

**REPORT OF THE SUBCOMMITTEE TO EXAMINE
RESTRAINING ORDERS**

INTRODUCTION

1. The Subcommittee was formed in order to give greater focus to the issue of restraining orders. It was recognised by several of the Taskforce committees to be a very important issue, but one on which there was no simple consensus.

COMMITTEE

2. Nominations were requested from concerned sub-groups and agencies, and the committee convened as follows:

Ms Lynne McGuigan	Office of Women's Interests
Chief Superintendent Val Doherty	Police Department
Acting Inspector Harry Heavens	Police Department
Ms Gabrielle Whitely	Anawim Refuge
Ms Gwen Baldini	Aboriginal Community
Ms Wendy Rose	Ethnic Communities Council
Ms Linda Savage-Davis	Social Security Appeals Tribunal
Ms Cassandra Goldie	Legal Aid Commission

PROCESS OF REPORT PREPARATION

3. Very short time-lines prevented an in-depth study or call for submissions. However, it was recognised that each member of this subcommittee brought expertise, experience and networks of contacts, all of which would be called on and utilised in the process.

4. The subcommittee also acknowledges that extensive research on this issue exists, and availed itself of research data to the extent possible.

5. Specifically, the subcommittee acknowledges use of

Easteal, Patricia Killing the Beloved (Australian Institute of Criminology) 1993

Ralph, Alan The Effectiveness of Restraining Orders for Protecting Women from Violence (unpublished paper, March 1992, prepared for the Western Australian Office of the Family)

Brown, Andrew A Summary of Ralph, The Effectiveness of Restraining Orders for Protecting Women from Violence

Australian Law Reform Commission, Discussion Paper no. 54, Enquiry into Equality Before Law, July 1993 and Report no. 67, Interim, Enquiry into Equality Before the Law, March 1994.

Graycar, Regina and Morgan, Jenny The Hidden Gender of Law, Federation Press, 1990

Office of Women's Interests, Women and Justice
Seminar 2 : Sexual Assault and General Assault, May 1993 (Transcript)

Office of Women's Interests, Women and Justice
Seminar 3 : Domestic Violence and the Law, August 1993 (Transcript)

Heald, F.J., Armada Station Domestic Violence Pilot Training Program, May 1993

Albany Region Police, Domestic Violence Handling Policy, (Circular Order 9/93)

National Committee on Violence Against Women, The Effectiveness of Protection Orders in Australian Jurisdictions, Australian Government Publishing Services, Canberra December 1993

6. The Committee met four times, and individual members made written submissions. Recommendations were discussed at the meetings and commented on in written submissions. The need for separate consideration of issues unique to some Aboriginal communities was acknowledged. Gwen Baldini submitted a report dealing with some of these considerations.
7. An enormous amount of policy work was done in the former Domestic Violence Policy Unit in the former Office of the Family. This work also provided information for the subcommittee.
8. The subcommittee noted legal models from other Australian jurisdictions, notably South Australia and Victoria, and noted developments in New South Wales in relation to penalties for breaches of restraining orders in domestic violence cases.
9. The unpublished research on the Effectiveness of Restraining Orders for Protecting Women from Domestic Violence conducted by Dr Alan Ralph at the Centre for Behavioural Analysis, for the then Office of the Family in 1992, was particularly useful. This research was found to confirm the anecdotal evidence of women - as victims, witnesses, applicants for restraining orders, advocates, refuge workers and lawyers - on occasions such as the Women and Justice: Domestic Violence and the Law Seminar in Perth in August 1993, and at the Western Australian public hearing of the Law Reform Commission's Inquiry into Equality Before the Law the same month.

10. Throughout its work, the subcommittee was aware of how critical the issue of restraining orders has become, because of its central role in legal responses to domestic violence.

ALTERNATIVE LEGAL REMEDIES : CIVIL VERSUS CRIMINAL PROCESS

11. Restraining orders derive their legal force from section 172 of the Justices Act, which was amended in 1982 for the express purpose of providing women with more easily accessible interim protection from violence.

