ATTACHMENT HD 3

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Intimate Partner Violence: Transforming Harm into a Crime

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Introduction

1. Research continues to demonstrate the extraordinary extent of domestic violence,[1] its impact on women and children, and the need for co-ordinated responses.[2] In Queensland, as in most other jurisdictions in Australia, [3] it seems that domestic violence is not treated as criminal behaviour in any practical sense and is generally dealt with outside the boundaries of the criminal law.[4] The criminal code "has slipped into oblivion"[5] to the point that the only effective legal avenue in many situations of domestic violence is civil legislation.[6] Thus while there has been an increasing use of 'protection' orders under domestic violence legislation, only a relatively small number of criminal charges and prosecutions take place in relation to intimate partner violence in Queensland.[7] Our research, albeit preliminary in scope, indicates that there is a range of factors involved in the

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limited use of the criminal law which work to undermine the effectiveness of the formalised procedures, policies and laws.

2. In this article we argue that the Criminal Law should be a practical option in the community's response to domestic violence working in conjunction with the civil law reform introduced through various statutory regimes. The factors that operate to 'filter out' the use of the criminal law need to be recognised and addressed. This article draws on material gathered through a number of interviews[8] with domestic violence workers in Queensland firstly to inform a discussion of the role of the criminal law in domestic violence matters[9] and secondly to make some suggestions for how the criminal law may be used more effectively in response to intimate partner violence.

The Limited Use of the Criminal Law

3. Since the 1980s most Australian jurisdictions have introduced domestic violence legislation [10] which emphasises civil actions for the protection of those persons, largely women, who experience domestic violence.[11] The specific response to domestic violence in Queensland was the introduction of the Domestic Violence (Family Protection) Act, 1989 (DVA).[12] This legislation operates primarily to provide "Domestic Violence Protection Orders" (DVOs). When granted, these DVOs impose court ordered constraints on the respondent's behaviour, such as a requirement not to contact or be in the close vicinity of, the applicant. These constraints are coupled with a criminal penalty where police have the power to prosecute a breach of the court order. Primarily, it is these orders, and not the general criminal law, that are the legal mechanisms adopted to regulate most aspects of the violence arising between intimate partners where the violence falls short of major physical harm, such as murder.

4. The limited use of the Queensland Criminal Code (QCC) in situations of domestic violence was a concern identified by the Queensland Government, Taskforce on Women and the Criminal Code.[13] It had been anticipated that the reforms introduced by the Domestic Violence (Family Protection) Act would work in conjunction with the QCC. In response to the Taskforce concerns, the writers carried out research into the use of the QCC in domestic violence matters initiated at the Brisbane Magistrates Court in 2001 (the Queensland research).[14] Data was obtained from 694 files from the Brisbane Magistrates' Court for the year 2001. These files were selected as they involved a DVO application. Unsurprisingly, in the majority of cases, the aggrieved spouse was female (79.7%) and the respondent spouse was male (80.7%). These figures support the view that domestic violence remains, substantively, a gendered issue.[15] Any consideration of effective responses has to take into account the particular vulnerability of many women in situations of intimate partner violence.

5. In Queensland, police are required to file applications for a DVO when there is sufficient evidence of domestic violence to satisfy a civil standard of proof.[16] The civil standard of proof is less stringent than the standard necessary for the criminal law and only requires that the evidence satisfy the test - 'on the balance of probabilities'. Police have a concurrent obligation to investigate matters where there is 'reasonable suspicion' that a criminal act has occurred.[17] The Queensland research found that only seven (1%) of the court files relating to applications for DVOs recorded that a police investigation into the possibility of laying criminal charges had taken place. In only three matters (0.4%) were criminal charges actually laid. The relatively small number of criminal charges stands in marked contrast to the ever-increasing numbers of applications for domestic violence orders. In making an application for a DVO either the aggrieved spouse,.or the police on behalf of the spouse, is

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required to provide supporting information / evidence. The history of incidents frequently noted on the court files in support of the applications made serious allegations of violence which, even on a conservative reading of the QCC, would support a criminal charge. Often the allegations included visible physical injury to the aggrieved spouse and property damage observed by police. However these matters were rarely investigated, and even more rarely charged.

6. To supplement the information gathered from the court files, a pilot series of 12 qualitative interviews was conducted with domestic violence workers in representative urban and rural areas of south-east Queensland.[18] The experience of interviewed domestic violence workers was overwhelmingly that the QCC is rarely invoked in situations of domestic violence. Workers suggested a range of reasons why women clients were reluctant to support criminal charges.[19] Domestic violence workers also suggested reasons for the failure of police to initiate criminal prosecutions.[20] The interviews were analysed in terms of a range of factors that work to 'filter out' many incidents of violence between intimate partners from engagement with the criminal law processes. To understand why so many incidents are not addressed through the criminal law requires an analysis of processes operating beyond the formal legal system, as well as an examination of the substantive provisions of the law itself.

Why Might Intimate Partner Violence not be brought within The Legal System?

7. Many 'harms' that people suffer, in both a civil and criminal sense, are never included within the formal scope of the law. A number of studies have focussed upon the importance of understanding the influences that operate prior to people seeking redress through, or becoming involved with, the legal system.[21] Several early socio-legal studies focused upon the process and procedures leading to the formalisation of a legal dispute or criminal charge and the factors that might lead to potential disputants or claimants being 'filtered out' at various stages beyond the initial identification of harm having occurred, but before reaching the point of effective legal redress.[22] This approach represents a departure from more traditional legal scholarship, which places an emphasis upon the formalised, substantive law and its operation within legal institutions, such as courts.

