

## **What the Magistrates Say About Domestic Violence – Issues Relating to Queensland Magistrates Understandings of Domestic Violence**

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*(Paper by Rachel Field & Belinda Carpenter)*

### **Introduction**

A survey of Queensland Magistrates' attitudes to domestic violence was conducted in May and June 2000. All 96 Magistrates and Acting Magistrates in both urban and regional areas in Queensland were invited to respond to the survey. Of the 96 surveys sent out, 38 responses were received, representing a response rate of 40 percent.<sup>1</sup>

The survey instrument used was a modified version of the New South Wales Judicial Commission's survey of New South Wales Magistrates conducted in 1998. The reason for replicating such a survey was five-fold. First, as a response to the paucity of empirical qualitative research on domestic violence in Queensland. Second, as a response to the Australian Law Reform Commission's (ALRC) 1994 research which suggested that for many women the horror of the violence perpetrated against them had been compounded by the law's failure to protect them.<sup>2</sup> Third, as a contribution to the development of the legal discourse on domestic violence.<sup>3</sup> Fourth, as a response to the ALRC's call for more research and better data on women and the legal system.<sup>4</sup> Fifth, due to concern that most legal research on domestic violence issues is not comparable because of the various methodologies used in different projects and across jurisdictions. Finally, this project represents the first research to date on the views of Queensland Magistrates in relation to domestic violence.

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<sup>1</sup> The response from the NSW survey was 58%. Note that throughout this paper victims of violence are consistently referred to as women. This is because it has long been acknowledged, both by Australian and international research, that "women constitute the large majority of domestic violence victims." – Queensland Domestic Violence Task Force (1988) *Beyond These Walls*, Brisbane: Goprint at 13. *Beyond These Walls* refers to research pre-1988. Further confirmation that women continue to make up the majority of victims of violence can be found in, for example, National Committee on Violence Against Women (1992) *National Strategy on Violence Against Women*, Commonwealth of Australia, and Department of the Prime Minister and Cabinet (Office of the Status of Women) (1995) *Community Attitudes to Violence Against Women – Detailed Report*, Canberra: AGPS. This is not to deny, however, that men are sometimes victims of violence.

<sup>2</sup> Australian Law Reform Commission (1994) *Equality Before the Law: Women's Access to the Legal System*, Report No. 67 (Interim) Ch4.

<sup>3</sup> Office of Women's Policy, (2000) *Report of the Taskforce on Women and the Criminal Code*, Dept of Justice and Attorney General, Queensland: Goprint.

<sup>4</sup> Australian Law Reform Commission (1994) *Equality Before the Law*, Report No.69, Commonwealth of Australia, Parts I and II.

### **Demographics of Survey Respondents<sup>5</sup>**

With regard to gender, 9 of the 12 female Magistrates in Queensland responded (a response rate of 75%) and 28 of the 84 male Magistrates and Acting Magistrates responded (a response rate of 33%). In NSW 56 male and 12 female Magistrates responded. With regard to age, in Queensland nearly half of all Magistrates (47.4%) were aged between 51-60 with an additional 36.8% aged between 41-50. Similarly in NSW, 49% were aged between 51-60 and 38% between 41-50. In response to jurisdiction, 47% of Queensland Magistrates spent more than half their time in metropolitan courts while 42% spent more than half their time in country courts. In NSW most Magistrates (61%) spent more than half their time in metropolitan courts. One third (36% spent half their time in country courts. In Queensland, Magistrates estimated that the amount of time spent on domestic violence protection orders ranged from 5-40% of court time, with the majority of Magistrates claiming between 5-10% of their time in court spent on domestic violence orders. In NSW, Magistrates estimated that the amount of time spent on apprehended violence orders ranged from 5-75% of court time. Over two thirds of the Magistrates estimated that they spent between 10-20% of their time on such orders.

### **Key Themes and Issues Identified through the Survey.**

1. Magistrates believe they are adequately trained to deal with domestic violence issues.
2. Magistrates view domestic violence as a dispute between the parties that can be addressed appropriately by informal dispute resolution processes such as counselling and mediation.
3. Magistrates believe that women are using domestic violence proceedings as a tactic in family law matters.
4. Magistrates are reluctant to issue ouster orders except in cases of severe physical violence.
5. Magistrates are concerned about the workload associated with domestic violence matters.
6. Magistrates have a limited understanding of issues of domestic violence for Indigenous women.
7. Magistrates support the work of police in the area of domestic violence – particularly police prosecutors.
8. Magistrates are wary of too much community contact believing this to decrease their objectivity.
9. Magistrates consider their judicial role crucial in their dealings with domestic violence cases.

For the purposes of this paper, two issues will be highlighted and discussed in some detail: first, Magistrates' belief that women are using domestic violence proceedings as a tactic in family law matters; and second, Magistrates' reluctance to issue ouster orders except in cases of severe physical violence. These issues are analysed here in the context that a majority of Magistrates in Queensland (71%) and NSW (90%) believe that they are adequately trained to deal with domestic violence matters, with many citing life experiences as more important than legal training in this regard.<sup>6</sup> We argue however, that the issues identified below support a need for ongoing and specific training on domestic violence to assist in the administration of justice in this context, particularly for women.

### **Magistrates believe that women are using domestic violence proceedings as a tactic in family law matters.**

<sup>5</sup> This information is gleaned from questions 1.1-1.5 of the survey

<sup>6</sup> This information was gained from Q4.2 of the survey which asked Magistrates "Do you feel that your training has adequately prepared you for dealing with domestic violence matters?"

