

# *The Criminal Law's Response to Domestic Violence: What's Going On?*

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## *Abstract*

Scholars and activists have long campaigned for domestic violence to be recognised as criminal offending, however, at the same time, they have also consistently warned that a risk of criminalisation is that it inflicts further harm to women. This article draws on a study of criminal prosecutions of breaches of domestic violence protection orders in Queensland, Australia and explores the process of criminal intervention in the context of domestic violence. The Queensland data discussed in this article demonstrates that the process involved in prosecuting a criminal breach often involves a minimisation of the harm inflicted on women by perpetrators, police and magistrates, a ruthless contest about the facts and numerous court appearances before resolution. Prosecutions of breaches of protection orders often result in no conviction being recorded or in trivialising fines. In conclusion, this article explores whether there are shifts and changes that can be made in this area of criminal law so that it better embraces the three principles of justice that have been identified by Barbara Hudson: discursiveness, relationalism and reflectiveness.

## *1. Introduction*

The current Australian Government campaign against domestic violence states clearly that domestic violence is a crime.<sup>1</sup> However, there continues to be debate about the value of applying the criminal law in this field. This article investigates the operation of the criminal law in the domestic violence sphere and explores some of the problems with the application of criminal law in this area. Specifically this article examines a number of cases where breaches of domestic violence protection orders were prosecuted in Queensland. The analysis shows that

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1 Australian Government, Media Release: 'PM Launches Inaugural Meeting of National Council to Reduce Violence Against Women and Children' <[http://www.fahcsia.gov.au/internet/tanyaplibersek.nsf/content/nat\\_council\\_violence\\_05june08.htm](http://www.fahcsia.gov.au/internet/tanyaplibersek.nsf/content/nat_council_violence_05june08.htm)> at 17 July 2008.

although criminal charges are laid, criminal responsibility is often minimised by police prosecution authorities in terms of the type of charge applied. Further the research shows how defendants also minimise their responsibility in the offending conduct often by blaming the victim. This study reveals three key findings: that defendants charged with breach of a domestic violence order are less likely to plead guilty than defendants charged with non-domestic violence matters; defendants are usually legally represented; and that criminal prosecutions of domestic violence matters take longer to finalise than other criminal matters. The case analysis presented here also shows that in most cases penalties are relatively low, usually resulting in fines. Sentencing justices often fail to tailor an appropriate sentencing response that takes into account the particular background of the offence and the relationship between the perpetrator and the victim. In many cases examined in this study the victim was drawn into the prosecution process to assist in withdrawing charges or to support mitigation of penalty. The approaches of respondents, police, lawyers and magistrates in colluding in the minimisation and trivialisation of violence and the shifting of blame to the victim in the course of applying criminal justice responses found in this study have been recognised elsewhere. This research supports previous research based claims that criminal justice processes often add to the violence already experienced by women at the hands of their partners.<sup>2</sup> This article explores whether there are shifts and changes that can be made in the criminal law in this area that can re-orient the criminal law so that it better embraces the three principles of justice that have been identified by Barbara Hudson.

Hudson's conception of justice may be helpful in reconceiving the way that the criminal law responds to domestic violence. She argues that there are three key principles that should underpin justice. These principles are discursiveness, relationalism and reflectiveness.<sup>3</sup> She suggests that, while these principles should be embraced in all justice processes<sup>4</sup>. They seem particularly important in the domestic violence context. Hudson explains that discursive justice, 'is responsive to the circumstances of the particular case rather than subsuming individual acts and actors under general classes' and also 'represents a wider range of standpoints'.<sup>5</sup> Her idea of justice argues that it should also be relational. That is justice must recognise individuals as part of a 'network of relationships' with the State and with the community.<sup>6</sup> This principle accepts that identity is 'relationally'

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2 See, for example, Ruth Busch, 'Don't Throw Bouquets at Me ... (Judges) Will Say We're in Love: An Analysis of New Zealand Judges Attitudes Towards Domestic Violence' in Julie Stubbs (ed), *Women, Male Violence and the Law* (1994) at 105; Linda Mills, 'Killing her Softly: Intimate Abuse and the Violence of State Intervention' (1999–2000) 113 *Harvard Law Review* 551.

3 Barbara Hudson, *Justice in the Risk Society* (2003) at xvi, 206; Hudson, *Beyond White Man's Justice*, 'Beyond White man's Justice: Race, Gender and Justice in late Modernity' (2006) *Theoretical Criminology* 29 at 30. There are other principles Hudson identifies but the ones discussed here are identified as key principles.

4 Hudson, *Justice in the Risk Society*, above n3 at 206.

5 *Ibid* at 210, 213.

6 Hudson, *White Man's Justice* above n3 at 37.

contingent.<sup>7</sup> According to Hudson, justice should also be reflective. That is each case should be considered in terms of all its unique circumstances and situating them in the wider social context.<sup>8</sup> Given the particular context of domestic violence offending, where relationships between offenders and victims are often ongoing and where the victim's continuing safety is a key issue, her approach may be particularly helpful.

After turning to a brief discussion about the role of the criminal law in domestic violence matters, this article then explores the data collected in the study. In conclusion, the article returns to consider Hudson's three principles and how they could be used to improve the application of criminal law responses in domestic violence matters.

## 2. *The Role of Criminal Law in Domestic Violence Matters*

In contrast to Hudson's key principles for justice, writers about the criminal law have noted that criminal law tends to operate in a top down linear fashion rather than reflecting webs of connection; that the approach of the criminal law is individualised rather than relational and rules and responses are generalised rather than tailored to particular experiences.<sup>9</sup> As Rosemary Hunter explains, the experience of the law is 'one of abstraction, [requiring] the erasure of [women's] subjectivity in order to become the necessary kind of legal subject.'<sup>10</sup> Criminalisation of behaviours that affect women has been problematic particularly in relation to sexual assaults and domestic violence. On the one hand the criminal justice system has continuously refused to recognise harms perpetrated against women in the private sphere as crimes.<sup>11</sup> In some jurisdictions this has led to women taking civil action against the police for their failure to act.<sup>12</sup> On the other hand, where harms perpetrated in the intimate sphere are prosecuted as criminal acts, the approach of criminal law often results in these criminal offences being treated like other crimes;<sup>13</sup> that is, as 'one off' incidents that are abstracted from

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7 Ibid.

8 Id at 39.

9 Nicola Lacey, Celia Wells & Oliver Quick (eds), *Reconstructing Criminal Law* (2003) at 611–612; See also Nicola Lacey, 'Violence, Ethics and Law: Feminist Reflections on a Familiar Dilemma' in Susan James & Stephanie Power (eds), *Visible Women: Essays on Feminist Legal Theory and Political Philosophy* (2002) at 117–135, 123–124, 128 discussing rape laws; Elizabeth Schneider, *Battered Women, Feminist Lawmaking and the Struggle for Equality* (2000) at 5 and Adrian Howe, 'The Problem of Privatised Injuries: Feminist Strategies for Litigation' in Martha Fineman (ed), *At the Boundaries of Law: Feminism and Legal Theory* (1990) at 149.

10 Rosemary Hunter, 'Law's (Masculine) Violence: Reshaping Jurisprudence' (2006) 17 *Law and Critique* 27 at 40.

11 See Julie Stubbs, 'Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice' in Heather Strang & John Braithwaite, *Restorative Justice and Family Violence* (2001) at 52. A recent US study has suggested that police often fail to charge in the domestic violence context because domestic violence is characterised as mutual assault and a victim can not be identified, see John Worrall, Jay Ross & Eric McCord, 'Modelling Prosecutors' Charging Decisions in Domestic Violence Cases' (2006) 52 *Crime and Delinquency* 472.

their context. Intimate personal violence is a crime with a number of unique elements.<sup>14</sup> Regardless of whether the victim and the perpetrator are separated there are usually complex and continuing emotional, financial and legal ties between them and continuing complex power dynamics.<sup>15</sup> Some parties will not separate until years after the violence first began or not at all and separated parties may re-unite. Financial responsibilities and visiting rights to children often continue post-separation. Violence also often continues despite separation and indeed often becomes heightened after separation.<sup>16</sup> Despite such continuing connections, victims of domestic violence tend to be excluded from the criminal justice process. Only rarely do victims become involved when called upon by either prosecutors or defendants to assist with the determination of penalty or the level of criminal responsibility.<sup>17</sup> The criminal process often ignores or fails to accommodate the complications and individual characteristics of the parties and the relationships that exist in domestic violence cases.

Scholars and activists have recognised that women's experiences of the criminal justice system are often 'violent'<sup>18</sup> and sometimes devastating. It is argued by some that involving the criminal justice system in domestic violence matters may create distress, disadvantages and disillusionment for women<sup>19</sup> that override any hope or protection and safety gained through the criminal justice process. Donna Coker argues that a strong focus on criminal justice policies risks greater State control of women.<sup>20</sup> She argues that such a focus may expose women themselves to the greater chance of arrest for domestic violence, other offending and to the removal of their children.<sup>21</sup> Of particular concern is the fact that, faced with the possibility of criminal charges, some women may choose not to call on the police for assistance and protection.<sup>22</sup> In Australia, there is research available

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12 See for example, the Canadian case, *M.M., an infant, by her guardian ad litem, B.M., and K.M., an infant by her guardian ad litem, B.M v The Attorney General of British Columbia, the Attorney General of Canada and Constable C Andrichuk* [2001] BCSC 419. For a good discussion of the case and these issues generally, see Julia Tolmie, 'Police Negligence in Domestic Violence Cases and the Canadian Case of Mooney: What Should Have Happened, and Could it Happen in New Zealand?' (2006) *New Zealand Law Review* 243 at 243.

13 See Andrew Ashworth, 'Responsibilities, Rights and Restorative Justice' (2002) *British Journal of Criminology* 578 at 580.

14 Russell Dobash & Rebecca Emerson Dobash, 'Abuser Programmes and Violence Against Women' in Wilma Smeenk and Marijke Marlsch (eds), *Family Violence and Police Response: Learning from Research, Policy and Practice in European Countries* (2005) at 191.

15 Nancy Lemon, *Domestic Violence* (2002) at 27.

16 Stark points to research that suggests that the majority of men arrested for domestic violence were not living with their partner at the time of the assault. See Evan Stark, 'Insults, Injury and Injustice: Rethinking State Intervention in Domestic Violence Cases' (2004) 10 *Violence Against Women* 1302 at 1314. Martha Mahoney has also discussed 'post-separation assault', see 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90 *Michigan Law Review* 1 at 65. Australian research has also found that violence often continues after separation especially around child hand-overs, Miranda Kaye, Julie Stubbs & Julia Tolmie 'Domestic Violence and Child Contact Arrangements' (2003) 17 *Australian Journal of Family Law* 93 at 97.

