

## **Session - Challenging Our Traditional Ways of Thinking – Are There Other Ways of Promoting Safety For Women And Their Children**

### ***The Decriminalisation of Domestic Violence – Proving the Violence and Changing Responses***

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In 2001 – 2002 Lee Godden and I examined the interaction of the Queensland Criminal Code, 1899 (QCC) with the Queensland Domestic Violence legislation, Domestic Violence (Family Protection) Act, 1989 (DVA) and found that domestic violence between intimate partners is rarely prosecuted as a criminal offence in Queensland.<sup>1</sup> This suggests that domestic violence continues to be perceived as a private, social issue rather than as a public matter and a concern for the criminal law. The Domestic Violence (Family Protection) Act 1989 (Qld) has essentially trumped the operation of the Criminal Code (Qld). We submit that this approach leaves many violent perpetrators, who are usually men, subject to minimal public sanctions for their inappropriate and often dangerous behaviour.

#### **What Can Criminal Law Offer?**

The objects and effects of the QCC and DVA are completely different.<sup>2</sup> The DVA primarily focuses on the provision of protection orders to persons exposed to, or potentially exposed to, violence in a domestic setting.<sup>3</sup> By contrast, the QCC, as a criminal statute, focuses on the public accountability of the offender and the punishment and deterrence of those who perpetrate violence to persons and property.

“Criminal justice performs a function that is not only instrumental in enforcing legal and social norms, but is highly symbolic. Criminal law is a powerful agency of public disapproval and reprobation.”<sup>4</sup> The relatively limited use of the QCC in situations of

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<sup>1</sup> See H Douglas & L Godden “The Decriminalisation of Domestic Violence: Examining the Interaction Between the Criminal Law and Domestic Violence.” (2003) 27 (1) Criminal Law Journal 32 also: <http://www.gu.edu.au/school/law/slr/reports.html>.

<sup>2</sup> The objects of the QCC were to consolidate the criminal law in Queensland, but more generally the criminal law is involved in the use of penal sanctions to “enforce the prohibitions which the state imposes on conduct,” see Colvin et al, Criminal Law in Queensland and Western Australia (Butterworths, Sydney, 2001) at 3. The DVA short title is: “An Act to provide for protection to a person against violence committed or threatened by someone else...”

<sup>3</sup> See Domestic Violence (Family Protection) Act 1989 (Qld), s17.

<sup>4</sup> R Holder, “Domestic and Family Violence: Criminal Justice Interventions” Issues Paper No. 3. 1 (Australian Domestic and Family Violence Clearing House, Sydney, 2001), at 2. See M Goode, “Codification of Australian Criminal Law” (1992) 16 Criminal Law Journal 5 at 9, for a discussion of the messages implied by leaving issues outside of a criminal code.

domestic violence was a concern identified by the Queensland Taskforce on Women and the Criminal Code.<sup>5</sup> The report highlighted the need for more substantial investigation.,<sup>6</sup> In theory, and in policy rhetoric, domestic violence legislation was historically perceived to be an addition<sup>7</sup> to the arsenal available to deal with domestic violence, not as a replacement to the criminal law.<sup>8</sup> The bypassing of the criminal law was not intended by legislators to be a result of the introduction of domestic violence legislation.<sup>9</sup> The need for the DVA to act in conjunction with an effective criminal law regime is underscored in that, according to Queensland Police Service Operational Statistics, in Queensland in the years 1994 – 1997, 26.8 % of women victims of unlawful killing had a current Protection Order against the person who killed them.<sup>10</sup> 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.<sup>11</sup>

### **The Research:**

This research inspected all domestic violence files in the Brisbane registry of the Magistrates Court, Queensland for the year 2001. As the central court for the Brisbane metropolitan area, there is a high volume of matters related to domestic violence processed in this court. We identified 694 files which related to applications for protection orders under the Domestic Violence (Family Protection) Act 1989 (Qld) (DVA).<sup>12</sup>

These files were examined in detail and two particularly important points arose. In the 800 files related to domestic violence matters, where the gender of the parties was known, 82% (658) of those in need of protection were women. 694 files involved applications for Domestic Violence protection Orders. Of these files, only seven (1%) were identified in relation to possible investigation for prosecution of criminal offences under the Criminal Code (Qld) (QCC). Three (0.4%) of these files resulted in a prosecution for a criminal matter under the QCC.