8. Socio-legal research, such as that by Felstiner et al, recognises and discusses the fact that many people who suffer injury and harm will remain outside the legal avenues for obtaining redress for that harm. Such studies are significant for our current research on violence between intimate partners as this is an area where it is widely acknowledged that reported incidents and prosecuted offences of domestic violence represent only the 'tip of the iceberg' in terms of the actual occurrence of violence.[23] Indeed the concept of 'filtering out' has obvious parallels in the domestic violence context where many women experiencing violence in an intimate relationship may not seek legal redress or may not pursue the range of actions that may be available under the criminal law.[24] This disjuncture between the formal legal system and a 'pre-law' realm repeats the concerns about the public/private divide that has been the focus of much feminist critique.[25] One 'solution' that has often been advanced is to ensure public regulation of the so-called 'private sphere'. The instigation of civil domestic violence legislation has been an important reform, adopted as part of that regulation. Yet as Easteal suggests, there are a range of cultural factors that impinge upon the construction of violence both within the law and in our society more widely, that may militate against women being able to effectively seek redress and assistance in relation to intimate partner violence even with regulation of the 'private sphere'.[26]

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9. In particular, it is necessary to understand the manner in which traditional concepts of violence and crime may be subtly constructed as different from and somehow more important than 'domestic violence'.[27] In parliamentary debates surrounding the second reading of the bill, which introduced the current Queensland domestic violence legislation, Ms Warner, the Minister introducing the Bill, made the following comment, "[a]ll the statistics and evidence lead us to believe that domestic violence is the most pervasive crime in our society. Yet it is the most underreported crime." The invisibility of violence between intimate partners has been long recognised. In part this invisibility stems from the fact that this violence may not be 'named' as a crime - "The criminality of the violence is even questioned. Even the term that we all use to describe it, ' domestic violence' is a euphemism for what is effectively criminal assault in the home."[28] Arguably, the construction of domestic violence as an 'other' to 'real' violence,[29] and criminality is significant to an understanding of why many incidents of violence recorded on the DVO applications in the Brisbane Magistrates Court were not pursued as criminal charges. It demonstrates a failure to name the violence as criminal.

Naming Blaming and Claiming: A Conceptual Model

10. In their study of processes leading toward the formalisation of legal disputes, Felstiner et al conceived the process as comprising three stages; an initial naming phase where the potential claimant perceives that they have been harmed and is able to conceptualise or 'name' the harm; a second phase where the potential claimant identifies the persons who have been the source of harm; and thirdly where the claimant seeks redress.[30] The analysis identified a range of factors that were influential in explaining why potential claimants may drop out of this process before obtaining a legal remedy. In the 'naming' phase the analysis points to the crucial role of an individual's perception that they have been harmed and that the injury is assignable to a particular legal category of 'identifiable' wrong. [31] In some situations it will not be possible for an individual to authoritatively 'name' the harm they have suffered or to articulate it in such a manner as to bring it within accepted legal categories. This inability may arise from the diffuse nature of the harm itself or from the failure of social processes to acknowledge the experience as one constituting an identifiable harm.[32] The capacity to assign a harm suffered to a legal category underscores the crucial role of social and cultural perceptions in the construction of legal categories such as crime.[33] It also underscores the importance of the 'naming' process to the ultimate goal of being able to obtain legal redress as high attrition rates occur at this point.[34]

11. In addition, the Felstiner study identified further barriers to a person ultimately being successful in obtaining legal redress for the harms experienced. The second stage of the 'transformation' from 'harm' to legal remedy occurs where a potential claimant seeks to attribute 'blame' to another person for the harm once it has been identified.[35] Drawing upon attribution theory the study highlighted that yet again there are a range of 'filtering out' processes that may work at this point. For example an individual may not have sufficient information or the necessary resources and support to make that attribution of blame.[36] In this regard, the Felstiner study also noted the crucial role of the parties as potential agents of transformation. Parties included both those involved in the conflict itself and institutional personnel who adopt particular policy perspectives in relation to the harm suffered. These factors also have particular ramifications for many women experiencing intimate partner violence and may explain the apparent lack of criminal law redress. The implications of these factors in relation to women seeking redress through the criminal law are explored in detail below.

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12. Finally, Felstiner et al discuss the factors that may militate against the ability of an individual to obtain redress in the third stage of the transformation process- that of 'claiming'.[37] Here factors such as a lack of knowledge of the procedures involved for making a claim may be influential in further 'filtering out' claimants. Interestingly, the Felstiner study points to the role of many professionals and regulatory agencies in influencing the extent of the 'filtering out'. In particular the authors indicate the crucial influence of enforcement personnel in this regard. They state, albeit in relation to civil disputes that -

> "Enforcement personnel - police, prosecutors, regulatory agencies - may also produce transformations: seeking disputes in order to advance public policy or generate a caseload...discouraging disputes because of personnel shortages; or selectively encouraging those disputes that enhance the prestige of the agency and discouraging those that diminish its significance or call for skills it lacks or are thought to be inappropriate..." [38]

This experience accords with the views expressed by many workers in the domestic violence field, and again we explore below the implications of these third stage 'transformations'.

