as well. The law provides a presumption in favour of vulnerable or intimidated witnesses giving evidence behind screens or via a TV link. A witness who had concerns about being intimidated would not have to face the defendant in person. Vulnerable witnesses include those under 17 and some adults with physical and mental disabilities. Intimidated witnesses are defined in relation to their fear or distress about testifying. At present, a witness to a domestic violence incident cannot be sure that if they report the incident they will be entitled to such special measures if the matter goes to Court, although that guarantee is currently available to those involved in sexual offences[180]. Since it is perceived that a fear of having to face a perpetrator in Court is a significant discouragement to some who might otherwise report offences in the first place, this might provide reassurance from the outset.

The Government[181] has declined to make this extension. There is considerable divergence of views about the issue, which has been under review since the establishment of Government inter-departmental working group on Vulnerable or Intimidated Witnesses, reported as 'Speaking up for Justice' in 1998. First, they argue that some of the less serious types of domestic violence do not justify automatic special measures. Second, that the evidence in domestic violence cases is not necessarily as sensitive as that given in sexual offence cases. However, the Government has also assumed that Courts would regularly offer such protection in domestic violence cases where the CPS or police requested it. If that is the case, then it might be wise to offer it from the outset, so that a fearful person thinking about reporting an offence could be sure that they were going to have such protection. It might tip the balance in favour of domestic violence being properly controlled.

Wider education:

One of the surprising findings of the research of such groups as the Zero Tolerance Trust was the extent to which children, particularly boys, viewed violence within a relationship as acceptable. If the numbers of domestic violence incidents really number round about half a million per year, then the only way that is going to be tackled is by a widespread exercise in raising public awareness and teaching children different ways of tackling disagreements in relationships. At present there are a number of slightly facile poster campaigns, and a plan for a V-day (that is, an anti-domestic Violence day) but something more widespread and pervasive is going to be needed, within the school curriculum. Proper funding would need to be put

in place, and there is no mention of that in the Bill. Even at the most serious end of the scale of violence, the current proposal for Domestic Homicide Reviews is only a tentative exercise towards learning lessons from events.

A proper definition of domestic violence:

The absence of an effective definition of domestic violence hampers all this these endeavours. If the suggestion of a stepped definition of domestic violence were to be adopted, then it might be possible to get the appropriate different messages across for dealing with the really serious incidents of violence as well as the less serious. An integrated court could also give the right weights to different manifestations of the problem.

9. Conclusions

The Bill is likely to prove a wasted opportunity. It could have made a real difference to the many thousands of people who genuinely suffer from domestic violence every year, but it talks tough without making provision for acting tough. It has been oversold, but will offer only minor improvements for a few people. For the majority, it will make the current flexible system much more rigid and unresponsive.

Without repeating the commentary in Chapters 4, 5 and 6, it is clear that many parts of the Bill are badly worded and that opportunities to tighten wording should be taken. The civil liberties problems with parts of Clauses 1, 6 and 10 potentially infringing natural justice and the right to a fair trial, remain to be tackled. Above all, the absence of a working definition of domestic violence leaves the Bill exposed to the development of many subtly different interpretations. If it goes through in its current form, it will probably need to be revisited in a few years, and in the meantime those caught up in proceedings will face unfairness and injustice.

The Bill is also going to be a real disappointment to those who are victims and witnesses, who imagined that all the new bodies being set up would improve their lot measurably and make it easier to obtain justice. Of course those in the new bodies will do their best to make them work, but if things go wrong, the new bodies simply do not have the power to force them to be put right.

The tacked-on provisions dealing with child and vulnerable adult deaths, and with multiple criminal charges are ill-thoughtout and will have wide and unintended consequences for the rest of the criminal law unless amended.

The cost of being really tough on domestic violence and of providing victims and witnesses with a fair deal is going to be far higher than the Government will be prepared to pay. That is why the measures in the Bill are so limited in scope. We have to decide whether we want Government to make a proper job of all these measures or whether we are going to let them get away with claiming to be making real progress when they are not.