12. A restraining order is easier to obtain than a conviction in a criminal process. The standard of proof required is the civil, "balance of probabilities" proof. The 1982 legislation was designed to provide a mechanism which would afford a woman interim protection from violence, or the threat of violence from her husband or partner.

13. The legislation was not intended to introduce an alternative, more lenient legal response to domestic violence. Unfortunately, this is what it has done.

14. The subcommittee examining restraining orders was unanimous in its view that criminal assault proceedings, not restraining orders, were the proper and preferred legal response to domestic violence and to sexual assault, the other major area of violence against women.

15. Restraining orders were found to be over-used, too numerous, and a source of frustration to the Police whose job it was to serve them. Lapses of time between an order being issued and being served on the defendant were often too long. The restraining order itself was often ineffective in changing the defendant's behaviour, and breaches of orders were not pursued vigorously enough.

16. The data compiled by Dr Ralph showed that 41% of women who had obtained a restraining order against a violent partner said their involvement with the legal system did not help at all. Many respondents to Dr Ralph's questionnaire felt the process had actually placed them in danger of worse violence from the defendant - 50% of women murdered by their spouses had current Restraining Orders against that spouse.

17. When it is considered that 88% of the women interviewed described the violence they had been subjected to as Serious, Very Serious, or Critical, this result becomes extremely disturbing.

18. There is force to the argument that the Police should have lay assault charges, and apply for restraining orders on behalf of the women (as section 172 empowers them to do) for the women's interim protection, and support the women themselves to apply for this protection. Only 10% of the women interviewed by Dr Ralph had been advised by the Police to seek a restraining order. These were all in the metropolitan area.

19. Assault charges are infrequently laid by the Police as a result of domestic violence. Yet as noted earlier, in 88% of cases, restraining orders were sought after serious violence had occurred. That is, assault charges could and should have been laid. The subcommittee on restraining orders agreed that restraining orders have become a replacement for assault

charges, rather than the useful, protective supplement to criminal charges that they were intended to be. It should be noted however that some magistrates working in the area for many years agree that the majority of applications for restraining orders involve allegation of provocative or offensive behaviour and nothing more (Justices Act Section 172 (1)(c) and applications involving serious violence are in the minority. They say that cases of serious violence are normally dealt with by prosecution.

20. While many recommendations in the subcommittee's report are to do with making restraining orders more effective in protecting women from violence, the subcommittee sees the applications of this civil remedy to a criminal offence as inherently flawed.

Recommendation 1

21. Dr Ralph's Report be accepted and the recommendations of the report be implemented.

Recommendation 2

22. The response by the police in matters involving violence against women should be the same as that involving any other violence in our society.

This means:

- (1) That where a person has suffered an assault Police should be required to investigate with a view to determining what sort of charge should be laid against the assailant.
- (2) Where the woman has a fear for her safety, the alleged offender should be arrested and bailed upon condition that he not return to the property, or held overnight pending his appearance in court. Otherwise, rather than the alleged offender, the woman is forced to find alternative accommodation, often with children, to protect.
- (3) As with other charges, the police should ensure that where charges have been laid, bail conditions should be imposed which ensure that the alleged offender does not:
 - (a) endanger the safety of the woman;
 - (b) interfere with her as a witness, or other witnesses;
 - (c) commit a further offence against her;
 - (d) in appropriate cases, prevent the alleged offender from having any contact with the woman, or returning to her place of residence (even when he owns it).
- (4) Police should take responsibility for applying for restraining orders, in conjunction with laying criminal charges, when that also appears to be appropriate or where there is insufficient evidence to charge the assailant.

ISSUE

23. Because of the private nature of domestic violence, once the woman has made public the threat to her, and especially once she has invoked and involved the legal system, she is in a situation of greatly increased danger.

24. The first 24 to 48 hours after the woman has made an application for a restraining order are when she (and her children and close family and friends) are likely to be at most risk.

