



**Royal Commission  
into Family Violence**

**WITNESS STATEMENT OF HEATHER ANNE DOUGLAS**

I, Heather Anne Douglas, Professor of Law, of St Lucia in the State of Queensland, say as follows:

1. I make this statement on the basis of my own knowledge, save where otherwise stated. Where I make statements based on information provided by others, I believe such information to be true.

**Current role**

2. I am a Professor of Law at the University of Queensland. In 2014 I was appointed as an Australian Research Council Future Fellow of the School of Law. I was appointed to research the way in which women who have experienced domestic violence access, use and experience the legal justice system.
3. I am also currently working with colleagues on the Australian Feminist Judgments Project, which is funded by the Australian Research Council.

**Background and qualifications**

4. I have a particular research interest in Criminal Law, Criminology, Indigenous Peoples and Women and the Law.
5. Most of my research concerns the criminal justice system and domestic violence. I am particularly interested in the relationship between Indigenous people and the criminal law and the way the criminal law impacts on and constructs women. I have published widely around legal responses to domestic violence. I have also considered the criminal justice response to fetal alcohol spectrum disorders and to the drug khat. My earlier work explored the work of Justice Martin Kriewaldt, the sole judge of the Northern Territory Supreme Court during the 1950s.
6. I completed my PhD at the University of Melbourne in 2006 and was also appointed a Fellow of the Australian Academy of Law in 2013.

7. From 2001-2007, I was a part-time commissioner with the Queensland Law Reform Commission and in 2004 I was a visiting scholar at the Centre for Socio-Legal Studies, Oxford University.
8. Attached to this statement and marked "HD1" is a copy of my curriculum vitae.
9. Attached to this statement and marked "HD2" is a list of my recent and key publications.

### **The role of the criminal justice system in domestic violence**

10. My comments on these issues are grounded in my research and experience of the Queensland legal system. I am aware of broad similarities between the Queensland and Victorian systems and believe my comments are relevant to the Victorian system, but I also acknowledge the potential for some differences.
11. Domestic violence protection orders are the most common legal remedy sought by women experiencing domestic violence. Although successful applications for, and prosecuted breaches of, domestic violence orders increase with each passing year, the domestic assaults and property damage associated with these breaches are rarely prosecuted as criminal offences.
12. In Queensland, the police play an important role in the process through which violence between intimate partners is brought into the criminal arena. This is examined in my article (co-authored with Professor Lee Godden) "Intimate Partner Violence: Transforming Harm into a Crime", which is attached to this statement and marked "HD3".
13. Police are required to file applications for a Domestic Violence Order when there is sufficient evidence of domestic violence to satisfy a civil standard of proof. However, they also have a concurrent obligation to investigate domestic violence matters where there is a reasonable suspicion that a crime has occurred. Research demonstrates that concurrent criminal investigations rarely take place. This is the case despite domestic violence order application court files frequently including serious allegations of violence, such as visible physical injury to the aggrieved spouse and property damage observed by police. The failure to institute investigations and criminal charges reinforces domestic violence as being a private, social issue rather than a public, criminal issue.

14. I discuss this issue further in my article, co-authored with Professor Lee Godden, titled "The Decriminalisation of Domestic Violence: Examining the Interaction Between the Criminal Law and Domestic Violence", which is attached to this statement and marked "HD4".
15. I believe that the criminal law should be a real option to be implemented alongside domestic violence protection orders. The clear message from the domestic violence workers I interviewed in my article attached at "HD3", was that they wanted the criminal law to play a significant role in tackling domestic violence, but on terms appropriate to women's experience. For example, most workers want the police to collect the evidence of a crime scene but they also want women to have the opportunity to make a complaint and statement in a reasonable time and in a supportive environment. Workers also want a criminal prosecution indicating the social reprehensibility of the violence, but at the same time want vulnerable witnesses to be protected throughout the legal process.
16. Similarly, in my article "The Criminal Law's Response to Domestic Violence: What's Going On?", which is attached to this statement and marked "HD5", I recommend that when considering whether to prosecute domestic crimes, police need to be guided by the woman's views about the best way to proceed and above all else, consider the woman's safety. To ensure women receive the protections offered by the criminal justice system there must be procedural and attitudinal shifts in those who implement the legislation, particularly members of the police force.