13. The transformation model proposed by Felstiner provides a useful conceptual tool to analyse the court data and interview responses from the Queensland domestic violence research we conducted. However, while the Felstiner 'model' formulates a linear process, we suggest that such a model over simplifies the extent to which it is possible to identify discrete stages. By contrast, we propose a model in which the stages overlap and where 'procedural' questions about claiming legal redress through the criminal law cannot be clearly isolated from 'blaming' and 'naming' issues. Nonetheless, we suggest that this model is useful as a conceptual tool to understand the low number of prosecutions for crimes committed by men towards their intimate partners in the face of ever increasing numbers of applications for, and granting of domestic violence protection orders. Indeed this analysis highlights that a range of factors may operate to prevent the legal system, both civil and criminal, from responding appropriately to the needs of women experiencing harm in the context of intimate relationships. Moreover, in the context of harm between intimate partners, these filtering factors appear to be exacerbated in the instance of the criminal law. In effect, we contend that a 'filtering out' occurs at many points where violence experienced by women is often not 'named' as 'crime'. Moreover, the process for attributing responsibility for that violence is equally ineffectual, resulting in violent perpetrators not being held publicly accountable through the criminal law.[39]

14. We recognise that, as with all analytical tools, the model represents a simplification of a complex situation. In most circumstances the naming of the violence as a crime by itself will be insufficient without the resources and appropriate procedures being in place to implement the consequences of that designation. Clearly also, the criminal law will need to operate in conjunction with the measures in place under legislation as legal intervention by the courts through domestic violence orders has been found to provide a generally effective means of reducing violence against women.[40] Nonetheless, as Easteal recognises, the lack of an holistic, integrated response is a significant a barrier to effective implementation of the criminal law-

> "[T] he manner in which violence against women in the home is responded to by the community and its legal systems is very much affected by the patriarchal language, structures and beliefs of the cultural and legal context including the substance and procedures of the laws themselves."[41]

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Interview Responses: Naming the Violence

15. To obtain information about domestic violence outside formalised court and police reporting processes encounters a range of difficulties as there is little systematic reporting and relatively few empirical studies. To obtain empirical data we conducted a series of qualitative interviews with key domestic violence workers who are employed in a range of situations, such as domestic violence referral and counselling work, and court support roles in urban and rural areas in South East Queensland. The workers to be interviewed were selected after discussions with a key respondent, Zoe Rathus.[42] Each interview followed a set of pre-set questions developed in consultation with key personnel but the workers also were asked to identify key relevant issues in a more open-ended manner. These responses were recorded, later transcribed and assigned by the researchers to 'categories' of response. We also had discussions with a key member of police personnel.[43] We acknowledge that at best we only gained a partial picture of women's experience of domestic violence. As much of the literature details, many women experiencing domestic violence either do not make contact with formalised agencies or their contact is undocumented. Nonetheless, despite the accepted limitations on data gathering in this field it is possible for us to present some pertinent conclusions. The following discussion of the responses is organised largely in terms of the conceptual model outlined above. However it is recognised that the workers themselves are highly influential in any 'transformation' process.

16. Most of the workers interviewed supported the greater use of the criminal law as a response to domestic violence. The workers commented variously that the QCC is used "not nearly enough"[44] and that they would "like to see much more use of the criminal code."[45] Workers were fairly clear about why they wanted a greater use of the QCC and ultimately their reasons related to the naming of violence in the domestic sphere as 'real' violence. In their view, catching domestic violence under the rubric of the criminal law helps to ensure that the violence is recognised as illegitimate and ultimately this impacts on the kinds of legal claims that will be able to be made by women. In general, workers saw the criminal law as the legal arena which confirmed social disapproval.[46] For example one worker commented that the use of the criminal law helped to "send a message that it's not okay... [that] it helps make domestic violence be seen as a public issue and not just a private issue."[47] Finally workers described the need to open up the criminal law for use in domestic violence situations as an 'access to justice' issue.[48]

17. Thus, in general, workers were eager to name domestic violence as a crime. Clearly the criminal law already plays a role at the end stages of domestic violence, it is well documented that many murders are the final result of spiralling domestic violence.[49] However workers wanted to see the criminal law implemented as a response to domestic violence at an early stage.[50] A number of the workers interviewed also suggested that naming the violence as 'criminal' operated as a deterrent in itself against further violence. [51] Workers were extremely frustrated about what they perceived to be the police inability to approach the naming of domestic violence as criminal violence. One worker suggested that police were still operating in a traditional mind-set believing that only when " it occurs in a public place it's a crime."[52] Workers felt many police of saw intimate partner violence as a social issue falling outside the ambit of the law. One worker suggested that the introduction of the DVA had actually assisted in legitimising the naming of domestic violence as something outside the criminal law. The worker noted; "I don't know that it's a good thing that the police even have a civil code to work under."[53]

18. One of the workers discussed the police crime prevention focus in her area and noted that it was concentrated on public places like unlit roadways and parklands and completely evaded

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any engagement on public safety in private homes. This worker believed that such evasion resulted from a failure to understand domestic violence as a crime. Hence it was not covered in public crime prevention strategies. This worker argued that if domestic violence was named as criminal it would be more likely to be prevented because it would be more likely to be included in crime prevention activity.[54] Naturally crime prevention strategies which relate to preventing domestic violence disrupt spaces traditionally understood as private. To be proactive in relation to violence between intimates, prevention strategies would, at least to some degree, have to focus on homes being dangerous places and to emphasise the risk of violence within family life.

19. The interviewed workers had a number of concerns about the consequences of the perceived failure of police to name domestic violence as a crime. Workers suggested that, as a consequence of the failure to designate domestic violence as a crime, police identify domestic violence as outside "their core business...they're out to stop the criminals".[55] Consequently because it was not regarded as serious, 'domestic violence' was not considered to be a proper policing issue.[56] The result of this overarching attitude was that domestic violence is ultimately viewed in a practical sense "...as a low priority...and not as sexy as catching a burglar."[57]

20. This failure to identify crime when faced with a situation deemed to be a 'domestic' can have curious consequences. One worker noted that when police are called to a situation involving intimate partner violence the attending police are twice as likely to arrest a respondent for a matter unrelated to the domestic violence.[58] Statistics are not well collected in this area, but where they have been collected, they support this worker's view.[59] Generally for offences such as assault or damage to property police will only investigate a matter and consider criminal charges in situations where there is something described as a ' formal complaint'. Workers were concerned that police often failed to recognise women's complaints about domestic violence, seeing them instead as calls for future protection only rather than complaints about the immediate past criminal act as well. One worker noted that;

> "A restraining order is somehow seen to address what's occurred and it hasn't."[60]

21. The reported systematic lack of recognition of complaints as "formal complaints" to initiate the criminal law supports the view that there is a police failure to name domestic violence as criminal behaviour. We discuss the perception that women routinely fail to formally complain below.[61] Even at the early stage of attending a 'domestic' the failure of police and the women experiencing violence to name the behaviour of the violent perpetrator, as at least potentially criminal, filters many of these 'harms' away from the criminal law system.