17 See also Hunter, above n10 at 40 and also Mills, above n2 at 554.

18 Lacey, *Violence, Ethics and Law*, above n9 at 127.

that shows that indigenous women in some communities may be particularly reluctant to call on police to protect them from violence where arrest and prosecution focused strategies are in place.<sup>23</sup> However, there is also research that suggests that indigenous communities are under-policed and that there is a lack of police support for those women who do call on their assistance.<sup>24</sup> Strong messages of condemnation about domestic violence as criminal now appear regularly in the press in many countries.<sup>25</sup> However, a number of scholars and activists argue about whether a focus on criminal law causes some battered women to become sacrifices to public principles which are intent on showing that something is being done<sup>26</sup> rather than reflecting interest in the health and safety of individual women.<sup>27</sup>

Despite this critique of the operation of the criminal law in the domestic violence sphere, domestic violence activists have stressed, since the 1970s, that domestic violence should be understood as criminal assault not just a private or civil matter.<sup>28</sup> The reasons for recognising such violence as criminal are claimed to be both substantive and symbolic.<sup>29</sup> It is argued that recognising domestic violence as a crime will both improve victim safety and secure community denunciation. Feminist scholars and activists have argued that the application of criminal law to domestic violence has encouraged both public condemnation of violence in the intimate sphere and police accountability for the protection of women.<sup>30</sup> Although Ruth Lewis recognises that the criminal justice response is just one aspect of a wider system of intervention and that only a small number of domestic violence incidents reach the courts, her research supports the position

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- 19 See Donna Coker, 'Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review' (2001) 4 *Buffalo Criminal Law Review* 801. Mills also suggests that the early effectiveness of policies like mandatory arrest is gradually lost over time in individual cases, see Linda Mills, 'Mandatory Arrest and Prosecution Policies for Domestic Violence' (1998) 25 *Criminal Justice and Behaviour* 306 at 310, 313. See also Renee Romkens, 'Protecting Prosecution: Exploring the Powers of Law in an Intervention Program for Domestic Violence' (2006) 12 *Violence Against Women* 160 at 165, who notes the problem that both parties often end up being arrested.
  - 20 Donna Coker, 'Race, Poverty, and the Crime-Centred Response to Domestic Violence' (2004) 10 *Violence Against Women* 1331 at 1332, 1348.
  - 21 Coker, above n19 at 805, 813, 837, refers specifically to mandatory arrest policies. Coker points out that women sometimes become involved in criminal offending that is connected to their abuse, such as prostitution.
  - 22 Negative effects of mandatory policy have been noted in African-American communities, see Lawrence Sherman, Janell Schmidt, Dennis Rogan, Douglas Smith, Patrick Gartin, Ellen Cohn, Dean Collins & Anthony Bacich, 'The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment' (1992) *Journal of Criminal Law and Criminology* 137 at 139.
  - 23 The Aboriginal and Torres Strait Islander Women's Taskforce on Violence, Queensland Government, *Report* (1999) at 49–50. See also Larissa Behrendt, 'Aboriginal Women and the White Lies of the Feminist Movement: Implications for Aboriginal Women in Rights Discourse' (1993) 1 *Australian Feminist Law Journal* 27 at 29. Victorian Law Reform Commission, *Review of Family Violence Laws*, Report (2006) at [5.11].
  - 24 Both concerns are illustrated in Boni Robertson (chairperson), *The Aboriginal and Torres Strait Islander Women's Taskforce on Violence* (1999) for example at 55–56, 90, 97–98 <<http://www.austlii.edu.au/au/journals/AILR/2000/20.html>> accessed 17 July 2008.

that criminalisation of abusers can provide some protection for women and challenge to men.<sup>31</sup> As a direct result of feminist research and activism, domestic violence has increasingly been recognised as criminal,<sup>32</sup> at least rhetorically.

In practice domestic violence continues to be mainly dealt with as a civil matter through domestic violence protection order legislation rather than as a criminal matter.<sup>33</sup> The development of protection order legislation grew, to some extent, out of frustration with the failure of the criminal justice system. Some of the key obstacles in criminal prosecution and conviction of domestic violence offences are the high standard of proof of 'beyond reasonable doubt' that is required for the conviction of criminal matters and the fact that many of the standard criminal offences fail to encapsulate certain violent behaviours. Civil schemes that provide protection orders to those who are at risk of domestic violence are now common to all states and territories throughout Australia and in many other countries<sup>34</sup>. These protection order schemes have been embraced by both women and by police.<sup>35</sup> As one magistrate has noted, we have seen a 'rise and rise' in the use of protection orders.<sup>36</sup> Protection orders aim to stop the violence but also provide a public statement to the respondent that certain behaviour will not be tolerated. They also put the perpetrator 'on notice' to the police. However, the effectiveness of a protection order in stopping the unwanted behaviour often relies, at least in part, on the threat of the consequences for breach.<sup>37</sup> In each jurisdiction in Australia one possible consequence of breaching a protection order is that the perpetrator is charged with a criminal offence of contravention or breach of a protection order.<sup>38</sup> In Queensland the breach provision is set out as follows:

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25 Australian Government, above n1. In 2007 *Women's Aid* in the UK launched a national Domestic Violence Awareness campaign in 2007 <<http://www.womensaid.org.uk>> accessed 12 June 2007.

26 Mills, above n2 at 583.

27 Coker has argued that the current orthodoxy relies too heavily on crime control interventions at the expense of providing economic supports to women which would in turn impact positively on safety. See Coker, above n20 at 1335, 1348.

28 See Howe, above n9 at 149, 152. Hudson, *Beyond White Man's Justice* above n3 at 36. Law reform agendas have consistently emphasised this approach, see for example New South Wales Law Reform Commission, *Apprehended Violence Order*, Report 103 (2003) at [2.31], [2.39]; Department of Justice and Industrial Relations, Tasmanian Government, *Safe at Home: A Criminal Justice Framework for Responding to Family Violence*, Options Paper (2003) at 7–8; VLRC, above n23 at 156–157; Robyn Holder & Jane Caruana, *Criminal Justice Intervention in Family Violence in the ACT: The Family Violence Intervention Program 1998–2006* (2006) at 12–13. For an overview of the arguments about the role of criminal law in domestic violence intervention see Ruth Lewis, Rebecca Emerson Dobash, Russel Dobash & Kate Cavenagh, 'Law's Progressive Potential: The Value of Engagement with the Law for Domestic Violence' (2001) 10 *Social Legal Studies* 105.

29 Liz Kelly, 'Moving in the Same or Different Directions? Reflections on Recent Developments in Domestic Violence Legislation in Europe' in Wilma Smeenk & Marijke Malsch (eds), *Family Violence and Police Response: Learning From Research, Policy and Practice in European Countries* (2005) at 83. See also Lewis, Dobash, *et al*, *ibid*. see especially at 114–117.

30 Schneider, above n9 at 44; VLRC, above n23 at [5.8].

31 Ruth Lewis, 'Making Justice Work: Effective Legal Interventions for Domestic Violence' (2004) 44 *British Journal of Criminology* 204 at 205, 221.

32 Kelly, above n29, 83; see Howe, above n9 at 149, 152.

## 80 Breach of order or conditions

(1) A respondent must not contravene a protection order, temporary protection order or any other order made under this Act, including a condition imposed by the order, if—

- (a) the respondent was present in court when the order was made; or
- (b) the respondent was served with a copy of the order; or
- (c) a police officer told the respondent about the existence of the order.

Penalty: maximum 1 year imprisonment<sup>39</sup>

In Queensland a breach is a 'summary' or 'simple' offence. This is a classification usually reserved for less serious offences. The maximum penalty for breach in Queensland is significantly lower than most other offences. The criminal burden of proof, 'beyond reasonable doubt', is applied to breach offences throughout all Australian jurisdictions. Where domestic violence matters are charged as criminal offences, it is overwhelmingly as a breach of a domestic violence protection order rather than one of the established criminal offences such as assault or criminal damage.<sup>40</sup>

A number of studies have shown that there is a higher rate of successful criminal prosecution when police are mandated to arrest, charge and prosecute domestic violence matters and where mandatory reporting by service providers is required.<sup>41</sup> However, more recent research suggests that there is an inclination towards 'preferred arrest' policy rather than mandatory arrest due to some of the problems associated with such as dual arrests and retaliatory arrests (when the perpetrator has his or her partner wrongfully arrested).<sup>42</sup> There have been very cautious moves towards 'pro-arrest' approaches in two of the eight Australian jurisdictions.<sup>43</sup> A recent Queensland report recommended mandatory investigation and evidence

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33 Heather Douglas & Lee Godden, 'The Decriminalisation of Domestic Violence' (2003) 27 *Criminal Law Journal* 32 at 33. Carolyn Hoyle's research found a similar situation in parts of the UK; see Carolyn Hoyle, *Negotiating Domestic Violence: Police, Criminal Justice and Victims* (1998) at 213.

34 See *Domestic Violence and Protection Orders Act 2001* (ACT), *Crimes Amendment (Apprehended Violence) Act 2006* (NSW), *Domestic Violence Act 1992* (NT), *Domestic Violence (Family Protection) Act 1989* (Qld), *Domestic Violence Act 1994* (SA), *Family Violence Act 2004* (Tas), *Crimes (Family Violence) Act 1987* (Vic) *Restraining Orders Act 1997* (WA). See the overview provided in Kelly, above n29.

35 For example in Queensland, in 2002–2003, there were over 12,000 protection orders made; Crime and Misconduct Commission (Qld), *Policing Domestic Violence in Queensland* (2005) at 30.

36 Magistrate Barbara Cotterell, 'Domestic Violence and the Rise and Rise of the Intervention Order', *Papers Presented at the Eighth International Criminal Law Congress* (Melbourne, 2002). There were over 32,000 applications made in 2005–2006; see Magistrates' Court (Qld) *Annual Report 2005–2006* <<http://www.courts.qld.gov.au/magistratesCourt/MC-AR-2005-2006-1to36.pdf>> accessed 17 July 2008.

37 CMC, above n35 at 66; NSWLRC, above n28 at [10.41]. See also *Pungatji v Woodcock* [2003] NTSC 31 at [12] where the judge made a comment to this effect.

38 I note that these orders have different names in each State and Territory.

39 Note for third or subsequent conviction within three years the penalty increases to two years imprisonment maximum; *Domestic Violence (Family Protection) Act 1989* (Qld), s 80(1)(b).

collection when responding to domestic violence incidents but emphasised that mandatory arrest or charge was not recommended.<sup>44</sup>

Breach offences are usually dealt with in the Magistrates' Courts and are therefore not reported in the law reports. There has been limited research in this area.<sup>45</sup> State Government data collection from the Magistrates' Courts in Queensland is very limited and not contextual. The research reported in this article attempts to go some way to address this gap.

This article highlights the question of the role of the criminal law in responding to domestic violence. The article asks whether the problems in the implementation of the criminal law can be addressed in order to justify its continued application. Ultimately this article argues that although the criminal law has only partially fulfilled its promise to denounce and protect, it remains important in a symbolic and practical way in some circumstances.<sup>46</sup>

### 3. Methodology

The study discussed here examined 645 court files related to prosecutions for breach of domestic violence orders held at three of the busiest suburban courts in Queensland.<sup>47</sup> Information from the Magistrates' Courts files was supplemented with data from police files and State Government statistical material. The research relates to the six-month period from 1 July 2005 until 31 December 2005.<sup>48</sup>

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40 These issues were discussed by the CMC, above n35 at 66, 74 – despite this being where a crime is charged, there is still a very low rate of charging complained of. Given that only about 36 percent of women report violence to the police in circumstances where they know the perpetrator, a number of matters are not charged: Australian Bureau of Statistics, *Personal Safety Survey* (2005) <<http://www.abs.gov.au/ausstats/abs@.nsf/cat/4906.0>> accessed 13 June 2007. In Queensland, for the year 1996–1997, 1,839 defendants appeared in courts in relation to breaches of Domestic Violence Orders. Fourteen percent of defendants were not convicted: Office of Economics and Statistical Research, Queensland Treasury, *A Social and Economic profile of Women in Queensland 199* at [10] <<http://www.oesr.qld.gov.au/queensland-by-theme/demography/population-characteristics/regular-publications/social-econ-profile-women-qld/social-econ-profile-women-qld-1999.shtml#10%20Crime%20and%20justice>> accessed 17 July 2008. For a discussion of the kinds of crimes perpetrated in the intimate sphere that are successfully prosecuted see Heather Douglas, 'Crime in the Intimate Sphere: Prosecutions of Intimate partner Violence' (2004) 7 *Newcastle Law Review* 74.

