



Emmanuel College

# Papers

## **Domestic Violence and the Law: Achievements and Future Directions**

by

Professor Heather Douglas

Number 26 – August 2018



**Emmanuel College**  
**The University of Queensland**  
*Enriching lives since 1911*

Emmanuel College is Australia's ninth, and with St John's College, The University of Queensland's first residential college to gain affiliation. It was founded by the Presbyterian Church of Queensland in 1911 with the first students taking up residence in Wickham Terrace in 1912. As the Presbyterian Church moved towards partnership with other religious denominations during the 1970s, Emmanuel College also came under the auspices of the Uniting Church. Upon its inauguration, Emmanuel College was an all male residence but this changed in 1975 when women were admitted as collegians. Now, the College numbers around 358 students with half our population being female.

Further change was experienced by the College when it moved in 1956 from its original site in Wickham Terrace to its present location on the main university campus in St Lucia.

Since 1911, Emmanuel has stood for excellence in all round education and has had seven Rhodes Scholars during its history. Its graduates have gone on to make a major contribution to Australia in many areas, including as doctors, scientists, teachers, engineers, lawyers and judges, politicians, ambassadors and diplomats, and church leaders.

## THE AUTHOR

**Professor Heather Douglas**  
**TC Beirne School of Law, The University of Queensland**

Professor Heather Douglas researches and has published widely in the areas of criminal justice and domestic violence. She was awarded an Australian Research Council Future Fellowship to research the way in which women who have experienced domestic violence use the legal system to help them leave violence. She was the lead researcher and project co-ordinator with the Australasian Institute of Judicial Administration on the development of the National Domestic and Family Violence Bench Book, a project funded by the Australian Commonwealth Government. Heather was the lead chief investigator on the Australian Feminist Judgments Project funded by the Australian Research Council. In 2016 Heather was appointed as a Member to the Australian Research Council's College of Experts. In 2018 Heather was a fellow at the Humboldt University Faculty of Law and Center for Transdisciplinary Gender Studies in Berlin.

***Copyright is held by the author***

This paper is based on the *'In Conversation'* between Professor Heather Douglas and Cathy Van Extel of ABC Radio National which was conducted at the Sir Harry Gibbs Law Dinner held at Emmanuel College on 30 August 2018.

## Domestic Violence and the Law: Achievements and Future Directions

### Professor Heather Douglas\*

#### Introductory remarks

The appropriate place to start in this lecture is with a mention of Sir Harry Gibbs. At some point in their career judges inevitably confront domestic violence. Justice Gibbs – who later became the Chief Justice – was no exception. In the 1978 case of *Moffa*<sup>1</sup> the High Court was tasked to consider the limits of provocation. Michele Moffa bashed his wife to death with a piece of iron piping after she threw some photos at him declaring she had slept with another man and that she wanted a divorce. Moffa argued on appeal that the question of provocation should have been left to the jury. Justice Gibbs was in the minority and rejected this argument. He found that it was not up to the jury to find that a reasonable man could have been provoked by the words and actions of the dead woman. He pointed out that the Court had to consider contemporary conditions and attitudes and that what might be provocative in one age might be regarded differently in another and a greater measure of self-control is expected as society develops. While Justice Gibbs was known for his conservatism in constitutional matters, he was ahead of his time in recognising changing social attitudes in *Moffa*. The provocation defence has now been abolished or wound back in nearly every state in Australia.

#### The gendered nature of domestic violence

Increasingly, as a community, we are recognising the harms associated with domestic and family violence and changing our laws in an effort to respond. To begin with though, it's important to acknowledge the gendered nature of domestic violence and the deep harms it causes. The National Council to Reduce Violence against Women and their Children identified that: 'the biggest risk factor for becoming a victim of sexual assault or domestic and family violence is being a woman.'<sup>2</sup> The Australian Bureau of Statistics' National Personal Safety Survey has also identified that women are more likely than men to experience actual or threatened physical or sexual violence or emotional abuse by a partner. One in six women reported that they had experienced physical violence from a partner.<sup>3</sup> In over 70% of cases where a woman is the victim of homicide, her current or past intimate male partner is

---

\* Professor of Law, T.C.Beirne School of Law, The University of Queensland. The research on which this paper is based was undertaken as part of an Australian Research Council Future Fellowship [FT140100796]. Thanks to Jessica Downing-Ide for her assistance with the preparation of this paper.

