

ATTACHMENT HD 4

This is the attachment marked "**HD 4**" referred to in the witness statement of Heather Douglas dated 20 July 2015.

The decriminalisation of domestic violence: examining the interaction between the criminal law and domestic violence

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The article examines the interaction of the Queensland Criminal Code with the Queensland domestic violence legislation and finds that domestic violence is rarely recognised as criminal behaviour and is generally dealt with outside the boundaries of the criminal law. The article illustrates this position by reference to an examination of Brisbane Magistrates' Court files relating to applications for domestic violence protection orders during 2001, and a discussion of interviews with Queensland domestic violence support workers. Although successful applications for, and prosecuted breaches of, domestic violence orders increase with each passing year,¹ the domestic assaults and property damage associated with these breaches are rarely prosecuted as criminal offences. This article finds that the criminal law continues to fail to deal effectively with domestic violence.

INTRODUCTION

An increasing recognition in Australia that the criminal justice system does not reflect the needs and understandings of women in the Australian community,² has prompted a range of responses in Australian jurisdictions.³ In addition, there has been a greater recognition of the extent of domestic violence,⁴ its impact on women and children and the need for State legislative responses. Since the 1980s most Australian jurisdictions have introduced domestic violence legislation, which includes civil actions for protection of those persons experiencing domestic violence, together with criminal penalties for breaches of the civil orders.⁵ In Queensland, the *Domestic Violence (Family Protection) Act 1989* (Qld) (*Domestic Violence Act*) was introduced. However, unlike jurisdictions such as New Zealand,⁶ and more recently the Australian Capital Territory,⁷ the main objective in addressing

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¹ See New South Wales Domestic Violence Committee, *Report 1985-1989*, Local Communities Conference: Paper and Proceedings (University of New South Wales Domestic Violence Committee) pp 19, 22.

² See generally, Eastaale P, *Less Than Equal: Women and the Australian Legal System* (Butterworths, 2001), especially Chs 6 and 7.

³ See Eastaale P, *Balancing the Scales: Rape, Law Reform and Australian Culture* (Federation Press, 1998) for a selection of essays addressing these issues. Note also recent changes to the *Criminal Code 1899* (Qld) and the *Criminal Law Amendment Act 2000* (Qld).

⁴ 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 p 9.

⁵ 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). Restraining orders can be obtained in Western Australia under the *Restraining Orders Act 1997* (WA).

⁶ For an analysis of the response in New Zealand see Busch R and Robertson N, "'What's Love Got to Do With It?': An Analysis of an Intervention Approach to Domestic Violence" (1993) 1 *Waikato Law Review* 109 at 120-131.

domestic violence across Australia has been to provide civil actions and remedies. Attention has shifted away from the use of the criminal law in situations of domestic violence. This article examines the interaction of the *Criminal Code 1899* (Qld) (the *Criminal Code*) with the *Domestic Violence Act* and finds that domestic violence is rarely formally recognised as criminal behaviour and is generally dealt with outside the boundaries of the criminal law.

DISPLACING THE CRIMINAL LAW?

The suggestion that the criminal law fails to deal effectively with domestic violence may seem relatively unimportant given the existence of the *Domestic Violence Act*.⁸ The Act focuses on the protection of persons exposed, or potentially exposed, to violence in a domestic setting. Therefore, the main avenue for implementing these objectives is the court “protection” order, which imposes certain conditions.⁹ These conditions may include the limitation of physical contact between the parties and restrictions on the amount and type of communication between the parties. By contrast, the *Criminal Code*, as a criminal statute, focuses on the punishment and deterrence of those who perpetrate violence against persons and property. The lack of significant penalties in conjunction with domestic violence orders is regarded as a significant drawback by many people who assist women exposed to domestic violence in Queensland.

Further, the ‘preference’ for the *Domestic Violence Act* has ramifications for the manner in which the violence arising in a domestic relationship is understood. After all, “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”.¹⁰ By contrast, the predominant social message arising from our study is that violence in a domestic setting is not as ‘serious’ as the violence committed outside intimate relationships.¹¹

TASKFORCE ON WOMEN AND THE CRIMINAL CODE: THE CATALYST FOR RESEARCH

The limited use of the *Criminal Code* in situations of domestic violence was a concern identified by the Queensland Government in the *Report of the Taskforce on Women and the Criminal Code*.¹² Its final report made many proposals for legislative and procedural change to the criminal law.¹³ In this report, the Taskforce on Women and the Criminal Code acknowledged anecdotal evidence that police rarely bring criminal charges in relation to domestic violence.¹⁴ Accordingly, the taskforce identified the need for further research and asked the following question: How often are men charged with substantive criminal offences for assaulting or otherwise injuring their female partners?¹⁵

The taskforce also identified the overall paucity of information about the operation of the criminal law system and its impact upon women,¹⁶ specifically in the lower level courts. Data is not

⁷ See Urbis and Keys Young, *Evaluation of the ACT Family Intervention Program Phase II: Final Report*, prepared for the Australian Capital Territory Department of Justice and Community Safety (ACT Publishing Service, 2001).

⁸ 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 E, Linden S and McKechnie J, *Criminal Law in Queensland and Western Australia* (Butterworths, 2001) p 3. The *Domestic Violence (Family Protection) Act 1989* (Qld) short title is: “An Act to provide for protection to a person against violence . . . and for prevention of behaviour disruptive to family life.”