41 See for example Natalie Taylor, *Analysis of Family Violence Incidents July 2003-June 2004 Final Report*, Australian Federal Police (2006) at 4.

42 Lewis, Dobash *et al*, above n28 at 111 and see Valli Rajah, Victoria Frye & Mary Haviland, '“Aren't I a Victim?": Notes on Identity Challenges Relating to Police Action in a Mandatory Arrest Jurisdiction' (2006) 12 *Violence Against Women* 897.

43 For example the Australian Capital Territory Family Violence Intervention Program states that its core components include pro-arrest, pro-charge and pro-prosecution policies. ACT Family Violence Intervention Program, *Resource: FVIP info for website*, <<http://www.dvcs.org.au/Resources/FVIP%20info%20for%20WEBSITE.doc>> accessed 7 August 2007. Pro-arrest is distinguished from mandatory arrest. In the ACT arrest is one option for attending police officers and is the preferred method to bring a matter to court, see Holder & Caruana, above n28 at 29. See also Department of Justice and Industrial Relations (Tas), above n28. See also VLRC, above n23, [5.22], [5.20]; Rosemary Hunter, 'Narratives of Domestic Violence' (2006) 28 *Sydney Law Review* 733 at 737.



In 88 percent (n 568) of the cases examined the defendant was male.<sup>49</sup> The relationship between the parties was often not clear from the available data. Of those files where the relationship was known 95 percent involved matters between parties who were currently, or had previously been, married or involved in a de facto relationship.<sup>50</sup> This figure is consistent with Queensland Police statistics that show that over 94 percent of *Domestic and Family Violence Protection Act* matters are 'spousal' matters or intimate partner matters.<sup>51</sup> Such relationships have been the focus of feminist engagements with domestic violence as it is these types of relationships that are particularly susceptible to being characterised as 'private' and thus not a concern for the criminal law.<sup>52</sup> The nature of the breach was not clear from many of the Magistrates court files so police files were examined to ascertain this information.<sup>53</sup> Some issues arising from the data are discussed in the following sections of the article.

#### ***4. The Minimisation of Harm by Police and Prosecution Authorities***

This research suggests that minimisation of harm by police and prosecution authorities is common in domestic violence prosecutions.<sup>54</sup> Such minimisation is evidenced by lack of prosecution or charging less serious offences by police and prosecution authorities. The magistrate has a wide-ranging discretion in relation to the appropriate conditions to apply when dealing with protection order applications at first instance. Usually protection orders contain standard conditions requiring that the respondent be of good behaviour. Other conditions may require that the respondent remain a certain distance away from the 'aggrieved's' home or place of work.<sup>55</sup> Breach offences are focused on a breach of the conditions of the protection order. Given the requirement of good behaviour included in protection orders, a breach charge could cover all potential criminal offending undertaken while the protection order is in place. Based on the police descriptions of the

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44 CMC, above n35, recommendation 1 at xi, 78–80.

45 See Office of Women's Policy, *Report of the Taskforce on Women and the Criminal Code*, Queensland Government (2000) at v-vii, which recommended that more research should be undertaken in this jurisdiction.

46 Robyn Holder, 'Domestic and Family Violence: Criminal Justice Interventions: Issues Paper 3', Australian Domestic and Family Violence Clearinghouse (2001) at 2.

47 Brisbane, Beenleigh and Southport Magistrates' Courts. Since the expansion of the Queensland domestic violence legislation in 2001 parties in a range of relationships can apply for protection *Domestic and Family Violence Protection Act 1989* (Qld) s 12B.

48 These courts were chosen as they provide a solid picture of the approach of courts in a heavily populated region of the southeast corner of Queensland.

49 Similar figures are reported in New South Wales. See Julie People, 'Trends and Patterns in Domestic Violence Assaults' (2005) 89 *Crime and Justice Bulletin* at 6 and in the ACT. See Holder & Caruana, above n28 at 41. In a similar project which examined applications for protection orders it was found that approximately 80 percent of applicants for protection orders were women: Douglas & Godden, above n33 at 36. The statistics reported in the 2005 study suggest that where a protection order is made against a woman she is less likely to be charged with a breach offence than her male counterparts. It is not clear why this is so from this project.

50 Where the respondent was male 197 files showed that the parties were either married or in (or previously in) a de facto relationship. In six files the victim was the respondent's mother.

breach behaviour, it is likely that many of the matters charged as breaches of protection orders examined in this study could have been charged as crimes of criminal assault or criminal damage among other matters. Such alternatives have much higher associated penalties than the breach offence. The breach charge may often fail to reflect the seriousness of the offence. Although the criminal charge of breach of a protection order was initially developed to provide an alternative offence for those situations where it may be difficult to identify the elements and satisfy the burden of proof in relation to a more serious criminal offence, it would appear from the data in this study that the breach charge is the standard response to matters arising in the domestic violence context where an order is in place.<sup>56</sup> In fact charges should reflect the seriousness of the offence — even in the domestic violence context.<sup>57</sup>

Domestic violence legislation attempts to recognise domestic violence as something that goes beyond traditional categories of crime and can take into account the features of the power dynamics in the particular relationship.<sup>58</sup> The legislation, for example, extends to harassment and intimidation.<sup>59</sup> Verbal harassment, threats of harm and abandonment and name calling<sup>60</sup> may all be part of domestic violence and if this type of conduct underlies the breach then breach may be the appropriate charge.

The decision to charge a breach offence in preference to more serious criminal offences (in terms of penalty) such as assault, stalking or criminal damage has both practical and ideological ramifications. On a practical level it impacts on the available maximum penalty and the criminal record of the accused. Further, the

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51 Of 32,322 confirmed domestic violence incidences that Queensland police attended in 2004–2005, 30,414 were spousal matters, or matters between intimate partners, either separated or living together: Ross Patching, ‘System Responses: Police Responses’, unpublished paper presented at *The System Matters: Intensive Institute with Ed Gondolf* (Brisbane, 2006). Note that pursuant to *Domestic and Family Violence Protection Act 1989* (Qld) s 11, domestic violence is defined broadly as wilful injury, wilful damage to the person’s property, harassment or intimidation, indecent behaviour towards the other person without their consent, or a threat to commit any of these matters. Since 2001 ‘domestic relationship’ includes family relationships and informal care relationships (as well as intimate personal relationships and spousal relationships), see *Domestic and Family Violence Protection Act 1989* (Qld) s 11A.

52 See Patricia Easteal, *Less than Equal: Women and the Australian Legal System* (2001) at 108–109. See also Jerome Nadelhaft, “‘The Public Gaze and the Prying Eye’: The South and the Privacy Doctrine in Nineteenth-Century Wife Abuse Cases” (2007) <<http://ssrn.com/abstract=984736>> accessed 13 June 2007.

53 I thank Queensland Police for their assistance in this matter. Due to reasons of privacy of data the police provided a summarised version of data, where available, relating to the nature of the breach in each breach charge matter. In over half of the breach matters (n350) police data was useful to supplement the court file data.

54 Hunter notes a number of circumstances where harm to women tends to be minimised, see Hunter, above n10 at 42. See Lily Trimboli & Roseanne Bonney, ‘An Evaluation of the NSW Apprehended Violence Order Scheme’ (1997) at 35, where 22 percent of study participants indicated dissatisfaction with police (on the basis of rudeness, lack of sympathy and failure to act). Minimisation of harm is reported to be common among fathers’ rights groups also, see Miranda Kaye & Julia Tolmie, “‘Lollies at a Children’s Party’ and other Myths: Violence, Protection Orders and Fathers’ Rights Groups” (1998) 10 *Current Issues in Criminal Justice* 52 at 53.

55 *Domestic and Family Violence Protection Act 1989* (Qld) ss 22, 25.

decision to charge 'breach' rather than an indictable offence also excludes the possibility of the victim claiming criminal injuries compensation pursuant to the Queensland statutory scheme.<sup>61</sup> As noted previously, in all Australian jurisdictions the penalty for breach of a protection order is significantly lower than for other criminal offences.<sup>62</sup> Where a breach is charged and a conviction is recorded, the criminal record of the accused will state that there was a breach of a protection order without detailing the type of activity constituting the breach. In contrast, criminal damage or assault is listed on the accused's criminal record, leaving less to the imagination of potential employers or magistrates at future sentencing matters. The criminal record will also often be important for police who may rely on it to determine the seriousness of the perpetrator's behaviour at some future stage. For example, a number of previous breach convictions may suggest a pattern of stalking and that a subsequent breach should be charged as such. However, this kind of particularisation will not be clear from the criminal record. On an ideological level the preference for breach above other kinds of charges may be interpreted as trivialising or minimising what has occurred.<sup>63</sup> This underscores the importance of naming the harm,<sup>64</sup> a feminist strategy that is well-recognised.<sup>65</sup>

There are many examples of minimisation in this study. Queensland Police data provided descriptions for 350 of the breach files examined. Their descriptions are set out in the table below.

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56 Previous research has suggested that when criminal offences occur in the domestic violence setting and there is no protection order in place, the standard police approach is to obtain a domestic violence protection order and not charge at all. See Douglas & Godden, above n33.

57 See for example, Office of the Director of Public Prosecutions, *Director's Guidelines*, guideline 14 stipulates that the charge must 'fairly represent the conduct of the accused' and guideline 9 that states that charges must 'adequately reflect the criminality' of the act: <<http://www.justice.qld.gov.au/odpp/guidelines.htm>> accessed 21 November 2007. Note in some circumstances the issue of double jeopardy may arise, so it will often be the case that a breach offence and another offence will not be able to proceed at the same time if they are both based on substantially the same conduct. See for example *Ashley v Marinov* [2007] NTCA 1 at [14].

58 See for example Department of Attorney General Western Australia, *Report on a Review of Legislation Relating to Domestic Violence*, Final Report (2004) at 20.

59 *Domestic and Family Violence Protection Act 1989* (Qld) s 11; for discussion see *Bottoms v Rogers* [2006] QDC 80 at [15]–[18].

60 Gail Erlick Robinson, 'International Perspectives on Violence Against Women: Introduction' (2003) 6 *Archives of Women's Mental Health* 155.

61 See *Criminal Offence Victims Act 1995* (Qld), s21.

62 *Queensland Criminal Code* s 335 (assault): three years; s 469 (wilful damage): five years; s 359E (stalking): five years (excepting summary or street offences see *Summary Offences Act 2005* (Qld))

63 This has been recognised by others, see for example Ruth Busch, above n2, 105; Hunter, above n43 at 753.

64 See Heather Douglas & Lee Godden, 'Intimate Partner Violence: Transforming Harm into a Crime' (2003) 10 (2) *E Law – Murdoch University Electronic Journal of Law*. The article may be viewed at: <<http://www.murdoch.edu.au/elaw/issues/v10n2/godden102.html>> accessed 5 September 2007.