<sup>1</sup> *Moffa v R* (1977) 138 CLR 601.

<sup>2</sup> National Council to Reduce Violence against Women and their Children, 'Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021' (Report, 2009) 26.

<sup>3</sup> Australian Bureau of Statistics ('ABS'), 4906.0 – Personal Safety, Australia, 2016 (2016), Table 3 <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4906.0>>.

the killer.<sup>4</sup> While women are particularly vulnerable to domestic and family violence, Aboriginal and Torres Strait Islander women, women from culturally and linguistically diverse backgrounds, young women and women with physical or mental disabilities are overrepresented as victims.<sup>5</sup> In 2014-15 the hospitalisation rates for Aboriginal and Torres Strait Islander women who experienced domestic and family violence-related assaults were 32 times the rate for non-Aboriginal and Torres Strait Islander women.<sup>6</sup> In some remote areas, the rate was 53 times higher than for other women.<sup>7</sup>

The majority of women who reported family violence to the ABS' Personal Safety Survey also said that their children either saw or heard the violence.<sup>8</sup> But children don't need to see or hear the violence to be affected by it. They may experience the aftermath of violence, having to call the ambulance or police, the damaged furniture, the injured pets, and in some cases removal into state care.<sup>9</sup>

Research tells us that there are significant adverse health effects that arise from domestic violence. Longitudinal studies show that women who have experienced domestic violence report poorer mental and physical health throughout their lives than women who have not been abused.<sup>10</sup> Over 2% of the disease burden experienced by adult women in Australia is directly associated with domestic violence.<sup>11</sup> Children too are deeply affected by domestic and family violence. If a child is exposed to family violence, the effects may include higher levels of mental health difficulties, problems with learning and school, low self-esteem and increased likelihood of alcohol or substance misuse.<sup>12</sup>

---

<sup>4</sup> T Cusson and W Bryant, 'Domestic/Family Homicide in Australia' (Research in Practice No 38, Australian Institute of Criminology, 2015).

<sup>5</sup> Australasian Institute of Judicial Administration, *National Domestic and Family Violence Bench Book* (2018) [4.4.1] <<http://www.dfvbenchbook.aija.org.au/vulnerable-groups/women/>>.

<sup>6</sup> Steering Committee for the Review of Government Service Provision, 'Overcoming Indigenous Disadvantage Key Indicators 2016 – Report' (Productivity Commission, 2016) <<http://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/2016/report-documents/oid-2016-overcoming-indigenous-disadvantage-key-indicators-2016-report.pdf>>.

<sup>7</sup> Department of Prime Minister and Cabinet, 'Closing the Gap: Prime Minister's Report 2018' (Report, 2018) 120 <<https://www.pmc.gov.au/resource-centre/indigenous-affairs/closing-gap-prime-ministers-report-2018>>.

<sup>8</sup> Australian Bureau of Statistics, *above n 3*, Tables 17 and 18.

<sup>9</sup> K Richards, 'Children's Exposure to Domestic Violence in Australia' (2011) 419 *Trends and Issues in Crime and Criminal Justice* 1.

<sup>10</sup> D Loxton et al., 'Intimate partner violence adversely impacts health over 16 years and across generations: a longitudinal cohort study' (2017) *PLoS ONE* 12(6): e0178138, 8.

<sup>11</sup> J Ayre et al., 'Examination of the burden of disease of intimate partner violence against women in 2011: Final Report' (Report, Australia's National Research Organisation for Women's Safety ('ANROWS'), 2016).

<sup>12</sup> M Sety, 'The Impact of Domestic Violence on Children: A Literature Review' (Report, Australian Domestic and Family Violence Clearinghouse, 1 August 2011).

The response to domestic and family violence must be a holistic one encompassing health, housing, economic and educational responses. Law is just one part of the picture. But every year thousands of Australian women do turn to law to help them live lives free and safe from violence. In 2016-2017 over 32,000 people applied for domestic violence protection orders in Queensland.<sup>13</sup> Many people also become involved with the family courts to manage their children's contact with a violent father. They engage with child safety services and some women on insecure visas seek orders to avoid deportation after separation from an abuser. Many women are enmeshed in a variety of overlapping, complex and often inconsistent legal processes. Law plays an important role in the response to domestic and family violence and that's what I am going to focus on tonight.

