

A CORK STUDY ON 'DOMESTIC' VIOLENCE AND  
THE CRIMINAL PROCESS: TENTATIVE  
CONCLUSIONS FROM THE POLICING PERSPECTIVE

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I. INTRODUCTION

The Supreme Court has recently ruled that the provisions of the Domestic Violence Act, 1996, which provide for the granting of interim barring orders, are unconstitutional.<sup>1</sup> The Court found that section 4(3) “in failing to prescribe a fixed period of relatively short duration during which an interim barring order made ex parte is to continue in force deprive the respondents to such applications of the protection of the principle of audi alteram partem in a manner and to an extent which is disproportionate, unreasonable and unnecessary”.<sup>2</sup> This ruling provoked media comment to the effect that the lives of women and children could be at serious risk as a result of the Supreme Court’s finding.<sup>3</sup> The reference to danger to lives might suggest a criminal context, yet the Court was addressing a civil, as opposed to a criminal, piece of legislation. This serves to remind us of the apparent preference of those affected by domestic violence to seek redress through the civil route, which is not itself so often the subject of comment, so much as the inadequacy of those civil remedies. Hence, methods of improving the legal response have centred on broadening those civil remedies which are available.<sup>4</sup> This

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<sup>1</sup> *D.K. v. Judge Timothy Crowley and the Attorney General*, Supreme Court, unreported, 9 October 2002.

<sup>2</sup> *D.K. v. Judge Timothy Crowley and the Attorney General*, Supreme Court, unreported, 9 October 2002, at p. 32 of the unreported judgment.

<sup>3</sup> Breslin, J., “Barring order ruling ‘threat to lives of women’ in *The Irish Examiner*, 10 October 2002, p. 1.

<sup>4</sup> See Casey, M., *Domestic Violence Against Women: the Women’s Perspective* (University College Dublin, 1987); Lyons, M., Ruddle, H. and O’Connor, J., *Seeking a Refuge from Violence: the Adapt Experience* (Policy Research Centre, National College of Industrial Relations, 1992); Browne, D. and Connolly, R., *Domestic Violence - The Response of the Legal System* (Coolock Community Law Centre, Dublin, 1995); Kelleher Associates and O’Connor, M., *Making the Links* (Women’s Aid, Dublin, 1995); *Report of the Task Force on Violence Against Women* (Stationary Office, Dublin, 1997).

is so despite the fact that most acts which occur in the course of a domestic violence incident do constitute criminal offences. This begs the question as to why it is that the primary remedies have been offered through civil law and whether the criminal justice system is capable of offering an effective response? Given the recent difficulties caused by the Supreme Court decision regarding aspects of the civil remedy, the time may be apposite to focus on what does happen when the criminal law route - as opposed to the civil law route - is followed. This question was addressed in the context of an empirical study on domestic violence conducted by the writers in Cork. The focus of the study was the manner in which the criminal justice system currently processes complaints of domestic violence. Such an examination would give an insight into how that process, when invoked, responded to this type of violation, as well as if, and how, it might require improvement. The study was confined to the Cork region and the relevant agencies and courts in that district, and took place over the time period 1998 to August 2000.<sup>5</sup> While the study as a whole included the perspective of victims who report incidents of domestic violence to the Gardaí and, through a number of case studies, the response of the criminal courts to the prosecution of those charges which related to domestic violence, this article focuses on what was discovered regarding the policing response. It is, after all, the intervention or role of the police which is the hallmark of the criminal justice regime. This may provide a valuable yardstick for assessment of existent structures, and the viability of the future use of the criminal model in domestic abuse scenarios. That the search for remedies and avenues of redress should be both within and outside the civil law process is self-evident. That the latter has to date formed the mainstay of redress, should not preclude consideration of other - including criminal law - responses, all the more urgent in the aftermath of the Supreme Court's ruling.

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<sup>5</sup> The authors would wish to acknowledge the co-operation of the domestic violence agencies and Gardaí, court officials, and members of the judiciary involved. The study was funded by a grant received from the Royal Irish Academy which is gratefully acknowledged.

## II. THE CONTEXT: INTERNATIONAL AND NATIONAL

To place the Cork study in context, a review of the relevant literature reveals that commentators have in the past been critical of the police response to domestic violence, criticising the police for failure to attend reported incidents, for viewing the problem as one better addressed by the civil law rather than as a crime - in consequence 'no-criming' reported incidents - and for an attitude that suggests lack of sympathy for victims.<sup>6</sup> The most prominent criticism found to be levied at police, is a failure to arrest. This failure is often considered to be the result of the police perception that complainants will fail to follow through with the charges and as a consequence, arrest is considered to be a time-wasting exercise. It has even been suggested that the police actually discourage complainants from proceeding by repeatedly asking them whether they wish to continue and in allowing a cooling off period to think things over.<sup>7</sup> In general it has been suggested that the police were reluctant to intervene in cases of domestic violence and did not consider domestic violence to be 'proper police work'.

One such study is that undertaken by Susan Edwards in 1984 - 1985 at two stations in the Metropolitan Police Area in London.<sup>8</sup> The study revealed that spousal violence, even where assault occasioning actual bodily harm was apparent, was considered by the police to be a private matter and often the officers who attended a domestic violence incident approached it in the expectancy that the complainant would subsequently withdraw the complaint. Edwards' study also found that where suspects were charged, they were often charged with a lesser offence than one which would have appeared to be justified by the facts.<sup>9</sup> The seriousness of the incident was not

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<sup>6</sup> See for example Faragher, T., "The Police Response to Violence against Women in the Home" in Pahl, J. (ed.), *Private Violence and Public Policy* (Routledge, London, 1985); Edwards, S.M., *Policing 'Domestic' Violence* (Sage, London, 1989); Grace, S., *Policing Domestic Violence in the 1990s*, Home Office Research Study No.139, (HMSO, London, 1995); Buzawa, E. and Buzawa, C.G., *Do Arrests and Restraining Orders Work?* (Sage, London, 1996).

<sup>7</sup> Chambers, G. and Miller, A., *Investigating Sexual Assault* (HMSO, Edinburgh, 1983).

<sup>8</sup> Edwards, S.M., *Policing 'Domestic' Violence* (Sage, London, 1989).