The belief that Magistrates see domestic violence as a tactic in family law matters was gleaned most specifically from question 3.5 of the survey which asked Magistrates to agree or disagree with the statement “Domestic Violence Protection Orders are often used by applicants in Family Court proceedings as a tactic to aid their case and deprive their partner from contact with the children.” 74% of Queensland Magistrates who responded to the survey agreed with the statement with a number maintaining that many women were advised by their solicitors to apply for orders:

*“Yes. My solicitor told me to take out a DV order is often heard.” (15)<sup>7</sup>*

*“I am certain of this. Parties at times even admit to the above and often they take the above action on the advice of their solicitors. This makes it hard for the genuine cases to gain credibility in the eyes of the court and should be discouraged.” (30)*

*“Agree. Have seen this on numerous occasions in Court. It has been virtually admitted as such in both DV and family law applications.” (4)*

*“Agree – I have been informed on more than one occasion the only reason application was made was on legal advice.” (29)*

Of the 74% who agreed with the statement, just over half (55%) attempted to qualify their position by suggesting that this was not the case all of the time:

*“I am satisfied that this has occurred on some occasions in my court – I have no idea of how often.” (21)*

*“Sometimes used – it is often suggested to be the case. Family Court could do more to allay these fears.” (31)*

*“Agree in some cases only. And it works very effectively.” (1)*

Other questions not specifically related to the use of domestic violence orders as a tactical strategy in Family Court proceedings also on occasion elicited comment on this issue. For example, question 2.8, which asked Magistrates “In your experience how well does the *Domestic Violence (Family Protection) Act 1989*, dovetail with the *Family Law Act*?” resulted in 21% indicating that domestic violence applications are used as a tool in family law proceedings. Examples of the qualitative comments made are as follows:

*“There is no doubt that the DV Act is used as a tool in the Family Law Act proceedings even if it is not in the majority” (1);*

*“I must say that I am aware of cases where parties have been told by their legal representatives and on their own accord to obtain a DV order to enhance their chances in the Family Court”(16);*

*“Some applicants for orders are motivated by pending family law matters”(8);*

*“In my experience the DV Court is abused often on the advice of solicitors, to obtain leverage in Family Law Court – many applications are withdrawn or not pursued with family Court hearings being finalised before a DV hearing has been determined” (30);*

*“Not well. This is always in my mind – ulterior motives re: contact and residency” (31);*

*“Not at all well. Domestic violence applications are made to assist in Family Court applications”(6);*

Similarly, when asked in question 4.2 “Do you feel that your training has adequately prepared you for dealing with domestic violence matters?”, one Magistrate indicated that training on domestic violence would assist in understanding “*the personal dynamics and allegations of the parties involved in family law proceedings in manoeuvring themselves into advantageous positions by the use of DV legislation.*” (2)

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<sup>7</sup> A sequential numbering system was employed when entering the qualitative data. Each number corresponds to a completed survey received. The numbering was in order of receipt of survey.

These views of Magistrates are of significant concern and whilst it is a perspective that has been iterated in other contexts as well,<sup>8</sup> research tells us that it is not correct.

For example, the research of Melville and Hunter which involved the examination of 176 family court files, found 95 files containing evidence of domestic violence (which represented 54% of the total number of cases). Of these, 38% involved instances where a protection order had *not* been obtained.<sup>9</sup> “This would suggest that ... in cases where domestic violence is an issue, women may in fact be reluctant to take out” protection orders.<sup>10</sup> Further, “there is a lack of empirical evidence to suggest that women believe that allegations of domestic violence provide an advantage in family law proceedings, or that they fabricate allegations to gain tactical advantage.”<sup>11</sup> Similarly, other studies have found that women are often reluctant to take out protection orders, and consider such action to be a last resort.<sup>12</sup> And a study into child sexual abuse allegations in Australian family law proceedings has also found that, in a majority of cases, allegations were not made for tactical advantage.<sup>13</sup>

Further, although changes to the *Family Law Act, 1975 (Cth)* in 1996 included the issue of family violence as a relevant consideration in terms of determining the best interest of children, and although it has also been increasingly (recently) acknowledged within the court that children are detrimentally affected by violence (see for example, *In the Marriage of Jaeger*,<sup>14</sup> and *In the Marriage of Patsalou*<sup>15</sup>) there are a number of reasons why women are likely to be reluctant to use domestic violence as a tactical issue in Family Court proceedings.

First, historically, the Family Court has been reluctant to take domestic violence into account and has actively failed to do so. It is this history which informs the way the Court currently deals with issues of violence in both children’s and property matters.

For example, the Australian Law Reform Commission reported in 1994 that “evidence of violence against a spouse is often excluded or discounted at different stages of the legal system and that the Family Court often does not give proper

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<sup>8</sup> For example, Melville and Hunter refer to a statement by Hon PJ Hannaford in the NSW Legislative Council: “Whilst we might not like it, AVO proceedings are being used as tools in custody battles and in matrimonial arrangements. I believe that this is an inappropriate use of AVO’s.”: Criminal Law Review Division, NSW Attorney-General’s Department (1999) quoted in A Melville and R Hunter (2001) “‘As Everybody Knows’: Countering Myths of Gender Bias in Family law” 10(1) *Griffith Law Review* 124 at 127. Melville and Hunter also comment: “In our interviews, several family law solicitors also expressed a belief in this myth, asserting that many women were ‘access bitches’, who deliberately fabricated allegations in order to deny contact.”: at 127.

<sup>9</sup> Melville and Hunter (2001) at 124.

<sup>10</sup> Melville and Hunter (2001) at 128.

<sup>11</sup> Melville and Hunter (2001) at 128.

<sup>12</sup> For example, J Stubbs and D Powell (1989) *Domestic Violence: Impact of Legal Reform in NSW*, Bureau of Crime Statistics and Research, L Trimboli and R Bonney (1997) *An Evaluation of the NSW Apprehended Violence Order Scheme*, NSW Bureau of Crime Statistics and Research, and R Wearing (1992) *Monitoring the Impact of the Crimes (Family Violence) Act 1987*, LaTrobe University.