### **Gender of applicants:**

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<sup>5</sup> *Office of Women's Policy, Report of the Taskforce on Women and the Criminal Code, Dept of Justice & Attorney General, Queensland, 2000*

<sup>6</sup> *Taskforce at vi.*

<sup>7</sup> *ALRC # 30, Domestic Violence (AGPS, Canberra, 1986) at para 20; Women's Policy Co-ordination Unit, "Criminal Assault in the Home: Social and Legal Responses to Domestic Violence", Discussion Paper (Dept of Premier & Cabinet, Victoria, 1985), at 103, proposals. Such views continue to be cited see "Legal Protection Against Family Violence: Abuse by Informal Carers and Abuse within dating Relationships" Consultation paper (Dept of Families, Youth and Community Care, Brisbane, 1999)*

<sup>8</sup> *Theoretically modern provisions in DV legislation reflect this attitude; see Domestic Violence (Family Protection) Act 1989 (Qld), s30; note also discussion paper "Model Domestic Violence Laws" (National Domestic Violence Summit, prepared by Cmth, State and Territory officials, 1997) at 60-61.*

<sup>9</sup> *Second Reading Speech, Domestic Violence and Family Protection Bill 1989 (Qld).*

<sup>10</sup> *See "Fact Sheet", Domestic Violence Resource Centre, Queensland, 2001.*

<sup>11</sup> *J Stubbs, "Domestic Violence: The legal response" University of New South Wales Domestic Violence Committee, "Local Communities Conference: Paper and Proceedings" (NSW Domestic Violence Committee, Parramatta, 1990) at 47. See also Women's Policy Co-ordination Unit, "Criminal Assault in the Home: Social and Legal Responses to Domestic Violence", Discussion Paper (Dept of Premier and Cabinet, Victoria, 1985) at 87. See also, S Hunter, "A Report on the Northern Territory: Domestic Violence Phone in 1996" Occasional Paper # 5 (NT Govt Domestic Violence Strategy, Office of Women's Policy, 1996) at 15.*

<sup>12</sup> *We also examined breach files.*

As would be expected, for the majority of applications, the AS was female and the RS was male. In 542 (78.1%) applications the ASs were female and in 138 (19.9%) applications the ASs were male. In 14 (2%) of the applications gender information about the AS was not available.

Further, and again as the authors expected, for the majority of applications RSs were male. In 132 (19%) applications RSs were female and in 551 (79.4%) applications RSs were male. In 11 (1.6%) applications the data was unavailable.

These figures show that DVOs are primarily being applied for by women who believe they are in danger of being subjected to (further) domestic violence by a male RS.<sup>13</sup> The data from this research supports the understanding of domestic violence as a gendered issue and as such, efforts to promote formal equality in the law relating to domestic violence are clearly inappropriate and may be misguided.

### **History of Violence and Basis of DVO Application**

As noted, our research found a very low number of criminal prosecutions associated with applications for DVOs. On one level, the relatively low level of criminal prosecution might suggest that there are few incidents of violence that might give rise to criminal charges. However, data obtained from the Brisbane Magistrates court files in relation to applications for DVOs directly undercuts such an assumption.

In completing the application for a DVO, 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, the history of violence between the parties to the application and the immediate factual basis of the application were categorised into various types of personal violence and property damage according to possible criminal law offences. The table below displays each of these categories along with the percentage of all applications involving each particular category of violence. The section of the QCC that corresponds to a possible offence in the circumstances has also been noted.

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

In 158 (22.7%) matters, weapons, including knives, household instruments and guns, were used by the RS. This factor would tend to aggravate any potential criminal charge.<sup>14</sup> In 17 (2.4%) applications, RSs allegedly used guns. In all of these matters the RS was male. In 13 (1.9%) applications the AS complained that she was assaulted while she was pregnant.<sup>15</sup> The history of violence that was detailed in the applications would support serious allegations about potentially criminal activity. Often the allegations included visible injury, such as broken limbs, cuts and bruises, and property damage observed by police. However these matters were rarely investigated and even more rarely charged.