<sup>9</sup> This was also found by Smith, L.J.F., *Domestic Violence*, Home Office Research Study No. 107 (HMSO, London, 1989); Buzawa, E. and Buzawa, C.G., *Domestic Violence: The Criminal Justice Response* (Sage, London, 1990); Kemp, C., Norris, C. and Fielding, N.G., *Negotiating Nothing: Police Decision-making in Disputes* (Avebury, Aldershot, 1992); Grace, S., *Policing Domestic Violence in the 1990's* Home Office Research Study No.139, (HMSO, London, 1995), but not found by Sanders in a study of prosecution decisions in three police

necessarily sufficient to result in an officer making an arrest, and in cases where the complainant wished for no action to be taken, the police generally withdrew. The willingness of the complainant to press charges played a crucial role in police decisions to arrest. Police officers generally took no action in cases where the complainant subsequently withdrew a complaint. The study revealed that the arrest rate was low, in cases where non-molestation injunctions or protection orders with a power of arrest had been clearly breached. Furthermore, in cases where women had allowed men to return to the family home, the police felt they had forfeited their right to protection when the violence recurred. Overall, Edwards found a lack of understanding by police officers of the dynamics of domestic violence. A later study by Hoyle<sup>10</sup> revealed that many police officers believed that they needed both evidence, and a co-operative witness, in order to make an arrest. Moreover, officers tended to focus on the evidence necessary for charging suspects, rather than evidence necessary for simply arresting them.

The discretionary nature of practical policing, and police values and attitudes to domestic violence in the exercise of that discretion, have been variously identified as providing a key to explaining why low arrest rates predominate. Reiner<sup>11</sup> suggests that police values, attitudes and beliefs are heavily informed by what is referred to in the literature as ‘cop culture’. Reiner suggests that it is this police culture, rather than the law, which frames policing on the streets. Hoyle has distinguished between ‘cop culture’ and ‘canteen culture’. ‘Canteen culture’ “allows officers to articulate their fears, and vent their frustrations and anger,” in the privacy of the police canteen. However, in Hoyle’s view, canteen culture neither causes the police to behave in a certain way when dealing with members of the public nor corresponds with their actual practices. Hoyle concluded from her study of the Thames Valley police force that while it was evident that there is indeed a ‘canteen culture’, it did not translate directly

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force areas in England, conducted in the period 1981-1983, see Sanders, A., “Personal Violence and Public Order: The Prosecution of ‘Domestic’ Violence in England and Wales” (1988) 16 *International Journal of the Sociology of Law*, 359.

<sup>10</sup> Hoyle, C., *Negotiating Domestic Violence: Police, Criminal Justice and Victims* (Clarendon Press, Oxford, 1998).

<sup>11</sup> Reiner, R., *The Politics of the Police* (3rd ed., Oxford University Press, Oxford, 2000).

into the actual police behaviour while attending a domestic violence incident.

Studies of policing in Ireland, include a study on the role of the Gardaí undertaken by Morgan and Fitzgerald in 1992. This study suggested that the Gardaí saw themselves in a counselling role in relation to domestic violence as opposed to a strictly policing role. It also found that the Gardaí considered that many incidents of domestic violence were more appropriately dealt with under the civil legal route.<sup>12</sup> A research study carried out by Women's Aid in 1995 found that, in practice, because of the absence of clear arrest powers, the Gardaí often reverted to the role of mediator. It emerged from interviews conducted with the Gardaí, that some had a negative attitude to domestic violence incidents and showed unwillingness to take action in cases of domestic violence because of the perceived reluctance of women to proceed with the complaint. It was evident also, that Gardaí were unclear about their powers of entry to ensure safety or effect arrests.<sup>13</sup> A further study was commissioned by Women's Aid in 1999.<sup>14</sup> This study examined the way in which domestic violence cases are processed in the civil and criminal justice system and specifically sought to document court outcomes and outcomes of Garda action. Three research sites were selected; one rural Garda Division, a Garda Division comprised of towns and rural hinterland and a sub area of a Dublin Garda Division. In terms of the effectiveness of the then operative Garda Policy on Domestic Violence Intervention,<sup>15</sup> the pro arrest policy was considered to be working well in conjunction with the Domestic Violence Act, 1996, and women to whom court orders had been granted under the Act, were found to have made up a significant percentage of incidents where an arrest was made. In a large proportion of cases where no arrest was made, the woman either had made no statement, refused to make a statement or withdrew the statement prior to the court hearing.

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<sup>12</sup> Morgan, M. and Fitzgerald, M., "Gardaí and Domestic Violence Incidents" paper presented to the Conference on Safety for Women (October 1992).

<sup>13</sup> Kelleher Associates and O'Connor, M., *Making the Links* (Women's Aid, 1995).

<sup>14</sup> Kelleher, P. and O'Connor, M., *Safety and Sanctions Domestic Violence and the Enforcement of Law in Ireland* (Women's Aid, Dublin, 1999).

<sup>15</sup> *Infra*

### III. THE CRIMINAL LAW CONTEXT

It is useful to remind ourselves of how the criminal law can be relevant to domestic violence situations. The criminal justice system is equipped to address the problem of domestic violence through a number of legislative instruments. Various acts may be committed during the course of a domestic violence incident, which constitute offences under the substantive criminal law; for example, assault, threats and criminal damage. In addition, an act may be contrary to the provisions of the Domestic Violence Act, 1996, which makes it a criminal offence to breach a court order which has been granted under that civil legal route. The aforementioned Garda Síochána Policy on Domestic Violence Intervention creates the operational conditions under which the Gardaí implement the law generally, and this policy favours a pro-active criminal justice response.

### IV. RELEVANT SUBSTANTIVE CRIMINAL LAW

The Non-Fatal Offences Against the Person Act, 1997 contains a number of offences which may be committed in the course of a domestic dispute. Section 2 provides that the offence of assault is committed where a person intentionally or recklessly

(a) directly or indirectly applies force to or causes an impact on the body of another, or

(b) causes another to believe on reasonable grounds that he or she is likely immediately to be subjected to any such force or impact.

Section 3(1) makes it an offence to assault another causing him or her harm. ‘Harm’ is defined as ‘harm to body or mind and includes pain and unconsciousness’.<sup>16</sup> The level of harm caused by the assault in question will determine whether it falls under section 2 or section 3. Section 4 creates the offence of causing serious harm, serious harm is defined in section 1 as ‘injury which creates a substantial risk of death or which causes serious disfigurement or substantial loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ’.

In addition to the assault offences, section 5 provides that an offence is committed where a person “makes to another a threat, by

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<sup>16</sup> Section 1 of the Non-Fatal Offences Against the Person Act, 1997.

any means intending the other to believe it will be carried out, to kill or cause serious harm to that other or a third person". Two other offences are contained in the Act of relevance to domestic violence situations; the offence of coercion provided for by section 9, and that of harassment provided for by section 10. Section 9 makes it an offence for a person who:

... with a view to compel another to abstain from doing or to do any act which that other has a lawful right to do ... wrongfully (a) uses violence to or intimidates that other person or a member of the family of the other, or, (b) injures or damages the property of that other, or (c) persistently follows that other about from place to place, or (d) watches or besets the premises or other place where that other resides, works or carries on business, or happens to be, or the approach to such premises or place, or (e) follows that other with one or more persons in a disorderly manner in or through any public place.