The Flow on Effect from 'Naming'

22. As we observed earlier, it is difficult to usefully employ a transformation model in a linear fashion when examining situations of domestic violence. The cause and effect appear more like circles than straight lines. For example, the result of naming domestic violence as criminal behaviour may have flow on effects for how women blame perpetrators and how they go about making claims through the legal system. Further, procedural changes made to the manner in which women can claim legal redress may have the effect of encouraging people to name domestic violence as a criminal act. Further factors that operate to filter out women claiming from the legal system in domestic violence settings are discussed below, although we recognise that many are intrinsically related to the naming process.

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23. Many of the workers interviewed suggested that there would be a number of flow-on effects from the naming or recognition of domestic violence as criminal behaviour. One worker suggested that naming domestic violence as criminal behaviour moved the behaviour away from the arena of purely social welfare; the private domain. The effect of this move was to 'validate' the women's experience of violence. The shift tells women that;

   > "...no-one had the right to do that and that a person needs to be in trouble for their behaviour and sanctioned...in the longer term it is also about prevention." [62]

24. Given the well-documented history of women as 'invisible'[63] to the legal system, such validation may well have powerful effects. Other workers similarly suggested that charging criminal offences helped women feel safer due to the simple fact that involving the criminal law had a deterrent effect on the male perpetrator.[64] The very fact of the identification of the violence as criminal could also lead to a change in the perpetrator's behaviour. [65] Ultimately, most workers interviewed said that without the institutional power of the law to support this process of naming, the effects in terms of behavioural change would be limited. This leads us to a consideration of these more formalised procedures of the law.

Claiming: the Complaint and Evidence Gathering

25. A 'formal complaint' is a term used by police to justify the initiation of a criminal charge against a person. The charge then is the process that instigates criminal proceedings in the court.[66] Essentially when a police officer asks a victim whether they wish to make a "formal complaint" they are asking whether the victim will be prepared to assist in the prosecution of an alleged perpetrator. There is no legislative requirement that police must have a formal complaint or victim statement of events before they can commence an investigation into, or gather evidence about, possible criminal activity. However given the circumstances of many offences committed in the domestic sphere, the accepted police position is that without the co-operation of the victim, evidence will usually be insufficient to support a prosecution. The police request for a formal complaint before any proper investigation or evidence gathering takes place is thus considered (at least by the Police Service) to be a practical way of rationalising valuable police resources freeing up police resources for real crime.[67] Ultimately, the imposition of the requirement of a formal complaint operates as yet another filter. Again the requirement of a formal complaint filters violence occurring in the home away from the criminal law; the investigation and evidence gathering procedures are dispensed with and the possibility of criminal charges falls away.

26. Workers identified a number of concerns with the police requirement of a formal complaint. Indeed some workers suggested that the police attitude in asking for a formal complaint before taking any action was a serious inhibitor for many women. For example, a worker suggested that police often ask the victim if they want to make a complaint at the scene of the violence, often in the presence of the perpetrator.[68] Further, women are often questioned about the intimate partner violence and police take a statement in the middle of an open police office rather than in a confidential setting.[69] Clearly if procedures are made uncomfortable it may be the case that women will actually feel pressure not to make any formal complaint even when given the opportunity to do so. Thus a filtering out of intimate violence from the criminal law system may occur as a result of these procedural and institutional obstacles.

27. At a policy level there appears to be support for police to pursue violent offenders notwithstanding the lack of a formal complaint.[70] Police policy statements suggest a positive duty on the part of police to bring offenders to justice. Arguably, this duty prevails

even where police may not always be able to obtain the assistance of the victim in this endeavour, often at least not at the initial investigation. Indeed, several workers referred to the duty of police officers to investigate matters of violence involving intimate partners. The Queensland Police Manual states that police should discuss the possibility of criminal charges with the aggrieved spouse and;

> "...The onus rests on the investigating officer to properly investigate the matter. This may include audio and video taping of evidence, the taking of a statement, notes in an official police notebook and the gathering of evidence with the view to proving the matter to the appropriate standard."[71]

28. Thus the participation of the victim through provision of a victim statement is only a part of the whole of the evidence to support a charge. Although on occasion such a statement may be pivotal to the prosecution case often this will not be clear to the police investigators until evidence is gathered and the matter properly investigated. Workers pointed out that:

> "...if it is managed correctly the police are the ones laying the assault charges. They then use the woman as a witness. That woman doesn't have to be a helpful witness...if they use all their forensic evidence..."[72]

29. Given the context of violence in the domestic sphere it is likely that victims may not be sure of the direction they want to take with these types of matters until they have received counselling and support. Their decision to assist police may occur some time after the event and police should investigate and gather evidence with this outcome in mind. The main concern about the use of the criminal law was (and remains), the high level of proof required to substantiate allegations of domestic violence.[73] Therefore, one of the key filter points is when the police officer attends the domestic violence scene. As Hoyle has noted, the police officer at this point has an extremely high level of discretion.[74] The workers we interviewed recognised this situation and a number of the interviewees pointed out the importance of evidence gathering by attending police officers. Workers overwhelmingly reported that when the situation was perceived to be a 'domestic', police tend not to carry out investigations or gather evidence. One worker noted;