Some reasons for the lack of prosecution may appear in the history of violence. For example, in 132 (19%) matters, the AS complained that the RS was drunk or drugged and in 43 (6.2%), that the RS suffered from a mental illness.<sup>16</sup> These two issues may mean that prosecution is more difficult.

### **Were charges investigated?**

In seven of the court files relating to applications for DVOs there were notes on the file that recorded a police investigation into the possibility of laying criminal charges. One investigation related to the behaviour of a female RS while the other six matters investigated behaviour of male RSs.

In relation to why investigations did not lead to charges, only one matter provided a reason. On this file<sup>17</sup> there was a police affidavit to the effect that the female AS did not support the male respondent being criminally charged. The facts reported in the 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 respondent spouse was sitting on the front steps of the house. The AS was then taken to a hospital where police spoke to her about pursuing criminal charges. In all remaining cases the reasons were not noted.

In six matters in which the male RS had prior convictions for violence, criminal charges were not investigated or laid.

### **Were charges laid?**

In only three matters relating to applications for DVOs were criminal charges actually laid. One female RS was charged, and 2 male RS were charged. Given the relatively low level of criminal prosecution it might suggest that there are few incidents of violence that might give rise to criminal charges. Data obtained from the Brisbane Magistrates Court files in relation to the history of violence recorded in the applications for DVOs directly undercuts such an assumption.

The one matter which has been finalised relates to charges of Wilful Damage and Disorderly Behaviour. These matters resulted in the imposition of fines. It is a concern that in spite of the fact that less than one quarter of RSs are female, out of three sets of

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<sup>13</sup> See *Domestic Violence (Family Protection) Act 1989 (Qld)*, s 20

<sup>14</sup> Note *Criminal Code 1899 (Qld)* s69, "Going Armed to Cause Fear".

<sup>15</sup> Note *Criminal Code 1899 (Qld)* s313.

<sup>16</sup> Note *Criminal Code 1899 (Qld)* s27.

<sup>17</sup> Notes with author.

charges laid tone RS is female. These kinds of statistics may add further support to the view that the law is, in general, biased against women.<sup>18</sup>

There is a broad recognition that the imposition of fines is inappropriate in matters of domestic violence.<sup>19</sup> The reason being that often the fines are paid for by the AS or they are paid for from the household income of both the parties. In spite of this recognition of their inadequacy, fines clearly continue to be a common disposition.

The question of the appropriate sentencing regime in relation to assaults perpetrated in the context of domestic violence was discussed in *R v Piermont*.<sup>20</sup> A number of cases are discussed in *Piermont* which suggest that where physical violence arising in the context of domestic violence is prosecuted as a criminal matter, 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. Given the lack of detail on the court files it is impossible to know exactly what the breaches entailed. It is likely though that even breach offences of violence result in fines when they are dealt with in the Magistrates Court.

### **Understanding the lack of criminal prosecutions**

In an effort to try to understand why there are so few prosecutions for criminal matters we surveyed 12 domestic violence workers around Australia.<sup>21</sup>

### **A problem with policy and legislation?**

The lack of criminal prosecutions in Queensland appears to have little to do with the availability of appropriate legislation or police policy. A range of offences already exist in the QCC which could be used to charge offenders in situations of domestic violence. In 1997 two new offences were added to the QCC with the domestic violence context in mind, these new offences are the offences of Torture<sup>22</sup> and Stalking.<sup>23</sup> Torture was enacted in part to deal with the evidentiary, and sometimes factual, difficulties experienced in supporting traditional assault type offences. The essence of the offence of Torture has been said to be the "intentional infliction of severe pain or suffering."<sup>24</sup> This could clearly cover many instances of domestic violence.<sup>25</sup> Section 4 of the QCC also provides an offence of attempt in relation to most QCC offences.<sup>26</sup>

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<sup>18</sup> See *P Easteal*; *Less Than Equal : Women and the Australian Legal System (Butterworths, Sydney, 2001)*

<sup>19</sup> *In the ACT there has been a dramatic move away from the imposition of fines in domestic violence matters. See R Holder & N Munsterman, "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. See also C Hoyle, Negotiating Domestic Violence: Police, Criminal Justice and Victims, (Oxford University Press, Oxford, 2000) at 192.*