⁹ See *Domestic Violence (Family Protection) Act 1989* (Qld), s 17.

¹⁰ Holder R, “Domestic and Family Violence: Criminal Justice Interventions”, *Issues Paper No 3.1* (Australian Domestic and Family Violence Clearing House, 2001) p 2.

¹¹ See Goode M, “Codification of Australian Criminal Law” (1992) 16 *Crim LJ* 5 at 9 for a discussion of the messages implied by leaving issues outside of a criminal code.

¹² Office of Women’s Policy, *Report of the Taskforce on Women and the Criminal Code* (Queensland Department of Justice and Attorney General, 2000).

¹³ The Taskforce on Women and the Criminal Code recommendations led to changes in rape and sexual assault legislation and changes to some rules of evidence. See *Criminal Law Amendment Act 2000* (Qld).

¹⁴ Office of Women’s Policy, n 12, pp 47, 111.

¹⁵ Office of Women’s Policy, n 12, p vi.

¹⁶ Office of Women’s Policy, n 12, p 105. Also note comments by Putt J and Higgins K, *Violence Against Women in Australia* (Australian Institute of Criminology, 1997) p ix.

routinely collected from the lower courts, such as the Magistrates' Courts, where over 90% of criminal matters are concluded in Queensland. The scarcity of information is consistent with the long-standing phenomenon of legal research largely ignoring the lower level courts.¹⁷ The lack of research attention assumes particular significance when it is appreciated that all domestic violence applications in Queensland are initiated at the lower court level, and that breaches of domestic violence protection orders are also prosecuted in this context. It would seem that, to a large extent, women's experience of violence and the operation of the criminal law is potentially open to being trivialised.¹⁸

HISTORY OF LEGAL RESPONSES TO DOMESTIC VIOLENCE

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, although it was also acknowledged that there were broader systemic problems associated with its implementation.¹⁹ While the inherent conceptual rigidities of the criminal law are now more widely recognised, the research from the 1980s²⁰ largely accepted that the effectiveness of the criminal law simply depended on the role of police and the willingness or capacity of women to avail themselves of the criminal law.²¹ As a consequence of the perceived inadequacies of the criminal law, the central thrust of law reform turned to the introduction of specific civil legislation with a less stringent level of proof to regulate domestic violence.

In theory, domestic violence legislation was perceived to be an addition,²² not a replacement for, the criminal law.²³ Disagreement continues, though, in relation to the place of the criminal law in domestic violence situations. Stubbs argues that criminal law should be used alongside domestic violence protection orders.²⁴ Holder argues that the criminal law should be seen as just one player in dealing with domestic violence and that the focus should be on an integrated response, which takes into account primary health reforms and is community based.²⁵

CIVIL DOMESTIC VIOLENCE LEGISLATION IN QUEENSLAND

In Queensland, the *Domestic Violence Act* commenced in 1989 and its central purpose was to provide protection to people against whom violence had been committed or threatened and to discourage future violence.²⁶ In this sense the legislation is prospective rather than retrospective. Breaches of domestic violence orders are criminal offences²⁷ and recorded as part of the criminal history. They may be taken into account as prior convictions when criminal offences are sentenced, however they

¹⁷ McBarnett D, *Conviction: Law, the State and the Construction of Justice* (Macmillan, 1981) p 143.

¹⁸ These "lower levels" of violence may be quite pervasive, as an Australian Bureau of Statistics study in 1996 found that 1.1 million Australian women have experienced violence by a previous partner and 23% of Australian women who were, or had been married or in a de facto relationship, had experienced violence by a partner at some time in the relationship: Australian Bureau of Statistics, *Women's Safety Survey* (AGPS, 1996) (this report is available at <http://www.abs.gov.au/ausstats/abs@.nsf/0/0B565CA2569DE0025631C?Open>).

¹⁹ For an overview of these responses see Laing L, "Progress, Trends and Challenges in Australian Responses to Domestic Violence", Issue Paper No 1 (Australian Domestic and Family Violence Clearing House, 2000).

²⁰ Seddon N, *Domestic Violence in Australia* (Federation Press, 1989) p 35.

²¹ Women's Policy Co-ordination Unit, "Criminal Assault in the Home: Social and Legal responses to Domestic Violence", Discussion Paper (Victorian Department of Premier and Cabinet, 1985) p 85, at 7.4.

²² Australian Law Reform Commission, Report No 30, *Domestic Violence* (AGPS, 1986) p 20; Women's Policy Co-ordination Unit, n 21, p 103; Such views continue to be cited. See "Legal Protection Against Family Violence: Abuse by Informal Carers and Abuse within Dating Relationships", Consultation Paper (Queensland Department of Families, Youth and Community Care, 1999).

²³ See *Domestic Violence (Family Protection) Act 1989* (Qld), s 30; note also "Model Domestic Violence Laws", Discussion Paper (National Domestic Violence Summit, prepared by Commonwealth, State and Territory officials, 1997) pp 60-61.

²⁴ Stubbs J, "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) p 10.

²⁵ Holder R, n 10.

²⁶ "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 June 2001).