Source Materials

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Stanko (2000) *"The National Domestic Violence 'Day to Count' profile"* Women's Aid

Victim Support (2004) "*Briefing for House of Lords Grand Committee*"
von Heussen (2000) (director, NASH, UK) "*The Law and 'Social Problems'; The Case of Britain's Protection from Harassment Act 1997*" Web Journal of Current Legal Issues

Agencies & Interest Group Websites:

Home Office	www.homeoffice.gov.uk
Women & Equality Unit	www.womenandequalityunit.gov.uk
Criminal Justice System	www.cjsonline.org
Crime reduction	www.crimereduction.gov.uk
Department for Constitutional Affairs	www.dca.gov.uk
DV Data Source	www.domesticviolencedata.org
Victim Support	www.victimsupport.com
Domestic Violence Intervention Project	www.dvip.org
Zero Tolerance Trust	www.zerotolerance.org.uk
Refuge	www.refuge.org.uk
Women's Aid	www.womensaid.org.uk
RESPECT (DV perpetrator programmes)	www.respect.uk.net
ManKind Initiative	www.mankind.org.uk
UK Men & Father's Rights	www.coeffic.demon.uk
Families need Fathers	www.fnf.org.uk
Fathers 4 Justice	www.fathers-4-justice.org.uk

Notes

1 Baroness Scotland; Second Reading; 15th December 2003 Column 949
2 Clause 1
3 Clause 10
4 Clause 11
5 These were introduced at Report Stage in the House of Lords and do not appear in the original text of the Bill. They deal with intermittent custody and prosecution rights of appeal in non-jury trials. There are also provisions concerning mental health and unfitness to plead. The extension of Protection from Harassment provisions to Northern Ireland are also covered.
6 Baroness Anelay; Report Stage; 11th March 2004; Column 1423
7 A third even more controversial proposal was dropped from the Bill before publication. It would have involved reform of the law on the defence of provocation to murder, but the pre-Bill publicity provoked too great an outcry.
8 Originally Clauses 4 and 5, but subsequently amended to Clauses 5 and 6.
9 Originally Clauses 9 to 12, but subsequently amended to Clauses 13 to 16.
10 December 2003
11 Excluding road traffic offences, where compulsory insurance was available.
12 Von Heussen (2000)
13 such as counselling projects for perpetrators of violence in Gloucestershire: CAFCASS information
14 Entitled "*Reducing Domestic Violence - What works ?*" by the Policing & Reducing Crime Unit
15 Grand Committee; 19th January 2004; Columns GC207-219
16 Report Stage; 9th March 2004; Columns 1218-1227
17 or man, these days. The Times, 6th March 2004.
18 13th February 2004
19 Women's Aid, response to 'Safety & Justice' July 2003
20 Mirrlees-Black, C. (1999*):* "*Domestic Violence: Findings from a new British Crime Survey self-completion questionnaire*". Home Office Research Study 191
21 Baroness Gould; Grand Committee; 21st January 2004; Column GC 316
22 The 'one in four' women experiencing domestic violence in a lifetime figure is a case in point. See below.
23 a single day's recording of domestic incidents on the 28th September 2000
24 Council of Europe, 2002; BMA 1998; Home Office Research Study, 1999
25 Dame Elizabeth Butler-Sloss; President of the Family Division; speech 8th September 2003
26 Zero Tolerance Trust, Glasgow
27 Mirrlees-Black (1999)
28 the more serious cases are heard in the Crown Court; the less serious in the Magistrates' Court
29 note that no separate PHA figures are given in the published Crown Court statistics for 2002
30 see Fig.2 below
31 British Crime Survey 2000
32 CPS & Police Inspectorate study of a sample of 463 incidents; reported 19th February 2004; Daily Mirror
33 Figures given in Edwards (2000)
34 House of Commons; written answer by Ms Hazel Blears; 3rd March 2004; Column 1013W