#### **Cross application orders and gendered violence**

17. In my article "Legal processes and Gendered Violence: Cross-applications for Domestic Violence Protection Orders", which is attached to this statement and marked "HD6", Dr Robin Fitzgerald and I analysed cross orders, also known as mutual protection orders. Whilst in the majority of cases domestic violence applications are lodged by or on behalf of one partner against the other, in some cases both partners seek protection orders against each other. In Queensland, domestic violence support workers have claimed that the number of cross-applications and cross orders has been steadily increasing in recent years.
18. There needs to be closer scrutiny of the nature and extent of cross applications across jurisdictions. I am concerned about the potential misuse of cross orders.

Specifically, cross applications may be used as a tactic or bargaining tool by men to bring about the result of mutual withdrawal of an application.

19. Cross orders also put both parties at risk of prosecution of a breach charge. This may provide a disincentive to the vulnerable party to alert police of any breach, as victims of domestic violence may be fearful of also being charged. Thus, there is an increased risk of both parties becoming enmeshed in the criminal justice system.
20. Another concern is that most often both parties are not equally at risk. There is a large body of empirical research which underscores the asymmetrical nature of intimate partner violence between the genders. Michael Johnson and colleagues have developed a typology of violence which identifies two categories of abuse within domestic relationships. Attached to this statement and marked "HD7" is a copy of Michael Johnson and colleagues' article "Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence".
21. Johnson calls the first type of violence "situational couple" violence and defines it as "violence that enters a relationship when a disagreement that turns into an angry argument escalates into violence". According to Johnson, situational couple violence is the most common type. It is often an isolated incident, ranging from mild or severe and perpetrated by both men and women, (although violence carried out by men is likely to be more severe).
22. The second type of violence Johnson identifies is "intimate terrorism," or coercive controlling violence. This is the form of violence that is most often associated with domestic violence. According to Johnson, coercive controlling violence is almost always carried out by men against women and, although it is much less common than situational couple violence, it is very dangerous. He observes that victims of coercive controlling violence are attacked more often, and the violence is less likely to stop.
23. There is evidence that since its publication, Johnson's domestic violence typology has become influential in Australian policy discussions. Although it may be a useful framework in the context of therapeutic interventions, I am concerned about supporting the application of Johnson's typology within police practice or by courts in decision-making. Increasingly, police are faced with very complex domestic violence situations. There is a risk that using the typology framework, without adequate training of police and judicial officers, may lead to coercive controlling

violence being miscategorised as situational couple violence. This could potentially lead to more cross-applications and ultimately more cross-orders being made and associated dilution of the protective potential of domestic violence protection orders.

### **Sentencing for breaches of Intervention Orders**

24. I analysed the criminal law response to breaches of domestic violence protection orders in Queensland in my article "The Criminal Law's Response to Domestic Violence: What's Going On?", which is attached to this statement and marked "**HD5**".
25. It is very common for individuals not to be charged with other offences when they are prosecuted for breach of a protection order. If they are convicted, in the majority of cases, the defendant is ordered to pay a fine which on average is less than \$500.
26. This phenomenon was also highlighted in my article titled "Not a crime like any other: Sentencing breaches of domestic violence protection orders" which is attached to this statement and marked "**HD8**". The findings of this study suggest that magistrates in at least three Queensland Magistrates' Courts prefer fines above all other sentencing dispositions in relation to breach of protection order offences.
27. This approach suggests a magisterial culture of minimising or trivialising the seriousness of breaches of domestic violence. The problem is that the criminal law sentencing hierarchy limits discretion in the imposition of the type of sentence. We should move away from this "one-size fits all" approach adopted in Victoria and Queensland. I recommend that sentencing legislation be amended to give magistrates greater flexibility to provide more individualised sentences in the context of domestic violence intervention order breaches. The sentencing focus should be on offender accountability and rehabilitation and victim protection.
28. The sentencing point of criminal justice provides an opportunity for violent behaviours to be addressed and this opportunity should be seized. Protection to women and children should be the paramount consideration in sentencing these kinds of offences. Community Correction Orders, supervision orders and men's behavioural programs are more likely to meet the overarching sentencing aims of specific and general deterrence.
29. Fines are inappropriate in the context of breach of domestic violence intervention orders. Considering the frequently ongoing connections between the victim and

defendant, there is a risk that it will actually be the victim of the breach who will pay the fine from the family income. Alternatively, there is a risk that the fine will be paid from money that should be paid to help support children. The current judicial response of imposing fines does not hold perpetrators accountable for their actions, nor does it further community protection from domestic violence.

