ATTACHMENT HD 8

This is the attachment marked "**HD 8**" referred to in the witness statement of Heather Douglas dated 20 July 2015.

Not a crime like any other: Sentencing breaches of domestic violence protection orders

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The question of how to respond to domestic violence continues to be a significant issue in our communities. One of the underlying concerns of many of these initiatives is the role of criminal justice responses to domestic violence. Very low rates of criminal prosecution continue to be associated with domestic violence matters throughout most of Australia. One exception to this is the criminal prosecution of breaches of protection orders. In 2005, there were over 8,000 breaches of domestic violence orders prosecuted in Queensland. This article explores the role of sentencing in domestic violence matters through an examination of court responses to breach prosecutions.

INTRODUCTION

The question of how to respond to domestic violence continues to be a significant issue in our communities. The concern is reflected in the extensive advertising campaign launched by the Commonwealth government in 2005, "Australia says No"[1] and in a number of State government and community initiatives that are attempting to develop strategies to deal with domestic violence. Such initiatives include research and reports from law reform commissions,[2] the establishment of Ministerial Advisory Councils[3] and the continuing activities of community organisations. One of the underlying concerns of many of these initiatives is the role of criminal justice responses to domestic violence. Very low rates of criminal prosecution continue to be associated with domestic violence matters throughout most of Australia. One exception to this is the criminal prosecution of breaches of protection orders. In 2005, there were over 8,000 breaches of domestic violence orders prosecuted in Queensland.[4] This article explores the role of sentencing in domestic violence matters through an examination of court responses to breach prosecutions. Part one of this article defines domestic violence and overviews the approaches taken in Australian jurisdictions to the criminalisation and prosecution of breaches of protection orders. This is followed in part two by a discussion of an empirical study of Queensland Magistrates Courts' sentencing responses to breach prosecutions. Part three explores the principles and purposes of sentencing in the domestic violence context. This article concludes that a communitarian response to sentencing, which includes the rehabilitative ideals of restorative justice, should be part of the overall response to domestic violence. It is argued that the prosecution of breach matters should be viewed as an opportunity, through the sentencing response, to end violence and rehabilitate offenders. The article discusses approaches to sentencing that are specifically tailored to respond to the domestic violence context.

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[1] Australian Government, *Violence Against Women: Australia Says No*, http://www.australiasaysno.gov.au viewed 17 May 2007.

[2] See, eg Victorian Law Reform Commission (VLRC), *Review of Family Violence Laws Report* (2006); New South Wales Law Reform Commission (NSWLRC), *Apprehended Violence Orders Report* (2003); Northern Territory Department of Justice, *Domestic Violence Act Issues Paper* (2006).

[3] For example, Queensland Government, *Ministerial Council on Domestic and Family Violence*, http://www.communities.qld.gov.au/violenceprevention/resources/dfv_min_advis_council.html viewed 17 May 2007; Northern Territory Department of the Chief Minister, *Domestic and Family Violence Advisory Council*, http://www.nt.gov.au/dcm/people/council.html viewed 17 May 2007.

[4] Justice MP Irwin, Chief Magistrate of Queensland, Address presented at The System Matters – Intensive Institute with Ed Gondolf (Brisbane, 14 November 2006).

PART 1: AUSTRALIAN LEGISLATIVE APPROACHES TO BREACHES OF DOMESTIC VIOLENCE ORDERS.

Domestic violence is a contested term.[5] Most statutory definitions, reflecting the context of the violence, require that it occurs between intimate partners or within family relationships but definitions encompass a wide range of behaviours including assault, property damage, indecency, harassment and intimidation.[6] However, statutory definitions do not clearly reflect the gendered power and control issues that lie at the heart of most domestic violence.[7] It continues to be overwhelmingly women who make applications for protection orders against male respondents.[8]

The idea that domestic violence should be understood as criminal assault – rather than as a private or civil matter – has been stressed by domestic violence activists since the 1970s.[9] As Kelly points out, the reasons for the shift are claimed to be both substantive and symbolic.[10] It is argued that recognising domestic violence as a crime will both improve victim safety and secure community denunciation. However, although many in the community may share the view that domestic violence is a crime, in practice, domestic violence is dealt with as a civil matter.[11] This is largely because, as Dobash and Dobash point out, intimate personal violence "is not a crime like any other, [it] has a number of unique elements".[12] These unique elements include the fact that there are usually complex and continuing emotional, financial and legal ties between the parties.

In domestic violence matters, many women victims decide not to make a complaint or appear as prosecution witnesses for various reasons. Victims may fear increased violence[13] or they may perceive that assisting to prosecute may break up the family unit.[14] Sometimes victims feel that they are, in various ways, responsible for the violence and feel guilty.[15] Victims often decide not to prosecute because they assume that their involvement with police and the court process will be stressful and traumatic[16] and that the sentencing regime is, in any event, ineffective, overly lenient and inconsistent.[17] A policing culture focused on the civil protection order system[18] and a view frequently

[5] Graycar R and Morgan J, *The Hidden Gender of Law* (Federation Press, 2002) pp 313-314.

[6] See, eg *Domestic and Family Violence Protection Act 1989* (Qld), s 11. See also *Crimes (Family Violence) Act 1987* (Vic), s 4; *Family Violence Act 2004* (Tas), s 7.

[7] Easteal P, *Less Than Equal: Women and the Australian Legal System* (Butterworths, 2001) pp 103-104. It is noted that the Tasmanian legislation arguably gets a little closer to doing this, see *Family Violence Act 2004* (Tas), s 7.

[8] VLRC, n 2 at [2.19]-[2.20].

[9] See Howe A, "The Problem of Privatised Injuries: Feminist Strategies for Litigation" in Fineman M (ed), *At the Boundaries of Law: Feminism and Legal Theory* (Routledge, 1990) pp 149, 152.

[10] Kelly L, "Moving in the Same or Different Directions? Reflections on Recent Developments in Domestic Violence Legislation in Europe" in Smeenk W and Malsch M (eds), *Family Violence and Police Response: Learning From Research, Policy and Practice in European Countries* (Ashgate, 2005) p 83.

[11] Douglas H and Godden L, "The Decriminalisation of Domestic Violence" (2003) 27 Crim LJ 32 at 33.

[12] Dobash RP and Dobash RE, "Abuser Programmes and Violence Against Women" in Smeenk W and Marlsch M (eds), *Family Violence and Police Response: Learning from Research, Policy and Practice in European Countries* (Ashgate, 2005) p 100.

[13] Research shows that this fear is justified, see Dobash and Dobash, n 12, p 100.

[14] Douglas and Godden, n 11, p 40.

[15] See *R v Fairbrother; Ex parte Attorney-General of Queensland* [2005] QCA 105 at [23] where McMurdo P discusses these matters.