Recommendations:

25. All those charged with her protection must speed up their response. The safety of the victim and her children, if she has any, must be given the highest priority. This means:

- (1) Amend the Justices Act (if necessary) to emphasise that there be a presumption in favour of the applicant in restraining order proceedings.
- (2) Courts/Justices must use whatever means is necessary to speed the restraining order to the Police.
- (3) Any number of copies of the Restraining Order or Interim Restraining Order be made and supplied to the woman so that she can alert people in her environment to the danger she is in. (eg: her neighbours, workplace, children's teachers, etc.)
- (4) Police Standing Orders be amended to express the clear direction that responsibility for obtaining restraining orders lies primarily with the Police. To support this, and to ensure that Police are required to fulfil the proactive role intended for them by the 1982 legislation, Police training must be clear and unambiguous on the criminal status of domestic violence and the responsibility of Police to lay charges and to initiate restraining orders. Police training and directions must make clear that this responsibility is not discretionary in any way. Most specifically the decision to charge a perpetrator and initiate an order against him must not be an issue for the discretion of the victim.
- (5) A "red alert" high priority be given to service of restraining orders for domestic violence and sexual assault.
- (6) Where a restraining order is made in circumstances concerning personal violence or threats there be Automatic revocation of the defendant's Firearms Licence and confiscation of any firearms.

ISSUE

26. The process of obtaining a Restraining Order is not sufficiently responsive to the needs of the people it exists to serve. Often frightened and confused and physically and emotionally incapacitated, women are expected to come into an imposing, unfriendly, even intimidating system, to make an application. They may or may not find a sympathetic and unhurried clerk who is sufficiently trained to assist them to fill out the necessary forms and give advice on the availability of other victim support services - such as Court volunteers and some refuges. Further, the distressed woman on many occasions, is confronted with the presence of the

perpetrator of the violence. It should be of little surprise that the "non-appearance of women at subsequent hearings, increases with each return to the Court".

27. For justice to be done and the victim to be protected, the process of application must be more sensitive to the needs of women.

Recommendations:

28. That induction of and training for, clerks of courts include support to women victims to assist them to make successful and speedy applications.

29. That a special area in the court area be set aside and furnished to meet the needs of women making applications or waiting for a hearing.

ISSUE

30. Often women may not be able to present themselves very well in the Court. A woman's mode of speaking may militate against her and she may not be very articulate in making her case.

Recommendations:

31. That the Judiciary and Magistracy receive ongoing and compulsory education to ensure that notions of presentation do not unwittingly discriminate against women who are applicants for restraining orders for domestic violence.

32. That women who wish to be represented by an advocate at Court hearings for restraining orders have the right to be so represented, and be encouraged to take up this right.

ISSUE

33. Too many Restraining Orders are issued. Women often say they are not worth the paper they are written on. Part of the solution is to restore the original focus of the Restraining Order and establish clearer protocol for response. (see above)

Recommendations:

34. That Restraining Orders for personal/domestic violence be differentiated from those not related to violence, eg: neighbourhood disputes, by being named Protection Orders (Family Violence) or Violence Orders.

35. The re-naming of Restraining Orders for domestic violence will encourage consistency and conformity with the approach taken in some other States and Territories where Protection Orders are taken out under a Crimes Act or Domestic Violence (Family Protection) Act and are portable between jurisdictions.

36. That legislation be passed to ensure portability of such Restraining Orders made in Western Australia to other jurisdictions.

37. That, within the new category of Orders taken out for personal/domestic violence, there be a priority classification for the most urgent cases, and

38. Restraining Orders issued where there has been an allegation or a threat of sexual assault be given a high priority within the "red alert" grading system of Restraining Orders.

ISSUE

39. One of the current major problems to both Police and the victim is often the difficulty in locating the perpetrator to serve him with the order.

Recommendation:

40. Amend the Justices Act in relation to Mode of Service to allow for a variety of means of serving summonses - including FAX, electronic mail, multiple copies to be sent to the workplace, last known address, etc.