Section 10 creates the offence of harassment, which is committed where a person harasses another "by persistently following, watching, pestering, besetting or communicating with him or her". Acts will constitute harassment where a person (a) intentionally or recklessly, seriously interferes with the other's peace and privacy or causes alarm, distress or harm to the other and (b) his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other's peace and privacy or causes alarm, distress or harm to the other. Section 10(3) and section 10(5) allow the court to make an order prohibiting contact by the harasser with the victim, even where the court has been unable to convict the defendant due to insufficient evidence.

More specific than the offence of coercion is that provided for under section 41 of the Criminal Justice Act, 1999, which creates an offence of intimidation of witnesses and others. The section provides that:

... a person (a) who harms or threatens, menaces or in

any other way intimidates or puts in fear another person who is assisting in the investigation by the Garda Síochána of an offence or is a witness or potential witness ... in proceedings for an offence, or a member of his or her family, (b) with the intention thereby of causing the investigation or the course of justice to be obstructed, perverted or interfered with, shall be guilty of an offence.

Section 2(1) of the Criminal Damage Act, 1991 makes it an offence to damage property belonging to another. Section 2(2) makes it an offence for a person to damage any property, including property belonging to himself, “intending by the damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered”. The Act also makes it an offence under section 3 to threaten to damage property belonging to another, or to threaten to damage property belonging to himself “in a way which he knows is likely to endanger the life of that other or a third person”. Section 11 of the Firearms and Offensive Weapons Act, 1990 makes it an offence to produce “in a manner likely unlawfully to intimidate another person any article capable of inflicting serious injury”.

A number of offences of a sexual nature are contained in the Criminal Law (Rape) (Amendment) Act, 1990 and the Criminal Law (Rape) Act, 1981. The common law offence of rape is given statutory footing in the 1981 Act and is committed where a man has sexual intercourse with a woman without her consent. Until 1990 a husband was deemed to be legally incapable of raping his wife but that immunity was abolished by section 5 of the 1990 Act. Other relevant offences in the 1990 Act are sexual assault, aggravated sexual assault and rape under section 4. Sexual assault is provided for under section 2 and is an assault of a sexual nature, aggravated sexual assault is a sexual assault accompanied by serious violence or the threat of serious violence, or is such as to cause injury, humiliation or degradation of a grave nature to the person assaulted (section 3), and rape under section 4 criminalises penetrative acts of or by a sexual organ.

The Criminal Justice (Public Order) Act, 1994 is concerned with acts which take place in public places. Nonetheless, it is useful in some instances for dealing with incidents of domestic violence which take place out of the private home environment. Such instances could occur, for example, where a person is excluded from the home by a court order but stands outside on the public street shouting abuse at the person who is inside. Section 5 makes it an offence for a person in a public place to engage in offensive conduct between the hours of midnight and 7 a.m. or at any time having been requested by a Garda to cease such behaviour. 'Offensive conduct' is defined as "any unreasonable behaviour which is likely to cause serious offence or serious annoyance to any person who is, or might reasonably be expected to be, aware of such behaviour". Section 6 provides that it is an offence for any person in a public place "to engage in any threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or reckless as to whether a breach of the peace may be occasioned".

#### V. RELEVANT PROCEDURAL LAW

In terms of the invocation of the criminal process and these criminal offences, Garda powers include the following. The Gardaí are given powers of arrest under the Criminal Damage Act, 1991, the Firearms and Offensive Weapons Act, 1990 and the Public Order Act, 1994. The Domestic Violence Act, 1996 makes it a criminal offence for a person who is the subject of the court order to breach the order, and gives the Gardaí a power of arrest where breaches of such court orders are suspected. No power of arrest is directly provided within the Non-Fatal Offences Against the Person Act, 1997, or by the Criminal Law (Rape) Acts, 1981-1990. However section 2(1) of the Criminal Law Act, 1997 created an 'arrestable offence', defined as an offence which:

... may, under or by virtue of any enactment, be punished by imprisonment for a term of five years or by a more severe penalty and includes an attempt to commit any such offence.

An arrest may be made without warrant under section 4(1) of that Act by any person who with reasonable cause, suspects another to be in the act of committing an arrestable offence or, under section 4(2), to arrest another where an arrestable offence has been committed, and the person seeking to make the arrest has reasonable cause to suspect that that other is guilty of it. In the context of the Non-Fatal Offences Against the Person Act, 1997, the Gardaí may arrest any person who they suspect has committed any one of the offences of: assault causing harm (section 3), causing serious harm (section 4), threats to kill (section 5), coercion (section 9) and harassment (section 10). There is no power of arrest available for section 2 assault, other than the power at common law. When the Gardaí make an arrest for an offence under the Non-Fatal Offences Against the Person Act, 1997, there is no bar to arresting a person for a section 3 offence, if it would appear to be justified upon the facts as found by the Garda attending the incident, even if it were to subsequently transpire that the act was not serious enough to merit such a charge:

[T]he Gardaí may conclude that, while a reasonable suspicion existed to justify the arrest, there is no admissible evidence upon which a prosecution can properly be initiated. The actions of the arrestor must be considered at the time he made the arrest and not in the light of any subsequent events ... An inference drawn by a Garda from certain facts may be sufficient to constitute a reasonable suspicion justifying an arrest and yet may fall far short of anything which could be considered as evidence in a criminal case.<sup>17</sup>

If the Gardaí do not make an arrest but an offence has nonetheless been disclosed, they may proceed by summons. This must be served on the offender within six months of the date of the complaint.

Under the common law a spouse was not competent to give

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<sup>17</sup> Ryan, E.F. and Magee, P., *The Irish Criminal Process* (Mercier Press, Cork, 1983), p.104; for a summary of the law on arrest see further Ryan, A., "Arrest and Detention: a Review of the Law" (2000) 10 I.C.L.J. 2.

evidence on behalf of the prosecution in a criminal trial.<sup>18</sup> The law has changed in this regard since the enactment of the Criminal Evidence Act, 1992. Section 21 provides that a spouse or former spouse shall be competent to give evidence at the instance of the prosecution, and shall be compellable, under section 22, to give evidence on behalf of the prosecution where the offence involves violence or the threat of violence to a spouse, a child of the spouse or any person under the age of seventeen, or where the offence is a sexual offence. These provisions apply to any criminal proceedings, whether prosecuted summarily or on indictment.