[16] Curtis-Frawley S and Daly K, "Gendered Violence and Restorative Justice" (2005) 11 *Violence Against Women* 603 at 604. Note that some studies are starting to show that women's experiences with police in the domestic violence context are becoming more positive and supportive, see Hester M and Westmarland N, *Tackling Domestic Violence: Effective Interventions and Approaches* (United Kingdom, Home Office Research, Development and Statistics Directorate, 2005) p 55.

[17] VLRC n 2 at [10.74]; Holder R and Mayo N, "What Do Women Want? Prosecuting Family Violence in the ACT" (2003-2004) 15 *Current Issues in Criminal Justice* 5 at 19; Office of Women's Policy (Qld), *Report of the Taskforce on Women and the Criminal Code* (2000) p 111.

[18] Hall D, "Domestic Violence Arrest Decision-Making: The Role of Suspect Availability in the Arrest Decision" (2005) 32 *Criminal Justice and Behaviour* 390 at 391.

held by police, that a successful prosecution relies on the commitment of the victim to give evidence at a subsequent trial, provide other impediments to prosecution.[19] A recent Queensland study on policing domestic violence found that some of the most important factors for police in deciding whether to charge a criminal offence related to the victim and whether she had previously dropped charges, whether she wanted the offender charged, and a police view that victims generally do drop charges.[20] Both the courts and research have also recognised that the cyclical and complicated nature of domestic violence relationships will often lead victims to seek to withdraw charges during periods of calm in the relationship.[21] This understanding has led some jurisdictions to implement mandatory prosecution strategies to ensure that prosecution takes place regardless of the victim's wishes.

Research generally shows that there is a higher rate of successful criminal prosecution when police are mandated to arrest, charge and prosecute domestic violence matters and where mandatory reporting by service providers is required.[22] However, increasingly, commentators have questioned whether the costs of such mandatory policies are too high for women.[23] For example, Mills argues that mandatory approaches operate to disempower women victims by excluding them from the process and taking decision-making powers away from them.[24] She suggests that such mandatory processes produce a new form of State-sanctioned violence that replicates the violence experienced by women at home.[25] Others have suggested that mandatory policies may operate to disenfranchise particular groups in society.[26] For example, in Australia, some commentators have suggested that indigenous women may be more reluctant to call on police to protect them from violence where mandatory arrest and prosecution strategies are in place.[27] There have been cautious moves towards mandatory approaches in some Australian jurisdictions.[28] A recent Queensland report recommended mandatory investigation and evidence collection when responding to domestic violence incidents but emphasised that mandatory arrest or charge was not recommended.[29] Although there is continuing debate about

[19] Crime and Misconduct Commission (Qld), *Policing Domestic Violence in Queensland* (2005) p 79. Hoyle argues that policing is influenced by societal attitudes: see Hoyle C, *Negotiating Domestic Violence: Police, Criminal Justice and Victims* (Oxford University Press, 1998) p 101.

[20] Crime and Misconduct Commission, n 19, p 49.

[21] *R v Christodoulou* [2005] NSWSC 1362 at [15] (Howie J); *R v Glen* (unreported, NSWCCA, Simpson J, 19 December 1994) where the judge pointed out that forgiveness by the victim needed to be approached with caution. See also Crocker D, "Regulating Intimacy: Judicial Discourse in Cases of Wife Assault, 1970-2000" (2005) 11 *Violence Against Women* 197 at 198.

[22] See, eg Taylor N, *Analysis of Family Violence Incidents July 2003-June 2004*, Final Report (Australian Federal Police, 2006) p 4.

[23] Coker D, "Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review" (2001) 4 *Buffalo Criminal Law Review* 801.

[24] Mills LG, "Killing her Softly: Intimate Abuse and the Violence of State Intervention" (1999-2000) 113 *Harvard Law Review* 551 at 554. See also Hunter R, "Law's (Masculine) Violence: Reshaping Jurisprudence" (2006) 17 *Law and Critique* 27 at 40.

[25] Mills also suggests that the early effectiveness of such policies is gradually lost over time in individual cases, see Mills L, "Mandatory Arrest and Prosecution Policies for Domestic Violence" (1998) 25 *Criminal Justice and Behavior* 306 at 310, 313. See also Romkens R, "Protecting Prosecution: Exploring the Powers of Law in an Intervention Program for Domestic Violence" (2006) 12 *Violence Against Women* 160 at 165, who mentions the problem that both parties often end up being arrested.

[26] Negative effects of mandatory policy have been noted in African-American communities: see Sherman L, Schmidt JD, Rogan DP, Smith DA, Gartin PR, Cohn EG, Collins J and Bacich AR, "The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment" (1992) 83(1) *Journal of Criminal Law and Criminology* 137 at 139.

[27] Queensland Government, *The Aboriginal and Torres Strait Islander Women's Taskforce on Violence Report* (1999) pp 49-50 and generally Ch 4. See also Behrendt L, "Aboriginal Women and the White Lies of the Feminist Movement: Implications for Aboriginal Women in Rights Discourse" (1993) 1 *Australian Feminist Law Journal* 27 at 29.

[28] For example, the Australian Capital Territory Family Violence Intervention Program states that its core components include pro-arrest, pro-charge and pro-prosecution policies: ACT Family Violence Intervention Program Resource, http://www.dvcs.org.au/Resources/FVIP%20info%20for%20WEBSITE.doc viewed 17 May 2007. See also Tasmanian Government, *Safe at Home: A Criminal Justice Framework for Responding to Family Violence in Tasmania: An Options Paper* (2003).

[29] Crime and Misconduct Commission, n 19, pp 78-80, Recommendation 1 at xi.

appropriate criminal justice responses to domestic violence, this article argues that, regardless of the existence of mandatory policies, the sentencing response to breaches of protection orders may offer an opportunity for increasing women's safety.