Police description of breach	Total matters described as assault/criminal damage/stalking (n=350)	Charged as assault/criminal damage/stalking	Found guilty of assault/criminal damage/stalking
Assault	193 (55%)	16 (5%)	14 (4%)
Criminal damage	116 (33%)	9 (3%)	7 (2%)
Stalking	61 (17%)	0	0

In numerous matters (55 percent, n193) police data records the nature of the breach as including ‘assault’;<sup>66</sup> however assault was charged in only 16 (5 percent) matters and in 14 matters there was a finding of guilt. Although visible physical evidence of assault usually supports the prosecution of assault in other contexts, the data in this study suggests that this prediction can not be made in domestic violence matters.<sup>67</sup> In a further group of cases (33 percent, n116) police data described the breach behaviour as criminal damage, in only 9 matters were criminal damage charges pursued and in seven of those cases there was a finding of guilt.<sup>68</sup> In one matter the defendant kicked the victim and threw her video-player with enough force to make a hole in the wall of the house. In that case the defendant was charged with breach only despite physical evidence of criminal damage.<sup>69</sup> In another case, for example, where the defendant punched through a window to access the house and damaged the door to gain entry or damaged property in the victim’s yard<sup>70</sup> the charge was simply a breach charge and fines were ordered. Stalking was stated as the breach behaviour in police data in 61 cases (17 percent).<sup>71</sup> In none of the cases examined were stalking charges laid.<sup>72</sup>

65 Howe, above n9 at 161. See also Hudson, *Above White Man’s Justice*, above n3, 40, who argues that naming is an aspect of ‘reflectiveness’.

66 See *Criminal Code* (Qld), s335 (QCC). Note that in 48 cases police identified both assault and criminal damage as part of the breach.

67 See for example case 487 (where bruising was present there was a charge of assault and breach laid) compared with case 529 (where there was evidence of bruising there was no charge of assault, only a charge of breach laid). The police response in Queensland can be contrasted with the situation in the ACT where assault is charged in 35 percent of matters where charges are laid in response to domestic violence, see Holder & Caruana, above n28 at 31.

68 This can be contrasted with the situation in the ACT where property damage is charged in 14 percent of matters where charges are laid, see Holder and Caruana, *ibid*.

69 Case 480; fined \$500. A further example: the writer of a pre-sentence report in one case notes that the defendant said: ‘I did not want to kill her I was only threatening her with a knife.’ This defendant was charged with a breach when clearly this is a matter that may have been more appropriately charged with a more serious and specific offence of making threats or assault, especially given the apparent admissions of the defendant. Case 95. See also QCC s75.

70 See case 560-fined \$300; case 612- fined \$350 and case 546- fined \$350 respectively.

71 See QCC ch33A, this offence was introduced in all Australian states in the early 1990s. See Emma Ogilvie, ‘Stalking: Policing and Prosecuting Practices in Three Australian Jurisdictions’ *Trends and Issues Paper* (2000).

72 For a discussion of penalties appropriate for stalking see *R v Keong* [2007] QCA 163.

Arguably the case of stalking is of particular concern. Holmes, who has studied different types of stalking behaviour, has found that in the case of the 'domestic stalker' the behaviour is likely to be long-term and is prone to lead to tragic consequences.<sup>73</sup> In her study of domestic murders in Western Australia Carolyn Johnson found that many of the killings were preceded by obsessive stalking behaviour.<sup>74</sup> Arguably, especially in the case of stalking, the criminal record should be clear about the kind of behaviour complained of.

Another aspect of minimisation occurs when police prosecutors negotiate with the defendant to accept a plea to one breach charge in exchange for the withdrawal of a number of breach charges, or where police charge one breach offence where there have actually been a number of consecutive offences. Not surprisingly, in some situations, charges appear to have been negotiated with a plea to breach being accepted by police while charges in relation to other criminal matters are withdrawn.<sup>75</sup> For example in one matter serious assault was charged along with breach.<sup>76</sup> Ultimately the police proceeded with the breach matter and offered no evidence on the serious assault charge. A conviction was recorded for the breach with no other penalty. Presumably this was because the defendant had already served 6 weeks on remand awaiting trial in relation to these offences. The problem in this example is that the criminal record will only record a breach and the associated penalty does not reflect the serious nature of the breach. For the reasons discussed earlier this may have dangerous ramifications. In other matters, where the police submitted photographs of the bruised and cut legs of the victim to the court<sup>77</sup> or photographs of the bite marks perpetrated by the defendant,<sup>78</sup> the police ultimately proceeded only with breach charges.<sup>79</sup> In other examples the defendant was found guilty of one count of breach and was fined, despite six separate charges of breach being noted on the court file.<sup>80</sup>

Where the defendant has not only harmed the victim but also offended the police in some way, matters involving police were usually charged as separate criminal offences of assault. The police assault, unlike the assault on the victim or criminal damage to the victim's property, was not subsumed into the overall context of the breach offence. This is no doubt partly because police attend at domestic violence incidents in pairs and this means that they are both willing and

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73 Ronald Holmes, 'Stalking in America; Types and Methods of Criminal Stalkers' (1993) 9 *Journal of Contemporary Criminal Justice* 317 at 322.

74 Carolyn Johnson, *Come with Daddy: Child Murder-Suicide After Family Breakdown* (2005) at 54–70, 94–96.

75 Plea and charge negotiation is usual in the criminal justice process throughout Australia, see Mark Findlay, Stephen Odgers & Stanley Yeo, *Australian Criminal Justice* (2005) 116–117; see also Office of the Director of Public Prosecutions (Qld) *Director's Guidelines*, <<http://www.justice.qld.gov.au/odpp/pdfs/guidelines.pdf>> accessed 14 September, guideline 14.

76 Case 320.

77 Case 41.

78 Case 413; conviction but no penalty was imposed.

79 See also Case 410 where the defendant was originally charged with assault, criminal damage (cutting the telephone cord in the victim's home) and breach. Only the breach matter proceeded. This defendant had two prior convictions for breach and received a 4 month suspended prison sentence.

80 Case 606; fines \$300, the circumstances were similar in case 605.

able to give evidence to support each other's narrative of events. The approach to police assault is not consistent with the way that police deal with the behaviour of the respondent towards the victim.<sup>81</sup>

The charge negotiating process is recognised as a standard practice in relation criminal matters.<sup>82</sup> However, certain guidelines are applied to the process. For example, the prosecution should not accept a plea of guilty if it does not adequately reflect the gravity of the offence<sup>83</sup> and undercharging may constitute an abuse of process.<sup>84</sup> Conversely, negotiating charges to ensure a plea of guilty may be positive where it spares the victim the ordeal of a trial and where the prosecution evidence is deficient in some way.<sup>85</sup> The reality is that both of these matters are often relevant in domestic violence prosecutions underscoring the complexity of decision-making in this sphere.<sup>86</sup>

Coker points out that the dilemma for feminists is to ensure that prosecutors do not trivialise cases while at the same time that State control of women is not increased.<sup>87</sup> On many occasions it is likely that police prosecutors made a decision to proceed on breach prosecutions rather than other more serious criminal offences despite available evidence of higher-level charges. However, women often make the decision to refuse to assist the prosecution, and this also influences prosecutorial decisions. Research suggests that when women seek to prevent criminal prosecutions, police are likely to support them. A recent Queensland study on policing domestic violence found that some of the most important factors for police in deciding whether to charge a criminal offence related to the victim and whether she had previously dropped charges and whether she wanted the offender charged.<sup>88</sup> However, many victims have complained that police have refused to charge criminal offending despite available evidence and their willingness to give evidence.<sup>89</sup> This is a concern because, as Coker points out, often women's assessments have been quite accurate about how matters should proceed to ensure their safety.<sup>90</sup> The role of victims in the prosecution of domestic violence offences is complex. Lewis notes that women who have been abused are often 'very active in strategising their responses' and using available resources to protect themselves and their children.<sup>91</sup> At the same time it has been recognised that women's judgments are sometimes 'fatally wrong' about the level of risk to their safety.<sup>92</sup> As Julie Stubbs suggests:

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81 See for example case 503 where both police assault and breach were charged. The breach charge related to a separate assault, criminal damage and specifically damage to the victim's vehicle. See also case 518 where both police assault and breach were charged; the breach charge related to a separate assault and property damage.

82 Office of the DPP, *Director's Guidelines*, above n75.

83 *Ibid.*

84 *Brown* (1989) 44 A Crim R 385.

85 Office of the DPP, *Director's Guidelines* above n75.

86 See Hoyle, above n33 at 159–162.

87 Coker above n19, 807.

88 CMC, above n35 at 79, 49.

89 See Trimboli & Bonney, above n54 at 35, also see Douglas & Godden, above n33 at 25–33.

90 Coker, above n19 at 818, 823.

91 Lewis, above n31 at 219–220.

We need to move beyond polarized debates that characterize women as either free agents empowered through choice or as too victimized to act in their own interests and to recognize agency as constrained by material circumstances and cultural narratives and practices.<sup>93</sup>

Similarly Hudson notes that '[c]hoices are not made in a bubble of atomistic individualism, but from within a web of values, role models and relationships.'<sup>94</sup> The victim's own knowledge and views should be sought but she should also be supplied with proper information and a safe place to tell her story.

In light of these complexities, Ursel argues that the partnership between the justice system and victims is crucial.<sup>95</sup> Other jurisdictions have developed their criminal justice processes so that there is a focus on effective police evidence gathering at the investigation stage. When a victim's evidence is not pivotal to the prosecution case, the victim may not be pressured to make the 'choice' about assisting the prosecution.<sup>96</sup> At the outset, police should treat a domestic violence scene as a crime scene and collect relevant evidence.<sup>97</sup> Once this is done prosecutors need to accommodate women's agency but also her personal danger in a multifaceted consideration of whether and what to charge in each individual case.<sup>98</sup>

## 5. *Pressure on Victims and their Families*

Many victims of domestic violence are ambivalent about the benefits of supporting or pursuing criminal prosecution. In many domestic violence matters women victims seek to prevent prosecutions or refuse to assist as prosecution witnesses in criminal prosecutions. There are a number of reasons for this. For example, women from non-English speaking backgrounds may experience linguistic and cultural

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92 Jane Ursel, 'Can Specialised Courts Meet Victim Needs for Justice?: The Case for Family Violence Courts', *Paper presented at the Queensland Centre for Domestic Violence* (2007) <<http://www.noviolence.com.au/janeursel.html>> accessed 23 November 2007.

93 Julie Stubbs, 'Beyond Apology?: Domestic Violence and Critical Questions for Restorative Justice' (2007) 7 *Criminology and Criminal Justice* 169 at 180. See also Kathryn Abrahams who has written very scathingly about the 'dominance' approach in feminism, 'Sex Wars Redux' (1995) 95 *Columbia Law Review* 304, especially at 324–326.

94 Hudson, *Justice in the Risk Society*, above n3 at 95, 96.

95 Ursel, above n92.

96 See for example the ACT Family Violence Intervention program, see Holder and Caruana, above n28 at 35; see also Jane Ursel, 'His Sentence is my Freedom: Processing Domestic Violence cases in the Winnipeg Family Violence Court' in Lesley Tutty & Caroline Goard (eds), *Reclaiming Self: Issues and Resources for Women Abused by Intimate Partners* (2002) at 47–48. See also Lewis, Dobash *et al.*, above n28 at 118 where they note that 'women's active participation in the legal process as part of their strategy of resistance and challenge can be beneficial.'

97 Note, in the late 1990s, Betty Taylor, then director of the Gold Coast Domestic Violence Service, instigated the 'Kodak project' which ensured that all police officers carried a camera to domestic violence call-outs in the Gold Coast region so that they could photograph the scene.