<sup>13</sup> M Hume (1995) “Study of Child Sexual Abuse Allegations Within The Family Court of Australia”, Paper Presented at Enhancing Access to Justice: Family Court of Australia, Second National Conference, Sydney 20-23 September.

<sup>14</sup> (1994) 18 Fam LR 126.

<sup>15</sup> (1994) 18 Fam LR 426

weight to the existence and effects of violence."<sup>16</sup> Further, Alexander refers to “cases in which the court has discounted a history of violence (characterising such behaviour as going to the issue of marital fault and therefore to be ignored) and made orders for custody or access even when future violence was a real possibility.”<sup>17</sup> Prior to the 1996 amendments there were only very few cases in the history of the court in which domestic violence was directly discussed as relevant to the determination of proceedings,<sup>18</sup> and the Chief Justice has had to acknowledge that many criticisms of the Court have related “to its approach on a legal basis to family violence issues.”<sup>19</sup>

As a consequence of the Court's failure to recognise the relevance of violence, there has been little incentive for women in terms of raising domestic violence issues in court. For example, in terms of the writing of Family Reports (which are a crucial aspect of assisting the Court to determine the best interests of children), it has been the experience of Women's Legal Service, Brisbane, that in the past, if violence were mentioned "it was usually in a throwaway fashion such as 'the wife alleges violence'."<sup>20</sup> The Service has suggested that the writers of reports have in fact been

<sup>16</sup> ALRC (1994) Report No. 69 at 167. Submissions to the Joint Select Committee Enquiry of 1991 also indicated that "there is a need for changes to the manner in which some judges of the court, and Magistrates with family law jurisdiction, approach the resolution of disputes over children in cases where domestic violence is involved.": Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act (1992) *Report* Canberra: AGPS at 145.

<sup>17</sup> R Alexander, (2002) “Domestic Violence in Australia: The Legal Response”, 3<sup>rd</sup> ed, The Federation Press: Sydney at 57 referring to *Heidt and Heidt* ((1976) FLC 90-077), *Chandler and Chandler* ((1981) FLC 91-008) and *Danci and Danci* ((1984) FLC 91-560).

<sup>18</sup> *In the Marriage of JG and BG* (18 Fam LR 255) Justice Chisholm stated that "there are relatively few Australian decisions which expressly deal with family violence in [the context of custody and access] ." He went on to identify some of the cases which had dealt with general issues of parental behaviour and misbehaviour as follows: *Barnett v Barnett* (1973) 2 ALR 19; 21 Fam LR 335 at 343; *Marriage of Kress* (1976) 2 Fam LR 11,230, *Marriage of Smythe* (1983) 8 Fam LR 1029, and *In the Marriage of Schenck* (1981) 7 Fam LR 170. Justice Chisholm then discussed two reported decisions specifically dealing with allegations of violence in the context of custody proceedings: *Marriage of Heidt* (1976) 1 Fam LR 11,576 and *Marriage of Chandler* (1981) 6 Fam LR 736. In *Heidt* Murray J distinguished between violence directed at the wife (which was largely considered irrelevant) and violence directed at the children. In *Chandler* Nygh J considered a number of the allegations of violence as irrelevant to the welfare of the children. Justice Chisholm endorsed these cases as providing correct principles, but reinterpreted them saying that it was not the intention of the Justices involved to lay down a rule of law to the effect that violence is relevant only if it 'directly' affects the children. Justice Chisholm continued, "each was concerned to emphasise the important point that the *Family law Act* strictly limits the relevance of marital misconduct. In the context of custody cases, the court has always been properly concerned to prevent parties from engaging in general attacks, or smear campaigns, that are unrelated to the children's welfare. The court no doubt felt that it was important to emphasise this in the early years of the Act's operation. This is clearly correct: the principle that the child's welfare is paramount has an exclusionary aspect, excluding material that has no relevance to the welfare of the children. But it also has an inclusionary aspect, by which I mean that admissible evidence that is relevant to the children's welfare should be taken into account. It may be that in their concern to discourage parties from using custody proceedings as an occasion to engage in a general criticism of each other's behaviour, unrelated to the children's welfare, Murray J and Nygh J somewhat overemphasised the exclusionary aspect of the principle. If so, then I must respectfully differ. I believe it is clear law that matters truly relevant to the child's welfare, whether indirectly or directly relevant should be taken into account.": 18 Fam LR 255 at 259.

<sup>19</sup> A Nicholson (1995) “The Family Court – 1994 and Beyond” 10(2) *Australian Family Lawyer* 1 at 8.

<sup>20</sup> Women's Legal Service, Brisbane (1995) *Draft Submission to the Family Law Council's Enquiry Into Violence and the Family Law Act*, November at 3.

reluctant to deal with the issue of domestic violence, its dynamics and impact on women and their children, as a result of a lack of understanding and training in domestic violence, or because they have been concerned to avoid any perception of their taking sides or laying blame.<sup>21</sup>

The Court, then, has failed to recognise the reality of many women's experience,<sup>22</sup> and its processes have not been "responsive to clients who are or have been affected by violence."<sup>23</sup> The message from the Court to society, and more specifically to victims of violence, has been one that has said that violence is not important, and that there are no serious legal consequences in the Family Court context for perpetrators of violence. Based on this history, there is little reason for women to think it prudent to use issues of domestic violence for tactical advantage in the Family Court.