²⁷ See *Domestic Violence (Family Protection) Act 1989* (Qld), s 19. Note also s 62(4), which states that, "an application, proceeding or order under this Act in relation to the conduct of a respondent spouse does not affect any proceeding for an offence against the spouse arising out of the same conduct".

are listed as a different kind of criminal offence to assault, criminal damage or other criminal offences.²⁸

Although in some high profile cases women are the violent aggressors, generally in domestic situations women (on a statistical basis) are most likely to be the victims of violence.²⁹ In relation to serious violent offences in situations of domestic violence, there are trends which suggest that slowly, and belatedly, the criminal law is starting to respond to the various reforms advocated from time to time.³⁰ However, as the data discussed below reveals, with respect to less extreme violence against women, the criminal law remains moribund.

The need for the *Domestic Violence Act* to act in conjunction with an effective criminal law regime is underscored³¹ by Queensland Police Service operational statistics. These figures record that in Queensland in the years 1994-1997, 26.8% of women victims of unlawful killing had a current domestic violence order against the person who killed them.³² The fact that domestic violence sometimes ends in death highlights the need for it to be taken seriously at its early stages – rather than waiting for the deadly endpoint – and for it to attract the sanctions imposed by the criminal law.³³

RESEARCH OBJECTIVES

Any investigation into the implementation (or lack of implementation) of legislation dealing with domestic violence encounters a range of difficulties.³⁴ There are a wide variety of government and non-government agencies involved. There are few formal connections between these organisations and they are often under-resourced. These factors limit the amount and the nature of the information that can be collected and recorded regarding the incidence and extent of violence.³⁵ Adding to this complexity is the sensitivity of the data and the need for confidentiality.³⁶

To gain a preliminary idea of the extent to which domestic violence was dealt with under the *Criminal Code* we conducted initial “case tracking” in Brisbane and Ipswich Magistrates’ Courts between February and June 2001.³⁷ On no occasion throughout the period did a female defendant appear before the court charged with a violent offence where her spouse or intimate was the victim. During the relevant period only one man appeared before the court charged with criminal offences against an intimate or partner (two matters of assault causing actual bodily harm under s 337 of the *Criminal Code*) and also with the breach of a domestic violence order).

This initial case tracking alerted the researchers to the very limited use of the *Criminal Code* to regulate domestic violence. It highlighted the need to examine the *Domestic Violence Act* application process in the Magistrates’ Court, together with gaining information on the extent and nature of criminal charges including breaches of domestic violence orders. As there is no formal reporting of

²⁸ See New South Wales Domestic Violence Committee, n 1, p 28 for further discussion of this position.

²⁹ Hegarty K, Hindmarsh E and Gilles M, “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/>.

³⁰ See, for example, s 348 of both the *Criminal Law Amendment Act 2000* (Qld) and *Criminal Code 1899* (Qld).

³¹ Queensland, Legislative Council, *Debates, Domestic Violence and Family Protection Bill 1989* (Qld), Second Reading Speech.

³² See Domestic Violence Resource Centre Queensland, *Fact Sheet* (2001).

³³ Stubbs J, “Domestic Violence: The Legal Response”, Local Communities Conference: Paper and Proceedings (University of New South Wales Domestic Violence Committee, 1990) p 47. See also Hunter S, *A Report on the Northern Territory: Domestic Violence Phone-in 1996*, Occasional Paper No 5, (Northern Territory Government Domestic Violence Strategy, Office of Women’s Policy, 1996) p 15.

³⁴ See Carpenter B, Currie S and Field R, “Domestic Violence: Views of Queensland Magistrates” <http://www.nuancejournal.com.au/documents/three/car.pdf> (viewed 12 August 2002).

³⁵ Note the development of CEAVAW (Co-ordinating Efforts to Address Violence Against Women), a response to this problem is currently being made by the Queensland Government. CEAVAW is endeavouring to collect information on domestic violence services in Queensland into one database. Report of the CEAVAW Project: Co-ordinating Efforts to Address Violence Against Women (Queensland Department of Premier and Cabinet, 2002).

³⁶ See corresponding American research: Hutchison I and Hirschel D, “Abused Women” (1998) 4 (4) *Violence Against Women* 436 at 437.

³⁷ Research assistants attended Monday callovers during this period at Brisbane Magistrates’ Court and Ipswich Magistrates’ Court.

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matters that are conducted in the Magistrates' Court, we relied on examining the Brisbane Magistrates' Court files for 2001, including applications under the *Domestic Violence Act*.³⁸

To supplement this more formal source of information, 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.³⁹ We also had discussions with key police personnel⁴⁰ and examined the domestic violence policy directives for operational police in Queensland.⁴¹ We appreciate that, even with this range of sources of information, at best we have only a partial picture. Many women experiencing domestic violence either do not make contact with formalised agencies or their contact is undocumented.⁴² Nonetheless, despite the accepted limitations on data gathering in this field it is possible for us to present some significant findings.

MAGISTRATE COURT FINDINGS

With few official statistics available to draw the link between the incidence of domestic violence applications and any associated *Criminal Code* prosecutions, we relied primarily upon the data obtained in relation to domestic violence order applications. Of the 804 matters for which data was obtained from the Brisbane Magistrates' Court for 2001, 694 (86%) involved a domestic violence order application. As would be expected from published research, in the majority of cases, the aggrieved spouse was female (79.7%) and the respondent spouse was male (80.7%). These figures show that domestic violence orders⁴³ are primarily being applied for by women. The data makes it clear that domestic violence is a gendered issue and efforts to promote formal equality in this area of the law are clearly inappropriate.