The development of protection order legislation has grown, to some extent, out of frustration with the criminal justice system. Common to all States and Territories throughout Australia are civil schemes that provide protection orders to those who are at risk of further domestic violence. The protection order scheme has been embraced by both women victims and by police. In Queensland, in 2002-2003, there were over 12,000 protection orders made.[30] Protection orders provide a public statement to the respondent that certain behaviour will not be tolerated. However, the effectiveness of the order in stopping the unwanted behaviour relies on the threat of the consequences for breach.[31] In each jurisdiction, protection order legislation creates a criminal offence for the contravention or breach of a protection order.[32] The criminal burden of proof – "beyond reasonable doubt" – is applied to breach offences throughout all Australian jurisdictions. Easteal has suggested that the high threshold for proof also helps to explain why there are relatively low prosecution rates for breach of protection orders and for other criminal prosecutions of domestic violence.[33]

In some jurisdictions, penalties for breach are staggered depending on whether the breach is the first, second or a subsequent breach of the protection order. For example, in Queensland, the maximum penalty for the first or second offence of a breach of a domestic violence order is a one-year maximum period of imprisonment. For a third or subsequent breach offence, the penalty increases to a maximum period of two years imprisonment.[34] Throughout Australia, penalties for breach range from a six-month maximum period of imprisonment[35] up to a maximum of five years imprisonment in some States.[36] Generally, fine amounts are listed in the alternative to imprisonment.[37] Mandatory penalties exist in the Northern Territory: a person who is found guilty of a second or subsequent breach must be sentenced to a minimum of seven days imprisonment and the provision states a maximum penalty of six months imprisonment.[38]

Generally, sentencing for the breach of a protection order is discretionary but follows sentencing principles set out in jurisdiction specific sentencing legislation and the common law.[39] Usually the approach to sentencing is not specific to domestic violence circumstances; however, there are some exceptions. For example, in Tasmania, the court may consider as an "aggravating factor the fact that the offender knew, or was reckless as to whether, a child was present or on the premises at the time of

[30] Crime and Misconduct Commission, n 19, p 30.

[31] Crime and Misconduct Commission, n 19, p 66; NSWLRC, n 2 at [10.41]; see also *Pungatji v Woodcock* [2003] NTSC 31 at [12] where Riley J makes a comment to this effect.

[32] These orders have different names in each State and Territory.

[33] Easteal, n 7, p 113. See also Douglas and Godden, n 11, pp 39-40.

[34] *Domestic and Family Violence Protection Act 1989* (Qld), s 81(1)(a) and (b). In order to obtain the maximum of two years imprisonment, at least two of the prior breaches must have occurred in the past three years. See also *Family Violence Act 2004* (Tas), s 35. *Domestic Violence Act 1992* (NT), s 10 also provides a staggered regime.

[35] *Domestic Violence Act 1992* (NT), s 10.

[36] See *Family Violence Act 2004* (Tas), s 35 (for a fourth or subsequent offence); *Domestic Violence and Protection Orders Act 2001* (ACT), s 34 (five years maximum period of imprisonment is available for a first or subsequent offence). Note that *Restraining Orders Act 1997* (WA), s 61 provides a maximum penalty of 18 months imprisonment, regardless of whether the breach is a first or subsequent breach. Similarly, the *Domestic Violence Act 1994* (SA), s 15 and the *Crimes Act 1900* (NSW), s 562I provide for a maximum of two years imprisonment for first and subsequent breaches.

[37] However, see *Family Violence Act 2004* (Tas), s 35(1)(d): "in the case of a fourth or subsequent offence, to imprisonment for a term not exceeding 5 years."

[38] *Domestic Violence Act 1992* (NT), s 10(1A). Further to this, breaches of domestic violence orders are classified as regulatory offences in the Northern Territory. This means that the defence of mistake of fact is not available: *Domestic Violence Act 1992* (NT), s 10(1). For further discussion see Northern Territory Department of Justice, n 2, p 34.

[39] For example, in Queensland, the *Penalties and Sentences Act 1992* (Qld) will be the primary legislation used to guide sentencing. See also *Domestic Violence and Protection Orders Act 2001* (ACT), s 34(1), the note associated with this provision make specific reference to the *Crimes (Sentencing) Act 2005* (ACT).

the offence, or knew that the affected person was pregnant".[40] Further, Tasmanian legislation states that the results of any rehabilitation program assessment must be taken into account.[41] In the Australian Capital Territory, sentencing legislation directs that the court "must not draw any inference about the harm suffered by a victim from the fact that a victim impact statement is not given to the court".[42] Such provisions may be particularly relevant to many of the criminal prosecutions related to domestic violence.

Where domestic violence prosecutions, including breach prosecutions, do come before the higher courts, the judiciary has generally sent a clear message about the seriousness of the matter. For example, in *Lyon's case*, the judge emphasised the fact that a breach is inflicted in defiance of a court order, and found that a breach suggests "contempt for law and legal process".[43] In other cases, the court has warned against not taking the offence of breaching a protection order seriously.[44] Courts have agreed that neither the intimate,[45] nor the emotional nature of the relationship,[46] nor the continued attraction of the victim to the defendant[47] should reduce penalty. Other judges have emphasised that courts should "never tire of condemning domestic violence wherever it occurs".[48] Breaches of domestic violence orders will usually be heard in the Magistrates Court, so unless matters are appealed there is generally no record of sentencing comments. Nevertheless, magistrates' sentencing obviously takes place in light of higher court comment on the matter. In the next section, information gathered from a study of Magistrates Courts' responses to breach offences is presented.

PART TWO: THE QUEENSLAND STUDY

Introductory matters

There is currently very limited information available about how breaches of domestic violence matters are dealt with in courts in Queensland or indeed throughout Australia. There is only limited information emanating from the District and Supreme Courts of Queensland on sentencing appeals generally and, where breach matters are linked to serious offending, this has been discussed elsewhere.[49] However, the overwhelming majority of breach matters are dealt with in the Magistrates Courts and are therefore not reported. State government data collection from the Magistrates Courts in Queensland is very limited and not contextual.[50] The study sought to complete some of the gaps in available information by examining files related to prosecutions for breach of domestic violence orders held at the Brisbane, Beenleigh and Southport Magistrates Courts and associated statistics for the

[40] *Family Violence Act 2004* (Tas), s 13(a). A similar provision is found in the *Crimes (Sentencing) Act 2005* (ACT), s 33(1)(g); this provision states that the matter "must" be considered.

[41] *Family Violence Act 2004* (Tas), s 13(b).

[42] *Crimes (Sentencing) Act 2005* (ACT), s 53(1)(b).

[43] *R v Lyon* [2006] QCA 146 at [33] (Fryberg J). Similar comments made in *Gokel v Althouse* (2000) 10 NTLR 179 at [16] (Martin CJ); [2000] NTSC 99.

[44] *Head v Palmer* [2002] QDC 331 at [11] (McGill DCJ). See also *Tysoe v Kennedy* [2005] WASC 148 at [11] (McKechnie J); *Whyms v Rowe* [2004] ACTSC 18 at [4] (Connolly J); VLRC, n 2 at [10.73].

[45] *R v J* [2002] QCA 48 (Davies, McPherson, Williams JJA).

[46] *R v Millar* [2002] QCA 382 (de Jersey CJ, Helman and Jones JJ).

[47] *R v P* [2002] QCA 69 (McPherson and Williams JJA, Philippides J).

[48] *R v Stojkovic* [2002] VSC 210 (Bonjiorno J); see also *R v Melten* [2001] VSC 184 (Bonjiorno J); *R v Hudson* [2002] QCA 239 (Jerrard J) for similar comments.