Given the suggestion that these failings of the Court in its approach to issues of violence can be directly linked to the fact that until recently Australia's family law legislation has been silent about violence,<sup>24</sup> we might expect there to have been an improvement in terms of the operation of the reform provisions since 1996. These provisions, as we mentioned above, have made domestic violence specifically relevant to considering the best interests of the child in residence and contact matters.<sup>25</sup> However, this is where the second contra-indication of women using

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<sup>21</sup> "Clients have advised us that report writers have been 'taken in' by their violent partner's charm. He came across in the report as reasonable and cooperative. It is quite common for perpetrators of violence to present as articulate and charming whilst to their wife and children they are controlling and violent.": Women's Legal Service, Brisbane (1995) at 3.

<sup>22</sup> J Behrens (1996) "Ending the Silence, But ... Family Violence under the Family Law Reform Act 1995" 10 *Australian Journal of Family Law* 35 at 35.

<sup>23</sup> Women's Legal Service, Brisbane (1995) at 5. For example, compulsory attendance at court forces the victim and perpetrator into close proximity, which can be at the least very difficult for women, and at worst very dangerous. Notwithstanding the comments of the Chief Justice in T. Pegler and F. Farouque, "Family Court not a factor in murders, says Nicholson" *The Age*, 28 March, 1996 at A2, it should be noted that the Chief Justice's Direction regarding family violence issued in January 1993 acknowledged problems associated with court design: "There is a need to protect victims of family violence who use the Court's services. ... At the commencement of litigation and thereafter, there are a number of occasions where people are required to be present at the Court, either because of the requirements of the case management guidelines, for purposes of conciliation or mediation, or because of the necessity to attend Court offices, interlocutory hearings or at trial. It must be recognised that in cases where there are allegations of family violence ... , the very presence of the person at the Court's premises may place her or him in jeopardy, if the allegations are well founded. Equally, a person's fear may be severe and disabling even though others may think that the allegations are not well founded." The Chief Justice has also said: "The Court cannot, of course, guarantee the safety of its litigants any more than the police can guarantee the safety of citizens. However, the Court, with the assistance of the Marshal and now the Deputy Marshal, has a much more sophisticated security system than was ever the case in the past, both in relation to its buildings and to its procedures, and has developed much better liaison with Federal and State and Territory police forces. It is not possible to discuss these matters in detail but it does mean that litigants in the Court are better protected than was the case in the past.": Nicholson (1995) at 9.

<sup>24</sup> See the National Committee on Violence Against Women (1992) *National Strategy on Violence Against Women*, Canberra: AGPS at 19.

<sup>25</sup> It should also be noted that it is only recently that the Court has recognised the relevance of domestic violence to property proceedings. See, for example, S Middleton (2002) "Domestic Violence and Contributions to the Welfare of the Family: Why Not Negative?" 16(1) *Australian Journal of Family Law* 26 referring to the following cases: *In the Marriage of Doherty* (1995) 127 FLR 343; (1995) 20 Fam LR 137; (1996) FLC 92-652; *In the Marriage of Marando* (1997) 21 Fam LR 841; (1997) FLC 92-754; *In the Marriage of Kennon* (1997) 139 FLR 118; (1997) 22 Fam LR 1; (1997) FLC 92-757. See also on this issue: J Behrens, (1993)

domestic violence issues for a tactical advantage in the Family Court becomes evident.

The second contra-indication is that issues of domestic violence are being considered secondary to the new principle that "children have a right of contact, on a regular basis, with both their parents".<sup>26</sup> This prioritisation of the right of contact with fathers makes it difficult for survivors of domestic violence to convince the court that because of the history of violence in the family, the child's best interests would be better served by limiting or preventing contact with their violent father.<sup>27</sup> Rather, women who raise issues of violence in proceedings risk appearing as though they are not prioritising the rights of the children to contact with the other parent. They also risk appearing difficult and uncooperative, issues which potentially impact on their credibility in proceedings in terms of their being a parent with whom it is in the best interests of the child to reside.

The result then is that the principle of contact with both parents has the practical effect of silencing women on issues of violence. The wording of this principle in no way acknowledges the potential for an existing contextual environment of violence. Rather, Rendell, Rathus and Lynch note that "the 'right to contact principle' has been given greater emphasis by most practitioners and judges than the domestic violence aspect of the reforms."<sup>28</sup>

In addition it should be remembered that notwithstanding provisions that legislatively acknowledge the importance of domestic violence, it is always difficult for women to raise issues of violence in formal legal proceedings. "The level of risk is often felt by the women but it can be difficult for them to articulate or convince others of its reality."<sup>29</sup> On the other hand, "violent men are experts at trumpeting their legal rights as a way of intimidating their partners."<sup>30</sup>

The third contra-indication of women using domestic violence for tactical purposes in Family Court proceedings is the current emphasis on the use of informal dispute resolution processes (such as mediation) to promote private agreement between parties to Family Court proceedings.<sup>31</sup> This has silenced many women on the issue of violence for a number of reasons.

First, informal dispute resolution processes are based on consensual dispute resolution in a private environment away from the formal protections of legal proceedings – such as legal representation. It is often not possible for a woman who

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"Domestic Violence and Property Adjustment: a Critique of 'No-Fault' Discourse" 7(1) *Australian Journal of Family Law* 9, J Behrens, (1995) "Violence in the Home and Family Law: An Update" 9(1) *Australian Journal of Family Law* 70, Australian Law Reform Commission (1994) *Report No.69*, at paras 9.47-9.54, and R Alexander (1996) "Family Violence and Family Court Litigation: A Feminist Perspective" 3(2) *Psychiatry, Psychology and Law* 119.

<sup>26</sup> See s.60B(2) - although this right is conditional on its not being "contrary to a child's best interests". See H Rhoades, R Graycar and M Harrison (1999) *The Family Law Reform Act 1995: Can Changing Legislation Change Legal Culture, Legal Practice and Community Expectations? Interim Report*. The University of Sydney and Family Court of Australia.