98 See generally Martha Mahoney, 'Victimisation or Oppression? Women's Lives, Violence and Oppression' in Martha Fineman & Roxanne Mykitiuk (eds), *The Public Nature of Private Violence: The Discovery of Domestic Abuse* (1994).

issues in their dealings with police. Uncertain immigration status may also impact on a victim's willingness to involve police.<sup>99</sup> Victims may fear increased violence<sup>100</sup> or they may perceive that assisting to prosecute may break up the family unit.<sup>101</sup> Sometimes victims feel that they are, in various ways, responsible for the violence and feel guilty.<sup>102</sup> Victims often decide not to assist the prosecution because they assume that their involvement with police and the court process will be stressful and traumatic<sup>103</sup> and that the sentencing regime is, in any event, ineffective, overly lenient and inconsistent.<sup>104</sup> A policing culture focused on the civil protection order system<sup>105</sup> and a view, frequently held by police, that a successful prosecution relies on the commitment of the victim to give evidence at a subsequent trial provide other impediments to prosecution.<sup>106</sup> Entrenched police views about victims of domestic violence may also be an impediment to more serious charges being applied. A recent Queensland study found that police hold the view that many victims drop charges.<sup>107</sup> Both individual judges and research have also recognised that the cyclical and complicated nature of domestic violence relationships often leads victims to seek to withdraw charges or understate the harm of particular conduct during periods of calm in the relationship.<sup>108</sup>

In a number (17 percent, n109) of the case files examined in this study, it was clear that victims had supported the defendant at the hearing either by trying to end the prosecution or advocate for a reduced penalty. In a number of cases the victim submitted affidavit material to the court seeking to revoke charges but police prosecutors often forged ahead regardless.<sup>109</sup> In one case the victim decided she wanted to recommence the relationship with the accused and wrote a letter to the court apologising for the fuss that *she* had caused. In that case the court recorded a conviction for breach and fined the defendant anyway.<sup>110</sup> Similarly, in some cases victims seek to minimise the penalty. One victim wrote to the court

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99 See generally Neville Robertson, Ruth Busch, Radha D'Souza, Fiona Lam Sheung, Reynu Anand, Roma Balzer, Ariana Simpson & Dulcie Paina, *Living at the Cutting Edge, Women's Experiences of Protection Orders: Volume 2 What's To Be Done? A Critical Analysis of Statutory and Practice Approaches to Domestic Violence* (2007) at 218, but generally see pp218–238.

100 Research shows that this fear is often justified see Dobash & Dobash, above n14.

101 Holder, above n46 at 9.

102 See *R v Fairbrother; Ex parte A-G* [2005] QCA 105 at [23] (McMurdo P).

103 Sarah Curtis-Frawley & Kathleen Daly, 'Gendered Violence and Restorative Justice' (2005) 11 *Violence Against Women* 603 at 604. Note that some studies are starting to show that women's experiences with police in the domestic violence context are becoming more positive and supportive (at least in some jurisdictions), see Marianne Hester & Nicole Westmarland, *Tackling Domestic Violence: Effective Interventions and Approaches* (2005) at 55.

104 VLRC, above n23, [10.74]; Robyn Holder & Nicole Mayo, 'What Do Women Want? Prosecuting Family Violence in the ACT' (2003–2004) 15 *Current Issues in Criminal Justice* 5, 19; Office of Women's Policy, above n45 at 111.

105 Donna Hall, 'Domestic Violence Arrest Decision-Making: The Role of Suspect Availability in the Arrest Decision' (2005) 32 *Criminal Justice and Behaviour* 390 at 391.

106 CMC, above n35, 79. Hoyle argues that policing is influenced by societal attitudes, see Hoyle, above n33 at 101.

107 CMC, above n35 at 79, 49.



explaining that she only wanted the defendant to leave, not to be imprisoned.<sup>111</sup> Another victim begged, via a letter to the court, for a non-incarceration penalty so the family home could stay intact.<sup>112</sup> In another case, where the defendant was charged with assaulting a police officer and breach, the victim wrote a letter to the court claiming that the defendant had not actually assaulted the attending police. In spite of the denials from the victim, the defendant pleaded guilty to both offences in this matter.<sup>113</sup> Linda Mills has argued that placing too much pressure on women to testify forces her to realign publicly with her batterer's view of things.<sup>114</sup> This concern is reflected in some of the case examples noted in this research, but must be considered in light of the complexities of the circumstances under which 'choices' are made.<sup>115</sup>

Evidence legislation in the Australian Capital Territory (ACT) has attempted to address this issue. Generally, in the ACT, when a witness objects to giving evidence and the court finds that there is a likelihood of harm if the person does give evidence then that that person is not required to give evidence.<sup>116</sup> However, this provision does not apply where the matter is a domestic violence offence.<sup>117</sup> The rationale for this approach is that in domestic violence matters there is a high risk that victims will be influenced by the offender to withhold testimony; even though it is not the victim's true wish to withhold their testimony.<sup>118</sup> While this approach is understandable, especially in the context of a jurisdiction strongly focused on the criminal prosecution of domestic violence matters, the approach may undercut the agency and choice of women. However, this approach is part of a broader model developed to deal with domestic violence prosecutions in the ACT that provides support to victims and specialist prosecutors.<sup>119</sup>

Criminal justice responses that destabilise women's agency are problematic; however, as suggested previously,<sup>120</sup> there is arguably a protective role for the

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108 *R v Christodoulou* [2005] NSWSC 1362 at [15]; *R v Glen* [1994] NSWCCA where Simpson J pointed out that forgiveness by the victim needed to be approached with caution. See also Diane Crocker, 'Regulating Intimacy: Judicial Discourse in Cases of Wife Assault, 1970–2000' (2005) 11 *Violence Against Women* 197 at 198. This understanding has led some jurisdictions to implement mandatory prosecution strategies to ensure that prosecution takes place regardless of the victim's wishes: Department of Justice and Industrial Relations (Tas), above n28 at 14–15. Ptacek has emphasised the importance of judicial responses to women applying for protection orders through the court process. His research shows that what judges do in the hearing becomes part of the dynamic of battering, see James Ptacek, *Battered Women in the Courtroom* (1999) at 172.

109 Case 11, 123, 128, 149, 165.

110 Case 145.

111 Case 610, see also 112.

112 Case 418, see also 15, 101, 107, 109, 154, 418.

113 Case 618.

114 Mills, above n2 at 592, 595.

115 See Stubbs above n93, Hudson, *Above White Man's Justice*, above n3.

116 See *Evidence Act 1995* (Cth) s 18.

117 See *Evidence Act 1995* (Cth) s 19.

118 See *R v Wright* (2004) 149 A Crim R 298 at 302.

119 Holder & Caruana, above n28 at 13–14.

120 Ursel, above n92.

courts and prosecutors in certain domestic violence matters. In one matter in the current study where the defendant was in custody, police submitted an affidavit opposing bail to the defendant on the grounds of risk of further harm to the victim. The victim, however, did not attend to give evidence on the day of the hearing and the charge was dismissed on the basis of no evidence to offer. The defendant's prior offending record included 28 different sets of offences in various states and three very recent convictions for threatening violence, deprivation of liberty and common assault.<sup>121</sup> The prior history suggests that the defendant may have been a particularly intimidating person and may also explain the victim's failure to attend court. The decision of the court to dismiss the charges was, in one sense, appropriate given that the defendant was in custody but the decision may have placed the victim in serious danger. In this case the defendant's liberty was privileged over the victim's safety.

Mills has noted the increased risk of danger for some women if they become involved with criminal prosecution.<sup>122</sup> Similarly, Coker notes that women who are escaping well-funded or well-connected dangerous men need the equivalent of a witness protection program.<sup>123</sup> Certain protections exist for vulnerable witnesses giving evidence in Australian courts, although these are generally limited to screens and giving evidence on closed circuit television.<sup>124</sup> In any event, in Queensland, they appear to be mainly used in child-sex cases. Anecdotal comments by some police prosecutors suggest that they are rarely used in domestic violence cases because of alleged prejudice to the defendant and resource constraints of magistrate's courts. However, such witness support mechanisms should be available in domestic violence prosecutions and magistrates' courts should be properly equipped to provide such support.

It is not only the victim who is drawn into domestic violence breach prosecutions. On two court files examined, children's letters were retained on file. These letters requested leniency for fathers. Similar to some family law matters, children may become objects of bargaining for parties in the prosecution process.<sup>125</sup> Sometimes others in the community are also drawn in to take sides in the prosecution. In one case the male respondent arranged for a letter to be placed on the court file from the body corporate of the building where he lived.<sup>126</sup> The letter set out incidences of fighting between the defendant and victim. Presumably the aim of the letter was to reduce the culpability of the defendant.<sup>127</sup> The effect

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121 Case 110. Unfortunately criminal records in Australia do not disclose victims so it is impossible to know without searching out the physical court file who the victims were; especially for interstate offences.

122 Mills, above n2 at 591.

123 Coker, above n19 at 805.

124 See, for example, *Evidence Act 1977 (Qld)* s 21A.

125 Case 16, case 400, see generally Miranda Kaye, Julie Stubbs & Julia Tolmie, 'Domestic Violence, Separation and Parenting: Negotiating Safety using the Legal Process' (2003) 15 *Current Issues in Criminal Justice* 73.

126 Stubbs has noted that higher status enjoyed by the perpetrator compared to the victim in the 'community' may impact on the victim's credibility and the legitimacy of her claims; see Stubbs, above n11 at 54.

of such extensive involvement in this kind of tense situation is no doubt extremely divisive to communities as well as ultimately unsupportive to victims. The level of violence experienced by women may be exacerbated.<sup>128</sup>

## 6. *A Contest*

In this study breach defendants were more likely to be legally represented than in other criminal matters heard in the magistrates courts; there were more returns to court for breach of domestic violence matters than other criminal matters and there was a reduced rate of pleading guilty compared to other offences. These three interrelated findings from the study suggest that defendants in breach prosecutions make more sustained efforts to contest the charge of breach of a protection order than other magistrate's court matters. These factors seen together demonstrate a highly adversarial approach by alleged defendants and are likely to cause greater stress for victims awaiting the outcome of prosecutions. Once the defendant indicates that they will plead not guilty there is usually a substantial time lag between the first mention of the case at court and the finalisation of the matter.<sup>129</sup>

This significantly delays closure of the matter for the victim and also provides greater opportunity for the perpetrator to pressure her.<sup>130</sup> She will be uncertain of the outcome for a significant period of time. Further, a plea of not guilty is likely to mean that the victim may be required to give evidence at some time. There are many studies that document the stresses involved in giving evidence.<sup>131</sup> The victim may have to endure cross-examination and allegations about her behaviour.

The majority of defendants appearing in the courts for breach charges were represented (76 percent, n492). This continued to be the case even for the majority of matters that were returned to court on a number of subsequent occasions. The high likelihood of representation in domestic violence breach matters is at odds with research that suggests that generally around 50 percent of defendants in the magistrates courts are unrepresented.<sup>132</sup> As part of a broader argument, Nils Christie has claimed that lawyers steal conflicts.<sup>133</sup> Once a lawyer becomes

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127 Case 65.

128 Mills, above n2 at 589.

129 There are now delays of up to six months to list matters for hearing in the Magistrates' Courts, see Magistrates' Courts Annual Report, above n36 at [6].

130 See generally Neville Robertson, Ruth Busch, Radha D'Souza, Fiona Lam Sheung, Reynu Anand, Roma Balzer, Ariana Simpson & Dulcie Paina, *Living at the Cutting Edge, Women's Experiences of Protection Orders: Volume 1 The Women's Stories* (2007) at 254.

131 See for example Kristin Bumiller, 'Fallen Angels: The Representation of Violence Against Women in Legal Culture' in Martha Fineman & Nancy Thomadsen (eds), *At the Boundaries of Law: Feminism and Legal Theory* (1991) at 103–106.