This view is supported further when the nature of the relationship between the majority of applicants and respondents is considered. In 89.6% of the applications for domestic violence orders that were surveyed, the parties to the application were in an intimate relationship or had been involved in an intimate relationship (defacto or marriage). Of the 650 applications for protection orders, 53% involved the aggrieved spouse as the applicant, with a further 46% involving the police as the applicant on behalf of the aggrieved spouse. Given the vulnerability of many aggrieved spouses in these circumstances, it is significant that over half of the applications were made by individuals rather than the police. With less than half of all applications being taken out by police it suggests the violence, or threat of violence, is often not perceived to be sufficiently "serious" to warrant state intervention.⁴⁴

In Queensland, police are required to file applications when there is sufficient evidence of domestic violence to satisfy a civil standard of proof.⁴⁵ They have a concurrent obligation to investigate matters where there is "reasonable suspicion" that a criminal act has occurred.⁴⁶ Thus, in most situations where police are applicants for a domestic violence order it can be assumed that there is some evidence of violence, or of potential violence (for example, threats). It is telling then, that, in spite of the fact that police find a civil standard of proof to support violence or threats of violence, there is usually no corresponding investigation into the possibility of a criminal act.

³⁸ It is possible that not all Brisbane Magistrates' Court matters relating to domestic violence were noted by the researchers, as some may not have involved a domestic violence application. However, given the relatively few incidents of domestic violence appearing as criminal matters in the earlier case tracking the numbers are likely to be relatively few.

³⁹ The workers to be interviewed were selected after discussions with a key respondent, Zoe Rathus, Co-ordinator, Womens Legal Service, Queensland, who has experience in domestic violence issues. This form of respondent-driven sampling, where key personnel are identified and they subsequently identify other key interviewees, is described in Heckathorn D, "Respondent-driven Sampling: A New Approach to the Study of Hidden Populations" (1997) 44 (2) *Social Problems* 174.

⁴⁰ Senior Sergeant Dale Murray, State Domestic Violence Co-ordinator for Queensland Police Service.

⁴¹ See Queensland Police Service, *Operational Procedures Manual* (current as at 31 July 2001).

⁴² See D'Arcy M, "Speaking the Unspeakable: Violence Against Women" (1998) 8 (4) *Health Sharing Women* 1.

⁴³ See *Domestic Violence Act 1989* (Qld), s 20.

⁴⁴ See Eastal P, n 2, pp 108-109.

⁴⁵ See Queensland Police Service, n 41, at 9.6.1.

⁴⁶ See, generally, *Police Powers and Responsibilities Act 2000* (Qld) and Queensland Police Service, *Operational Procedures Manual* at 9.3.1.

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In seven of the court files relating to applications for domestic violence orders there were notes on the file that recorded a police investigation into the possibility of laying criminal charges. In three matters criminal charges were actually laid. In relation to why investigations did not lead to charges in the remaining files, only one matter provided a reason. On this file there was a police affidavit to the effect that the female aggrieved spouse did not support the male respondent being criminally charged. The facts reported in the police affidavit stated that the police had been called to the home of the aggrieved spouse and on arrival she was propped in bed with bleeding gashes to her face. A bloodied clock radio was on the floor beside the bed. The aggrieved spouse reported that she had been hit with the clock radio. The aggrieved spouse was then taken to a hospital where police spoke to her about pursuing criminal charges. In all remaining cases the reasons for the lack of criminal charges were not noted. In six matters in which the male respondent spouse had prior convictions for violence, criminal charges were not investigated or laid.

Given the relatively low level of criminal prosecution it might suggest that there are few incidents of violence that may give rise to criminal charges. Yet data obtained from the Brisbane Magistrates' Court files in relation to applications for domestic violence orders directly undercuts such an assumption.

In making an application for a domestic violence order, applicants must complete a section of the form that sets out in detail the factual circumstances that give rise to the application. In our research, these circumstances were categorised into various types of personal violence and property damage. Figure 1 displays each of these categories along with the percentage of all applications involving each particular category of violence. The section of the *Criminal Code* which corresponds to a possible offence in the circumstances, is noted.

Figure 1:

<i>Categories of Violence</i>	<i>Frequency</i>	<i>Percent</i>
<i>Violence towards children/family (QCC,* ss 335, 339)</i>	110	15.9
<i>Threats of violence (QCC, s 359)</i>	179	25.8
<i>Death threats (QCC, s 359)</i>	108	15.6
<i>Verbal harassment (possibly QCC, s 359)</i>	299	43.1
<i>Fraud and Property (QCC, ss 408, 391)</i>	50	7.2
<i>Stalking (QCC, Ch 33A)</i>	17	2.4
<i>Wilful Damage (QCC, s 469)</i>	138	19.9
<i>Assault (QCC, s 335)</i>	412	59.4
<i>Assault bodily harm (QCC, s 339)</i>	136	19.6
<i>Grievous bodily harm (QCC, s 320)</i>	6	0.9
<i>Sexual Assaults / Rape (QCC, ss 352, 349)</i>	27	3.9
<i>Removing Children (QCC, ss 354, 363)</i>	13	1.9
<i>Imprisonment (QCC, s 355)</i>	19	2.7
<i>Assault while victim pregnant (QCC, s 313)</i>	13	1.9

*Note: QCC denotes *Criminal Code 1899* (Qld).