[49] A number of these cases have previously been examined. See Douglas H, "Crime in the Intimate Sphere: Prosecutions of Intimate Partner Violence" (2003-2004) 7(2) *Newcastle Law Review* 74.

[50] Other researchers have noted the lack of research in this area: see, generally, the research of Kathy Mack and Sharyn Roach Anleu. See also the Office of Women's Policy (Qld), n 17, pp v-vii, which recommended research should be undertaken in this field.

six-month period from 1 July 2005 until 31 December 2005.[51] The study examined 646 court files altogether. Since the expansion of the Queensland domestic violence legislation in 2001, parties in a range of relationships can apply for protection.[52] The relationship between the parties was often not clear from the Magistrates Courts' files. Of those files where the relationship was known, 95% were matters between intimates.[53] Police statistics similarly show that over 94% of *Domestic and Family Violence Protection Act 1989* (Qld) matters are "spousal" matters[54] or intimate partner matters. In this study, it was overwhelmingly men (88%, n 571) who were prosecuted with breach of domestic violence orders; only 11.5% (n 74) of the defendants were women.[55]

In 15% (n 96) of the files examined, there was ultimately no evidence offered by the prosecution. In 2% (n 15) of cases, although there was no evidence to offer on the breach matter, there were other charges that went ahead. In a number of the cases where no evidence is ultimately offered by the prosecution, it is likely that the victim advised that that he or she would not give evidence for the prosecution.[56] In a small number of matters (1.5%, n 10), the breach charge was transmitted to a higher court for decision along with other more serious charges.[57]

According to government statistics, pleas of guilty account for approximately 74% of all criminal matters finalised by the courts in Queensland.[58] In prosecutions for breach of domestic violence order matters, 62% (n 373) of defendants pleaded guilty. However, in spite of an apparently greater reluctance to plead guilty to this type of offence, 89% (n 539) of defendants were ultimately found guilty. It might be suggested that the greater reluctance to plead guilty to this kind of charge can be attributed to a lack of awareness of the likely sentence discount for pleading guilty.[59] However, the majority of defendants in this study were represented (85%, n 553), so this is an unlikely explanation in most cases. It is possible that the higher level of not-guilty pleas compared to other types of charges may be related to the elevated emotion of many of the situations associated with breach charges, the belief that the other party is to blame or an unwillingness to accept criminal responsibility for this kind of matter. These possible reasons may have a significant impact on the magistrate's choice of sentence. Pursuant to the Queensland sentencing legislation, intensive correction orders, community service orders and probation orders all require that the defendant consent to the order.[60] Pleading not guilty is more likely to suggest that the defendant does not take responsibility for the action and may be more likely to result in lack of co-operation with sentence. This may reduce the availability of sentencing options for magistrates in some cases.

In a number of matters investigated, the magistrate found that one penalty should apply to more than one offence. However, in most matters where the defendant was found guilty, the magistrate

[51] These courts were chosen as they provide a solid picture of the approach of courts in a heavily populated region of the south-east corner of Queensland.

[52] *Domestic and Family Violence Protection Act 1989* (Qld), s 12B.

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

[54] Of 32,322 confirmed domestic violence matters that police attended in 2004-2005, 30,414 were spousal matters, or matters between intimate partners, either separated or together: Patching R, *System Responses: Police Responses*, Paper presented at The System Matters – Intensive Institute with Ed Gondolf (Brisbane, 14 November 2006).

[55] In a similar project examining applications for protection orders, it was found that approximately 20% of respondents were women. Perhaps this means that women are less likely to breach orders, or that many of the orders made against women in the first place may be vexatious. See Douglas and Godden, n 11, p 36.

[56] Crime and Misconduct Commission, n 19, p 15.

[57] See *Criminal Code 1899* (Qld), s 652. These charges included a charge of stalking, two matters of serious assault, breach of bail and breach of a suspended sentence.

[58] This figure relates to 2003-2004 year and is similar for Australia as a whole. See Queensland Government, Office of Economic and Statistical Research, *Information Brief: Criminal Courts Australia 2003-2004* (2005). The figure is higher when only Magistrates Courts matters are taken into account.

[59] See *Penalties and Sentences Act 1992* (Qld), s 13; *Cameron v The Queen* (2002) 209 CLR 339; 76 ALJR 382; 187 ALR 65.

[60] See *Penalties and Sentences Act 1992* (Qld), ss 106, 117, 96, respectively.

provided a discrete penalty for the breach charge. The remainder of the discussion in this section of the article focuses on those files (n 439) where the breach matter was sentenced discretely.

Low-level penalty

In 40% (n 176) of cases, no conviction was recorded. The justice has a broad discretion in relation to whether to record a conviction, but is required to take into account the nature of the offence, the character of the accused, and the impact that recording a conviction will have on the offender's social and economic well-being and chances of finding employment.[61] The courts have recognised that this course effectively gives the accused the right to conceal what has happened in a court.[62] Courts have, for instance, suggested that there is a public right to know about matters of a sexual nature involving children, thus supporting the recording of a conviction in such cases.[63] Generally, greater flexibility has been applied to domestic violence breach matters in Queensland on this point, in spite of the general recognition that such matters should be taken seriously.[64] It is not absolutely clear how relevant conviction is to recidivism in domestic violence matters. Some research suggests that conviction, along with arrest, appears to have a modest positive effect on recidivism.[65] Another study has found that conviction has at least a modest effect on reducing recidivism but is negated when certain penalties are applied together with the conviction.[66] However, Gondolf's research found that where perpetrator programs[67] were completed, conviction had little relevance to the likelihood of recidivism. Gondolf's research suggests that the type of approach taken overall is the critical question, rather than the issue of conviction per se. He found that the timing of the delivery of perpetrator programs was important. Men were less likely to re-offend when they were placed in perpetrator programs within weeks of arrest as opposed to waiting for conviction, which may be several months post-arrest.[68]

In 7% of matters (n 32), defendants received either no penalty aside from conviction or were placed on a recognisance to be of good behaviour for a specific period of time. This is a relatively small number within the sample size. There was often no information about the type of behaviour that was the subject of the breach in the magistrate's court files.[69] For example, it may have involved non-violent breaches such as telephoning. It can be assumed that the relevant magistrate found that the penalty of conviction or recognisance was sufficient in the particular circumstances. However, submissions to the Victorian Law Reform Commission noted concern that minor breaches are not taken sufficiently seriously, when such a breach may cause fear and distress to the aggrieved and cause negative consequences.[70] Placing the defendant on a recognisance to be of good behaviour does not address the violence and has a minimal impact on many defendants. Some victims have expressed their frustration at this approach.[71]

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[61] *Penalties and Sentences Act 1992* (Qld), s 12.