> "It would be really good to see police treat it as a crime scene when they get there and as seriously as they would treat any other that wasn't of a domestic nature."[75]

30. Workers were concerned that an investigation of possible criminal charges was rarely carried out in the context of intimate partner violence.[76] Certainly the data gathered in the Queensland study of the Magistrates Court files supports this claim.[77] Workers generally wanted a greater commitment from police to gathering evidence at the domestic violence scene; invariably this is related to naming intimate violence as a criminal matter. One worker suggested that in Queensland we could learn from some jurisdictions in the USA where '911' calls are recorded and evidence is routinely gathered at all domestic violence sites.[78]

31. Perhaps police fail to appreciate the difficulties faced by women being required to make a 'formal complaint" against their intimates. However, it appears to be in this context that police routinely decline to investigate or gather evidence in 'domestics'. In this manner police are essentially operating as gatekeepers[79] to the criminal law - and it seems that the gate is often shut for many women. Felstiner et al discuss the importance of the subculture of the audience in defining an experience as injurious and in encouraging or discouraging certain conflict processing strategies.[80] Police are an important subculture of the audience in the context of intimate partner violence. Workers consistently complained that they are a

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subculture which discourages the implementation of the criminal law through their failure to investigate and record intimate violence as criminal.

32. Unlike many other areas of the criminal law, violence between intimate partners appears to be an area of criminal law where the responsibility for initiating charges has been delegated to the victims of the offence. The rhetoric of existing procedures suggests that police are the instigators of the criminal process but the domestic sphere is possibly an exception to this policy position. If not an outright exception then the responsibility for initiating criminal law processes is certainly rather diffuse.

33. Moreover, the role of women complainants in the process towards any criminal prosecution was a contentious point for many of the workers. Even in situations where police do identify a criminal act, they characteristically ask the aggrieved spouse for her opinion on whether charges should be pursued.[81] Women are placed in the position where they effectively filter themselves out of the criminal justice system. Workers generally argued that police should take the responsibility for making the decision about whether to pursue criminal charges, certainly at the stage of investigation and on some occasions at the stage of proceeding to trial.[82] This is likely to be controversial in many circumstances as it may be seen as yet another site where women have control taken away from them in the context of the justice system. The very vexed question of the degree of autonomy to be accorded to women experiencing intimate partner violence, leads to a more general examination of the support offered to women in the context of the criminal justice system.

Claiming: The Need for Systemic Support

34. As we have noted earlier women have historically been marginalised in their participation in the justice system, Easteal has noted that women are 'less than equal'. The legal system has made a number of modifications in response to this, especially in relation to how matters can be dealt with at trial. Recently changes in evidentiary procedures related to rape prosecutions have attempted to respond to the difficulties women tend to face as witnesses in that context.[83] There have also been substantial efforts to make access to justice more equal at the latter stages of the legal process; for example when the parties get to court, as here the inequality becomes more visible.[84] Women who have experienced domestic violence are inevitably very vulnerable in any situation of public claiming against or blaming their violent partner. It is during the early stages, in making a complaint, formulating the witness statement and preparing for hearing that women's vulnerability and inequality is largely invisible. The workers we spoke to emphasised the need for support to be given to women at all stages of their involvement in the legal process.

35. Workers made some specific suggestions to ensure support, such as providing women with advocates when dealing with police,[85] and ensuring women are connected to local support networks as early as possible.[86] One worker also suggested that personal violence matters needed to be 'fast tracked' through the legal system.[87] The experience in the ACT, where complainants have support at the early stages, is that "fast tracking" is occurring and many charges are resulting in guilty pleas.[88]

Blaming and Claiming: Appropriate Penalty

36. Understandably perhaps, the workers we interviewed were often very focussed on the issue of blame and penalty in the context of intimate partner violence and the criminal law. The lack of significant or appropriate penalties, in relation to DVOs, is regarded as a significant drawback by many who assist women exposed to domestic violence in Queensland. In

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contrast to the DVA, the QCC is arguably well placed to address these concerns as it focuses on the punishment and deterrence of those who perpetrate violence to persons and property. [89] Ultimately, the consequence of failing to name domestic violence as a criminal act is that the perpetrator avoids the potentially more onerous sanctions available under the QCC and associated legislation. Workers also argued that avoidance of criminal prosecution resulted in a failure to make violent perpetrators publicly accountable for their actions.[90] Workers were concerned about the message that was given to perpetrators when they were not penalised pursuant to the criminal law.[91]

37. However, there was less consistency between workers as to what was an appropriate sanction. For some interviewees simply bringing the perpetrator within the bounds of the criminal law was enough; for others the type of sanction was equally important. Some workers argued against the imposition of fines and good behaviour bonds.[92] Often the fine or bond had negative impacts upon the victim of violence as well as the perpetrator, for example fines may be paid out of joint domestic income. Overwhelmingly, interviewees were frustrated that when matters did ultimately result in a criminal conviction the penalty was frequently a minor fine. The lack of a significant sanction could be seen arguably as yet another filter limiting the engagement of women in the criminal justice system. As we have noted elsewhere, there is some suggestion that when complainants find that ultimate penalties are minor fines they may be reluctant to pursue the legal process again.[93] By contrast, a number of workers supported very severe sanctions and insisted that jail penalties should be applied.[94] However, most workers supported well-resourced court mandated men's programs.[95] Clearly though, without defined and appropriate sanctions against violence, many women experiencing intimate partner violence will be deterred from seeing the criminal law as an effective form of redress. Arguably the, inappropriate court responses at the sentencing level to situations of intimate violence may operate as a further filter to women achieving effective redress through the criminal law.