ISSUE

41. Many women are unable to come to a Court and apply for a restraining order. There are women who live on isolated farms or in small country towns where getting to a Court can involve considerable travel and organisation of children and work or family responsibilities. Some women experience shame because of their visible injuries and are reluctant to go out in public.

Recommendations:

42. The Justices Act be reviewed with a view to altering practices, so that restraining orders may be obtained after hours by phone in special circumstances.

43. Where it is desirable, but not possible, to obtain a restraining order after hours, Police should be able to detain alleged perpetrators for the purpose of protecting the woman until such time as the Police can obtain the order.

44. A system of duty magistrates or justices be available to hear applications and make orders after hours.

ISSUE

45. Women are not consulted on and informed of any bail conditions.

Recommendations:

46. Police and Courts adopt a presumption in favour of the victim where serious violence or its threat is involved.

47. Bail conditions be set that the perpetrator not be allowed to return home or have contact with the victim if there is any likelihood of violence re-occurring.

48. Detention to be used as necessary to ensure the perpetrator/alleged perpetrator does not commit further violence or threaten the victim.

49. Judicial Officers have compulsory training to ensure understanding of the nature and danger of private violence.

ISSUE

50. Women who are victims of domestic violence have often been terrorised and battered for years before taking action. They then often have to face their batterer (and perhaps his family) in an alien, Court environment. They may be intimidated by the defendant's presence at the court.

Recommendation:

51. Applications should be able to be made by affidavit, rather than by the victim's personal appearance in court, especially at subsequent hearings where the defendant is more likely to be present.

ISSUE

52. Confirmation of the restraining order may lack force with a defendant if there is doubt that he will be criminally charged.

Recommendations:

53. Magistrates and Justices to be more specific in their instructions to the defendant.

54. Police should be required to investigate the possibility of laying charges where the evidence given in an application is of serious threats or actions of sexual or physical violence.

ISSUE

55. The long history of community acceptance of domestic violence has blurred the distinction between Breaches of Court Orders and Domestic Assault.

Recommendations:

56. There needs to be education for Justices and Magistrates in the real nature of domestic violence and appropriate separation of the two issues.

57. There should be provision for a situation of domestic violence to invoke Breach of Peace procedures only if this is the best or most immediate legal means to protect a woman who is in danger of violence.

ISSUE

58. Domestic violence and sexual assault are the only crimes of violence where the onus is largely on the victim, and where victims must invoke and initiate the legal system's response, including representing their case in Court.

Recommendations:

59. As above - Amend the Justice's Act if necessary and Police Standing Orders to ensure presumption in favour of the complainant.

60. On ex parte applications for a restraining order, if the Magistrate considers that an offence has occurred, the complainant is to be referred to the Police Unit whose duty it will be to represent the complainant at the confirmation hearing.

ISSUE

61. Discretionary powers of the Police (eg: whether or not to lay charges, whether or not to keep records of attendances at households where there has been a complaint but no charge laid) actually serve to protect perpetrators at the expense of victims.

Recommendations:

62. Discretionary powers of the police to be the subject of ongoing review by the Victims of Crime Committee which reports directly to the Attorney General.

63. Police Standing Orders be revised to require station records to clearly disclose the number of complaints and attendances for a particular household and the time lag between receipt of a complaint and Police attendance.

ISSUE

64. Co-ordination of Police Response with Courts and other relevant parties. The subcommittee was impressed by the Armadale Station Domestic Violence Pilot Training Program, initiated by Sergeant Fred Heald. (May 1993)

Protocols to be followed if an arrest is made, include:

- Police arrange for an advocate from the local women's refuge, if desired.
- Photographing the victim's injuries, to assist in sustaining the charge.
- Explanation of Court procedures to the victim.
- Ensuring victim knows the perpetrator's bail conditions.
- Detailed Family Incident Report to be completed.
- Conditions set for bail - priority to the personal safety of the victim and her children.
- Police to oppose bail if there is a likelihood of the perpetrator re-offending.
- The Police Prosecutor to argue the case for charges to go ahead, even if the victim says she will withdraw them.