## VI. THE GARDA SÍOCHÁNA POLICY ON DOMESTIC VIOLENCE INTERVENTION

The manner in which the Gardaí operate is necessarily influenced by the Garda Síochána Policy on Domestic Violence Intervention (hereinafter DV Garda Policy).<sup>19</sup> This defines domestic violence as:

... the physical, sexual, emotional or mental abuse of one partner by the other partner in a relationship which may or may not be one of marriage or cohabitation and includes abuse by any family member against whom a safety order or barring order may be obtained by another family member.

The DV Garda Policy sets out the procedures which members should follow when dealing with domestic violence incidents. It is stated in the introduction to the Policy that “[t]he primary Garda role is one of protection through law enforcement - reconciliation, if appropriate, is better left to those skilled in that area”. The Gardaí are directed to make an arrest where a power of arrest exists, and the Policy states that “the injured party’s attitude will not be the determining factor in respect of the exercise of such power”. The Gardaí are also directed to make an arrest where a court order, granted under the Domestic Violence Act, 1996, which is in force,

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<sup>18</sup> See generally Fennell, C., *The Law of Evidence in Ireland* (2nd ed, LexisNexis, Dublin, 2003).

<sup>19</sup> Garda Policy introduced in 1994, revised in 1997 to take account of Domestic Violence Act.

has been breached.

## VII. GARDA PRACTICE IN DOMESTIC VIOLENCE CASES

A complaint of domestic violence will most usually be received by a telephone call to the Garda Station in the complainant's locality, or by a 999 call. In the case of the former, if the local station is closed for the night, the caller will be redirected to the Central Command and Control Station, which will dispatch a Garda car patrolling the area in question. The Gardaí attending the scene will take whatever action they deem to be appropriate. If it is considered by the Gardaí that the incident warrants effecting an arrest, the arrested person may be taken into custody and either released on station bail, to appear before the District Court at a future date, or may be detained in custody to appear at the next sitting of the District Court to be formally charged, at which point the suspect may apply for release on bail. The Sergeant at the station with jurisdiction for the area where the incident has occurred, will generally first be informed of the incident after the initial charge has been preferred by the arresting Garda. The latter (depending on the practice in individual stations) will make a record of the incident in the 'station occurrence book' and document the incident in a DVSA form. On learning about the incident, the Sergeant will make a preliminary decision as to whether further investigation is necessary, whether an arrest should be effected (for example in the case of an incident where the alleged offender has absconded before the arrival of the Gardaí) or whether the case should be prosecuted through the summons mechanism. Alternatively, the Sergeant may conclude that the incident was too trivial to warrant any further Garda involvement, or that it did not disclose a criminal offence. Where further involvement appears warranted, the Sergeant will request more information from the arresting Garda, including requesting the latter to interview the complainant in order to get a formal statement of complaint, if one has not already been obtained and to interview any further witnesses if applicable. A file is then compiled and sent on by the Sergeant to the Superintendent. The Sergeant's report containing his recommendations regarding prosecution is attached to the file.

The Superintendent makes the final decision as to whether the file discloses an offence of a summary nature, or whether the facts would appear to warrant a more serious charge. If the Superintendent concludes the former applies, the file is forwarded to the Inspector, who will prosecute the case in the District Court. If he concludes the facts disclose an indictable charge, the file must be forwarded to the D.P.P. who will make the final decision on whether to prosecute, the charge to be preferred, and whether summary disposal in the District Court is sufficient to meet the case.

### VIII. METHODOLOGY OF THE CORK STUDY

The study aimed to discover the degree of implementation and adherence to the directions as set out in the Garda Policy by Gardaí in the Cork City region. It examined the processing of domestic violence complaints from the time an incident is reported to the Gardaí, through to the decision to prosecute, and the final outcome in the criminal court.

Following Garda attendance at an incident relating to domestic violence, a DVSA form is completed.<sup>20</sup> Permission was sought to examine copies of all DVSA forms compiled over the period of study. Authorisation was given by the Garda Commissioner for Garda participation in the research. The authorisation did not extend to releasing copies of the DVSA forms, nonetheless it was agreed that the information therein (excluding names and addresses) could be divulged. A form was devised whereby the information in the official forms could be transferred into a checklist form. These checklist forms will henceforth be referred to as 'Incident Forms'. Ten Garda Stations in the Cork area were selected to participate in the study. These ten stations represented four individual Garda Districts, and were selected with the view to include a broad range of socio-economic areas of Cork City and suburbs.

Incident Forms were obtained for a seventeen month period, beginning in October 1998 and up to and including February 2000. Following retrieval of the Incident Forms, each station which had participated in the study was visited, in order to discover the

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<sup>19</sup> Garda Policy introduced in 1994, revised in 1997 to take account of Domestic Violence Act.

outcome of each case referred to in each Incident Form. The available Garda files corresponding to the Incident Forms were collated by the Sergeants in the participating stations, using the date of complaint appearing on the Incident Forms as the main identifier. An interview schedule was devised containing a number of general questions which were asked of all Sergeants, and other questions which specifically related to the Incident Forms received from the individual stations. Due to the confidential nature of Garda files, each Sergeant in the ten participating stations related the information sought, by reading from the Garda files to the researcher who noted the data contemporaneously. Descriptions of complaints were available in the case of 123 Incident Forms. The study also sought to ascertain the views of rank and file Gardaí regarding their experience of attending domestic violence incidents. This aspect of the research was conducted by means of questionnaires. In all, a total of ten questionnaires were dispatched. Seven completed questionnaires were returned.

#### IX. RELEVANT FINDINGS OF THE CORK STUDY

A review of relevant findings of the survey reveals the following factors:

- Physical violence accounted for the highest category of domestic violence complaint, incidents reflecting a range of violence from minor to very serious. One murder charge was recorded.
- Breaches of court orders made up 28% of all incidents.
- The majority of alleged offenders were husbands (46%). Male cohabitants, sons, ex-boyfriends and ex husbands accounted for a large proportion of alleged offenders (38%). Female alleged offenders accounted for 8%, the highest figure being female cohabitants and daughters.
- Children were present in 55% of all reported incidents.
- Arrests occurred in 41% of all incidents reported. Arrests were more often effected where breaches of court orders were alleged and arrests were less frequent where no court order was in existence.
- Arrests of female spouses/partners were rare.

- The reason most often recorded for not effecting arrests, was complainant's reluctance to proceed any further with the complaint.
- The percentage of all incidents reported which proceeded to court was 40%. In 34% of all reported incidents, no prosecution was envisaged, due to complainant reluctance to take further action.
- Of cases where prosecution was envisaged by the Gardaí (one hundred and forty), 25% (thirty-six) did not proceed due to complainants withdrawing statements or declining to make formal statements.
- Of the cases which did proceed to court hearing, (one hundred and three), a conviction rate of 36% was recorded, with custodial sentences being passed in 46% of all convictions.