When considering the domestic violence order applications, in 69.7% (484) of the applications, more than one category of violence was noted, and in 37.8% of applications, three or more categories of violence were noted. The history of violence noted in the applications made serious allegations

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about what appears to be criminal activity. Often the allegations included visible injury and property damage observed by police. However, these matters were rarely investigated and even more rarely charged.

The other key set of data from the files was the outcome in relation to the applications. Figure 2 summarises the percentage of all cases involving possible outcomes, although some applications involved more than one of these outcomes.

Figure 2:

<i>Outcome of Application</i>	<i>Frequency</i>	<i>Percent</i>
<i>Interim Protection Order</i>	16	2.3
<i>Protection Order made</i>	470	67.7
<i>Application withdrawn</i>	88	12.7
<i>Application dismissed</i>	84	12.1
<i>Other protection order</i>	56	8.1

When the aggrieved spouse is male, a domestic violence order is significantly less likely to be granted than when the aggrieved spouse is female. Applications are also more likely to be dismissed when the aggrieved spouse is male, rather than when they are female. Thus women are more likely to make applications that are supported by evidence that can demonstrate, on the balance of probability, that violence will occur (again).

UNDERSTANDING THE LACK OF CRIMINAL PROSECUTIONS

The lack of criminal prosecutions appears to have little to do with the availability of appropriate legislation or police policy. A range of offences already exists in the *Criminal Code* which could be charged in situations of domestic violence, including the traditional offences such as wilful damage, threats, assault and assault causing bodily harm⁴⁷ (see Figure 1). In 1997, two new offences were added to the *Criminal Code* with the domestic violence context in mind – the offences of torture⁴⁸ and stalking.⁴⁹ Torture was enacted in part to deal with the evidentiary, and sometimes factual, difficulties experienced in supporting traditional assault type offences,⁵⁰ and it could clearly cover many instances of domestic violence.⁵¹ Broad powers also operate under the *Police Powers and Responsibilities Act 2000* (Qld) in relation to arrest and detention of suspects.⁵² The underlying policy view of the Queensland Police Service also overtly supports the criminalising of domestic violence.⁵³ However, despite the practical avenues and policy frameworks currently available, perpetrators of domestic violence are rarely charged with criminal offences.⁵⁴ A more contextual understanding of why the *Criminal Code* is rarely used was gained from the series of interviews with workers in the domestic violence sphere.

⁴⁷ *Criminal Code 1899* (Qld), ss 469, 359, 335 and 339 respectively.

⁴⁸ Under s 320A of the *Criminal Code 1899* (Qld), “Torture” is defined as “the intentional infliction of severe pain or suffering on a person by an act or series of acts done on 1 or more than 1 occasion.” See *Criminal Code 1899* (Qld), s 320A(2).

⁴⁹ *Criminal Code 1899* (Qld), Ch 33A.

⁵⁰ *Burns* (unreported, Queensland Court of Appeal, 2000, McMurdo P, McPherson JA, Douglas J).

⁵¹ See also Office of Women’s Policy, n 12, pp 112-113.

⁵² See especially *Police Powers and Responsibilities Act 2000* (Qld), s 19.

⁵³ Queensland Police Service, *Operational Procedures Manual* at 1. Note also comments of Transcript 6, p 3: “The police manual certainly says they are required to provide assistance, and in fact to investigate the violence ... but there are some police who don’t see that as their role.”

⁵⁴ Transcript 4, p 5.

INTERVIEWS

The experience of key domestic violence workers is overwhelmingly that the *Criminal Code 1899* (Qld) is rarely invoked in situations of domestic violence. There were two main aspects to why interviewees felt that Criminal Code offences are rarely prosecuted. First, we discuss the workers' views on why their women clients generally did not want to pursue criminal matters, and secondly their views on why it is that police do not usually pursue criminal charges. Only a small snapshot of their views is included.⁵⁵

Why women are reluctant to assist in police prosecutions

Workers suggested that women clients were not properly equipped with the necessary information to make appropriate decisions. The Taskforce on Women and the Criminal Code pointed out that, generally, the availability of information was critical in relation to how women make choices about the directions they take.⁵⁶ This position is echoed through many of the interviews. Sometimes for women, it is a matter of not knowing what legal or other avenues are available for them, or it could be that they do not have the language and terms to express what they want to happen.⁵⁷

We find that women ... haven't been told about their right to ... make a complaint about a criminal charge. They may not even realise that it's against the law. The police have been called out. They often say "oh, the police never told me that that's stalking or that's assault".⁵⁸

Such complaints are made despite the police policy that police should actively canvass the possibility of criminal charges in conjunction with *Domestic Violence Act* orders.⁵⁹

Another problem is a perception held by women that they have a choice between making a criminal or a civil response to domestic violence, but not both. In one example provided by interviewees, a woman had contacted the police. Police attended at the hospital and advised the woman "that she had a choice of whether to press assault charges, make a complaint of assault or the domestic violence legislation but not both, which is clearly absurd".⁶⁰

One worker noted that women worry that if they pursue criminal matters they will be "earmarked as a troublemaker and the [police] will not support them if they need [it]".⁶¹ Women are historically less likely than men to pursue matters through the justice system.⁶² Without police support – in the sense of proper information – at this early stage, the possibility of criminal charges being sustained is very unlikely.