Recommendation:

65. That the Armadale Domestic Violence Project be adopted state-wide by the Police Department.

ISSUE

66. Breaches of restraining orders are not treated seriously enough. Police do not give sufficient priority to breaches and present penalties reflect this lack of priority.

Recommendations:

67. Amend Police Standing Orders to give increased priority to complaints concerning breaches of restraining orders.

Where serious allegations and complaints have been made, the breach to be treated as an urgent matter and the defendant to be bound over and detained.

68. Increase penalties (present maximum: \$1,000 or 6 months in gaol) for breaches.

69. On the general issue of Police Standing Orders in relation to domestic violence, the subcommittee notes with approval the strength, logic and paramount concern for the safety of the woman and her children, of the Armadale Police Domestic Violence Pilot Training Program. (See Recommendation above: Co-ordination of Police Response.)

RECOMMENDATIONS SPECIFIC TO THE PROTECTION OF ABORIGINAL WOMEN FROM VIOLENCE

ISSUE

70. The Committee recognises that the social and economic position of some Aboriginal women leaves them too worn down, too exhausted with just surviving, to struggle with securing their own protection from violence. Their plight is made worse when their homes are on remote communities far removed from the normal supports offered to the wider community. For their safety and well-being and that of their children and other dependant family members, special consideration to their needs should be given by the Police and Courts and protection agencies.

Recommendations:

71. An appropriately and sensitively staffed unit should be established within the courts, wherever possible, for the purpose of giving detailed explanation to both the victim and the perpetrator after a restraining order is issued of what the restraining order means for both parties.

72. An active policy should be initiated, of recruitment of Aboriginal women and men to the Police Force, not as Police Aides but as Officers.

73. The role and powers of Police Aides be subject to regular review in recognition of the unique nature of the Police Aide function and possible difficulties inherent in it for both the Aides themselves and the Aboriginal community.

74. Interpreters need to be skilled in explaining legal terminology and legal processes to Aboriginal women. A general facility with an Aboriginal language or dialect is not enough.

75. That Police training include compulsory and ongoing cross-cultural awareness to increase serving officers' sensitivity to the reality and relevance of cultural differences and to optimise the use of Police powers to protect Aboriginal women and their families from violence.

76. Mediation between partners is acknowledged to be inappropriate where there is a history of abuse or continuing violence in the relationship. However, some Aboriginal women and their abusers both require culturally sensitive, ongoing counselling to move beyond violence.

77. Courts and Police must take into sufficient account the reality of inter-family feuding as a frequent accompaniment to domestic violence. Aboriginal women who invoke the legal system to stop domestic violence are often at risk of further violence from the defendant's family. It is essential that support is given to the woman to continue, especially so if she is subjected to harassment or threats.

Evidence by affidavit (referred to above) should be possible for Aboriginal women who feel intimidated by the necessity of a court appearance.

78. As above, under Co-ordination of Police Response, Police called to situations of domestic violence in Aboriginal families and communities be aware that charges for assault should be laid as a first option, and a Restraining Order be initiated by Police for the woman's interim safety.

79. Courts and Police must together ensure the swift service and enforcement of a restraining order, or interim order, as soon as it is issued. Some Aboriginal women have left Court believing themselves to be protected by an order, and the order has not been served on the perpetrator for a month afterwards.

CONCLUSION

80. Finally, the subcommittee returns to its earlier conclusion, that examining and improving the capacity of restraining orders to achieve protection for women from domestic violence is a necessary short-term strategy.

81. The long-term solution to the problem of violence against women lies in both community education, including the elimination of gender bias, and the proper application of the criminal code to crimes of violence, assault and battery, wherever and whoever by, they are committed.

SUPPLEMENTARY REPORT

1. A. R. Robins SM and V. J. French SM, who were not members of the sub-committee, wish to record the following:

2. Magistrates are conscious of the content of the Second Reading Speech (Hansard 14/10/82 at p 3843) introducing Part VII of the Justices Act as follows:

"the legislation will apply generally to all domestic violence, even to violence which may not strictly be classed as domestic, and is not limited to violence between spouses ... An immediate order can be made so that immediate relief is given to the victim of the domestic violence."