<sup>20</sup> *Unreported decision, Queensland Court of Appeal, 13 November 2001, (Thomas JA, Ambrose, Cullinane JJ).*

<sup>21</sup> *We were unable despite our efforts to do so to talk to police or prosecutors.*

<sup>22</sup> *Under s 320A 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)*

<sup>23</sup> *Criminal Code 1899 (Qld) Chapter 33A.*

<sup>24</sup> *R v Burns Unreported, Queensland Court of Appeal, 2000.*

<sup>25</sup> *See also Taskforce at 112 - 113.*

<sup>26</sup> *For commentary on this offence and its components see Shanahan et al, Carter's Criminal Law of Queensland (Butterworths, Sydney, 2001), at 181.*

Broad powers also operate under the Police Powers and Responsibilities Act 2000 (Qld) in relation to arrest and detention of suspects.<sup>27</sup> Clearly, as Sheey points out, legislative change by itself is not enough.<sup>28</sup> The underlying policy view of the Queensland Police Service also overtly supports the criminalising of domestic violence. The subtitle on the section of the Queensland Police Service web site that relates to domestic violence states: "[w]herever it hides, domestic violence is still a crime."<sup>29</sup> However, despite the practical avenues and policy frameworks currently available, perpetrators of domestic violence are rarely charged with criminal offences - "very rarely is the QCC used."<sup>30</sup>

### **Women lack information.**

The Taskforce pointed out that, generally, the availability of information to women was critical in relation to how women make choices about the directions they take.<sup>31</sup> This position is echoed through many of the interviews undertaken with domestic violence workers in this study. Sometimes for women, it is a matter of not knowing what is available for them or what they want legally or not having the correct terms for what they want;<sup>32</sup>

*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 or...'*<sup>33</sup>

Such complaints are made despite the police policy that police should actively canvas the possibility of criminal charges in conjunction with DVA orders.<sup>34</sup>

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. A worker commented that one woman was advised by police:

*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.*<sup>35</sup>

Workers talked explicitly about the need for support.<sup>36</sup> Women are historically less likely than men to pursue matters through the justice system.<sup>37</sup> Without police support - in the sense of proper information- at this early stage, the possibility of criminal charges being sustained is very unlikely.

<sup>27</sup> See especially *Police Powers and Responsibilities Act 2000 (Qld)*, s 19.

<sup>28</sup> E Sheey, "Legal Responses to Violence Against Women in Canada" (1999) 19 (1&2) *Canadian Woman Studies* 62.

<sup>29</sup> *Queensland Police Service Operational Procedures Manual* (current as at 31 July 2001) at 1, Note also comments of Transcript 6 at 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."

<sup>30</sup> Transcript 4 at 5.

<sup>31</sup> Taskforce at 27.

<sup>32</sup> Transcript 4 at 11

<sup>33</sup> Transcript 1 at 3.

<sup>34</sup> *Queensland Police Service Operational Procedures Manual* (current as at 31 July 2001) at para 9.3.1.

<sup>35</sup> Transcript 6 at 4

<sup>36</sup> Transcript 3 at 2.

<sup>37</sup> See *Discussion Paper 54, July 1993, Equality Before the Law* (ALRC, Sydney, 1993), chapter 2.

Women fear retribution and further relationship or family breakdown. 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 and they feared the response of the perpetrator to them, their children or their extended families.

*[women] usually try to keep the family together for the sake of the children [and they believe] that is really important for society.<sup>38</sup>*

Given the situation of many women confronting domestic violence, the primary interest is in stopping the violence rather than punishment.<sup>39</sup> This may be another reason why the QCC is frequently not pursued by women.

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.<sup>40</sup>

Women are uncomfortable with police involvement and court processes and are cynical about sentencing outcomes?

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. Women's discomfort with the court process was constantly referred to by the workers interviewed:

*...the 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.<sup>41</sup>*

Workers noted that the reluctance to assist a prosecution could be overcome where there was significant support in each part of the process. This view is supported by studies in the ACT which have recorded a significant rise in prosecutions since support has been provided to women as witnesses in this context.<sup>42</sup>

*Q And how often is it the case that women will respond to your encouragement and ...go to the police and make complaints?*

*A I think quite often it actually happens if the woman feels that she can be supported in doing it.<sup>43</sup>*

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<sup>38</sup> Transcript 5 at 2

<sup>39</sup> Transcript 4 at 7. Note also R Holder & N Munsterman, "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.