#### X. IMPLICATIONS OF THE CORK STUDY FINDINGS FOR DV GARDA POLICY & INVOCATION OF THE CRIMINAL PROCESS IN DOMESTIC VIOLENCE CASES

The initial and instigating role of the Gardaí is as significant in this context as in all criminal law intervention. The extent to which these findings show implementation of, and adherence to, the DV Garda Policy has implications for future and possibly further intervention. In reviewing the findings of the Cork study under relevant headings, account will usefully be taken of the findings of the earlier research conducted in Ireland by Women's Aid, together with the extent to which issues raised by commentators generally in the literature, may pertain to the present study. The headings under which the findings are considered are arrest and charge; attrition; attitudes of the Gardaí to the issue of domestic violence; and conviction and sentence.

#### XI. ARREST AND CHARGE

The arrest rate of 41% found by this study indicates a significantly higher figure than that reported by Women's Aid in their 1995 study, which reported an arrest rate of 19% for an 8 month period during 1994, at which time the Garda Policy was in

it's first year of operation. The findings in the Cork study also reflect a higher arrest rate than that reported by Women's Aid in 1999, which showed an arrest rate of 34%. The 7% rise indicated in this study, would appear to suggest that the pro arrest aspect of the Garda Policy is being increasingly implemented by the Gardaí. The Women's Aid study (1999) found that the majority of arrests occurred where court orders were alleged to have been breached. That finding is also reflected by the present study, which shows the power of arrest most frequently used, is that provided for under the domestic violence legislation. The number of court orders alleged to have been breached totaled 74. In 64 of which incidents arrests ensued. Thus, where breaches of court orders occur, the findings indicate that Gardaí will usually arrest, as directed by the Policy.

The likelihood of arrest decreases substantially where no breach of court order is at issue. Of 185 incidents alleging physical violence, threats of violence and verbal argument, only 33 arrests were effected, indicating an 18% arrest rate.

The most frequently cited reason for no arrest being effected, is that the complainant declined to make a formal statement of complaint. This suggests that the Gardaí are not fully adhering to the direction in the Garda Policy that "the injured party's attitude will not be the determining factor in respect of the exercise of [an arrest power]". Gardaí are directed by the Policy to utilise a power of arrest where one exists. The low arrest rate for incidents not involving breaches of court orders, raises the issue of sufficiency of arrest powers granted to the Gardaí. Excluding the domestic violence legislation, powers of arrest are provided as seen under the common law, the Criminal Damage Act, the Firearms Act, the Public Order Act, the Rape Act and the Criminal Law Act. It must be asked whether the Gardaí are sufficiently utilising the powers which these Acts bestow, in accordance with the direction in the Policy. The findings of this study show that the Firearms Act and the Rape Acts were never utilised; the Public Order Act used on four occasions; the Criminal Damage Act on two; and the Criminal Law Act, (the most recent piece of legislation) was used in ten instances. The most frequently used power of arrest was that granted under the common law for breach of the peace. It is evident from the descriptions of

incidents received that in many incidents noted in the Incident Forms under the heading 'threats of violence', that damage to property is often a feature of threatening behaviour. In only two instances, however, was the power of arrest invoked under the criminal damage legislation. The offence of criminal damage is committed by damaging property belonging to another. In one incident, the legislation was invoked to arrest a son who was doing damage to his mother's house. However, as explained by one of the Sergeants interviewed, in many instances of criminal damage the situation is not usually clear-cut as the property may be owned jointly or by the alleged offender. While the offence may also be committed by damaging property belonging to oneself, that offence is only constituted where the life of another is endangered by the damage to property. It is difficult to discern in any of the incidents examined involving criminal damage, evidence of such endangerment to life.

The power of arrest granted under the Criminal Law Act appears to have been rarely invoked. The power provided by section 4 of the Act may be invoked wherever an arrestable offence, that is, an offence for which statute provides a penalty of five years or more, is suspected to have been committed. The offence of assault causing harm, provided under section 3 of the Non-Fatal Offences Against the Person Act falls within the category of arrestable offence. To constitute the offence under section 3, harm must be caused by the assault, and the word harm, as has been outlined earlier, is broadly defined to include harm to mind and body and includes pain and unconsciousness. A further definition is provided by case-law, and even though it refers to the old offence under the Offences Against the Person Act, 1861, it is likely that it still holds relevance for the section 3 offence: "Bodily harm has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt need not be permanent, but must be more than merely transient and trifling". The facts given in a number of incidents examined would suggest that a section 3

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<sup>21</sup> The question asked: "Which of the following actions would you consider to be contained within the definition of Assault Causing Harm, under section 3 of the Non-Fatal Offences Against the Person Act, 1997: Dragging by the hair causing the person pain but no injury (such as bruises or cuts); Hitting across the face with open palm causing pain but no injury (e.g. bruises or cuts); Punching in the body/face causing bruising; Punching in the body/face

assault, as defined by case-law and statute, had in fact occurred. Those facts would have enabled the section 4 power of arrest to be invoked to effect arrest, but in the majority of cases this did not occur.

The low employment of the section 4 power of arrest, raises the issue of down-charging. It is interesting to note that the Gardaí who responded to the questionnaire considered that the examples given in one question asked<sup>21</sup> all constituted a section 3 assault, as defined by statute. The majority of those examples were drawn from facts disclosed in the returned Incident Forms. What emerges from this is that while from a theoretical perspective, the Gardaí consider certain acts to constitute certain offences, this would not appear to translate to Garda practice on the ground. This would appear to indicate a practice of ‘down-charging’, that is, charging a suspect with a lesser offence than one which would appear to be justified by the facts. This finding is in line with the findings of a number of commentators.<sup>22</sup> Down-charging was also evident in relation to one example, where the facts could be said to have constituted the new offence of harassment contained in the Non-Fatal Offences Against the Person Act. Nonetheless, the charge was framed under the Public Order Act. The initial explanation offered by the Sergeant for that course of action related to the fact that the new offence of harassment carries a ten year sentence. This may suggest that the offence in that instance was not considered to be sufficiently serious to warrant such a charge. It may also be indicative of an unfamiliarity with the new legislation, in that the charge could have been prosecuted summarily, in which case the maximum sentence would be twelve months. It may suggest an attitude on the part of the Gardaí which is essentially not punitive. In other words, the Gardaí are prepared to perform their duty of bringing offenders

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causing fractures; Stabbing causing a wound requiring 8 or less stitches; Hitting with a household implement, for example a poker, sweeping brush, causing bruising; Kicking causing bruising; Kicking causing fractures”.