<sup>27</sup> Women's Legal Service, Brisbane (1995) at 3. Although Nygh believed before the provisions had been tested that "the new [violence provisions] will ... mean that the 'right' of the child to contact with a violent parent will be strongly counterbalanced.": P Nygh (1996) "The New Part VII – an Overview" 10 *Australian Journal of Family Law* 4 at 14.

<sup>28</sup> K Rendell, Z Rathus and A Lynch (2000) *An Unacceptable Risk: A Report on Child Contact Arrangements Where There is Violence in the Family*, Women's Legal Service, Brisbane at 21 referring to Rhoades, Graycar and Harrison (1999).

<sup>29</sup> Z Rathus (1995) *Submission on Family Law Reform Bill 1994*, Women's Legal Service, Brisbane at 10.

<sup>30</sup> Rathus (1995) at 10.

<sup>31</sup> See Part III of the *Family Law Act* and s.60B(2)(d) and s.63B. See also Behrens (1996) at 39.

is a victim of violence in this context to confidently represent her own interests against her former violent partner, or raise issues such as a history of violence. And it is a context in which “to get things over with” victims will often minimise issues of violence, and perhaps put their own safety at risk in terms of contact with the children, in order to comply with the imperative of consensual and cooperative dispute resolution.

Secondly, the rhetoric about the inappropriateness of mediation for victims of violence (which is very soundly based and acknowledged in, for example, the Courts’ Practice Direction on Family Violence, and also the Family Law Council’s Report on Family Mediation<sup>32</sup>) has meant that in some circumstances women victims of violence are denied access to informal processes. This is appropriate on many grounds, for example, because violence creates an extreme power imbalance between the parties that mediators are unable realistically to redress;<sup>33</sup> because informal processes can further endanger the victim – physically and emotionally; and because informal processes, being private processes, are not accountable in terms of the fairness or justice of the outcomes. Further, training of mediators and facilitators is not yet sufficient to allow for the safe participation of victims of violence in informal processes. Nevertheless, a consequence of cutting off the option of informal dispute resolution processes for women who are victims of violence is that many such women, who cannot afford litigation and who also cannot get Legal Aid, will be silent on the issue of violence in order to access at least some assistance in communicating with their former partner about separation matters.

On the other hand, if women participate in informal dispute resolution processes and raise issues relating to a history of violence with their former partner, they risk offending the future focus of informal processes, and also risk being labelled difficult and uncooperative, a label which we noted above will potentially impact negatively on the way they are perceived in any later proceedings in court.

There are, therefore, a number of important reasons why women might actively avoid raising issues of violence in Family Court related proceedings. These issues also assist our understanding of the reality, quite contrary to the myth, that women are in fact silenced about violence in Family Court proceedings. It is legitimate then to ask why is it that Magistrates think that domestic violence is being used as a tactic?

Our answer is that the current legislative relevance of domestic violence has resulted perhaps in domestic violence being increasingly, legitimately, raised in Family Court proceedings. That is, lawyers have a responsibility to raise with their clients the possibility of such issues being brought before the Court, and this is potentially increasing the number of occasions when domestic violence is raised as an issue in relation to, especially, the best interests of children.<sup>34</sup> In this context it is important to consider that “a commonality of violence among those who divorce is evident.

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<sup>32</sup> Family Law Council of Australia (1992) *Report on Family Mediation*, at xiii. The report states that mediation is not appropriate where there is a fear or threat of violence or abuse or where violence or abuse is occurring.

<sup>33</sup> See for example, R Field (1996) “Mediation and the Art of Power (Im)balancing” 12 *QUT Law Journal* 264, R Field (2000) “Neutrality and Power: Myths and Reality” 3(1) *The ADR Bulletin* 16 and Zylstra’s comment that that mediation is acknowledged as being “far too brief an encounter to adequately address and counteract the effects of long-term abuse and the socially sanctioned domination of men over women which results in submission, placating, obliging, and accommodating behaviour on the woman’s part”: A Zylstra (2001) “Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators”, *Journal of Dispute Resolution* 253 at 256

<sup>34</sup> Note however issues arising from the principle of contact with both parents as discussed above.

When broadly defined, spousal violence is not an exceptional circumstance for divorced women and men but the norm.”<sup>35</sup> This means that rather than domestic violence being raised as a tactical issue – it is being raised as a legitimate legally relevant consideration. The casting of legitimate issues of domestic violence into the realm of ‘tactical advantage’ indicates a disbelief on the part of Magistrates about the veracity of women’s assertions of violence against them. This disbelief is a serious issue which must be addressed.

Further, the reality of the misogyny that is present in the men’s rights lobby must be acknowledged as a strong force in promoting the myth that women are using domestic violence for tactical advantage in the Family Court. Those groups have been successful in creating a strong backlash against women litigants in the Family Court context.<sup>36</sup> As Hunter and Melville have said the “myths of the men’s movement are not the beliefs of a fraction of men who blindly resist social change, but instead demonstrate the resilience of hegemonic masculinity.”<sup>37</sup> There is, therefore, a great need for the myth to be dispelled if women who are victims of violence are to access justice in family law proceedings.