<sup>40</sup> Transcript 1 at 8

<sup>41</sup> Transcript 1 at 8-9, see also transcript 12 at 11

<sup>42</sup> R Holder & N Munsterman, "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.

<sup>43</sup> Transcript 1 at 3

According to workers there is a perception amongst women that, considering the results of prosecution, there is simply no point in participating in the criminal prosecution of the violence. 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 especially where fines are imposed.

*[women think] he's not going to go to jail over this ...- its just going to make him angrier - he knows how to get around the system...even if he does go to jail he's got contacts ...he'll always be able to harass her.<sup>44</sup>*

*[the penalties for breaches] are very minor, like a two hundred dollar fine or Overwhelmingly domestic violence is dealt with by way of a fine.<sup>45</sup>*

The Burden of Proof - Some police believe there is a lack of evidence. Often domestic violence, like rape and sexual assault, is perpetrated in private where there are no witnesses.

*You know it is a private crime...these guys don't go hitting people in the crowd...they hit in their homes. There are obviously no witnesses.<sup>46</sup>*

Inevitably the lack of witnesses makes evidence gathering more difficult. However workers referred to some situations where the evidence problem had been surmounted. One worker mentioned a situation where the victim had video taped the offenders repeated attendance at her home and taped his telephone calls. This had resulted in a successful prosecution of stalking.<sup>47</sup>

As a general statement the conduct of a criminal trial is concerned with the protection of the innocent rather than with punishment of the guilty. In a criminal proceeding the onus of proving any relevant issue rests with either the prosecution or the defence. The onus will vary depending on the issue to be proved and the type of offence.<sup>48</sup>

The general rule is that the Crown must prove the guilt of the accused beyond reasonable doubt. Another way of saying this is that the Crown has the “persuasive onus” or that the crown has the “legal onus” of proof. Thus the Crown bears the onus of establishing each ingredient of the offence which has been charged. This is described as the “golden thread” which runs through the web of the criminal law.<sup>49</sup> The standard of proof for the first rule is “beyond reasonable doubt”. Where the accused relies of justifications, defences, and excuses it is for the crown to negative them “beyond reasonable doubt”. This standard- ‘beyond reasonable doubt’ is not conclusive but it is very high. This standard is usually described as the criminal standard of proof. If there is a reasonable doubt in the mind of the magistrate or jury the accused is entitled to an acquittal. Courts have consistently refused to define the phrase stating that it should be left for the jury without explanation.<sup>50</sup>

For most matters of excuse there is no reversal of the onus of proof. Thus the persuasive onus remains with the crown who must also negative any excuses relied

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<sup>44</sup> Transcript 1 at 10

<sup>45</sup> Transcript 9 at 12

<sup>46</sup> Transcript 8 at 10

<sup>47</sup> Transcript 2 at 29

<sup>48</sup> For a helpful discussion see Yousseff (1990) 50 A Crim R 1

<sup>49</sup> Woolmington [1935] AC 462, per Viscount Sankey at 481-482

<sup>50</sup> See Dawson (1961) 106 CLR 1, per Dixon CJ at 18 and Wilson Tchorz and Young (1986) 22 A Crim R 130 and Goncalves (1997) 99 A Crim R 193.

upon by the accused. However the evidentiary onus rests with the accused. The accused must point to evidence which supports an excuse. The trial judge will direct the jury to consider excuses (or the magistrate will consider them) where there is evidence which would enable a reasonable jury to have at least a reasonable doubt about whether the accused could rely on the excuse raised.<sup>51</sup>

The workers interviewed to date all pointed out the value of medical evidence and visible injury in terms of a successful criminal prosecution. Again the workers comments support the suggestion that generally only serious crimes related to domestic violence are prosecuted under the QCC. One worker reported on a situation where Stalking<sup>52</sup> had been charged. The worker interviewed suggested that a significant amount of pressure was placed on police by the worker and the victim before the charge was made. Essentially workers often complained that police were failing to gather evidence and that they were not treating the matter as a potential crime scene:

*They're not gathering the evidence - they're not doing proper investigations...*<sup>53</sup>

*[Police] need to be trained in when they go out to domestic violence, that they're going to a crime scene, and they're to photograph stuff around the crime scene.*<sup>54</sup>

Workers also expressed dissatisfaction with the pressure placed on the AS by the police, to find the evidence for themselves:

Some police believe that women do not really want to prosecute or that they will make unreliable witnesses.