<sup>22</sup> Smith, L.J.F., *Domestic Violence Home Office Research Study No. 107* (HMSO, London, 1989); Buzawa, E. and Buzawa, C.G., *Do Arrests and Restraining Orders Work?* (Sage, London, 1996); Kemp, C., Norris, C. and Fielding, N.G., *Negotiating Nothing: Police Decision-making in Disputes* (Avebury, Aldershot, 1992); Grace, S., *Policing Domestic Violence in the 1990s* Home Office Research Study No.139 (HMSO, London, 1995); Edwards, S.M., *Policing ‘Domestic’ Violence* (Sage, London, 1989).

before the courts to answer criminal charges but at the same time, to make a value judgment relating to the punishment that they deem to be necessary in the circumstances. Further research would need to be conducted to ascertain whether some offences are regarded by the Gardaí themselves as meriting greater punishment. The practice of down-charging may be affected by the Garda view of what constitutes 'serious', which may be very different from the view held by the victim of the offence. It is noteworthy that there was a general consensus amongst the Sergeants, that the levels of violence were generally low. Typical violence as described by two Sergeants consisted of punching on the body and face. While this may appear to constitute a low level of violence to the Gardaí, who in the course of their work encounter all degrees of violence and thereby become to some extent case hardened, such a level of violence may seem much more severe to the victim. As a result, the victim may consider that the Gardaí are not treating the violence as serious and may conclude that the reason for that attitude lies in the fact that the violence has occurred in the domestic context. How 'serious' a complaint appears to be to the Gardaí, will also have implications for recording of incidents in the DVSA forms. Even though there is a consensus amongst the Gardaí as to what constitutes domestic violence, in some Stations, only those incidents which involve physical violence will be officially recorded. It may be that an incident is considered by the Gardaí to constitute 'argument' as opposed to psychological abuse, where it may be considered by the victim to constitute the latter.

Even though down-charging is evident from the findings, it is not necessarily conclusive of an attitude which regards domestic violence as not serious, as suggested by some commentators.<sup>23</sup> The reasons for down-charging may be more easily understood, when the organisational and legal factors are taken into consideration. Central to the reluctance to pursue an indictable charge, or one which may be tried either summarily, or on indictment appears, to be the lengthy procedure which accompanies it. Take section 3 of the Non-Fatal Offences Against the Person Act, 1997, as an example: - In order to

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<sup>23</sup> See for example Edwards, S.M., *Policing 'Domestic' Violence* (Sage, London, 1989).

pursue this charge, the Gardaí must prepare a file. This involves obtaining a statement from the victim, who may often be unhappy with that course of action. Medical records must also be included as evidence of the existence of ‘harm’. These may only be released with the consent of the victim. If the statement and medical records are forthcoming, the file must then be forwarded to the D.P.P., having been first examined by the State Solicitor’s Office, for decision to prosecute. It is evident that in many instances the D.P.P. decides on summary prosecution, either as a section 3 charge tried summarily, or more often as a section 2 assault. The process for pressing a section 3 charge is therefore lengthy, and when considered in the context of a complainant who may be ambivalent or reluctant to continue with the complaint, the longer the delay, the more the likelihood of the complaint being withdrawn increases. From an operational perspective, the Gardaí would appear to be more inclined towards pressing forward with a section 2 assault charge, which is within their own competence and jurisdiction to pursue.

From a strictly legal perspective, in order to effect an arrest, a police officer must have reasonable suspicion that an offence has been committed. Reasonable suspicion may exist on information supplied, for example, a report that an incident of domestic violence has occurred, but does not depend on a formal written statement. It has already been noted that “an inference drawn by a Garda from certain facts may be sufficient to constitute a reasonable suspicion justifying an arrest”.<sup>24</sup> The meaning of ‘suspicion’ was stated by Lord Devlin as follows:

Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end ... Prima facie [proof] consists of admissible evidence ... suspicion can take into account matters that could not be put in evidence at all.<sup>25</sup>

Therefore, the police officer may still effect the arrest albeit without a formal statement of complaint, provided that he

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<sup>24</sup> Ryan, E., and Magee, P., *The Irish Criminal Process* (Mercier Press, Dublin, 1983), p. 104.

<sup>25</sup> *Shaabin Bin Hussein v. Chong Fook Kam* [1969] 3 All E.R. 1626 at 1630 (P.C.).

reasonably suspects that the facts as verbally reported to him have indeed occurred, such suspicion being formed from his assessment of the evidence available to him when attending the scene. From both a legal and operational perspective however, the case may proceed no further without the involvement of the complainant, at least in a situation where there are no other witnesses to the incident or other evidence through which the charge could be proved.

Given that the reason cited for not effecting arrests in 42% of the Incident Forms relates to absence of formal complaint, it would appear that in these instances, the Gardaí approach the issue of arrest from an operational perspective. The findings, in line with those of Edwards, suggest that the Gardaí hold some degree of expectancy that the complainant will be reluctant to pursue the complaint, and suggest that their decision to arrest is informed by working rules, as identified by Hoyle, rather than by legal rules. It would appear that Hoyle's findings that the focus of the police is on the evidence necessary for charge, rather than arrest, also pertains here.

23 of the examples of incidents received, excluding incidents relating to court orders, resulted in arrest. Our examination of these suggests that in a number of incidents, the Gardaí made arrests in those cases where there was a strengthened possibility that the incidents could proceed to prosecution without sole reliance on the evidence of the complainant. Prosecution would be more easily facilitated by virtue of certain factors including incidents witnessed by Gardaí, clear instances of breach of the peace in the presence of the Gardaí, public order elements, and threats and abusive behaviour towards the Gardaí. This shows that the Gardaí are applying the direction in the Policy to arrest where a power exists. It also shows that arrests are being made because the operational conditions are more conducive. In such cases, a conviction could be sought based on the evidence, not of the complainant, but of the Garda alone. In such an instance, however, a conviction could not be

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<sup>26</sup> Chatterton, M.R., "Police in Social Control" in King, J. (ed.), *Control without Custody* (University of Cambridge I.T., Cambridge, 1976), p. 26.

<sup>27</sup> Edwards, S.M., *Policing 'Domestic' Violence* (Sage, London, 1989); Oppenlander, N., "Coping or Copping Out?: Police Service Delivery in Domestic Disputes" (1982) 20(3/4) *Criminology*, 20; Dobash, R.E. and Dobash, R.P., *Women, Violence and Social Change* (Routledge, London, 1992).

obtained for a domestic assault, unless such an assault was witnessed by the Garda, which occurred in only one incident examined. These cases may indicate that the strategy of ‘resource charging’, as identified by Chatterton<sup>26</sup> and Edwards may to some extent form a practice utilised by the Gardaí. The cases also suggest, in line with the findings of commentators, a willingness on the part of the Gardaí to effect an arrest where suspects behave in an abusive manner towards them.<sup>27</sup> Like Edwards, our findings suggest that the seriousness of the offence was not necessarily sufficient to result in a decision to arrest, and also in line with Edwards, it would appear that the willingness of the complainant to press charges played a role in the decision to arrest.