132 Craigie reports that around 50 percent of defendants appearing in summary courts are unrepresented, see Chris Craigie, 'Unrepresented Defendants: The Criminal Justice Perspective' (2005) 1. Presumably this figure would be even lower for summary offence matters. See the discussion and references in David Brown, David Farrier, Sandra Egger & Luke McNamara, *Criminal Laws* (2001) 301–303 see also Senate Legal and Constitutional References Committee, Australian Senate, *Inquiry into Legal Aid and Access to Justice* (2004) at 35–39.

involved in a matter they may pick out arguments that ‘we might find irrelevant or even wrong to use’ in order to ‘rescue’ their client.<sup>134</sup> Lawyers may be contributing to delays in the finalisation of these matters. In this study it was not possible to determine in all cases whether defendants were legally aided or paying their representatives privately. Many of the files showed that the parties were represented by legal aid lawyers (28 percent n181) and it is possible that a number of defendants noted in court files to be represented by private practitioners were actually on a grant of legal aid.<sup>135</sup> Legal aid policy guidelines throughout Australia are focused largely on serious crime. However duty lawyers are explicitly made available to breach matters according to Legal Aid policy guidelines.<sup>136</sup> In some of the matters discussed in this study, the accused was at risk of imprisonment and so there is an argument that state funded aid should be available. However, given that usually the penalty outcome is a fine, it is surprising to see that legal aid appears to be so readily available in these matters.

Matters heard at the magistrates’ courts throughout Australia are generally finalised after two mentions (or court dates).<sup>137</sup> The mean number of times that breach matters were returned to court in this study data was 3.24. However 21 percent (n122) of matters were returned to court five times or more before being finalised. These extra reappearances would have delayed finalisation of matters and are likely to contribute to the stress experienced by victims.<sup>138</sup>

Guilty pleas account for approximately 74 percent of all criminal matters finalised by the courts in Australia.<sup>139</sup> In prosecutions for breach of domestic violence order matters only 59 percent (n378) of defendants pleaded guilty. Unlike domestic violence prosecutions, significant research has been carried out in relation to sexual offence prosecutions in Australia. Sexual offence prosecutions share some similarities with breaches of domestic violence orders<sup>140</sup> and research

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133 Nils Christie, ‘Conflicts as Property’ (1977) 17 (1) *British Journal of Criminology* 1 at 4, Christie suggests that more neighbourhood based, victim focused dispute resolution procedures should be employed and that experts or professionals should have a less substantial role, see 10–11. Stubbs has suggested that in the domestic violence context the State has tended to ignore rather than steal conflicts; Stubbs, above n11 at 52. See also Hudson, *Beyond White Man’s Justice*, above n3 at 31 where she notes that redress for women’s rights remains only ‘patchily available’ in some areas. Although this is generally the case, it is arguable, given the data presented here, that when domestic violence is prosecuted the conflict tends to be ‘stolen’ from the participants.

134 Christie, *id* at 4.

135 By virtue of private practices requesting grants of aid for specific matters.

136 The duty lawyer is available to represent on breach of domestic violence order matters: <<http://www.legalaid.qld.gov.au/Services?Services.htm>> accessed 17 July 2008.

137 Queensland Magistrates’ Court, above n36 at [6].

138 See also Robertson, Busch *et al*, *Living at the Cutting Edge*, above n99 at 196.

139 This figure relates to magistrates’ courts and higher courts in the 2003–2004 year and is similar for Australia as a whole. See Office of Economic and Statistical Research, Queensland Government, *Information Brief: Criminal Courts Australia 2003–2004* (2005).

140 In that, usually, offences occur in private and the victim is a woman while the perpetrator is male, both offences are concerned with power. See Victorian Law Reform Commission, *Sexual Offences: Law and Procedure (Final Report)* (2004) at 82–85.

in relation to sexual offence prosecutions also shows that defendants are less likely to plead guilty to rape or sexual assault than to other offences.<sup>141</sup>

However, in spite of an apparently greater reluctance to plead guilty to domestic violence breach offences, (and unlike rape prosecutions),<sup>142</sup> 89 percent (n539) of defendants in breach matters were ultimately found guilty. This proportion is ultimately similar to findings of guilt for other offences.<sup>143</sup> Pleading guilty has traditionally been equated with remorse.<sup>144</sup> Thus, pleading not guilty is more likely to suggest a lack of remorse and further that the defendant does not take responsibility for the action. Throughout Australia a sentence discount is generally applied where there is a guilty plea. This operates as an incentive to assist in the efficiency of the justice system and as a reward for taking responsibility for the offensive behaviour.<sup>145</sup> In Queensland there is no numerical amount of discount placed on the value of the plea so it is impossible to know in each case what the actual discount might have been.<sup>146</sup> However, despite the number of pleas of not guilty, penalties overall were relatively low. The higher level of not guilty pleas compared to other types of charges may be related to the perpetrator's belief that the other party is to blame and an unwillingness to accept criminal responsibility for this kind of matter. The issue of blame and failure to take responsibility is discussed further below.

## 7. *Defendants Minimise Harm and Responsibility*

Research and case law has recognised that many men engage in blame shifting in relation to domestic violence matters. For example in a recent Australian case Justice Adams commented that crimes involving domestic violence are different to other crimes partly because 'the offender usually believes that, in a real sense, what they do is justified, even that they are the true victim.'<sup>147</sup> In a number of cases examined in this study defendants attempted to shift the blame for the breach from themselves to some other matters or source. This blame shifting included claims of provocation, intoxication, that the defendant was 'just visiting the children' or

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141 In a New South Wales study 20 percent of defendants charged with a sexual offence pleaded guilty, see NSW Violence Against Women Specialist Unit, *Improving Service and Criminal Justice Responses to Victims of Sexual Assault* (2006) at 12. In a study conducted by the Victorian Law Reform Commission, only 30 percent of defendants committed to trial for rape pleaded or were found guilty, see VLRC, *ibid* at 80.

142 Where only about 30–40 percent of matters conclude with a finding of guilt; see VLRC above at 80 and VAWSU above n141 at 12.

143 Note also about 94 percent of Magistrates' Courts matters are proven guilty. See Office of Economic and Statistical Research, above n139.

144 *Cameron v The Queen* (2002) 209 CLR 339 at 343 (Gaudron, Gummow & Callinan JJ).

145 *Cameron v The Queen* (2002) 209 CLR 339 at 343 (Gaudron, Gummow & Callinan JJ); see also *R v Marumaru* [2005] QCA 332 where plea of not guilty suggested lack of remorse in a domestic violence matter.

146 See *Penalties and Sentences Act 1995* (Qld) s 12. In New South Wales the Court of Appeal in *R v Thomson; R v Houlton* (2000) 49 NSWLR 383 at [160] found that the discount range in matters where a plea of guilty is entered should be between 10–25 percent.

147 *R v Dunn* (2004) 144 A Crim R 180 at 195 (Adams J).

‘worried about the children’s welfare’, or that the order was not properly explained. These matters are discussed below.

Feminist analysis of the provocation defence, in the Australian context most notably the research of Jenny Morgan and Adrian Howe,<sup>148</sup> has demonstrated the gendered nature of this excuse. As Howe has shown, provocation has operated as a ‘sexed excuse’.<sup>149</sup> In Victoria and Tasmania provocation has been abolished. However, it remains relevant at the sentencing stage in all jurisdictions.<sup>150</sup> In Queensland the provocation defence remains as a complete defence for offences of assault.<sup>151</sup> This may be another factor that contributes to police reluctance to charge assaults in the context of domestic violence in Queensland.<sup>152</sup> Any charge of assault theoretically leaves open the possibility that the defendant could claim the provocation defence. Given the history of case law in Australia in interpreting what it means to be provocative, it is likely that in a domestic violence context, matters like insults or refusals to allow contact with children could amount to provocative conduct.<sup>153</sup> Breach charges are not assaults for the purpose of the provocation defence and so provocation is only relevant at the sentencing stage.<sup>154</sup> In one case in this study the defendant was charged with breach of an order after he hit the victim with a metal pole and a cricket bat.<sup>155</sup> The court file notes that witnesses could testify to these events. However the defendant claimed that he was provoked by his wife’s refusal to let him see the children. In this matter, this latter information may explain why police charged breach and not assault. Most debate about the provocation defence has been focused on whether provocation should be

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148 Victorian Law Reform Commission, Jenny Morgan, ‘Who Kills Whom and Why: Looking Beyond Legal Categories’ Occasional Paper (2002); Adrian Howe, ‘Reforming Provocation (More or Less)’ (1999) 12 *Australian Feminist Law Review* 127. See also Victorian Law Reform Commission, *Defences to Homicide Final Report* (2004) at 27–30.

149 Adrian Howe, ‘Provoking Polemic – Provoked Killings and the Ethical Paradoxes of the Postmodern Feminist Condition’ (2002) 10 *Feminist Legal Studies* 39 at 39.

150 The Sentencing Advisory Council (Victoria) is currently examining how provocation features in sentencing decisions since provocation has been abolished as a partial defence in that state, see <<http://www.sentencingcouncil.vic.gov.au>> accessed 20 November 2007. See Ian Leader-Elliott, ‘Passion and Insurrection in the Law of Sexual Provocation’ in Ngaire Naffine & Rosemary Owens (eds), *Sexing the Subject of Law* (1997).

151 Provocation is set out in the *Criminal Code* (Qld) ss 268, 269; and applies to assault (s 335), assault bodily harm (s 339) and serious assaults (s 340). Provocation is also a complete defence to assault in Western Australia – *Criminal Code* (WA) s 246.

152 It is difficult to know the effect of the availability of this excuse on police decisions to prosecute assaults in Queensland. Although provocation operates as a complete excuse for assault in Western Australia (see *Criminal Code* (WA) s 246 relevant analysis of the impact of this excuse on the discretion to prosecute assaults is not available. In the ACT where police discretion to charge in domestic violence matters has been extensively examined, provocation is not an excuse for assault, it is only a partial defence to murder, see *Crimes Act* 1900 (ACT) s 13.

153 See the discussion in *Stingel* (1990) 171 CLR 312 at [13]–[17] (Mason CJ, Brennan, Deane, Dawson, Toohy, Gaudron, & McHugh JJ). See also Graeme Coss, ‘The Defence of Provocation: An Acrimonious Divorce from Reality’ (2006–2007) 18 *Current Issues in Criminal Justice* 51 at 52–54.

154 See also *Hoggett v Lowis* [2004] QDC 508. See for example case 187 where a defendant charged with breach attempted to argue provocation as a defence. This argument was of course not successful and the defendant was convicted and placed on 12 months’ probation.

available to defend charges relating to unlawful killing.<sup>156</sup> Despite the lack of availability of provocation as a defence to breach offending, claims of provocation were common in the cases examined for this study. In one matter the defendant argued that his wife's refusal to see him provoked him to break into the house. This defendant subsequently threatened to burn the house down when his wife arrived at home.<sup>157</sup> In another case, the defendant reported to the parole officer in relation to a pre-sentence report that he had often been assaulted by the victim.<sup>158</sup> Jeremy Horder has tracked the development of the defence of provocation and noted that it has developed into a defence grounded in loss of self-control in response to anger.<sup>159</sup> The relationship between domestic violence, anger and provocation claims were illustrated in this study. In a number of the cases examined magistrates were concerned about defendants' ability to manage anger and many of the defendants were referred to anger management programs.<sup>160</sup> This would suggest that magistrates are not accepting anger (or provocation) as a justification for violence. This is an example, in Mills' terms, of 'rejecting behaviour by the state',<sup>161</sup> in the sense that the narrative offered by the defendant is not accepted by the magistrate. In this instance it is an approach that appears to support women experiencing domestic violence. It is suggested that provocation as an excuse in assault matters should be abolished in Queensland as this may open the way for assault to be charged in many matters where breach is currently charged.<sup>162</sup>

A number of defendants (4 percent n28) also claimed they were intoxicated at the time of the breach.<sup>163</sup> Defendants sometimes implied that but for drug or alcohol abuse the breach would not have occurred. Many service providers assisting the courts supported this view. In a number of matters reports were presented to the court that stated that the violence only occurred in the context of drinking or drug taking. In those cases where reports were on the file, the direct claim made was that if the drinking or drug abuse could be stopped so too could the violence.<sup>164</sup> In some cases family members provided similar evidence to the court. For example, one defendant's mother wrote to the court explaining that the domestic violence was perpetrated as a result of alcoholism.<sup>165</sup> In a number of

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155 Case 493.