[62] *R v Briese; Ex parte Attorney-General* (1997) 92 A Crim R 75; [1998] 1 Qd R 487.

[63] *R v Gallagher; Ex parte Attorney-General* (1997) 98 A Crim R 513; [1999] 1 Qd R 200.

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

[65] Maxwell C, Garner JH and Fagan JA, *The Effects of Arrest on Intimate Partner Violence: New Evidence for the Spouse Assault Replication Program* (National Institute of Justice, Washington, 2001).

[66] For example, conviction with a fine or suspended sentence may reduce effectiveness. See Ventura L and Davis G, "Domestic Violence: Court Case Conviction and Recidivism" (2005) 11(2) *Violence Against Women* 255 at 272, 274.

[67] Perpetrator programs are also known as "men's change programs" and "men's programs" among other names. There are various models used. See the discussion in Dobash RE, Dobash RP, Cavanagh K and Lewis R, *Changing Violent Men* (Sage, 2000) pp 48-50.

[68] Gondolf EW, "Evaluating Batterer Programs: A Difficult Task Showing Some Effects and Implications" (2004) 9 *Aggression and Violent Behaviour* 605 at 619.

[69] This information is only available from police files, which the author has not been able to examine.

[70] VLRC, n 2 at [10.73], [10.75].

[71] Easteal, n 7, p 113.

Fines

The study shows that 61% (n 270) of matters resulted in fines. This is a high figure compared to other States.[72] In most of the matters (n 206) where fines were ordered, the fines were less than $500. Fines are generally considered to be a lower order penalty and are the most common form of penalty throughout Australia.[73] There are, however, potential problems associated with this form of penalty in the context of domestic violence. When deciding to impose a fine, justices in Queensland are required to consider the defendant's ability to pay.[74] However, given the frequently ongoing connections between victim and defendant in the domestic violence context, there is a risk that it will actually be the victim of the breach who will pay the fine from the family income.[75] Alternatively there is a risk that the fine will be paid from money that should be paid as child support. The imposition of fines could provide an opportunity for further intimidation, harassment or actual violence towards the victim where the defendant tries to obtain money from the victim in order to pay the fine. Research has recognised that the imposition of fines is inappropriate in matters of breach of domestic violence orders because of these kinds of risks.[76]

Fines are unlikely to have any useful effect on offender behaviour in terms of deterrence, rehabilitation or community protection. Further, given the relatively low order of most fines, it is questionable that fines are useful as a general deterrent. Fines are not considered appropriate for denouncing a crime.[77] In the domestic violence context, one study has found that fines were the most likely penalty to be associated with recidivism.[78] Although some may argue that fines are appropriate for situations where the defendant is before the court for their first offence of breaching a protection order, in 19% (n 48) of cases where fines were ordered, the defendant had at least one prior conviction for breaching a protection order. In fact, in some of these cases (n 15), the defendant had two or more prior convictions for breaching protection orders. Sometimes the fines ordered for third or subsequent breaches were also under $500 (n 12). Given this approach, it is perhaps not surprising that some victims have suggested that their abusers "pay the court to hit them".[79] This approach suggests a magisterial culture of minimising or trivialising the seriousness of breaches of domestic violence orders. The approach also suggests a lack of understanding of the context of domestic violence.

Imprisonment and suspended imprisonment

Imprisonment must be considered as a last resort in Queensland, unless the offence involves violence or physical harm.[80] In this study, 4% (n 22) of offenders were imprisoned.[81] In all the matters examined, the period of imprisonment ordered was less than six months. Research shows that the likelihood of re-offending increases once the person has been incarcerated.[82] Mackenzie's interviews with Queensland judges highlighted their views that generally jails do not rehabilitate and that imprisonment strips people of responsibility when ideally offenders should start to take some

[72] Of these 254 cases, 16 defendants were also placed on a recognisance to be of good behaviour. This can be compared to 30% of matters resulting in fines in Victoria for the same offence, see VLRC, n 2 at [10.70].

[73] Findlay M, Odgers S and Yeo S, *Australian Criminal Justice* (Oxford University Press, 2005) p 238; *Penalties and Sentences Act 1992* (Qld), Pt 4.

[74] *Penalties and Sentences Act 1992* (Qld), s 48.

[75] See NSWLRC, n 2 at [10.44] where this concern was also noted.

[76] Hoyle, n 19, p 193.

[77] See Wilson W, *Central Issues in Criminal Theory* (Hart, 2002) p 74.

[78] Ventura and Davis, n 66 at 271.

[79] 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.

[80] *Penalties and Sentences Act 1992* (Qld), ss 9(2)(a)(i), 9(3), Pt 9.

[81] Six others were also imprisoned but are not included in this figure because they were also placed on probation (to operate post-release). These matters are included with the probation figures.

[82] Wilson, n 77, p 53.

responsibility for their lives.[83] This latter point is perhaps particularly pertinent in cases involving domestic violence. Imprisonment is extremely costly and works primarily as incapacitation. Lacey has emphasised the disruptive effect of imprisonment on employment and relationships, which[84] she suggests create longer-term effects that may run counter to public protection (and rehabilitation). The concerns are particularly relevant in the context of domestic violence matters where family and financial connections are more likely to continue. Another particular concern of the prison setting is that abusers are likely to associate with other abusers in an unsupervised and unstructured way. Mazzerole's research has found that peer support is an important ingredient for the continuation of domestic violence behaviours.[85] Some research has also indicated that jail time and the length of jail time does not appear to have any impact on recidivism rates.[86] Thus, increasing the application or length of jail terms would not appear to have any impact on reducing domestic violence. Imprisonment clearly denounces domestic violence and provides limited safety for the short period that the perpetrator is in custody, but its advantages appear limited to those two points only. Although, for the worst offenders, particularly those that have not responded to other penalties, imprisonment may be the ultimate and inevitable end point of penalty, it is not readily applied to breach offenders. Presumably in situations where the breach is particularly violent, a prosecution pursuant to other criminal provisions such as assault will be preferred.[87]

A further 32 (7%) defendants were placed on suspended sentences.[88] This type of penalty has been associated with higher rates of recidivism than other forms of penalty.[89]

Intermediate penalties

In 31% (n 138) of matters, offenders received what can be described as intermediate penalties. This group includes intensive correction orders,[90] community service orders,[91] and probation orders.[92] Although intensive correction orders are not usually described in this way, they are included here because of their potential to operate as a rehabilitative penalty. Both community service orders and probation orders can only be made for an offence punishable by imprisonment.[93] Given that the breach offence in Queensland is punishable by imprisonment, this requirement does not create any impediment for magistrates to apply these penalties in breach cases. Of the intermediate penalties, probation was most common outcome (n 61, 13%; and 44% of intermediate penalties). Probation requires that the person be released under supervision of the corrective services for a period of time. These orders require that the person report regularly, take part in counselling, and comply with other directions, which may include submitting to medical or psychological treatment.[94] As part of a probation order, magistrates can require offenders to attend a perpetrator program.[95] There is a court-ordered, 12-week program available at Southport run in partnership between the Domestic Violence Prevention Centre and the office of Community Corrections in Southport. Most men in the

[83] MacKenzie G, *How Judges Sentence* (Federation Press, 2005) pp 65-67.