## XII. ATTRITION

Attrition occurred at the arrest stage of the process. Not all incidents where no arrests were effected, however, were discontinued. The study reveals a significant utilisation of the summons procedure. While arrests were effected in a total of 105 incidents, a total of 140 Incident Forms indicated that prosecution was pending, showing an intention on the part of the Gardaí to pursue the case further by summons in 35 instances. This may indicate evidence of Hoyles finding, that “the intended objectives of a policy can be largely met even though the directive is not ritualistically applied”.<sup>28</sup>

Further attrition occurred during the prosecution stage, with complainant reluctance featuring highest as the reason for discontinuation of proceedings. Findings reveal that in some stations, efforts were made to reduce this attrition through a practice of a no-drop policy, which resulted in a higher number of cases reaching the court than recorded in stations which did not operate such a policy. Attrition resulting from the practice of ‘no criming’ identified by a number of commentators, was not strongly identified in this study. A low percentage of Incident Forms were marked ‘no offence disclosed’. Arrest rates were lowest in the incidents

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<sup>28</sup> Hoyle, C., *Negotiating Domestic Violence: Police, Criminal Justice and Victims* (Clarendon Press, Oxford, 1998).

categorised as 'verbal argument' and in a number of these instances, it is difficult to discern whether any offence has been committed. The types of acts evident in those examples fit more comfortably under the offences contained in the Public Order Act than offences of assault. Where arrests were made in those instances, the charge was usually breach of the peace. Disputes were also evident in the verbal argument category which related to access to children. These disputes were generally considered by the Gardaí to fall within the boundaries of the civil law, rather than being a criminal matter.

### XIII. GARDA ATTITUDES TO DOMESTIC VIOLENCE

The majority of breaches of court orders were alleged in the area of protection orders and barring orders. Edwards' finding that the police considered complainants who had allowed their spouses back following a court order to have forfeited their right to protection was not evident in this study. Furthermore, the lack of understanding by police officers of the dynamics of domestic violence highlighted by Edwards, was not obvious. The findings from the interviews with Sergeants and the Garda survey would suggest that there is a greater awareness of the issues involved, than earlier research would have indicated. The attitude of the Gardaí appears to be one which regards incidents of domestic violence to warrant investigation as much as a crime between strangers. A certain frustration with complainants remaining with the violent partner, or refusing to make statements was nonetheless evident from responses of both Sergeants and rank and file Gardaí. Preferences were expressed by the latter for operational assignment in the area of non-domestic rather than domestic incidents, principally because there is more likelihood that the matter will be pursued by complainants in the non-domestic category. Nonetheless, there was no evidence that the Gardaí consider domestic violence to be 'not proper police work', as suggested by some commentators highlighted in the literature review.

### XIV. CONVICTION AND SENTENCING

Conviction rates recorded by this study fall between the rates

noted by the Women's Aid 1999 research. That study showed a 21% conviction rate for one site, 20% in another and 3% in the third, giving an average rate of 14%. These figures take their percentage from all reported incidents. The overall conviction rate found by this study from all reported incidents was 14%. If the conviction rate is measured from the number of incidents which reached court, which is arguably a more accurate way in which to measure the courts' contribution to attrition rate and to show the actual conviction rate, the figure rises to 36%. Custodial sentences in this study were shown to account for 46% of those convicted, with a further 16% being given suspended sentences.

#### XV. TENTATIVE CONCLUSIONS FROM A POLICING PERSPECTIVE

In summary, the findings from the Cork study reveal that the DV Garda Policy is being strongly implemented, where cases involve breaches of court orders, but less vigorously, where the incident occurs in the absence of a court order. Arrest powers which are available, however, are found not to be invoked in situations where the facts would appear to justify their use. There is evidence of down-charging. It would also appear that Gardaí are basing the decision to arrest on evidence required to prosecute a charge, rather than that which is legally required to justify an arrest.

Attrition was highest at the arrest stage of the process, with further attrition occurring prior to the incidents reaching court hearing, the reason for such attrition most often cited being complainant unwillingness to proceed. The directive of the DV Garda Policy not to allow the attitude of the injured party to be determinative in the decision to arrest appears therefore, not to have been followed in many incidents. Efforts are being made to pursue a case in the absence of arrest through the summons mechanism, however, suggesting that the spirit, though not the letter, of the Policy is being pursued. Many of the directions contained in the Policy would appear to being adhered to, such as taking a note of the evidence, interviewing parties separately, advising about court orders, and pursuing a complaint in the period following reporting.

In terms of completing the DVSA form as directed by the Policy, it would appear that compliance is the norm, though it is clear that not all incidents are recorded and that in two stations in particular, the completing of the official forms could be improved.

The gender-neutral aspect of the Policy is not always being adhered to, most particularly with regard to incidents where the complainant is a male spouse or partner. Arrests and prosecution of female perpetrators have been found to be rare.

A number of issues raised by other commentators in the literature in this area, that of 'no-criming', lack of sympathy for victims and failure to understand dynamics of domestic violence, were not found to be in evidence in the Cork study. The attitude of the Gardaí was revealed as one which regards incidents of domestic violence to warrant investigation, as much as a crime between strangers.

## XVI. CONCLUSION

It is evident from the findings of the Cork study that the Gardaí frequently encounter situations where complainants wish to proceed no further, having initially reported the incident. In order for the criminal justice system to respond effectively to the issue of domestic violence, this issue of complainant reluctance to engage with the process needs to be addressed. This has been attempted through the DV Garda Policy, but there is evidence that in relation to domestic assaults, the Gardaí are allowing the complainants' wishes to influence their decision regarding arrest. It is also evident from the findings, that where breaches of court orders are alleged, the Gardaí are adhering to the directions of the Policy, and exercise their power of arrest in the majority of these cases. The Policy offers clear direction to the Gardaí in relation to allegations of breaches of court orders. If similar clarity of direction were to be offered in relation to allegations of domestic violence, in the absence of court orders, it might result in a lower level of attrition at the arrest stage of the process. A useful starting point might be the Duluth Police

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<sup>29</sup> Duluth Police Department General Order (August 14 1989) # 89-01. See further appraisal by Asmus, M.E., Ritmeester, T., and Pence, E.L., "Prosecuting Domestic Abuse Cases in Duluth. Developing Strategies for Understanding the Dynamics of Abusive Relationships" (1991) 15 *Hamline Law Review*, 115.