35 Women's Aid Statistical fact sheet 2002, quoted by Baroness Scotland, Second Reading; 15th December 2003; Column 951
36 (1980) 1 FLR 1 (the first case reported in the Family Law Reports)
37 Matrimonial Homes Act 1983; Domestic Violence & Matrimonial Proceedings Act 1976
38 It is not clear why Government spokesmen have talked about the current Bill as being the 'first specialist domestic violence legislation' for 30 years, given the date of that Act.
39 *C v C* [1998] 1 FLR 554
40 Section 45 Family Law Act 1996
41 Judicial statistics (Family matters) 2001 & 2002 (No separate figures published in 2002 for High Court or Magistrates)
42 Sections 46 & 47 Family Law Act 1996
43 e.g. *Chechi v Bashier* [1999] 2 FLR 489
44 e.g. *A-A v B-A* [2001] 2 FLR 1 a 12 month sentence for contempt of court which included a rape which had not been prosecuted in the criminal courts
45 Judicial statistics (Family Matters) 2001 & 2002
46 figures in von Heussen (2000)
47 Magistrates' Court statistics for England & Wales 2002
48 Budd & Mattinson; 2000
49 Report Stage; 9th March 2004; Column 1216
50 figures in von Heussen (2000)
51 D.C.A. House of Commons: Written answer; 8th March 2004
52 figures given by von Heussen (2000)
53 expressed by Lord Justice Thorpe in the case of *Lomas v Parle*
54 Lord Justice Thorpe; *Lomas v Parle*; Court of Appeal, 18th December 2003
55 Baroness Scotland; Grand Committee; 9th February 2004; Column GC 474
56 Grand Committee, 19th January 2004; Columns GC229-233
57 A pilot programme on Section 60 lines was apparently run in 2002 by the Lord Chancellor's Department, but it is not known what the conclusions were because they do not appear to have been published.
58 Which is believed to have been inserted on an opposition amendment: that is, by the present Government when in opposition.
59 Clause 1, Schedule 7 para 23, 24, 25 & 26 and Schedule 8.
60 Baroness Scotland; Grand Committee; 19th January 2004; Column GC 238
61 Report Stage: 4th March 2004; Column 872
62 Paragraph 23(2) of Schedule 7
63 See Chapter 3 above
64 Section 1 Protection from Harassment Act 1997
65 Figs. 6 & 7
66 Baroness Scotland; Report Stage; 4th March 2004; Column 871
67 Grand Committee; 19th January 2004; Columns GC225 & 226
68 See CCR Ord 29 rule 1(6)(b) rule 1 and FPR 3.9(2) for the various procedural requirements.
69 Report Stage; 4th March 2004; Columns 870-873
70 Tucked away amongst the 'minor' and 'consequential' amendments in Schedule 7, paragraph 24.
71 Baroness Scotland; Grand Committee; 9th February 2004; Columns GC 475-476
72 Baroness Scotland; Grand Committee; 9th February 2004; Column GC 475
73 Baroness Scotland, Grand Committee, 9th February 2004; Column GC 476
74 The wording of Sections 42(1) and 46(1) & (4), when taken in conjunction with the proposed Section 42A(1) is, to say the least, obscure on this point, though.