Our view is that an important approach to dispelling the myth about domestic violence being used as a tactic in Family Court matters is the training of key judicial officers, such as Magistrates, who deal with domestic violence matters on a daily basis. Such training involves replacing the myth with reality,<sup>38</sup> and facing the societal and legal assumptions that perpetuate a culture of violence against women.<sup>39</sup>

**Magistrates are reluctant to issue ouster orders except in cases of severe physical violence.**

Ouster orders, also known as sole occupancy or exclusion orders, ensure that a perpetrator of violence is removed from the family home, and that the victim and her children are able to avoid the cost and dislocation of escaping to alternative accommodation. The Domestic Violence (Family protection) Act 1989 (Qld)<sup>40</sup> (the Act) provides that a condition can be placed on a protection order made under the Act which prohibits a perpetrator of domestic violence from remaining in, entering (or attempting to enter) or approaching within a stated distance of, a particular

<sup>35</sup> G Sheehan and B Smyth (2000) “Spousal Violence and Post-Separation Financial Outcomes” 14 *Australian Journal of Family Law* 102 at 117. Trimboli and Bonney also point out that “the timing of applications for protection orders “may reflect the fact that violence often escalates at the time of separation and the issuing of an application for parenting orders (or indeed may precipitate separation).”: (1997)

<sup>36</sup> See for example, M Kaye and J Tolmie (1998) “‘Lollies at a Children’s Party’ and Other Myths: Violence, Protection Orders and Fathers’ Rights Groups” 10 *Current Issues in Criminal Justice* 52 and M Kaye and J Tolmie (1998) “Father’s Rights Groups in Australia and their Engagement with Issues in Family law” 12 *Australian Journal of Family Law* 19.

<sup>37</sup> Melville and Hunter (2001) at 135.

<sup>38</sup> See for example, S Todd (1994) “Fears About Abuse of the Legislation are Unjustified: The Other Half of the AVO Story” *Law Society Journal* December at 38 and H Spowart and R Neil (1997) “Stop in the Name of Love” 22 *Alternative Law Journal* 81.

<sup>39</sup> See for example, R Graycar (1990) “Equality begins at Home” in R Graycar (ed) *Dissenting Opinions: Feminist Explorations in Law and Society*, Allen and Unwin, and R Graycar (1989) “Equal Rights versus Father’s Rights: The Child Custody Debate in Australia” in C Smart and S Sevenhuijsen (eds) *Child Custody and the Politics of Gender*, Routledge.

<sup>40</sup> Other domestic violence legislation around Australia containing ouster order provisions includes: the *Domestic Violence Act*, 1992 (NT), *Crimes Act* 1900 Part 15A – Apprehended Violence Orders (NSW), *Crimes (Family Violence) Act* 1987 (Vic), *Justice Act*, 1902 (WA), *Justices Act*, 1959 Part XA (Tas), *Domestic Violence Act*, 1986 (ACT).

premises.<sup>41</sup> A protection order with such a condition attached to it works to override any legal or equitable interest the perpetrator may have in the property.<sup>42</sup>

The making of ouster orders is controversial<sup>43</sup> because they involve superordinating and prioritising the housing, support, social and familial needs of women and their children in a situation where in the past they have been subordinated to a societal assumption that it is the woman's responsibility to escape domestic violence.<sup>44</sup>

Ouster orders raise the issue of increased requirements for funding of men's emergency accommodation – and there is concern that this may be at the risk of funding for victim's services. They challenge legal notions of proprietary rights, that a "man's home is his castle".<sup>45</sup> And yet they also offer one of the most legally and socially significant ways to ensure that a perpetrator of domestic violence is held responsible for his actions, as well as providing some sense of normalcy for women and children whose lives are otherwise chaos. In addition ouster orders address the inevitable "poverty and dislocation caused by (women and children) having to leave the family home".<sup>46</sup> In short they can be seen as an effective alternative tool to address issues of homelessness that confront survivors of violence and their children.

Magistrates in Queensland make orders under the act on a daily basis. They are key players in ensuring that victims of violence achieve justice through the legal system and as such their understanding of issues relating to ouster orders is very important. Research in other states tells us that Magistrates have been reluctant to make such orders and that in 1987 only 3.2% of orders made in New South Wales included a requirement that the offender no longer reside in the family home<sup>47</sup>. We also know that in some jurisdictions, the likelihood of obtaining an ouster order ex

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<sup>41</sup> S.25, *Domestic Violence (Family Protection) Act*, 1989 (Qld).

<sup>42</sup> S.25(3)(b), *Domestic Violence (Family Protection) Act*, 1989 (Qld). The Federal draft model domestic violence legislation includes a section almost identical to the Queensland provision indicating national support for the ouster condition and its consistent availability for all Australian victims of domestic violence: Domestic Violence Legislation Working Group (1999) *Model Domestic Violence Laws – Report*, Canberra: AGPS, s.16(2)(b) at 74.

<sup>43</sup> The issue was acknowledged by the Australian Law Reform Commission in 1986 as "controversial": Australian Law Reform Commission (1986) *Report (No 30) Domestic Violence*, Canberra: AGPS at 44.

<sup>44</sup> "There is a need to diversify models (of services) to fit the needs of women rather than women attempting to fit the (current) model. This is very much needed in an environment where funding is limited for services responding to domestic and family violence and the societal expectation for women to leave a violent situation still exists." - Partnerships Against Domestic Violence (2000) *Home Safe Home – The Link Between Domestic and Family Violence and Women's Homelessness*, Canberra: AGPS at 31 referring to N Stanes (1998) "Meeting Women's Needs – innovative service models responding to women escaping violence", 5 *Women Against Violence* December 44-49.

<sup>45</sup> "Workers and survivors often comment that the courts appear reluctant to limit the perpetrator's access to 'his castle'" - J Nunn "'Sole Occupancy' Orders" in NSW Women's Refuge Movement, Domestic Violence and Incest Resource Centre, Council to Homeless Persons (eds) (2001) *Out of the Fire: Domestic Violence and Homelessness*, at 35.

<sup>46</sup> Department of Families, Youth and Community Care (QLD) (1996) *Where to from here? – Report on the needs of women who have experienced domestic violence* Queensland Government at 11.