[84] Lacey N, "Principles, Politics and Criminal Justice" in Zedner L and Ashworth A (eds), *The Criminological Foundations of Penal Policy: Essays in Honour of Roger Hood* (Oxford University Press, 2003) p 96.

[85] Mazzerole P, Presentation to Criminology Department (Griffith University, 3 October 2005).

[86] Ventura and Davis, n 66 at 271.

[87] See generally Douglas, n 49, for a discussion of sentencing in these matters.

[88] *Penalties and Sentences Act 1992* (Qld), Pt 8.

[89] See Venture and Davis, n 66, pp 255, 272 and 274.

[90] See *Penalties and Sentences Act 1992* (Qld), Pt 6.

[91] See *Penalties and Sentences Act 1992* (Qld), Pt 5.

[92] See *Penalties and Sentences Act 1992* (Qld), Pt 7.

[93] *Penalties and Sentences Act 1992* (Qld), ss 91, 101.

[94] Intensive Correction Orders allow the same conditions to placed on the offender, see *Penalties and Sentences Act 1992* (Qld), s 114. These orders are only available where the justice is considering a period of imprisonment of one year or less: see *Penalties and Sentences Act 1992* (Qld), s 112.

[95] See *Penalties and Sentences Act 1992* (Qld), s 93(1)(d).

program are there as a result of court-mandated probation orders and there is often space in the program.[96] The Beenleigh Magistrates Court is closely associated with the *Move* program[97] – a 16-week program run by Youth and Family Services. The court refers some participants for assessment for this program pursuant to probation orders, and others voluntarily attend. Both of these programs are free of charge. The situation at these two courts can be contrasted with the position at the Brisbane Magistrates Court. There is no free program associated with the Brisbane Magistrates Court. Not surprisingly, those defendants found guilty of breaching a protection order are significantly less likely to be placed on a probation order when their matter is heard at the Brisbane Magistrates Court. Offenders dealt with in that court are much more likely to be placed on a recognisance to be of good behaviour.[98] Clearly, magistrates are sentencing perpetrators in consideration of the context of available services. These figures suggest that when magistrates do have the alternative of being able to refer offenders for assessment for attendance at perpetrator programs, coupled with probation, they are more likely to choose this option.

Dobash and Dobash suggest that men who successfully complete perpetrator programs are more likely to cease violent behaviour.[99] As noted earlier, Gondolf's research suggests that the earlier the person attends a perpetrator program, the more likely he (or she) will cease offending.[100] In certain circumstances, magistrates may be concerned that the penalty should be of a lower order, considering the type of breach and the lack of prior convictions of a particular defendant. In those circumstances, it may be appropriate to recommend programs as part of bail conditions.[101] Although some research is less certain of the value or effect of such programs,[102] there is sufficient evidence to suggest that this is an approach worth persisting with at this stage. Ideally, probation orders should be the penalty of choice for breach offences where there is a perpetrator program available. Such rehabilitation-oriented sentences may also include intensive correction orders. As noted above, in all of the imprisonment cases examined, periods of imprisonment of less than six months were ordered. This would allow consideration of an intensive correction order. These kinds of penalties allow for more significant emphasis to be placed on the offender's rehabilitation and, arguably, on the victim's long-term safety.

Prior convictions and drug use

In over one quarter (27%, n118) of the files examined, defendants had prior convictions for breaching a protection order. Other research has noted the correlation between arrest on subsequent offence of a breach of a protection order and the existence of prior convictions for breach.[103] Not surprisingly, once police have noticed a person, there is more chance they will be noticed in relation to subsequent offences.[104]

Also relevant to the question of penalty may be the relationship of drug use to the breach matter. In 24% (n 103) of matters, defendants had prior convictions for drug related matters.

[96] Discussion with Betty Taylor, immediate past director Southport Domestic Violence Service (20 November 2006). This program is currently being independently evaluated by Dr Patrick O'Leary of the University of South Australia.

[97] The title of the program is an acronym for "Men Overcoming Violence for Equity".

[98] Thirty-one out of 115 (26%) of the defendants found guilty of breaching a protection order at Beenleigh Magistrates Court were placed on probation; 13% (23 of 168) of Southport Magistrates Court matters; and only 4% (7 of 153) of those matters were finalised at the Brisbane Magistrates Court. Of the defendants found guilty of breaching a protection order at Beenleigh Magistrates Court, 0.8% (1 out of 115) were placed on recognisance to be of good behaviour, 5% (10 of 168) of Southport Magistrates Court matters and 16% (24 of 153) of those matters finalised at the Brisbane Magistrates Court.

[99] Dobash and Dobash, n 12; Gondolf EW, *Batterer Intervention Systems: Issues, Outcomes and Recommendations* (Sage, 2002).

[100] Gondolf, n 68 at 619.

[101] *Bail Act 1980* (Qld), s 16; note Gondolf, n 68 at 619.

[102] VLRC, n 2 at [10.84].

[103] Dobash RE and Dobash RP "Evaluating Criminal Justice Interventions for Domestic Violence" (2000) 46(2) *Crime and Delinquency* 252 at 264.

[104] The figures may also suggest that victims who have a history of commitment to prosecution are more likely to be supported. There is insufficient information here to support this idea convincingly.

In a further 12 matters (where there were no prior convictions related to drugs), the sentencing magistrate recommended drug or alcohol rehabilitation counselling as part of a sentence. Such a recommendation would usually be a response to plea material provided to the court. While the perpetrator should still be held responsible for the breach regardless of the role of alcohol or drug use,[105] the strong relationship between drug use and domestic violence has been noted elsewhere.[106] Indeed, some research has found that up to 92% of domestic violence offenders had used alcohol or drugs on the day of the assault.[107] These figures suggest that it is particularly important in breach cases that the possibility of drug or alcohol abuse should be explored at the sentencing hearing. Other research has recommended that problems with domestic violence and problems with drug abuse at least should be dealt with concurrently.[108] Probation orders would enable this to occur.