Conclusion

38. As suggested there are many factors at play which continue to make the criminal justice system inaccessible to, or ineffective for, women experiencing intimate violence. These factors are key determinants in the transformation of a 'harm' into a form of redress available through the criminal law. The individual woman experiencing harm, at the very least needs to be able to perceive this violence as publicly sanctioned, inappropriate behaviour. Domestic violence support workers and the police service also play an important role in the process through which violence between intimate partners is brought [or not brought] into the criminal arena. Often it is the behaviour of workers and police at the early and 'invisible' moments of pre-court processes that can transform an experience of harm into one that is recognised as a situation in which the criminal law has a role to play. Naming such violent situations as criminal in nature at an early stage, will also assist the more formalised institutional 'transformation agents' to offer appropriate support to women. Such changes in naming also should contribute toward more thorough investigations and evidence collection by police irrespective of whether there is (initially) 'cooperation' by the victim of the violence.

39. Further, while these concrete outcomes are important they need to be accompanied by an overall understanding of how many situations of intimate violence are 'filtered away' from the criminal law. The circle of naming, blaming and claiming as a holistic approach needs to be understood in more detail before we can begin to understand the attitudinal and procedural shifts that are required to effectively respond to violence between intimate partners.[96] A simple call to resort to the criminal law to solve the problem of intimate

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partner violence will be of little value unless the factors that operate to filter matters away from the criminal law system are better recognised.

40. Indeed, the problems associated with the criminal law were recognised at the time of the introduction of the Domestic Violence legislation and many of these problems have not disappeared. However, we argue that it is not new legislation that is required. The current criminal legislation in most regards is adequate - rather the issues lie more with the need to better implement the legislation in situations of intimate partner violence. To achieve this, procedural and attitudinal shifts are needed. Although many in the community have not articulated a precise view of what the criminal law is to achieve, the clear message from the workers we interviewed was that they want the criminal law to play a significant role in tackling domestic violence. The criminal law should be a real option to be implemented alongside domestic violence protection orders.[97] This means a greater sensitivity to the factors that now often result in the criminal law being seen as a rather ineffectual, 'blunt instrument'. 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 statement in a reasonable time and in a supportive environment. Workers want a criminal prosecution indicating the social reprehensibility of the violence but they want vulnerable witnesses to be protected along the way. They want penalties but they want penalties to be appropriate. Workers want the criminal law to operate in this sphere, but on terms appropriate to women's experience.

Notes

[1] R Alexander, Domestic Violence in Australia: The Legal Response, 3rd ed. (Federation, Leichardt, 2002), p.4. Alexander quotes statistics from a 1996 survey which found that 23 percent of women who have ever been married, or lived in a defacto relationship, experienced violence by their partner. See Australian Bureau of Statistics, Women's Safety Australia (Canberra, 1996, cat No 4128.0.)

[2] R Holder, "Domestic and Family Violence: Criminal Justice Interventions" Issues Paper No 3.1 (Australian Domestic and Family Violence Clearing House, Sydney, 2001) at 2.

[3] The ACT is perhaps an emerging exception in Australia. See Urbis Keys Young, "Evaluation of the ACT Family Violence Intervention Program" Phase II Final Report (Publishing Services for the ACT Department of Justice and Community Safety, Australian Capital Territory, 2001) at 93.

[4] H Douglas and L Godden, The Decriminalisation of Domestic Violence (Griffith University, Brisbane, 2002) at 58. Available on line.

[5] Interview Transcript #6 at 16. (Transcripts are represented by numbers and not by names in order to retain confidentiality). Transcript copies are held by Heather Douglas, Griffith University. The interview sample and methodology are discussed later in the article and a more extensive discussion of the broader empirical study can be found in H Douglas and L Godden The Decriminalisation of Domestic Violence (Griffith University, Brisbane, 2002)

[6] Interview Transcript #4 at 20.

[7] It seems that a similar situation exists in most other Australian states. See generally P Easteal, Less Than Equal: Women and the Australian Legal System (Butterworths, NSW, 2001) pp110-112, 115-116, where she notes the lack of police and institutional responses to intimate partner violence in many Australian jurisdictions.

[8] Interview methodology is discussed below.

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[9] We have focussed our research on intimate partner violence between married or de facto (or previously married or de facto) partners. It is from their partners (or ex-partners) in their homes that women are most at risk of violence and thus most likely to perpetrate violence in response. See Criminal Justice Commission Queensland, "A Snapshot of Crime in Queensland" (1999) 5 (1) Research Paper Series at 9. See A Elliot, Evaluation of the FAX-BACK Project (2001, WAVS-Working Against Violence Support Service) at 7.

[10] Such legislation also provides for criminal offences and associated penalties for breaches of the civil orders. See Domestic Violence (Family Protection) Act 1989 (Qld), Domestic Violence Act 1986 (ACT), Crimes (Domestic Violence) Amendment Act 1993 (NSW), Domestic Violence Act 1992 (NT), Domestic Violence Act 1994 (SA), Justices Act 1959 (Tas), Crimes (Family Violence) Act 1987 (Vic). Note also the Restraining Orders Act 1997 (WA)

[11] Note the writers' recent research, which found that 79.7% of applicants for protection orders from the Brisbane Magistrates Court in 2001 were women. H Douglas and L Godden as above n 4 at i.

[12] The central purpose of which is to provide protection to people against whom violence had been committed or threatened and to discourage future violence. Violence in the Family: Crime Statistics Bulletin #1, p 8, http://www.oesr.qld.gov.au/data/bulletins/crime/01_violence/bull_crime01.html visited 4/6/01.

[13] Office of Women's Policy, Report of the Taskforce on Women and the Criminal Code (Department of Justice and Attorney General, Queensland, 2000).