Workers also commented that women did not pursue criminal prosecutions because of a fear that their engagement with the criminal justice system would exacerbate current levels of violence.⁶³ Given the situation of many women confronting domestic violence, the primary interest is in stopping the violence rather than punishment.⁶⁴ "The main fear is the fear of their safety if they follow it up even more – of what he will do once there's criminal charges as well."⁶⁵ Where women wanted to make peace with the offender or keep their relationships together, workers suggested that women clients did not believe the criminal justice process was helpful. "The ones that are in relationships ... may not even see that they're in a domestic violence situation ... or feel that they should be able to

⁵⁵ The interviewees' identities have been coded to preserve the confidentiality of the information provided.

⁵⁶ Office of Women's Policy, n 12, p 27.

⁵⁷ Transcript 4, p 11.

⁵⁸ Transcript 1, p 3.

⁵⁹ Queensland Police Service, *Operational Procedures Manual* at 9.3.1.

⁶⁰ Transcript 6, p 4.

⁶¹ Transcript 2, p 23.

⁶² See Australian Law Reform Commission, *Equality Before the Law*, Discussion Paper 54 (1993), Ch 2.

⁶³ Transcript 5, p 2.

⁶⁴ Transcript 4, p 7. Note also Holder R and Munsterman N, *What do Women Want? Prosecuting Family Violence in the ACT*, Conference paper presented at Expanding our Horizons: Understanding the Complexities of Violence Against Women Conference (18 February 2002).

⁶⁵ Transcript 1, p 8.

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work it out for themselves".⁶⁶ However, where there was some recognition that the relationship was over, workers suggested that women may be more willing to support criminal prosecutions.⁶⁷

One worker assisting women with a non-English speaking background felt women may be reluctant to even get a protection order or to seek support if they thought they would get caught up in criminal proceedings.⁶⁸ A real issue for one of the interviewees who worked with indigenous women was that, "If women complain, kids are often taken away, not the [violent] fella."⁶⁹

Importantly, women have concerns in relation to how the defendant will respond to a criminal charge.⁷⁰ Women report that they are afraid that the offender will gain a criminal record or that he will go to jail,⁷¹ and that this will have a negative impact on their family life in the longer term.⁷²

Workers also suggested that women were uncomfortable about police and the court process⁷³ and sometimes cynical about what the outcome might be in terms of penalty.⁷⁴ Research continues to suggest that domestic violence victims are reluctant and refuse to be involved in prosecutions because they are afraid of the court process.⁷⁵ Although efforts have been made in many jurisdictions, including Queensland, to improve the court process for women involved in domestic violence matters, such as closing the court to the public, women continue to express discomfort to domestic violence workers:⁷⁶

[T]he court process is terrifying ... to make a complaint of the breach ... they're scared because they know that they're going to have to come back and be a witness then ... they find the court process really intimidating and having to speak to the magistrate is scary and confusing – having to deal with [the perpetrator] in the courtroom, his solicitor and the intimidation that sometimes can happen from the respondent's solicitor as well can be all contributing factors.⁷⁷

Workers noted that the reluctance to assist a prosecution could be overcome where there was significant support in each part of the process.⁷⁸ This view is supported by studies in the Australian Capital Territory, which have recorded a significant rise in prosecutions since support has been provided to women as witnesses in this context.⁷⁹

There is a perception amongst women that there is simply no point in participating in the criminal prosecution of the violence.⁸⁰ A number of research projects have found that where prosecutions do occur, women feel that the results suggest that the assault has not been taken seriously by the court.⁸¹ Our research noted three *Criminal Code* charges at the domestic violence order application stage. Of those three charges only one has been dealt with and this led to a \$200 fine. This frustration is expressed in an interviewee's comment:

⁶⁶ Transcript 2, p 21.

⁶⁷ Transcript 1, p 10.

⁶⁸ Transcript 5, p 8.

⁶⁹ Transcript 3, p 1.

⁷⁰ See Fischer K and Rose M, "When 'Enough is Enough': Battered Women's Decision Making Around Court Orders of Protection" (1995) 41 (4) *Crime and Delinquency* 414 at 415.

⁷¹ Transcript 5, p 8.

⁷² Prepared by Keys Young for the Office of the Status of Women, *Against the Odds: How Women Survive Domestic Violence* (Partnerships Against Domestic Violence, Office of the Status of Women, AGPS 1998) p 52. See also Australian Law Reform Commission, *Domestic Violence*, Report No 30 (1986) p 20.

⁷³ Transcript 4, p 8.

⁷⁴ Office of Women's Policy, n 12, p 47 noted these reasons. Similar reasons were also recorded in a recent British study: see Hoyle C, *Negotiating Domestic Violence: Police, Criminal Justice and Victims* (Oxford University Press, 2000), especially Ch 7.

⁷⁵ See Fischer K and Rose M, n 70, at 415.