Workers suggested that police perceived women as unreliable or potentially hostile witnesses. If this perception is held, it is often unfounded. Research in the ACT 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.<sup>55</sup>

*They have an attitude she's going to drop [the charge]...*<sup>56</sup>

These complaints from interviewees are consistent with the very limited data gathered in relation to this issue. Police appear to use affidavit material to justify the relinquishment of responsibility in relation to the criminal law investigation in domestic violence matters.

The fact that a victim will make unavailable for cross examination is not necessarily fatal to the prosecution case. In a recent Queensland Court of Appeal judgement it was found that photographs of the victim's injuries could be tendered as evidence of injuries in spite of the fact that the victim did not give evidence. Her lack of availability did not make the ultimate conviction unsafe and unsatisfactory.<sup>57</sup>

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<sup>51</sup> See *Lobell [1957] 1 QB 547 at 551*.

<sup>52</sup> *Criminal Code 1899 (Qld) s359A*.

<sup>53</sup> *Transcript 2 at 19 and see also transcript 8 at 2*

<sup>54</sup> *Transcript 9 at 7*

<sup>55</sup> See *R Holder & N Munsterman*, "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.

<sup>56</sup> *Transcript 2 at 18 and transcript 12 at 6*

<sup>57</sup> See *R v Hearn unreported, Queensland Court of Appeal No 365 of 2000; McPherson JA, White & Holmes JJ. 17 April 2001*. As well as the photographic evidence there was also evidence of a number of witnesses.

Many Police do not perceive domestic violence as a crime.

Workers articulated that police see domestic violence as a low priority<sup>58</sup>:

*...police, frankly, see this as a low priority. It's not as sexy as capturing a burglar.*<sup>59</sup>

Related to seeing domestic violence as a low policing priority was a view that police simply did not characterise domestic violence as a crime:

*...[police] still see the whole issue of domestic violence as a social issue...I don't know that it's a good thing that the police even have a civil code to work under.*<sup>60</sup>

One worker suggested that the reason evidence was not gathered at a domestic violence incident was that an investigation was rarely commenced.<sup>61</sup>

### **Conclusion:**

Our research clearly suggests that domestic violence is rarely being treated as a crime in Queensland. The very fact of the increasing number of civil application orders without corresponding criminal prosecutions points to a level of unacknowledged violence.

Clearly though, one of the first questions we have to answer is whether we as a community want to see domestic violence prosecuted as a criminal offence. Further we need to articulate how the increased use of the criminal law will be able to achieve outcomes for people at risk of domestic violence that other legal and social strategies cannot achieve. Moreover in making such a policy choice, we need to consider carefully, what are the advantages and disadvantages to women at risk of domestic violence where such a policy is pursued. Clearly there is strong support among many domestic violence support workers for an increased use of the criminal law. Moreover, as we have indicated, many of the legal mechanisms for such increased use already exist within the legal framework. More research is needed to clarify what we are attempting to achieve through the use of the criminal law. We need to communicate what we hope to achieve both in terms of the desired outcomes of an increased use of the criminal law and the more practical details about how such increased use of the criminal law can be implemented.

I have listed the reasons for lack of prosecution suggested by the domestic violence workers interviewed and have made some suggestions for reform. I hope that this will spark some discussion around these two objectives.

#### **1. The role of women in the prosecution of intimates for criminal offences.**

- Develop something close to a "no drop" policy. Once there is sufficient evidence to pursue criminal matters, prosecution will proceed with the prosecution unless good reason demonstrated that it should not be pursued.<sup>62</sup> \* This would make it more difficult for a complainant to discontinue criminal proceedings.
- Guidelines would need to be developed .
- Further research needed- what do the community think of this proposal.