[14] As there is no formal reporting of matters that are conducted in the Magistrates' Court, the researchers relied on examining the actual Brisbane Magistrates' Court files for 2001, including applications under the DVA.

[15] While in some high profile cases women are the violent aggressors, generally in domestic situations, women are most likely to be the victims of violence. K Hegarty, et al, "Domestic Violence in Australia: Definition, Prevalence and Nature of Presentation in Clinical Practice" (2000) Medical Journal of Australia (published on the Internet) at http://www.mja.com.au/public/issues/173_07_021000/hegarty/hegarty.html visited 9/2/03.

[16] See Queensland Police Service Operational Procedures Manual, at paragraph 9.6.1.

[17] See generally Police Powers and Responsibilities Act 2000 (Qld) and Queensland Police Service Operational Procedures Manual at paragraph 9.3.1. See s71 DVA.

[18] The workers to be interviewed were selected after discussions with a key respondent, Zoe Rathus, Co-ordinator Women's Legal Service, Brisbane, a person with a long history of experience in domestic violence issues. This form of respondent driven sampling where key personnel are identified and they subsequently identify other key interviewees, to form a focus group is described in D Heckathon, "Respondent-driven Sampling: A New Approach to the Study of Hidden Populations", (1997) 44 (2) Social Problems 174-199.

[19] For a discussion of these reasons see H Douglas and L Godden as above n 4 at i.

[20] Op cit. at i, ii.

[21] Early studies in this field include, W Felstiner et al, 'The Emergence and Transformation of Disputes: Naming Blaming and Claiming' (1980-81) 15 Law and Society Review 631 and D Mc

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Barnett, "Pre-Trial Processes and the Construction of Conviction" in P Carlen (ed) Sociology of Law (Sociological Review Monographs, Keele 1976) pp 172-201.

[22] W Felstiner et al, ibid.

[23] Taskforce on Women and the Criminal Code at 110. Easteal, as above n 7 at 101. R Alexander as above n 1 at 5.

[24] Violence designates a wider category of harm than simply physical abuse.

[25] See for example, C Mackinnon, Toward a Feminist Theory of the State (Harvard UP 1989) and more directly on the private/public sphere K O'Donovan, Sexual Divisions in Law (Weidenfeld and Nicolson 1985) at ch 1.

[26] Easteal, as above n 7 at 101-106.

[27] This point was made by Warner in her discussion at the time of the second reading speech introducing the Queensland DVA. Ms A Warner, Hansard Qld Parliament Second Reading Speech, Domestic Violence (Family Protection) Bill, 11 April 1989, 4418 at 4420.

[28] Op cit at 4418.

[29] A Young, "Textual Outlaws and Criminal Conversations", Imagining Crime, (Sage 1996), at 8-15; 'Crime is often associated with violence that occurs in public places and which occurs between comparative strangers'.

[30] W Felstiner et al as above n 20 at p 633-636.

[31] W Felstiner et al describe the phenomenon of naming as, 'a perceived injurious experience, see W Felstiner et al as above n 20 at 634.

[32] W Felstiner et al as above n 20 at 633-4.

[33] For a discussion of the manner in which legal categories are ultimately to be regarded as social constructs based around language, see the work of structuralist theorists such as de Sassure and post-structuralist theorists. See generally in regard to the application in law, M Davies, Asking the Law Question (Law Book Company, Sydney, 2002) pp. 306-320.

[34] W Felstiner et al as above n 20 at 636.

[35] W Felstiner et al as above n 20 at 641.

[36] W Felstiner et al as above n 20 at 639 and 645.

[37] W Felstiner et al as above n20 at 636.

[38] W Felstiner et al as above n20 at 647.

[39] H Douglas and L Godden as above n 4 at 32-33; there were 3 criminal prosecutions arising from 694 applications for protection orders.

[40] Two empirical studies have concluded that generally court orders were effective in that the majority of applicants who were granted such orders reported a reduction in violence toward them after the order was issued. See L Trimboli and R Bonney, An Evaluation of the NSW Apprehended Violence Order Scheme, (New South Wales Bureau of Crime Statistics and

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Research, Sydney, 1997) at vii and M Young, J Byles and A Dobson, "The Effectiveness of Legal protection in the Prevention of Domestic Violence in the Lives of Young Australian Women", Trends and Issues Paper no. 148 (Australian Institute of Criminology, Canberra, 2000) at 4-5.

[41] P Easteal as above n 7 at 108.

[42] Co-ordinator of the Women's Legal Service, Queensland and Deputy Chair of the Taskforce on Women and the Criminal Code.

[43] Senior Sergeant Dale Murray, State Domestic Violence Co-ordinator for Queensland Police Service, as he then was.

[44] Interview Transcript #7 at 6.

[45] Interview Transcript #6 at 21.

[46] R Holder, "Domestic and Family Violence: Criminal Justice Interventions" Issues Paper No. 3.1 (Australian Domestic and Family Violence Clearing House, Sydney, 2001) at 2.

[47] Interview Transcript #1 at 19.

[48] Interview Transcript #9 at 13.

[49] Women's Coalition Against Family Violence Blood on Whose Hands: The Killing of Women and Children in Domestic Homicides (Funded by Women's Trust, 1994, Melb, Victoria) at 72.

[50] Interview Transcript #1 at 24.

[51] Interview Transcript #6 at 13.

[52] Interview Transcript #6 at 17.

[53] Interview Transcript #9 at 9.

[54] Interview Transcript #9 at 16 and 19. See also B Taylor "Domestic Violence Integrated Responses: Reflections from the USA and Canada." (2002) Vol. 1 No. 2 Newsletter, Queensland Centre for the Prevention of Domestic and Family Violence 3 at 5.

[55] Interview Transcript #12 at 10.

[56] Interview Transcript #2 at 16.