156 Morgan, above n148; note generally provocation is not viewed by the public as a valid excuse for violence, see the discussion in Regina Graycar & Jenny Morgan, *The Hidden Gender of Law* (2002) at 307.

157 Case 478; placed on 12 months' probation and ordered to attend a perpetrators' program.

158 Case 105; this claim was obviously not very influential as the defendant still received a very heavy fine of \$1800.

159 Jeremy Horder, *Provocation and Responsibility* (1992) at 7.

160 17 cases in all: see cases 52, 61, 73, 106, 125, 266, 295, 461, 476, 477, 479, 489, 490, 491, 492, 512, 558.

161 Mills, above n2, 588.

162 The future of the provocation excuse in murder cases in Queensland is currently being considered by the Queensland Law Reform Commission, see <[http://www.qlrc.qld.gov.au/projects.htm#AccidentProvocation](http://www qlrc.qld.gov.au/projects.htm#AccidentProvocation)> accessed 17 July 2008.

163 Research conducted in New South Wales found that 36 percent of domestic violence offending was flagged by police as alcohol-related, see People, above n49 at 6.

164 Cases 18, 27, 51, 63, 115, 96, 78, 107, 124, 164, 188, 265, 414, 418.

cases the courts appear to accept that there is often a relationship between domestic violence offences and intoxication. In some matters (2 percent, n16) the sentencing magistrate recommended drug or alcohol rehabilitation counselling as part of a sentence.<sup>166</sup>

The perpetrator must still be held responsible for the breach regardless of the role of alcohol or drug use.<sup>167</sup> However, research supports the connection between drug and alcohol use and violence generally.<sup>168</sup> Indeed some research has found that up to 92 percent of domestic violence offenders had used alcohol or drugs on the day of an assault.<sup>169</sup> In this study, in 24 percent (n103) of matters defendants had prior convictions for drug related matters. These figures suggest that it is particularly important in breach cases that the possibility of drug or alcohol abuse should be explored at the sentencing hearing, not to minimise the response or seriousness of the matters but in order to tailor an appropriate response. Other research has recommended that domestic violence and problems with drug abuse should be dealt with, at least, concurrently.<sup>170</sup> There are limitations to this approach. The sentence can only address victim's concerns in part. As Coker emphasises, 'bundling services within crime control programs does not adequately address [the] need for material assistance' to women.<sup>171</sup>

The Queensland protection order legislation includes various provisions designed to avoid any problems with misunderstanding by respondents of protection orders. The legislation requires the magistrate to explain the requirements of the order to the respondent and also to provide a copy of the order to the respondent.<sup>172</sup> Apparently anticipating claims of misunderstanding, the Act specifies that a mistake about the meaning or purpose of the order will not be a defence in relation to a breach charge.<sup>173</sup> Despite these precautions, assertions by defendants that they did not understand the requirements of the protection order were common in this study. Many protection orders contain clauses stipulating that the respondent cannot visit or contact the victim. Generally the courts have taken

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165 Case 77.

166 Cases 19, 64, 78, 97, 98, 108, 111, 116, 125, 165, 266, 375, 483, 592, 596, 631. See also *R v Butler* [2007] VSC 185 at [29]–[32] sentencing a domestic murder and the connection between alcohol abuse and violence. In one Australian state the legislation specifically requires results of any rehabilitation program assessment must be taken into account in sentencing, see *Family Violence Act 2004* (Tas) s 13(b).

167 See *R v Bell* [2005] ACTSC 123 at [31].

168 See generally Rob White & Daphne Harris, *Crime and Society* (2005) chapter 5 and see Caroline Easton, Suzanne Swan & Rajita Sinha, 'Motivation to Change: Substance Use Among Offenders of Domestic Violence' (2000) 19 *Journal of Substance Abuse Treatment* 1.

169 Lisa Lightman & Francine Byrne, 'Addressing the Co-occurrence of Domestic Violence and Substance Abuse' (2005) *Journal of the Center for Families, Children and the Courts* 53 at 54. Substance abuse is an important contextual factor in abuse, see R Emerson Dobash *et al*, 'Not Just an Ordinary Killer – Just An Ordinary Guy' (2004) 10 (6) *Violence Against Women* 577 at 582.

170 Lightman & Byrne, *ibid* at 69.

171 Coker, above n19 at 859.

172 *Domestic and Family Violence Protection Act 1989* (Qld) s 50.

173 *Domestic and Family Violence Protection Act 1989* (Qld) s 80(3).



a broad approach to the definition of what constitutes contact.<sup>174</sup> However, a familiar claim in the cases in this study was that the defendant did not actually go to the house; only the boundary, they only drove past, or only telephoned and so on.<sup>175</sup> In two cases defendants were ordered not to contact the victim but sent numerous text messages proclaiming love, or sent several bunches of flowers.<sup>176</sup> Both claimed that they did not understand the order. Such behaviours demonstrate a lack of insight into behaviour. Such lack of insight has been discussed in relation to many stalking cases.<sup>177</sup> For example Millar was convicted of stalking his ex-partner; his behaviour included the delivery of many gifts and letters. He told the court that, 'ten years ago they would call this chivalry — now it's called stalking.'<sup>178</sup>

In a number of cases defendants claimed that their behaviour was not a breach or alternatively that it was a necessary breach because of matters related to children. It was noted previously the way in which children often become bargaining tools in domestic violence matters and the claims made in some of the cases further exemplify that. For example some defendants claimed they needed to attend the victim's home to hand deliver information to the victim in relation to family law matters,<sup>179</sup> just to see the children,<sup>180</sup> or because they were concerned for the welfare of their children.<sup>181</sup> The behaviour of men in some of these matters operates as another layer of abuse. Adding to the complex nature of domestic violence, studies have found that the abuse of mothers and their children often occurs simultaneously.<sup>182</sup>

The role of the magistrate is also symbolically important in providing an opportunity to state publicly where the responsibility for violence lies. In one matter in this study the magistrate specifically noted that the defendant had failed to take responsibility for his behaviour and increased the sentence.<sup>183</sup> However, in another matter the magistrate noted that both parties in the relationship needed to take the blame for the violence of the husband, he recommended relationship counseling.<sup>184</sup> This latter approach again operates to minimise the violence and the responsibility of the batterer and to reject the woman's narrative of abuse.<sup>185</sup>

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174 See for example *Longfield v Glover* [2005] ACTSC 25.

175 For example Case 136.

176 Case 185, Case 8.

177 See Holmes, above n58.

178 *Millar v Chief Executive, Department of Corrective Services* [2005] 2 Qd R 29 at [18].

179 Case 140.

180 Case 448; case 15 attendances to see children.

181 Case 157, 493.

182 Kaye, Stubbs & Tolmie, above n125 at 91.

183 Case 496.

184 Case 9.

185 Rosemary Hunter discusses this point in 'Narratives of Domestic Violence', above n43 at 751; see also Busch, above n2 at 106. For further discussion see James Ptacek, *Battered Women in the Courtroom* (1999) at 50–57.

## 8. Sentencing

Sentencing is the most public aspect of the criminal justice process. Punishment communicates to the public the fact of censure of the particular act and the degree of disapproval of the society.<sup>186</sup> Courts have strongly focused on the deterrent (both specific and general) role of sentencing in domestic violence matters.<sup>187</sup> For example in *Edigarov* the court noted:

...violent attacks in domestic settings must be treated with real seriousness. ... such conduct is brutal, cowardly and inexcusable, and the courts have a duty to ensure that it is adequately punished, and that sentences are handed out which have a strong element of personal and general deterrence.<sup>188</sup>

Despite such rhetoric, and to the frustration of some victims,<sup>189</sup> penalties are often inappropriate and generally very low for breach matters. The sentencing data gathered in this study has been discussed in detail elsewhere.<sup>190</sup> However, for the purposes of completeness, the key findings from the data in relation to sentencing and breach matters are set out here. Generally the approach to sentencing breaches reflects a trivialising or minimising view by magistrates. The majority of matters resulted in lower order fines and many matters resulted in no conviction being recorded.

In 40 percent (n176)<sup>191</sup> of cases no conviction was recorded. This can be compared to statistics for all criminal offending in Queensland from 1998-1999 where 5 percent of matters resulted in no conviction being recorded.<sup>192</sup> The magistrate has a broad discretion in relation to whether to record a conviction.<sup>193</sup> The courts have recognised that this course effectively gives the accused the right to conceal what has happened in a court. It means that the matter will not appear on the criminal record made available to the public, including potential employers.<sup>194</sup> It appears that great flexibility has been applied to domestic violence breach matters in Queensland on this point, in spite of the general recognition that such matters should be taken seriously.<sup>195</sup> Given the potentially tragic results of domestic violence particularly and the generally ongoing nature of this violence, it is important that the defendant's prior history is available.<sup>196</sup> The decision not to

186 William Wilson, *Central Issues in Criminal Theory* (2002) at 61.

187 See *R v Hamid* [2006] NSWCCA 302 for a survey of relevant case-law.

188 *R v Edigarov* (2001) 125 A Crim R 551 at 558 (Wood J).

189 Robertson, Busch *et al*, above n99 at 180.

190 Heather Douglas, 'Not a Crime Like any Other: Sentencing Breaches of Domestic Violence Protection Orders' (2007) 31 *Criminal Law Journal* 220.

191 In 7 percent of matters (n32) defendants received either no penalty aside from conviction or were placed on a recognisance to be of good behaviour for a specific period of time.

192 See Australian Bureau of Statistics, *1999 Yearbook Queensland* at 136. The data does not distinguish between offences and it is likely that a higher proportion of summary offences avoid recorded convictions.

193 *Penalties and Sentences Act 1992* (Qld) s 12.

194 *R v Briese; Ex parte A-G* (1997) 92 A Crim R 75.

195 *R v Marsden* [2003] QCA 473.

196 There were current or previously protection orders recorded in 12 percent of case of intimate partner killings in 2005-2006. See Megan Davies & Jenny Mouzos, *Homicide in Australia: 2005-2006 National Homicide Monitoring Program Annual Report* (2007) at 25.

record a conviction has both practical and ideological implications similar to those previously discussed in relation to the choice of charge.

The study shows that 42 percent (n 270) of matters resulted in fines.<sup>197</sup> In most of the matters (32 percent, n206) where fines were ordered, the fines were less than \$500. Fines are generally considered to be a lower order penalty; they are the most common form of penalty in relation to criminal offences throughout Australia.<sup>198</sup> Fines are often inappropriate in the context of breach matters as there are potential problems associated with this form of penalty in the context of domestic violence. Considering the frequently ongoing connections between the victim and defendant in the domestic violence context there is a risk that it will actually be the victim of the breach who will pay the fine from the family income.<sup>199</sup> Alternatively there is a risk that the fine will be paid from money that should be paid as child support. The imposition of fines could provide an opportunity for further intimidation, harassment or actual violence towards the victim in circumstances where the defendant tries to obtain money from the victim in order to pay the fine or withholds family support money in order to pay the fine. In Lewis' study women claimed that fines were 'futile'.<sup>200</sup> This approach suggests a magisterial culture of minimising or trivialising the seriousness of breaches of domestic violence orders and a failure to recognise the particular context of domestic violence.<sup>201</sup>

Sentencing hierarchy, implicit in most sentencing regimes, limits discretion in the imposition of the type of sentence. This tends to foster a 'one-size fits all' approach. Generally sentencing justices will move up the sentencing hierarchy with each subsequent offence of the same type. This may make it difficult to apply an appropriate penalty. For example probation orders in Queensland, which may be tailored to the circumstances of individual offenders, are higher in the sentencing hierarchy than fines.<sup>202</sup> In other jurisdictions the sentencing focus has been on offender accountability and rehabilitation. For example in the ACT many offenders have been placed on probation and ordered to attend change programs. The results in terms of victim satisfaction and recidivism in the ACT program have been mixed at this stage.<sup>203</sup> However, consideration should be given to amending sentencing legislation in Queensland so that there is greater flexibility for magistrates to provide more individualised sentences.