Department General Order<sup>29</sup> which mandates arrest in the case of an assault causing visible injury or physical impairment, or where there has been a threat with a dangerous weapon. The definition of a dangerous weapon should be broad enough to include household items, which are capable of inflicting pain or injury. Few commentators support the idea of mandatory arrest, because they believe the wishes of the victim should always be taken into account. Nonetheless, the inclusion of a provision in the DV Garda Policy which mandates arrest, where court orders have been breached, would appear to have resulted in more cases of domestic violence appearing before the courts, thereby enabling the criminal law to respond. Where no orders are in existence, the Policy direction to Gardaí not to take account of the injured party's attitude in deciding whether to arrest, has clearly not been adhered to, as evidenced by the findings of this study. This reason has been cited in the majority of cases where no arrest occurred. A difficulty in operating a mandatory arrest policy in the case of physical violence is that, as the findings show, the degree of violence varies. A range of violence is evident from those which could be termed 'technical assaults' to assaults resulting in injury or even death. A mandatory arrest policy which removes all discretion, has a danger of blurring the distinction between those situations where arrest is appropriate, and those which are not serious enough to require such a course of action. Some level of discretion may need to be maintained. The role of discretion in Irish Garda practice generally must be relevant here. Indeed commentators such as Vaughan argue that the Irish response to domestic violence is unlikely to succeed for precisely the reason that it requires police to act contrary to the norm (where they do not enforce the law in all situations).<sup>30</sup>

In terms of powers of arrest, a perusal of the law shows that the Gardaí do have sufficient powers at their disposal, however they would appear not to use them to their full potential. An amendment to the DV Garda Policy, which would set out the legal requirements necessary for effecting an arrest, might go some way to remedying this situation. In relation to down-charging, the belief that the injured party is more likely to drop the complaint because of the

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<sup>30</sup> Vaughan, B., "Selecting Responses to Domestic Violence" (2001) 11 I.C.L.J. 23 at 27.

inherent delay, should not be a reason for preferring lesser charges. In the absence of a mechanism by which cases of domestic violence could be fast tracked through the system, to reduce the delay, the introduction of a no-drop policy could be given serious consideration. A no-drop policy would have the benefit of enabling the court to exercise some degree of supervision over the case through the adjournment mechanism, even if the complainant refuses to give evidence. A more probative enquiry would discover the level and frequency of the violence, and the reasons why the complainant does not want to proceed. This should be undertaken by a trained professional, who would furnish the Court with a report, so that the judge may decide, having been fully appraised of the situation, whether the case ought to be struck out.

It is evident from the details of incidents received in the Cork study, that the Gardaí are called upon to deal with a wide range of complaints. The more difficult cases from the criminal law perspective are those which fall under the psychological abuse category. While 'emotional or mental abuse' are included in the DV Garda Policy definition of domestic violence, it does not necessarily follow that they in fact constitute criminal offences. The offence of assault may be committed without making any physical impact upon another, but to constitute an assault, the other person must fear that they are about to be immediately struck. Threats of violence will be included within the definition of assault, but behaviour which comes under the category 'emotional or mental abuse' may not always fit within the offence of assault as currently defined. In this sense, the DV Garda Policy defines the term 'domestic violence', to include behaviour which may not be prohibited by the existing criminal law. It would appear to have based the definition on the various types of behaviour which have been found to occur in domestic violence cases by those working in the field. Controlling behaviours which were identified in the Incident Forms, such as the abuser placing financial constraints on the victim, limiting access to friends and family, and other behaviours such as name calling, criticism and shouting may also not of themselves constitute criminal assaults. As such, in the absence of creating a new offence which would encompass these types of behaviour, the Gardaí have little scope for

offering a response to these types of incidents, other than to advise the complainant to seek a court order under the civil route. Whether a new such offence should indeed be created could be given further consideration. This should not be done, however, without first addressing those factors which have been found to inhibit the effectiveness of those offences currently in existence.

Ultimately, the criminal law exists to demarcate an act as a crime, and to provide sanctions against persons who are proved, through the law of evidence, to have committed crimes. The crime of assault is not defined in terminology of place, and an assault is no less an assault if it occurs in a private arena as opposed to a public, or between families, as opposed to strangers. The criminal law, within the context of an adversarial system such as exists in Ireland cannot function, aside from its power as a deterrent, unless persons appear before the courts to make accusation and to answer accusation so that judgment may be passed. The victim of domestic violence plays a dual role, that of accuser, and of witness, and as such, is as integral a part of the process as much as judges, prosecutors and offenders. In such a context, if the victim refuses to make an accusation, there can be no one standing accused, thus rendering the criminal law ineffective. All parties could of course be mandated to appear before the criminal courts, but there would appear to be an ingrained resistance to using the criminal law to operate as an arbitrator in personal relationships. This resistance is sustained both by those who are given the function of enforcing the law, and by those who experience violence. Reviewing the role of the police in domestic violence situations reminds us of the context in which they normally serve. The private ordering of the criminal process for victim empowerment, which some might suggest,<sup>31</sup> justifies the non-cooperation of victims raises as many issues as pro arrest and pro prosecution policies in a context where they are not the norm. Arguably if the criminal process is not to be rendered irrelevant, and victims (and accused) shortchanged, it is these questions which should now be addressed. That day may be closer now that the Supreme Court has spoken.

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<sup>31</sup> Ford, D.A., "Prosecution as a Victim Power Resource: A Note on Empowering Women in Violent Conjugal Relationships" (1991) 25 *Law & Society Review*, 314.

A question with particular pertinence for the area of domestic violence is, where is the boundary to be drawn here between the role of the civil and the criminal law? At what point has behaviour passed beyond the type of wrong which may be adequately redressed through the civil law mechanisms, to the type of wrong which, as a society, we regard as deserving of punishment and should be labelled as such? To date the civil route has facilitated avoidance of that question or at least fudged the answer. It has meant that the realm of 'domestic' violence has been differentially (not to say minimally) treated; and has been compromised by invocation of criminal law stigmatisation, in an atmosphere where criminal law principles (presumption of innocence, proof beyond reasonable doubt, public hearings, adversarial style cross-examination) may be resisted. While proper and effective utilisation of the criminal law can undoubtedly prove an effective alternate weapon in combating domestic violence, and avoid further 'civil'isation of the criminal process, it does so at a price. It offers the ultimate condemnation of unacceptable behaviour and has huge symbolic value. That that comes at a cost to both victim and accused is an uncomfortable dilemma that has yet to be resolved.