⁷⁶ Transcript 4, p 8.

⁷⁷ Transcript 1, pp 8-9.

⁷⁸ Transcript 1, p 3.

⁷⁹ Holder R and Munsterman N, n 64.

⁸⁰ Transcript 3 1.

⁸¹ Liston B, "He Paid the Court to Hit Me" in Lawrence D (ed), *Future Directions: Proceedings of the Queensland Domestic Violence Conference* (Rural, Social and Economic Research Centre, Central Queensland University, 1995) p 293.

[The penalties for breaches] are very minor, like a two hundred dollar fine or something like that ... If it's serious, like a serious physical assault, it's taken so much more seriously and it'll go through the criminal process and then, you know, then we do often hear of guys being locked up as well.⁸²

There is a broad recognition that the imposition of fines is inappropriate in matters of domestic violence,⁸³ particularly as often the fines are paid for by the aggrieved spouse or they are paid for from the household income of both the parties. In spite of this they continue to be a common disposition.⁸⁴ The question of sentencing in relation to assaults perpetrated in the context of domestic violence was discussed in *Piermont* (unreported, Supreme Court of Queensland, 13 November 2001, Thomas JA, Ambrose, Cullinane JJ). *Piermont* suggests that where serious physical injury is prosecuted, serious penalties (imprisonment for example) are likely to be delivered. However, all of the cases discussed in *Piermont* related to physical violence where there was presumably medical evidence of injury available. This finding sheds light on the points raised by workers noted below.

Why police don't pursue charges in situations of domestic violence

Workers interviewed suggested that, from the police perspective, a lack of evidence was the crucial reason why *Criminal Code* matters were not pursued.⁸⁵ This reason was followed in importance by a view expressed by most workers that many police held an outmoded belief that women don't want to prosecute or that they will make unreliable witnesses. Workers saw these perceptions by police as a significant deterrent to police taking action in relation to possible criminal charges.

Workers referred to some situations where the evidence problem had been surmounted. One worker mentioned a situation where the victim had videotaped the offenders repeated attendance at her home and taped his telephone calls. This had resulted in a successful prosecution of stalking but shows that the onus is upon women to gather evidence.⁸⁶ Workers suggested some dissatisfaction with the pressure placed on complainants to find the evidence⁸⁷ and also identified a reluctance by police to gather evidence:

They're not gathering the evidence – they're not doing proper investigations ... it would be really good to see the police treat it as a crime scene when they get there and as seriously as they would treat any other kind of crime if it wasn't of a domestic nature.⁸⁸

The workers interviewed all pointed out the value of medical evidence,⁸⁹ and visible injury in terms of a successful criminal prosecution.⁹⁰ Again, the workers' comments support the suggestion that generally only serious violent crimes related to domestic violence are prosecuted under the *Criminal Code*.⁹¹

Workers also suggested that police perceived women as unreliable or potentially hostile witnesses.⁹² If this perception is held, it is often unfounded.⁹³ Research in the Australian Capital Territory has demonstrated that a very low percentage of women become hostile witnesses once they are required to give evidence against a violent spouse in a criminal prosecution.⁹⁴ "What I think is that police need to shift their attitude. They need to change their perception of women as witnesses ... and

⁸² Transcript 2, pp 29-30.

⁸³ In the Australian Capital Territory there has been a dramatic move away from the imposition of fines in domestic violence matters. See Holder R and Munsterman N, n 64. See also Hoyle C, n 74, p 192.

⁸⁴ 58% of breach matters in Queensland courts between 1996 and 1997 resulted in a fine: Office of Economic and Statistical Research: <http://www.oesr.qld.gov.au/> (visited 21 February 2002).

⁸⁵ Transcript 2, p 19.

⁸⁶ Transcript 1, p 20.

⁸⁷ Transcript 1, p 6.

⁸⁸ Transcript 1, p 18.

⁸⁹ Transcript 1, p 7.

⁹⁰ Transcript 2, p 28.

⁹¹ Transcript 2, p 24.

⁹² Transcript 2, p 18.

⁹³ Transcript 2, p 20.

⁹⁴ See Holder R and Munsterman N, n 64. See Australian Capital Territory Director of Public Prosecutions, *Annual Report 2000-2001* (Australian Capital Territory Government, 2000) pp 12-13.

... have a much more consistent and much more non-judgemental approach”⁹⁵. Workers emphasised the growing number of cross-applications. One interviewee commented, “[women] usually consent to cross-applications because they just want to be left alone ... I think there’s a trend of having more and more cross-applications”.⁹⁶ Thus, instead of characterising the situation as one of violence and possible self-defence, it is designated as one of mutual fault.⁹⁷ Jurevic suggests that police and prosecutors see the domestic sphere as a site of “mutual combat”, and that the resulting violence is seen as part of a mutual scuffle where the woman comes off worse.⁹⁸

SUMMARY OF RESEARCH FINDINGS

As we have seen from the data discussed, it is mostly women who experience and fear violence enough to become involved in the justice process in order to obtain protection orders.⁹⁹ The separating out of domestic violence from other kinds of crime perpetuates a range of outmoded views about intimate relationships and the split between domestic violence and “real assaults”.¹⁰⁰ This has meant that men who have been violent towards intimate partners have often eluded punishment and accountability, and the police, perhaps unwittingly, have continued to collude in perpetuating such outmoded views. Workers articulated the problem: “police, frankly, see this as a low priority. It’s not as sexy as capturing a burglar”.¹⁰¹

Given the wide range of interview responses, in all likelihood it is a mixture of the proposed explanations that may account for the rising number of domestic violence protection orders, without a corresponding increase in the amount of criminal charges being made in relation to violence in the context of intimate relationships.