3. Magistrates are sympathetic to the needs of applicants for Restraining Orders, many of whom are of ethnic origin, and require interpreter services. At least one Court, and frequently two, dealing exclusively with Restraining Orders, are held daily at Central Law Courts. Attached are statistics for the months January - April 1994 inclusive, showing numbers of applications dealt with by Magistrates Courts throughout Western Australia.

4. An application for a restraining order is not a prosecution for a criminal offence, but is an application for an order that a defendant be restrained from contacting or molesting the applicant, to which not the criminal, but the civil standard of proof applies. A Restraining Order should not be seen as a substitute for a criminal charge of assault. If there is evidence of assault, the Police should proceed pursuant to the Criminal Code.

5. The experience of magistrates who preside over applications for Restraining Orders is that most applications between domestic partners do not involve allegation of any criminal offence. The majority of incidents arise out of disputes over questions of custody and access. Whether they like it or not, parties are going to have continuing contact over the years in this context and while a Restraining order will not change human nature, counselling can often help.

6. Magistrates believe the establishment of counselling facilities at Courts of Petty Sessions would benefit many parties (as happens at the Family Court) their experience being that in many cases the parties subsequently reconcile, or condone breaches of their Restraining Orders. Magistrates also share the view that many Restraining Order applications would be dealt with more appropriately by the Family court, in cases where Family Court proceedings have commenced between the parties.

RESTRAINING ORDERS

Listed below are the statistics in relation to Restraining Orders heard in Magistrates' Courts for the month of January 1994.

	No of Applications	No. of Interim Orders	Confirmed after Hearing both Parties
Perth	227	176	34
Albany	14	11	5
Armadale	16	4	1
Broome	15	6	7
Bunbury	20	5	4
Carnarvon	3	3	3
Fremantle	45	24	3
Geraldton	9	5	3
Joondalup	40	38	23
Kalgoorlie	11	5	1
Midland	37	11	16
Northam	8	2	4
Port Hedland	4	1	1
Rockingham	22	9	7

RESTRAINING ORDERS

Listed below are the statistics in relation to Restraining Orders heard in Magistrates' Courts for the month of February 1994.

	No of Applications	No. of Interim Orders	Confirmed after Hearing both Parties
Perth	210	154	88
Albany	6	5	5
Armadale	19	3	NIL
Broome	11	1	5
Bunbury	27	4	5
Carnarvon	9	7	2
Fremantle	28	17	10
Geraldton	8	6	4
Joondalup	41	33	19
Kalgoorlie	7	5	3
Midland	29	21	17
Northam	14	6	4
Port Hedland	5	0	2
Rockingham	16	8	5

RESTRAINING ORDERS

Listed below are the statistics in relation to Restraining Orders heard in Magistrates' Courts for the month of March 1994.

	No of Applications	No. of Interim Orders	Confirmed after Hearing both Parties
Perth	213	119	64
Albany	6	4	2
Armadale	26	5	1
Broome	10	3	2
Bunbury	21	3	8
Carnarvon	6	3	NIL
Fremantle	58	22	11
Geraldton	9	6	5
Joondalup	52	39	19
Kalgoorlie	12	6	2
Midland	39	23	17
Northam	29	12	3
Port Hedland	9	1	2
Rockingham	14	12	2

RESTRAINING ORDERS

Listed below are the statistics in relation to Restraining Orders heard in Magistrates' Courts for the month of April 1994.

	No of Applications	No. of Interim Orders	Confirmed after Hearing both Parties
Perth	213	119	64
Albany	3	3	2
Armadale	20	3	4
Broome	5	2	2
Bunbury	26	2	5
Carnarvon	5	2	2
Fremantle	42	28	15
Geraldton	11	6	--
Joondalup	50	40	24
Kalgoorlie	8	5	--
Midland	25	19	23
Northam	17	6	7
Port Hedland	6	0	2
Rockingham	7	4	7