<sup>47</sup> J Stewart (1990) *Report to the Department of Community Services on Responses to Domestic Violence in Tasmania*; R Wearing (1991) "Family Violence: Has Anything Changed in 4 Years?" 5 *Socio-Legal Bulletin* at 4-5; National Committee on Violence Against Women (1992) at 53; J Stubbs and D Powell (1989) *Domestic Violence: The Impact of Legal Reform in NSW* Sydney: NSW Bureau of Crime Statistics and Research at 31.

parte is low unless the Magistrate is able to see physical injury<sup>48</sup>. And we know that police seem reluctant to assist with excluding perpetrators from their home as very few police initiate applications including a request for such a condition.<sup>49</sup> Finally it has been suggested that many self-representing women do not know that the ouster order option exists.<sup>50</sup>

In this survey, Queensland Magistrates were asked: “Do you feel comfortable ousting a violent person from their home?” A total of 79% of Queensland Magistrates surveyed responded positively to the question, with 21% of Magistrates stating that they did not feel comfortable about making an ouster order. Those Magistrates who felt uncomfortable were all male. This result would seem, on the face of it, to contradict some of the concerns raised in other jurisdictions. However, we have taken the view that although many Magistrates may assert that they feel comfortable making such an order (because that was the word used in the question) this comfort may not necessarily translate into appropriate numbers of orders actually being made. Certainly an analysis of the qualitative comments that accompanied the quantitative data for the question suggests this to be the case. The issues raised through these comments, discussed below, also provide an important indication of a possible need for specific training in this area for Magistrates.

The first key issue is that, in order for many Magistrates to feel comfortable ousting a violent person from their home, it seems important that the violence must be seen to be relatively severe:

*“If physical violence yes” (5);*

*“When the circumstances are bad enough” (37);*

*“Yes. Provided the circumstances warrant it” (13);*

*“Yes. Providing there are sufficient grounds” (14);*

Severity, in terms of conceptions of domestic violence, usually requires an element of physical violence to be present. This finding concurs with research on Magistrates and the making of orders under domestic violence legislation in Victoria conducted by Ingrid Wilson which also indicated the priority of importance placed on physical violence.<sup>51</sup> What this means is that Magistrates consider ouster orders to be justified only as a last resort measure, and “when the circumstances are bad enough”.

However, circumstances where there is a clear and present danger to the woman and where there is evidence of physical violence are precisely those circumstances in which ouster orders are likely to be most inappropriate.<sup>52</sup> That is, where a woman is

<sup>48</sup> Nunn (2001) at 35.

<sup>49</sup> Nunn (2001) at 35.

<sup>50</sup> Nunn (2001) at 35.

<sup>51</sup> IM Wilson (1992) *‘Were these Serious Assaults?’: An Analysis of Magistrates’ Dialogue During Proceedings for Intervention Orders Under the Crimes (Family Violence) Act 1987* – thesis completed in satisfaction of requirements of the BA (Hons) in Criminology at the University of Melbourne. Steiner confirms that “most Magistrates will grant (an ouster) condition when the application has not been served only if serious domestic violence is alleged, the aggrieved has children in her care and they are also at risk if the respondent is permitted to remain in the matrimonial home, and the aggrieved is able to indicate to the Magistrate that the respondent has alternative accommodation available to him/her.” – C Steiner (2001) “Working practically with the legislation and potential issues for practitioners” in *Domestic Violence – Queensland Law Society Continuing Legal Education Seminar Papers* (25 September) at 2.

<sup>52</sup> “Obviously there are women and children for whom this is not an option where the perpetrator is particularly violent and relentless in his pursuit of the woman. As violence often increases following separation this is an important consideration in pursuing such a shift in

frightened for her physical safety, and also for her children, she is least likely to want to remain in the family home and most likely to need the security and safety of refuge accommodation. Magistrates should therefore not rely on the criterion of circumstances being “bad enough” for the issuing of ouster orders because it is more appropriately where the circumstances are “good enough” that such orders should be made.

A second key issue for Magistrates appears to be a reluctance to issue ouster orders *ex parte*. That is, many Magistrates do not feel comfortable ousting a perpetrator of violence from his home unless the respondent has been given the opportunity to be heard and to defend his case:

*“Yes. Provided that the person has been heard by the court and present when the order is made” (1)*

*“No problem once justice has been served by the respondent having the opportunity to attend court” (35)*

*“Yes but the violent person should be given the opportunity to respond”(18)*

This approach satisfies liberal legal notions of natural justice but also potentially results in an encouragement by the system of the perpetrator’s denial and mitigation of his behaviour. That is, if a perpetrator has to deny his violent behaviour in order to stay in his home the system is failing to encourage him to take responsibility for his violence. Further, although only one of the surveyed Magistrates mentioned the issue of the respondent’s legal or equitable interests in the property as a consideration, it is possible that the reluctance of Magistrates to make *ex parte* ouster orders is linked to a respect for these interests. If this is the case, legal process is allowing a perpetrator’s property rights to be superordinated over the rights of women and children to live free of violence in their own home.

Additionally, where a woman is seeking an ouster condition under a protection order, she is indicating to the court that she feels safe to remain in the home if the perpetrator is removed. If the Magistrate is satisfied that a protection order should be issued under the legislation, then the requested ouster condition should be included in that order, whether or not the perpetrator is present in court at the time it was made. To do otherwise means that a perpetrator can ensure that an ouster order is not made by simply not being present in court.