CONCLUSION

While initiatives such as the *Domestic Violence Act* attempt to address a range of perceived inadequacies of the criminal law as an institution, they have also decreased the public recognition of the actual and metaphorical significance of the violent acts that are perpetrated. A failure to institute criminal charges at the initial stages reinforces domestic violence as being a private, social issue rather than a public, criminal issue.¹⁰² Arguably then, the effect of domestic violence legislation has been to separate “intimate partner” violence out from other forms of assault. The repositioning of violence between intimate partners within the civil, less publicly accountable, sphere has been to subtly construct it against the “more serious” categories of criminally vilified violence. Violence between intimates can now be legitimately examined in a different light to criminal matters and different assumptions and rules are applied to the way it is dealt with. The construction of domestic violence as a counterpoise to “more serious” forms of violence illustrates the continuing relevance of gender to the issue. Generally, men have more power than women in intimate relationships, in an economic, social and political sense. Men also tend to be more violent than women,¹⁰³ or at the very least their violent responses cause greater harm.¹⁰⁴

⁹⁵ Transcript 2, p 33.

⁹⁶ Transcript 5, p 6.

⁹⁷ Transcript 2, p 11.

⁹⁸ Jurevic L, “Between a Rock and a Hard Place: Women Victims of Domestic Violence and the Western Australian Criminal Injuries Compensation Act.” (1996) 3 (2) *E Law – Murdoch University Electronic Journal of Law* 5.

⁹⁹ Transcript 5, p 4.

¹⁰⁰ Eastaer P, n 2, p 108. For a discussion of the construction of crime, see Young A, “Textual Outlaws and Criminal Conversations” in *Imagining Crime* (Sage Publications, 1996) pp 8-15: “Crime is often associated with violence that occurs in public places and which occurs between comparative strangers”.

¹⁰¹ Transcript 6, p 3.

¹⁰² Women’s Coalition Against Family Violence, “Blood on Whose Hands: The Killing of Women and Children in Domestic Homicides” (Funded by the Women’s Trust, Victoria, 1994) p 72.

¹⁰³ See Bagshaw D and Chung D, “Women, Men and Domestic Violence”, *Partnerships Against Domestic Violence* <http://www.padv.dpvc.gov.au/oswpdf/mensforum/bagshaw.PDF> (viewed 11 January 2003).

¹⁰⁴ Straus M, “Physical Assaults by Wives: A Major Social Problem” in Gelles R and Loseke D (eds), *Current Controversies in Family Violence* (Sage Publications, 1993) pp 80 and 99.

Models operating in other Australian jurisdictions and overseas could assist in the process of law reform in this area. The Australian Capital Territory has introduced a range of initiatives in the domestic violence field that have been successful in highlighting the need for domestic violence to be understood as a crime and to be dealt with by a wide range of responses, including the criminal law.¹⁰⁵ However, as Sheey points out, legislative change by itself is not enough.¹⁰⁶ There also needs to be a reorientation in social attitudes toward domestic violence. The current research suggests that there also needs to be a corresponding change to encompass the notion of domestic violence as a crime within the parameters of the criminal law itself.

The “masculinist” approach to understanding violence has been widely criticised in many attempts to change the underlying assumptions in the operation of the criminal law. The reticence of many women to seek assistance from the criminal law, with its formalised structures and institutions, has been a significant factor in reforms that have sought to augment, and even displace, the criminal law with a variety of strategies for dealing with violence between intimate partners. In Queensland, it would have been possible to have placed more reliance on the existing criminal law structures and institutions to deal with violence arising in intimate relationships, although perhaps a significant change of orientation may have been required. The traditional offences of the criminal law and the penalties and sentencing legislation could have been invoked to deal with the issues that domestic violence law deals with. Instead though, the major reform direction consisted of the introduction of the domestic violence legislation.

The criminal law is a blunt instrument, which requires a formal and public accounting of guilt and blame. Advocates for the instigation of less “threatening” processes see the very public attribution of the criminal law as problematic. In particular, these features of the criminal law, it is argued, may prevent many women from effectively accessing the protection from domestic violence that it may provide. While these efforts to ensure a more accessible and efficient process are to be commended, the bypassing of the criminal law has tended to entrench the perception of a “public/private” split. The intensely intimate nature of the relationship in which the violence arises colours the perception of the violent act.

In many jurisdictions there remains a need for a cultural shift in the manner in which violence arising between intimate partners is perceived. Queensland is no exception. Further research will be needed to clarify whether a greater reliance on the more public and formalised criminal law, supported by institutional change, and working alongside domestic violence legislation can achieve the shift.

¹⁰⁵ See *Domestic Violence Act 1986* (ACT).

¹⁰⁶ Sheey E, “Legal responses to Violence Against Women in Canada” (1999) 19 (1 & 2) *Canadian Woman Studies* 62.