Summary

The results of the Queensland study show that in 40% of the cases examined, a conviction was not recorded. This figure suggests that the offence of breaching a protection order per se is not viewed as a serious matter by many magistrates. The study also shows that fines are the preferred penalty for breach of protection order charges. It appears that magistrates often consider that fines are appropriate in matters of first, second and even subsequent breaches of protection order charges. Considering the research discussed above, this approach may suggest that many magistrates lack a sufficient understanding of the context of domestic violence. Another explanation for some of the matters where fines were imposed may be that magistrates feel constrained by sentencing legislation and precedent. The magistrates at Beenleigh and Southport Magistrates Courts were more willing than those at the Brisbane Magistrates Court to refer offenders to perpetrator programs pursuant to a probation order. It appears that the availability of a free court-associated perpetrator program influences magistrates' choice of penalty. These issues are discussed more generally below.

PART THREE: APPROACHING SENTENCING IN THE CONTEXT OF DOMESTIC VIOLENCE

In Queensland, as in other Australian jurisdictions, sentencing is governed by specific legislation.[109] The sentencing legislation in Queensland provides five potential purposes of sentencing that may be considered in any given case. These are just punishment, rehabilitation, deterrence, denunciation and community protection.[110] These purposes of punishment are reflected throughout Australia.[111] They have been described as "guideposts" to the sentencing justice that often point in different directions.[112] This is particularly apparent in the context of domestic violence. For example, Easteal has emphasised that general deterrence is an important purpose of sentencing in domestic violence cases.[113] This view is reflected in a number of judicial comments.[114] Easteal argues that a sentencing approach that places a minimal, or non-existent, deterrent value in having a protection order in place may decrease the

[105] See the comments of Higgins J in *R v Bell* [2005] ACTSC 123 at [31].

[106] Easton C, Swan S and Sinha R, "Motivation to Change: Substance Use Among Offenders of Domestic Violence" (2000) 19(1) *Journal of Substance Abuse Treatment* 1.

[107] Lightman L and Byrne F, "Addressing the Co-occurrence of Domestic Violence and Substance Abuse" (2005) 6 *Journal of the Center for Families, Children and the Courts* 53 at 54. Substance abuse is an important contextual factor in abuse: see Dobash RE, Dobash RP, Cavanagh K and Lewis R, "Not Just an Ordinary Killer – Just An Ordinary Guy" (2004) 10(6) *Violence Against Women* 577 at 582.

[108] Lightman and Byrne, n 107, p 69.

[109] Findlay et al, n 73, pp 254-256; in Queensland, the *Penalties and Sentences Act 1992* (Qld).

[110] *Penalties and Sentences Act 1992* (Qld), s 9(1).

[111] Findlay et al, n 73, p 226.

[112] *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 472; 33 A Crim R 230.

[113] Easteal, n 7, p 113.

[114] *R v Rowe* (1996) 89 A Crim R 467 (Hunt CJ, Smart and Ireland JJ); *R v Glen* (unreported, NSWCCA, Simpson J, 19 December 1994); *R v Monks* [2001] VSC 516 at [30] (Coldrey J); *R v Bell* [2005] ACTSC 123 at [30] (Higgins J).

willingness of police to actually charge a breach in the first place.[115] Where a magistrate takes the view that it is important to send a strong message to the community and to the offender that domestic violence is not tolerated, it is the purposes of general and specific deterrence and denunciation that are the essential considerations. Where this approach is taken, it may be that sentences of a fine or imprisonment are considered the most appropriate response. However, this approach may lose sight of the immediate concerns of domestic violence legislation, which is to ensure the safety of the victim.[116] Given the particular context of domestic violence, the community has an interest in the rehabilitation of the offender and the long-term protection of the victim, but these goals will not usually be fulfilled by the imposition of a jail sentence or a fine. Increasingly, researchers and those working with victims of domestic violence in the community are supporting an approach to sentencing which better incorporates and emphasises the sentencing goals of rehabilitation and community safety. This support is demonstrated in part by the increasing engagement of women's services in the delivery of perpetrator programs.[117]

Sentencing is a highly discretionary task, particularly so in Queensland where sentencing grids or guideline judgments are not used.[118] This sentencing discretion is jealously guarded.[119] Each offender comes before the court with a particular background and set of circumstances that should be able to be taken into account by the sentencer.[120] The sentencing discretion is limited, to some extent, by precedent, maximum penalty, and the background of the offender or offence circumstances. Although Queensland legislation does not explicitly set out a hierarchy of sentencing options, a hierarchy can be inferred from the structure of the legislation.[121] Sentences range from the least serious penalties, such as absolute discharges and recognisances,[122] to penalties such as fines,[123] then intermediate orders such as probation[124] and, finally, to the most serious penalties of imprisonment and indefinite detention.[125] The sentencing hierarchy also limits discretion. For example, as a result of the sentencing hierarchy, it may be difficult to justify placing a first or second breach of protection order offender on a probation order. This may explain why the imposition of a fine is such a common response to first and second offence breaches dealt with in the Magistrates Courts. The structure of the sentencing legislation fosters a "one size fits all" approach with respect to responding to offending.[126] Moving up the sentencing hierarchy with each subsequent offence of the same type may make sense in many cases but in domestic violence matters this approach is not ideal.

It is likely that traditional views of criminal offending inform sentence response more than considerations of the particular context of domestic violence inherent in most breach matters. The background to criminal prosecution is usually that it responds to a one-off event of offending where the parties do not have an on-going relationship. The criminal justice process is then translated as a dispute between the State and the individual offender. This approach has marginalised victims and communities from the criminal process, providing them with no clear role. This marginalisation will be particularly pronounced where the victim and the offender have an on-going relationship coupled

[115] Easteal, n 7, p 113.

[116] Mills, n 24 at 555.

[117] For example, the Southport Domestic Violence Service and Annie North Inc (a women's refuge in the Ballarat/Campaspie region) are involved with the delivery of perpetrator programs in their regions.

[118] Zdenkowski G, "Sentencing Trends: Past, Present and Prospective" in Chappell D and Wilson P (eds), *Crime and the Criminal Justice System in Australia: 2000 and Beyond* (Butterworths, 2000) pp 173-180.

[119] MacKenzie, n 83, pp 41-46.

[120] *Penalties and Sentences Act 1992* (Qld), s 9(2).

[121] Mackenzie, n 83, p 64. (The author is grateful for conversations with magistrate, John Costanzo, on this point.)

[122] *Penalties and Sentences Act 1992* (Qld), Pt 3, Div 1.

[123] *Penalties and Sentences Act 1992* (Qld), Pt 4.

[124] *Penalties and Sentences Act 1992* (Qld), Pt 5, Div 1.

[125] *Penalties and Sentences Act 1992* (Qld), Pts 9-10.