A third issue arises as a result of the assertion by Magistrates of their objective legally focused approach to the issuing of ouster orders. That is, many Magistrates said that it was irrelevant whether or not they felt comfortable making such orders because if the order “must be made then it is made”:

*“In the context of the DV legislation if it is found that a person who committed an act of DV to the extent that such an order has to be made then I will make it. It is not to the point whether or not I feel personally comfortable” (28)*

*“My comfort is not relevant. If the circumstances of the case require that I do, then I do” (32)*

This indicates a commitment to notions of objective justice which perhaps belies the subjective nature of the exercise of a Magistrate’s discretion in responding to applications for ouster orders. We would argue that a Magistrate’s feelings about

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practice. This is not a suitable choice either for women and children who do not wish to remain in the house where they experienced the trauma of domestic or family violence. Where there have been high levels of violence and the perpetrator is relentless in continuing to pursue the woman it is unlikely the woman would choose to remain in the home with such a high risk to safety. In essence where the woman and children consider their safety to be a major risk this is not an option at the point of crisis. For some of these women it could be an option at a later stage.” - *The Home Safe Home Report* (2000) at 56.

the idea of ousting a person from their home certainly are relevant to whether these orders are being made or not. In order for justice to be served in the exercise of a Magistrate's discretion in making ouster orders, it may be necessary for Magistrates to more openly acknowledge the part their own feelings on the issue play in the making of such orders.

A fourth key issue for Magistrates is whether information is available about the involvement of children and the availability of suitable alternative accommodation for the applicant:

*"Not if there is some temporary accommodation for that person to attend" (2)*

*"I would have to look into the necessity closely" (5)*

*"I see no option if aggrieved spouse has no suitable alternative accommodation for herself and/or children" (37)*

Here we find evidence of the availability of refuge for women as a disincentive for the making of ouster orders. That is, because a woman is more likely to have alternative emergency accommodation available to her than the male perpetrator, she is the one who is expected to leave the home. In order for this issue to be addressed government must consider funding more men's emergency accommodation services – however this should not be to the detriment of current or continued funding for women's services which are already under-funded.

This leads us then to consider two key reform possibilities. Both reform options are based on the fundamental principle that legal practice and procedure in relation to ouster orders should encourage women to make their own decisions, empowering them to take control of and rebuild their lives.<sup>53</sup>

The first reform possibility is, as WESNET has recommended, that there should be "a presumption in favour of an exclusion order where one has been requested and where the safety of the protected person/children would not be compromised by remaining in the family home."<sup>54</sup> It has also been suggested that there be an obligation on the court, at least where children are involved, to consider making an ouster order, whether or not it has been requested.<sup>55</sup>

The *Home Safe Home Report* takes the idea even further by suggesting that legislative change for ouster orders could involve making such orders presumptive standard conditions to all protection orders unless there are reasons why this is not possible or appropriate, for example, where the violence is too severe.<sup>56</sup>

Second, the South Australian Domestic Violence Council (SADVC) in its *Report on Legal Issues*<sup>57</sup> recommended a new "cooling off period" for expedited ex parte ouster conditions. This proposal involves a "12 hour ouster order whereby the police, by telephone, can call a rostered Magistrate for an order to remove and detain the defendant for a period of 12 hours. At the end of the time the defendant is released and no further action is taken."<sup>58</sup> The idea is based on an understanding that "many women express the view that they do not want the perpetrator charged with

<sup>53</sup> V Wensing (WESNET) "Why We Still Need Women's Services in the Twenty First Century" in NSW Women's Refuge Movement, Domestic Violence and Incest Resource Centre, Council to Homeless Persons (eds) (2001) *Out of the Fire: Domestic Violence and Homelessness* at 18.

<sup>54</sup> J Earle for WESNET (1998) *Women's Services Network Submission on Model Domestic Violence Laws*, Canberra: AGPS at 6-7. This reflects current laws in NSW which require "Magistrates to give reasons if they decline to make an exclusion order.": Earle (1998) at 6.

<sup>55</sup> Earle (1998) at 6-7.

<sup>56</sup> *The Home Safe Home Report* (2000) at 58.

<sup>57</sup> South Australian Domestic Violence Council, (198?) *Report – Legal Issues Task Force*.

<sup>58</sup> South Australian Domestic Violence Council at 102.

assault and do not want to add to their longer-term risk by applying for a restraining order, but they do want him removed and cooled off.”<sup>59</sup>

Certainly, there are issues in relation to this proposal concerning civil liberties and arbitrary arrest. Conversely, however, it is a central democratic right for women and children to be safe in their home. It has also been acknowledged that such a system may increase risks for women by inflaming perpetrators. However, the SADVC responds to this issue by saying that any action taken by a victim is likely to be inflammatory and that this proposal may at least give them some breathing space to consider their options.<sup>60</sup>

Finally, a recommendation has been made that “legislation be introduced whereby the perpetrator is made to compensate the woman or the service (she is forced to escape to) for the expenses incurred when a woman is forced to leave the home to escape domestic violence”<sup>61</sup>

### **Conclusion.**

The purpose of this paper has been to discuss the findings of a 2000 survey of Queensland Magistrates attitudes to domestic violence. While a number of themes have been identified throughout the survey, two issues were highlighted for discussion. The first, that respondent Queensland Magistrates believe women use domestic violence as a tactic in Family Court proceedings and second, that Queensland Magistrates will only issue ouster orders when the circumstances are “bad enough”. In both cases we have argued not only that such understandings are contrary to established research and literature but that in both cases, such attitudes markedly decrease the justice available for women who are victims of domestic violence. Despite Queensland magistrates claims to the contrary, we believe that such attitudes do require more and specific training in order to raise awareness within the Magistracy and to contribute to justice for the victims of domestic violence.

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<sup>59</sup> South Australian Domestic Violence Council at 102.

<sup>60</sup> South Australian Domestic Violence Council at 103.

<sup>61</sup> Department of Families, Youth and Community Care (Qld) (1996) at 6.