75 Baroness Scotland; Grand Committee; 9th February 2004; Column GC 475
76 Grand Committee; 19th January 2004; Column GC 239
77 Clause 1, proposing new FLA Section 42A(3)&(4)
78 Clause 1's new Section 42A(3)&(4) exactly mirrors Section 3(7)&(8) PHA with the dual remedies in criminal law or civil contempt, so it might be said that any such problems of complainants pursuing both forms of breach would have been experienced already if they were going to happen at all. However, since there appears to have been minimal use of Section 3 PHA non-harassment injunctions, in recent years, it cannot be said that an absence of reported problems to date means that the problem of the vindictive complainant will not arise in the future.
79 Grand Committee; 19th January 2004; Column GC 228
80 [1982] AC 529
81 Clause 3 & Schedule 7 para 21, 22, 27 & 28
82 Report Stage; 4th March 2004; Column 874. Section 41 FLA will be repealed and Section 36(6)(e) will be amended so the Court can consider the commitment involved in a cohabiting relationship.
83 Clause 4
84 First cousins were included by amendment of the FLA at Report Stage on 15th March 2004, Column 40.
85 Sections 62(3)(g) and 63(2)(g) FLA
86 Clause 9
87 apparently under the aegis of the Department of Health
88 Baroness Scotland; Second Reading; 15th December 2003; Column 952
89 Report Stage; 9th March 2004; Column 1209
90 Baroness Scotland; Grand Committee; 2nd February 2004; Column GC 227
91 Clause 10 & Schedule 7 para 40 & Schedule 8
92 Section 42 Offences Against the Person Act 1861
93 Grand Committee; 2nd February 2004; Column GC 238 & 240
94 Grand Committee; 2nd February 2004; Column GC 239
95 Baroness Scotland; Second Reading; 15th December 2003; Column 951
96 Section 47 Offences Against the Person Act 1861
97 Section 25 of the Police & Criminal Evidence Act 1984
98 Baroness Scotland; Grand Committee; 2nd February 2004; Column GC 239
99 This issue was raised at Grand Committee; 2nd February 2004; Column GC 233; and further at Report Stage; 9th March 2004; Columns 1212-1214 and seems likely to be taken further.
100 Times 27th November 2003
101 Section 39, making common assault a summary offence, not triable on indictment at the Crown Court unless, by Section 40, a count of common assault appeared on the face of the indictment
102 actual bodily harm, Section 47 Offences Against the Person Act 1861; or racially aggravated assault Section 29(1) of the Crime and Disorder Act 1998
103 Clause 11 & Schedule 7 para 30, 31 & 34 & Schedule 8
104 It should be noted that the wording of Clause 11 is quite deceptive, since it does not refer to Section 5 PHA restraining orders being extended beyond the confines of the PHA. It merely seeks to remove the references to Section 2 or Section 4 offences, and thus opens the provision to apply to

any offence. Paragraph 48 of the Explanatory notes makes the position clear.

105 Section 1 of the Crime & Disorder Act 1998

106 Report Stage; 9th March 2004; Columns 1214-1218

107 Family Law Bar Association briefing on the Bill

108 Baroness Scotland; Second Reading; 15th December 2003; Column 952

109 Baroness Scotland; Grand Committee; 2nd February 2004; Column GC 246

110 Grand Committee 5th February 2004; Column GC 428

111 Clause 31. It is also not clear why Clause 31(1) limits the definition of victim and witness to Clauses 27 to 30, when Clauses 33 to 35 also make reference to victims and witnesses.

112 Clauses 23-25 and Clause 26 and Schedule 4

113 Second Reading; 15th December 2003; Column 954

114 Compare liability for statutory breaches under the Health & Safety at Work etc. Act

115 Lord Campbell of Alloway; Grand Committee; 5th February 2004; Column GC 421

116 Clauses 23 and 24

117 Clause 25(2)

118 Report Stage; 11th March 2004; Columns 1438-1441

119 Report Stage; 11th March 2004; Columns 1428-1431

120 Clauses 27-32 and Schedules 5 & 6

121 Report Stage; 11th March 2004; Columns 1431-1437

122 introduced by the Department for Education & Skills on the 4th March 2004

123 in parallel with those already existing in Wales and in Northern Ireland

124 Report Stage; 11th March 2004; Column 1450

125 Clause 33

126 Clarifying amendments, however, were not passed at Report Stage on 15 March 2004.

127 Clause 34

128 Limited details of the existing non-statutory panel were provided at Report Stage on 15th March 2004; Columns 16 to 22; but no further amendments were made to clarify the proposals.