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197 Of these 254 cases 16 defendants were also placed on a recognisance to be of good behaviour.

This is a high figure compared to other states. This can be compared to 30 percent of matters resulting in fines in Victoria for the same offence, see VLRC, above n23 at [10.70].

198 Findlay, Odgers & Yeo, above n75 at 238. *Penalties and Sentences Act 1992* (Qld), Part 4.

199 See NSWLRC, above n28 at [10.44] where this concern was also noted.

200 Lewis above n31 at 217.

201 See also Robertson, Busch *et al*, above n99 at 217 where similar points are made.

202 *Penalties and Sentences Act 1992* (Qld) Part 5, Division 1.

203 About 40 percent of offenders have been placed on supervision orders when found guilty of a domestic violence offence, 47 percent of respondents who responded to a victim satisfaction survey responded that they were 'satisfied with the outcome and that justice was done' and only 31 percent of women had experienced no harm or threats since the finalisation of their case, see Holder and Caruana, above n28 at 58 and 67. Although Lewis' research suggests that sentences focused on rehabilitation rather than deterrence may be more effective, see also Lewis, above n31 at 209.

## 9. Conclusion: Towards Discursiveness, Relationalism and Reflectiveness

As with many studies of domestic violence the data discussed here comes from a very local study of three magistrates' courts in Queensland. However, there would appear to be no theoretical reason why the data and conclusions would not be generalisable, at the least to most other Australian states as there are similar legislative regimes in place.<sup>204</sup> Further, given the concerns raised by American and English studies of domestic violence it seems likely that the results can, to some extent, be generalised to other countries as well.<sup>205</sup> Some of the observations of this study are reflected in international studies.<sup>206</sup>

Clearly the role of criminal law in domestic violence matters is problematic. Holder has commented that, 'criminal justice performs a function that is not only instrumental in enforcing legal and social norms, but is highly symbolic. Criminal law is a powerful agency of public disapproval and reprobation.'<sup>207</sup> This suggests that there should be some role for the criminal law in denouncing this violence and encouraging new norms to develop. However, as the research for this paper proceeded, incidences of what is effectively State-sanctioned violence associated with the criminalisation of domestic violence became more apparent. This study revealed problems of minimisation of harm, exclusion, misrepresentation, isolation and disempowerment of women in the application of criminal law to domestic violence matters in Queensland. However, despite continuing problems for women involved in the prosecution of domestic violence, there is some potential for the criminal law.<sup>208</sup> Lewis *et al* note that justice cannot eliminate violence or guarantee women's protection but that, 'there are *aspects* of the process of legal intervention which women value' and can challenge men's violence.<sup>209</sup> Schneider has urged that:

... we have moved beyond simple rejection of the state or a simple assumption that the state can solve the problem...so we should move beyond uncritical engagement with the state, particularly in the criminal context, and toward more critical theoretical and practical analysis.<sup>210</sup>

A number of researchers have asserted that responses to domestic violence must be survivor-centred and women focused.<sup>211</sup> For example, Mills suggests that approaches to women experiencing domestic violence should accept, reassure,

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204 Perhaps with the exception of Tasmania and the Australian Capital Territory as a result of a stronger focus on criminal prosecution of domestic violence matters in those jurisdictions.

205 See for example Hoyle, above n33, for a discussion of the UK position.

206 Kelly, above n29.

207 Holder, above n46 at 2.

208 Lacey, above n9 at 127, 135.

209 See Lewis, Dobash *et al*, above n28 at 123, see also 117.

210 Schneider, above n9 at 198.

211 See for example, and general discussion, Lisa Goodman & Deborah Epstein, 'Refocusing on Women: A New Direction for Policy and Research on Intimate Partner Violence' (2005) 20 *Journal of Interpersonal Violence* 479 at 484.

engage, and empower.<sup>212</sup> Can these kinds of ideas inform the application of criminal law? There is a body of research that says they can.<sup>213</sup> As noted earlier, Hudson's conception of justice may be helpful in reconceiving the way that the criminal law responds to domestic violence. Hudson's key principles for a reconception of criminal justice, discursiveness, relationalism and reflectiveness, are considered further below in light of the findings of this study.<sup>214</sup>

According to Hudson, the discursive requirement of justice relates to who gets to say 'what happened and the responsibilities and culpabilities' involved in the criminal activity.<sup>215</sup> In the context of domestic violence this might mean placing more emphasis on what victims and their families have to say. However, such stories would need to be told in the context of formal due process in a way that does not reproduce the power relations between the parties.<sup>216</sup> For example in considering whether to prosecute domestic crimes, police should primarily consider the woman's safety. In order truly to consider this they need to be guided by the woman's views about the best way to proceed and thus need to communicate properly with the women they are employed to protect. Police responses must be able to take into account the fact that women experience violence differently.<sup>217</sup> In their communications police must recognise the woman's danger and her agency.<sup>218</sup> Consideration needs to be given, for example, to where conversations take place with women about what action is to be taken, potential prosecution and about who should be present at such conversations. Generally, these discussions should not take place in the presence of the perpetrator or at the scene of violence. If women are called to give evidence in domestic violence matters appropriate consideration should be given to the use of evidence giving supports such as screens and closed circuit television. Legislation already enables the use of such supports in most jurisdictions. Hudson suggests that greater discursiveness means recognition that domestic harms are crimes that must be dealt with by a robust and effective justice system.<sup>219</sup> Charges that reflect

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212 Mills, above n2 at 555, 596. I note that in her book, *Insult to Injury: Rethinking our Responses to Intimate Abuse* (2003) Mills argues that the criminal justice responses have been so violent to women that they should be dismantled and new processes focused on healing and transformation should take their place. I note that Mills' work has been criticised by some. Stark argues that Mills' claims about the negative effects of state intervention are not supported by research, see Stark, above n16 at 1308. While Coker agrees with some of Mills' claims about the over-reliance on crime control interventions in domestic violence, one of Coker's central concerns with Mills' work is that Mills, 'minimises the importance of power inside battering relationships', see Coker, above n20 at 1332, 1342, 1348.

213 For some examples see Nicola Lacey, 'Principles, Politics and Criminal Justice' in Lucia Zedner & Andrew Ashworth (eds), *The Criminological Foundations of Penal Policy: Essays in Honour of Roger Hood* (2003); Curtis-Frawley & Daly, above n103; Ashworth, above n13.

214 Hudson, *Justice in the Risk Society*, above n3 at xvi; Hudson, *Above White Man's Justice* above n3.

215 Hudson, *Above White Man's Justice*, above n3 at 33.

216 Ibid at 35.

217 Hunter makes this point; see above n43 at 774.

218 Recall earlier discussion; see Stubbs above n93, Hudson, *Above White Man's Justice* above n3.

219 Hudson, *Above White Man's Justice*, above n3 at 36.

the seriousness of harm should be applied. The excuse of provocation in relation to assault should be abolished, this will assist in ensuring that many domestic violence harms are properly named and thus recognised as assaults.<sup>220</sup> Similarly, greater consideration should be given to the need to record convictions and to make criminal records more clearly reflect the behaviour prosecuted. Such records may help to ensure that any future prosecutions are effectively responded to.

Hudson's claim that justice must be relational is particularly compelling in the domestic violence sphere. She states that relationalism 'recognizes individuals as embodied in a network of relationships with community and the state'.<sup>221</sup> Police, prosecuting authorities and magistrates have a role to play in considering how their various approaches will impact on the ongoing safety of the victim and potentially the transformation of the perpetrator. Decisions made by police, prosecution authorities, lawyers and magistrates in terms of whether and what to charge, whether to accept evidence, whether to encourage clients to enter certain pleas, whether to allow adjournments and about the appropriate sentence may have significant impacts on the parties. Such decision-making needs to be considered in the context of the complex web of relationships in which parties are involved.<sup>222</sup>

Finally Hudson finds that justice must be reflective, that is, it must be 'individualised', rather than generalised and able to hear the accounts of those concerned in the act.<sup>223</sup> Women who agree to assist the prosecution need support and information throughout the process and not all women will need the same kinds of support. Generally sentencing should be individualised. It should be applied so that it fits appropriately with the harm prosecuted and so that it takes the particular victim's and the particular defendant's relationship and context<sup>224</sup> into account and also considers the potentially ongoing nature of these relationships. In light of particular circumstances it may be important to record a conviction despite the fact that for other first time offences a conviction may not be recorded as a matter of course. Given the particular context of many domestic violence matters fines may be inappropriate. In order to move away from fine-focused sentences, amendments to existing legislation may be required to free up judicial discretion to facilitate more individualised sentencing responses.

Domestic violence responses must always be holistic; education, health and social policy are all crucial in this area.<sup>225</sup> Any number of changes to the criminal justice process will never, by themselves 'bring justice into being'.<sup>226</sup> However, along with a range of other approaches and tactics, strategies applied in the

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220 I note that this suggestion is limited to abolition of provocation as it relates to assault, see also Hudson, *Above White Man's Justice*, above n3 at 40.

221 Hudson, *Above White Man's Justice*, above n3 at 37.

222 Jane Ursel, 'Specialised Justice Responses to Family Violence in Canada' (2004) 2 (4) *Queensland Centre for Domestic and Family Violence Research Newsletter*, 12; Holder & Caruana, above n28.

223 Hudson, *Above White Man's Justice*, above n3 at 38.

224 Lacey, above n9 at 117–135, 127; see also Lewis, above n31 at 207, 220 where she recognises that legal structures that focus on rehabilitation of men and support of women can help stop violence and make women feel more safe.

criminalisation of domestic violence need to continue to be developed and implemented in order to work towards the elimination of violence experienced by women, including in the context of the prosecution of domestic violence.<sup>227</sup> Many of the changes and reforms recommended here, and in other research, recognise the need for cultural shifts about how violence against women is perceived and dealt with, as well as legislative shifts, if the 'implementation problem' is to be avoided.<sup>228</sup> Research has shown both the potential value of criminal prosecution for those who have experienced domestic violence but it has also shown that there are dangers.<sup>229</sup> The shifts and changes suggested in this discussion may help to move the criminal justice process in a direction that provides more support and safety during the process to women who have experienced domestic violence and more appropriate outcomes for all concerned when domestic violence is prosecuted as a crime.<sup>230</sup>

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225 In a number of jurisdictions there have been more holistic programs developed. See for example RESOLVE in Canada (Research and Education for Solutions to Violence and Abuse) discussed in Ursel, above n222 at 13; and note the Family Violence Intervention Program in the ACT which has a holistic focus and has been evaluated positively recently, see Holder & Caruana, above n28.

226 Hudson, *Justice in the Risk Society* above n3 at 191.

227 Lacey, above n9 at 117–135, 128

228 See Hunter, above n43 at 737.

229 See Lewis, Dobash *et al*, above n28 at 123; Lewis, above n31 at 221.

230 This is discussed by Nicola Lacey; see 'Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law' in Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (1998) at 123.