[57] Interview Transcript #6 at 3.

[58] Interview Transcript #2 at 17.

[59] As the Taskforce noted, (Taskforce at iv) one of the problems with researching domestic violence is that statistics are not readily available or collated in a way that makes a thorough analysis of the current situation possible. It is clear that statistical data needs to be collected in an organised fashion. One interviewed worker in this study suggested that if the statistics were properly collected there would be a much greater realisation of the social and hidden costs of domestic violence (Interview Transcript #7 p.14). Currently, it is difficult to draw the links between the impact of domestic violence on the health sector with impacts on the welfare and legal sectors. It may be that openly naming domestic violence, as criminal behaviour will encourage proper statistics gathering to occur.

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[60] Interview Transcript #6 at 6; see also Interview Transcript #9 at 7.

[61] See the discussion by S Egger, and J Stubbs, The Effectiveness of Protection Orders in Australian Jurisdictions, (AGPS, Canberra, 1993) who suggest that it is likely that women who apply for a domestic violence order do not necessarily report the violence to the police.

[62] Interview Transcript #9 at 16.

[63] See for example J Scutt, The Incredible Woman: Power and Sexual Politics Volume 1 (Artemis Publishing, Melbourne, 1997) at 5-8.

[64] Interview Transcript #1 at 19.

[65] Interview Transcript #4 at 17.

[66] E Colvin, S Linden, J McKechnie, Criminal Law in Queensland and Western Australia 3rd edition, (Butterworths, Sydney, 2001) at 603.

[67] Interview Transcript #2 at 16

[68] Interview Transcript #8 at 11

[69] Interview Transcript #3 at 1. The Logan District Police Service (part of the Queensland Police Service) is examining this issue in conjunction with local domestic violence workers.

[70] The formal statement of the role of the Queensland Police Service includes: "The preservation of peace and good order in all areas of Queensland; the protection of all communities in Queensland; the prevention of crime; the detection of offenders and bringing of offenders to justice; and upholding the law generally and providing policing services in an emergency." http://www.police.qld.gov.au/pr/about/charter/intro.shtml at 10 December 2002

[71] See para 9.3.1 Queensland Police Manual.

[72] Interview Transcript #8 at 6. This has been the attitude of the police service in the ACT. See Urbis Keys Young "Evaluation of the ACT Family Violence Intervention Program" Phase II Final Report (Publishing Services for the ACT Department of Justice and Community Safety, ACT, 2001) at 88-89.

[73] Although it has also been acknowledged that there are broader systemic problems associated with its implementation. For an overview of these responses see L Laing, "Progress, Trends and Challenges in Australian Responses to Domestic Violence" Issue Paper No. 1 (Australian Domestic and Family Violence Clearing House, Sydney, 2000).

[74] C Hoyle, Negotiating Domestic Violence: Police Criminal Justice and Victims (Oxford University Press, Oxford, 2000) at 147.

[75] Interview Transcript #1 at 18.

[76] Interview Transcript #11 at 5.

[77] In seven matters investigations in relation to criminal matters took place. See H Douglas and L Godden as above n 4 at p32.

[78] Interview Transcript #9 at 4.

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[79] W Felstiner et al as above n 20 at 645.

[80] W Felstiner et al as above n 20 at 644.

[81] H Douglas and L Godden, as above n 4 at 32-33.

[82] See Interview Transcript #3 at 1 and Interview Transcript #4 at 16.

[83] See for example Criminal Law Amendment Act 2000 (Qld).

[84] W Felstiner et al, as above n 20 at 637.

[85] Interview Transcript #4 at 8, Interview Transcript #5 at 10. The ACT currently has a witness support program for women assisting to prosecute intimates in relation to criminal offences. See ACT Director of Public Prosecutions Annual Report 2000-2001(ACT Publishing Service, Canberra, 2000) at 14-15.

[86] Interview Transcript #9 at 17. The "Fax Back Domestic Violence Project" that is currently operating in a number of regions in Queensland requires police to advise complainants of the project and then where there is consent of the complainants to fax local domestic violence services with contact details of complainants. Local domestic violence workers then contact the complainant to offer support and to advise about options. See A Elliot, Evaluation of the FAX-BACK Project (2001, WAVSS- Working Against Violence Support Service).

[87] Interview Transcript #9 at 13. W Felstiner et al note that delays can transform a case that may have been considered a useful procedure into a "pointless frustration" as above n 20 at 648.

[88] Urbis Keys Young, as above n 74 at 93.

[89] More generally the criminal law is involved in the use of penal sanctions to "enforce the prohibitions which the state imposes on conduct," see Colvin et al, Criminal Law in Queensland and Western Australia (Butterworths, Sydney, 2001), at 3. The DVA short title is: "An Act to provide for protection to a person against violence...and for prevention of behaviour disruptive to family life."

[90] Interview Transcript #12 at 20.

[91] Interview Transcript #12 at 17, Interview Transcript #9 at 16.

[92] Interview Transcript #9 at 12, Interview Transcript #11 at 8, Interview Transcript #32 at 30.

[93] H Douglas and L Godden as above n 4 at 36-37. See also R Holder and N Munsterman "Prosecuting Family Violence in the ACT." Conference Paper presented at Expanding Our Horizons: Understanding the Complexities of Violence Against Women Conference, 18 February 2002.

[94] Interview Transcript #3 at 1, Interview Transcript #7 at 30.

[95] Interview Transcript #6 at 13 but noted that they were insufficiently resourced in Australia.

[96] See W Felstiner, et al as above n 20 at 653.

[97] See also J Stubbs, "The Effectiveness of Protection Orders - A National Perspective." Paper presented at Challenging the Legal System's Response to Domestic Violence Conference, (23-26 March 1994), at 10.

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