<sup>58</sup> *Transcripts 2 at 16 and see also transcript 8 at 3 & 4*

<sup>59</sup> *Transcript 6 at 3*

<sup>60</sup> *Transcript 9 at 9*

<sup>61</sup> *Transcript 12 at 5*

<sup>62</sup> *Currently being experimented with in the ACT. See Director of Public Prosecutions, Australian Capital Territory, Annual Report, 2000-2001 (2000, ACT Government, ACT) p12.*

- 2. Women lack information about the possibility of pursuing concurrently a domestic violence protection order application and criminal prosecution.**
  - Shift the focus of education campaigns to include encouragement to women that they make a formal complaint about domestic violence when it occurs.
  - Greater education for potential victims about what a crime is (ie stalking, torture)
  
- 3. Women fear retribution and further relationship breakdown will eventuate from pursuing criminal prosecution.**
  - Is it safer for women to avoid the criminal law? Further research into the behaviours of perpetrators in situations where they are charged with criminal offences needs to be undertaken.
  - Currently data is collected sporadically by a range of agencies. We recommend the establishment of a state-wide database relating to complaints and matters arising under the DVA / QCC<sup>63</sup> This would mean that police and courts and possibly other service providers would have ready access to information relating to the victim and perpetrator. This may allow more realistic risk assessments to be made about the safety of the complainant in each particular case.
  
- 4. Women are uncomfortable about police involvement and court processes.**
  - Specialist domestic violence court or lists in the larger magistrates courts for domestic violence matters and criminal matters associated with domestic violence - to encourage consistency in magistrates approach to sentencing and to foster a supportive court environment for victims (which need not be at the expense of fair process to perpetrators.)<sup>64</sup>
  - Support personnel to be trained and employed to assist complainants through each aspect of the process from complaint to sentencing..
  
- 5. Women are cynical about sentencing outcomes (especially where they have had previous contacts with police and courts).**
  - Provide more alternatives to magistrates in relation to sentencing.
  - Further experimentation with Perpetrator Programs. Currently there are few perpetrator programs operating in Queensland and those operating work over a short time frame (6 months or less).
  - Allow the imposition of Good Behaviour Bonds in conjunction with such programs for first time offenders.
  - Where convicted of "Breach DVO"; criminal record to include matter associated with the breach (ie threats, assault, criminal damage, stalking etc.)
  
- 6. There is a perception that police often believe there is a lack of evidence.**
  - Experiment further with the 'Kodak project', that is, police to carry cameras and record scene of the domestic violence.<sup>65</sup>
  - Set up standard procedure for investigating the scene of domestic violence.
  - Regardless of victim's attitude treat the scene of domestic violence as a crime scene.
  - Encourage police to contact victim after event to clarify whether she is prepared to pursue a criminal prosecution.

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<sup>63</sup> Note attempt at this in Queensland with creation of CEAVAW. Note also For an analysis of the response in New Zealand, see R Busch & N Robertson " '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.

<sup>64</sup> Currently being experimented with in the ACT. See Director of Public Prosecutions, Australian capital Territory, Annual Report, 2000-2001 (2000, ACT Government, ACT) p12.

<sup>65</sup> Note discussions with Betty Taylor at the Gold Coast Domestic Violence Service.

- Proper explanations to be given to the victim about the prosecution of criminal offences.
- 7. There is a perception that some police believe women do not want to prosecute or that they will make unreliable witnesses.**
- Note research in ACT which suggests a low rate of hostility among women witnesses for Domestic Violence prosecutions.<sup>66</sup>
  - Provision of support for women in the situation of potential complainant.<sup>67</sup>

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<sup>66</sup> Note experience of ACT program which has lead to 126%increase in DV prosecutions since 1998. See Director of Public Prosecutions, Australian capital Territory, Annual Report, 2000-2001 (2000, ACT Government, ACT) p12.

<sup>67</sup> Note the introduction of role of witness assistant in ACT. Over 80% of contacts with the witness assistant related to DV matters. See Director of Public Prosecutions, Australian capital Territory, Annual Report, 2000-2001 (2000, ACT Government, ACT) p13