[126] See Mills, n 24.

with a history of violence. Victims of domestic violence, police, and domestic violence workers have been frustrated by the apparent failure of the criminal law and there has been debate about whether restorative justice might provide an appropriate alternative approach.[127] Young and Hoyle suggest that the central concern of restorative justice approaches is to repair harm, but that the term also encompasses reduction in the risk of re-offending, lessening the fear of crime and strengthening the community.[128] A sentencing approach that aspires to these outcomes should ensure that both the process and the outcome are more victim-responsive and also more likely to strengthen communities in terms of reducing the likelihood of re-offending. Young and Hoyle point out that this kind of approach can be used in conjunction with the criminal justice system.[129] Daly and Curtis-Frawley challenge us to move beyond the "dualistic debate" about criminal justice[130] that pits the criminal justice system against the restorative justice approach. In a similar vein, regarding criminal justice, Lacey advocates a general shift from an individualistic approach to a more communitarian approach.[131] She argues that this shift also has important implications for the form of punishment.[132] An approach to sentencing breaches of protection order offences that reflects restorative justice and communitarian principles is appealing. It allows for the external or public validation[133] that many women seek from the criminalisation of domestic violence, avoids the re-privatisation of the violence, and maintains a central role for the State in the response.[134] At the same time, the sentencing purposes can be concentrated on rehabilitation and community protection.

Although sentencing legislation does not point to restoration as a purpose of punishment, judges have given its underlying aims consideration when sentencing, although generally this has been in cases concerning children.[135] In Mackenzie's research, many judges discussed the notion of restorative justice. Her interviews with Queensland judges demonstrate that, in spite of the restorative aim not being explicitly reflected in the sentencing legislation in Queensland, many judges believed that it was important to consider victim's interests and to be compassionate to victims. However, they also expressed concerns about the role of the victim in sentence and the high expectations of victims.[136] Mackenzie's interviews suggest that there is already at least a tentative acceptance of a role for restorative justice by some Queensland judges. While a communitarian or a restorative justice approach to sentencing may be appropriate for many types of criminal offending, it seems particularly appropriate in the context of domestic violence offending. As noted above, domestic violence crimes are not like all other crimes. Domestic violence does not reflect the individualistic paradigm where the offence is a one-off instance that can be abstracted from the context.[137] Although many parties may no

[127] See generally essays included in Strang H and Braithwaite J (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002).

[128] Young R and Hoyle C, "Restorative Justice and Punishment" in McConville S (ed), *The Use of Punishment* (Willan Publishing, 2003) p 201.

[129] Young and Hoyle, n 128, p 201; Curtis-Frawley and Daly, n 16 at 605.

[130] Curtis-Frawley and Daly, n 16 at 632.

[131] Lacey N, "Penal Theory and Penal Practice: A Communitarian Approach" in McConville S (ed), *The Use of Punishment* (Willan Publishing, 2003) pp 186-188.

[132] Lacey, n 131, p 187.

[133] Zedner L, "Reparation and Retribution: Are They Reconcilable?" (1994) 57 *Modern Law Review* 228 at 240.

[134] These risks are discussed in Stubbs J, "Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice" in Strang H and Braithwaite J (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002). See also Hudson B, "Restorative Justice and Gendered Violence" (2002) 42(3) *The British Journal of Criminology* 616 at 631.

[135] See, eg *R v Tran; Ex parte Attorney-General (Qld)* (2002) 128 A Crim R 1; [2002] QCA 21.

[136] Mackenzie, n 83, pp 127-129.

[137] Without embracing restorative justice, Ashworth notes the need to locate criminal justice responses within the wider social structure: Ashworth A, "Responsibilities, Rights and Restorative Justice" (2002) 42(3) *The British Journal of Criminology* 578 at 580.

longer live together post prosecution,[138] many separated parties will often have ongoing negotiations about their children, extended families and property. Some parties will not separate until years after the abuse, or not at all, and separated parties may re-unite. Whatever the relationship outcomes, the sentencing response in a breach prosecution offers an opportunity to reduce the risk of re-offending and increase the victim's safety. Probation orders coupled with directions to complete perpetrator programs are more likely to produce these effects than fines.

CONCLUSION

The sentencing point of criminal justice provides an opportunity for violent behaviours to be addressed and this opportunity should be seized. This study suggests that magistrates in at least three Queensland Magistrates Courts prefer fines above all other sentencing dispositions in relation to breach of protection order offences. Protection to women and children should be the paramount consideration in sentencing these kinds of offences. Frequently, this may be best achieved with a sentencing focus on rehabilitation. Research suggests that it is not the "severity" of the punishment that reduces recidivism in domestic violence cases;[139] the focus of justices should be on the appropriate type of penalty. There is encouraging research now available about the positive impact of perpetrator programs on reducing domestic violence recidivism.[140] Ideally, breach offenders should be assessed for attendance at a perpetrator program and, if accepted, should be placed on probation and ordered to attend the program unless there is a good reason not to proceed in this way.[141] Justices should be required to state why such an approach is not considered appropriate in the particular circumstances. In order to deal with the perceived hierarchy of sentences, it would be necessary to amend the sentencing legislation or domestic violence legislation in Queensland to ensure that this approach is clearly available for first time breach offenders and for those breaches where the magistrate considers that the breach is minor. Such an approach also has resource implications that would need to be addressed.[142]

Sentencing responses are potentially important but represent only one aspect of an integrated response that includes health, education and social responses generally.[143] The probation/perpetrator program approach to sentencing is more compatible with an integrated approach to domestic violence.[144] The continued safety of women and children should be the central priority of all responses to domestic violence.

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[138] Stark points to research that suggest that the majority of men arrested for domestic violence were not living with their partner at the time of the assault: Stark E, "Insults, Injury and Injustice: Rethinking State Intervention in Domestic Violence Cases" (2004) 10(11) *Violence Against Women* 1302 at 1314.

[139] Davis RC, Smith BE and Nickels LB, "The Deterrent Effect of prosecuting Domestic Violence Misdemeanours" (1998) 44 *Crime and Delinquency* 434 at 441; Lacey, n 84, p 94.

[140] See Dobash and Dobash, n 103, p 266; Holder R, *Domestic and Family Violence: Criminal Justice Interventions*, Issues Paper 3 (Australian Domestic and Family Violence Clearinghouse, 2001).

[141] Good reasons may include, eg that the person has previously and unsuccessfully attempted to complete or already completed such programs, that the defendant may be a risk to others in the program, that programs are not available or where the offence is so serious that a higher penalty should be imposed.

[142] For example, fee perpetrator programs would need to be more readily available than they are currently.

[143] See Taft A and Shakespeare J, "Managing the Whole Family when Women are Abused by Intimate Partners: Challenges for Health Professionals" in Roberts G, Hegarty K and Feder G, *Intimate Partner Abuse and Health Professionals* (Churchill Livingstone, 2006) p 147.

[144] See the discussion of such an approach in Holder R, "The Emperor's New Clothes: Court and Justice Initiatives to Address Family Violence" (2006) 16 JJA 30.