129 Clause 29(1)

130 Clause 34(3)

131 Clause 35

132 This was further discussed, without amendment, at Report Stage; 15th March 2004; Columns 22 to 25.

133 Baroness Scotland; Grand Committee; 5th February 2004; Column GC 453

134 Baroness Scotland; Grand Committee; 5th February 2004; Column GC 452

135 Baroness Scotland; Second Reading; 15th December 2003; Column 950

136 Baroness Scotland; Grand Committee; 9th February 2004; Column GC 463

137 Consultation paper: "Compensation & Support for Victims of Crime" January 2004

138 Baroness Scotland; Grand Committee; 19th January 2004; GC 197

139 Clauses 5 & 6

140 (1986) 82 Cr.App.R. 5

141 No. 279 "*Children: Their Non-Accidental Death or Serious Injury (Criminal Trials)*"

142 Baroness Scotland; Grand Committee; 21st January 2004; GC344

143 Grand Committee; 21st January 2004; Column GC 332

144 Grand Committee; 21st January 2004; Column GC 334

145 Report Stage: 9th March 2004; Columns 1153-1160

146 Applied for in just 119 cases in 2002 and granted in only 60% of those cases.
147 Report Stage; 9th March 2004; Columns 1160-1166
148 Although some groups regard the 'household' definition as too wide: see Report Stage; 9th March 2004; Column 1153
149 Baroness Scotland; Grand Committee; 21st January 2004; Column GC 336
150 Baroness Scotland; Grand Committee; 21st January 2004; Column GC 341
151 under Sections 35 & 38 Criminal Justice & Public Order Act 1994
152 Report Stage; 9th March 2004; Columns 1174-1188
153 Report Stage; 9th March 2004; Column 1189
154 Report Stage; 9th March 2004; Column 1171
155 Lord Thomas and Lord Carlisle; Grand Committee; 28th January 2004; Column GC 144 & 151
156 Baroness Scotland, Grand Committee; 28th January 2004; Columns GC 154
157 Lord Donaldson; Grand Committee; 28th January 2004; Column GC 149 and see also Report Stage; 9th March 2004; Columns 1174-1188
158 Section 38 Criminal Justice & Public Order Act 1994
159 Compare Report Stage; 9th March 2004; Columns 1169-1172
160 Clauses 13 to 16
161 [1998] 1 Cr.App.R. 79
162 Report stage; 11th March 2004; Columns 1390-1408 and 1424-1428; The latter recommended by Paragraph 6.9 of the Law Commission Report No.277.
163 Report No.277 at Paragraph 7.11
164 Baroness Scotland; Grand Committee; 2nd February 2004; Column GC 265 and Attorney General; Report Stage; 11th March 2004; Column 1396
165 Grand Committee; the 19th January 2004; Column GC 237
166 Grand Committee, the 19th January 2004; Column GC 228
167 Second Report; 4th March 2004; Columns 863-869
168 Note the Attorney General's comments to that effect; Report Stage; 9th March 2004; Column 1210
169 Report Stage; 4th March 2004; Column 854
170 Grand Committee; 19th January 2004; Column GC 206
171 Observer: Jamie Doward: 21st December 2003
172 18th December 2003
173 Report Stage; 9th March 2004; Columns 1209-1212
174 Section 66
175 Section 69
176 Section 75
177 Baroness Scotland; Grand Committee, 19th January 2004; Column GC 238
178 such as those set out in Part IV of the Powers of Criminal Courts (Sentencing) Act 2000
179 Youth Justice and Criminal Evidence Act 1999
180 Section 17(4) of the Youth Justice and Criminal Evidence Act 1999
181 Baroness Scotland Grand Committee 9th February 2004; Columns GC 468 & 469 and Report Stage; 15th March; Columns 30 to 34.

Domestic violence is a serious issue in Britain but there is much uncertainty about the scale of the problem and how to address it through the law. How will the Government's proposed Domestic Violence, Crime and Victims Bill improve the situation - if at all?

This pamphlet examines the magnitude of domestic violence problems and what risks and benefits the proposed legal measures will present. Significant issues are raised, not just for the victims of domestic violence, but also for the entire criminal justice system. Does the Bill pose a serious threat to civil liberties? Will the intended measures to support victims be truly effective or are they mere window dressing? The author considers the dangers of introducing a rigid system to deal with the wide range of domestic violence offences, and suggests an alternative, more flexible approach.

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