### **Proposed Offence of Cruelty**

30. England and Wales have recently introduced the offence of coercing and controlling behaviour within the context of domestic relationships. I have significant concerns regarding the application of such an offence in Australia, as discussed in my article "Do We Need a Specific Domestic Violence Offence?" which is attached to this statement and marked "HD9".
31. Specifically, criminalising ongoing, coercive and controlling behaviour may capture conduct that does not occur within the context of an abusive relationship. The offence should not be specific to conduct within relationships. Furthermore, what constitutes coercive and controlling behaviour is likely to be the subject of much debate in cases prosecuted under the new provision.
32. As an alternative, I propose we introduce an offence of "Cruelty". In my article at "HD9" I have defined cruelty as "the infliction of pain or suffering on a person by an act or series of acts done on 1 or more than 1 occasion". Pain or suffering can be physical, mental, psychological, or emotional, whether temporary or permanent.
33. Distinguishing features of the offence include:
  - 33.1. The level of pain and suffering inflicted need not be severe, however the severity may be relevant for sentencing purposes.
  - 33.2. Cruelty must encompass an act or series of positive acts as opposed to omissions, insults or demeaning comments. For example, regularly locking the bathroom so that the victim must use an outdoor hose to wash or regularly moving a wheelchair out of reach.
  - 33.3. Additionally, I suggest that cruelty be read as a crime of general intent, rather than requiring the offender to intend to cause severe pain and suffering.
  - 33.4. Cruelty would be heard summarily unless the defendant elected a jury trial.

34. Furthermore, I propose a two-tiered approach to the crime of Cruelty, by imposing a higher maximum penalty if the conduct occurs within the context of a domestic relationship. This approach indicates that cruelty in circumstances of domestic violence should be taken particularly seriously.

### **Strangulation within the context of domestic violence**

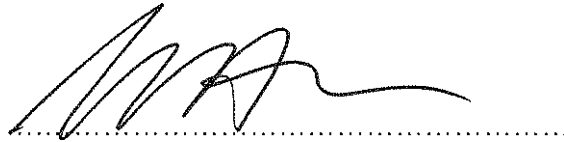
35. Statistics consistently show that strangulation within a domestic relationship is often a precursor to serious abuse and death. In my article “Strangulation, Domestic Violence and the Legal Response”, which is attached to this statement and marked “HD10”, Dr Robin Fitzgerald and I considered the police and court responses to strangulation allegations made by those applying for protection orders in Queensland.
36. In this article, we found no evidence to suggest that an allegation of strangulation is treated differently, or indeed more seriously, by the police and the courts than other less serious allegations such as assault. This points to the need for better training for domestic violence workers, police, and magistrates, in relation to recognition of strangulation injuries and their seriousness.
37. Furthermore, given the particularly high risks associated with non-fatal strangulation, I suggest it is timely to consider the introduction of a specific strangulation offence. Such an offence will ensure that appropriate charges and penalties are applied and will help to ensure records of strangulation are kept, which in turn will lead to better risk assessment. Just as stalking was introduced in large part because of the recognition of it being a prelude to violent behaviour, a specific strangulation offence may address a gap in the legislative framework.

### **Additional Research**

38. My article “Battered Women’s Experiences of the Criminal Justice System: Decentring the Law”, attached to this statement and marked “HD11”, explains how women and children who seek redress through the criminal justice process in Queensland sometimes find their way to feminism and personal empowerment by engaging with the legal system and their connection with feminist organisations.
39. I note that I have published other works in this area, specifically in relation to children, including “Mothers, Domestic Violence, and Child Protection” attached to

this statement and marked "HD12", and "Mandatory Reporting of Child Abuse and Marginalised Families", attached to this statement and marked "HD13".

40. I have also analysed the Victorian offence of defensive homicide and the Queensland defence of killing for preservation in an abusive domestic relationship. Attached to this statement and marked "HD 14" is a copy of my article "A Consideration of the Merits of Specialised Homicide Offences and Defences for Battered Women (Special Issue: Law's Response to Lethal Violence)" which explores this issue.

A handwritten signature in black ink, appearing to read 'HA Douglas', written over a horizontal dotted line.

**Heather Anne Douglas**

Dated: 20 July 2015