### **Coercive control**

Over the years there have been many reports written about how to improve the legal response to domestic violence, too many to discuss tonight. But a few recent reports stand out. In 2010, the Australian Law Reform Commission handed down its report on domestic violence laws in Australia.<sup>14</sup> It considered the laws overlap and conflict and made a raft of recommendations about what was needed. Since then, among other reports, there have been further recommendations made by the Victorian Royal Commission<sup>15</sup> and the *Not Now, Not Ever* Report.<sup>16</sup> In my own research over the past few years, I have talked to 65 women from diverse backgrounds about their experience of domestic violence and how they have used the legal system in response.<sup>17</sup>

A consistent recommendation from these various reports and from women I have interviewed is that definitions of domestic violence should be consistent across the country and should be consistent across different legal responses. It has been recommended many times that domestic violence should be defined as coercive and controlling behaviour that causes fear. In some states, here in Queensland and also in Victoria, protection order legislation, and in the Commonwealth *Family Law Act*, coercive and controlling behaviour is in the definition.<sup>18</sup> Lots of researchers have emphasised the need for this approach.

---

<sup>13</sup> Magistrates Courts of Queensland, *Annual report 2016 – 2017* (2017) Queensland Courts, 51 <[https://www.courts.qld.gov.au/data/assets/pdf\\_file/0006/561237/mc-ar-2016-2017.pdf](https://www.courts.qld.gov.au/data/assets/pdf_file/0006/561237/mc-ar-2016-2017.pdf)>.

<sup>14</sup> Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence - A National Legal Response*, Report No 114 (2010).

<sup>15</sup> Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2018) <<http://www.rcfv.com.au/Report-Recommendations>>.

<sup>16</sup> Special Taskforce on Domestic and Family Violence in Queensland, 'Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland' (Report, 2015).

<sup>17</sup> TC Beirne School of Law, *Using law and leaving domestic violence* (2018) University of Queensland <<https://law.uq.edu.au/research/our-research/using-law-and-leaving-domestic-violence-project/using-law-and-leaving-domestic-violence>>.

<sup>18</sup> E Stark, *Coercive Control: How men entrap women in personal life* (Oxford, 2007).

Evan Stark<sup>19</sup> is perhaps best known. He explains that coercive control refers, in essence, to a pattern of abusive behaviours involving the exercise of control. The aims of this behaviour are to instil fear and ultimately to take away the victim's freedom and autonomy. The effect of these coercive and controlling behaviours is cumulative and gradual. While they often include physical and sexual assault and threats, other behaviours are designed to isolate the woman from her friends and family and degrade her. Domestic violence often includes control over finances, and generally the microregulation of her everyday life.

From my interviews, Roseanna, a Torres Strait islander woman provides a good description of such everyday control. She said her partner would time her trip up to the school and back. If she was one minute late she would, in Roseanna's words, get 'the biggest hiding'. Everything was her fault if she wasn't back on time. Even if she was delayed because the teachers wanted to talk to her. She always knew she had to get home in the expected 17 minutes. She said the whole family were walking on eggshells. When the kids came inside the house they would have to be perfectly quiet and there was a complex set of rules about what they had to do when they came inside around washing and homework and so on.

While physical abuse is obviously damaging, many women regard the emotional abuse and control as the worst aspects of the abuse. Most of the women I spoke to said the emotional abuse was the worst aspect of the abuse even when they had experienced physical violence. Jamila said that the worst thing was the way that her partner spoke to her. There were threats, but he was also constantly belittling her, talking negatively about her body and his family also treated her as dirt. She said this was worse than the physical violence because you start to believe it.

When a woman is so broken down by abuse and isolated from friends and family it can be difficult to see a way out. I want to quote from Faith who describes this situation so compellingly. She said:

The domestic violence had such a hold. It's like this octopus that holds my brain. In order to break away I had to have no contact. It was like I was just covered in that black ink that they spurt.

Sometimes of course, women do manage to escape and separation might result in ending in the violence. However this is so often not the case. In many cases, coercive and controlling behaviour continues after separation. Many women I spoke to believed they were stalked by their abuser. They talked

---

<sup>19</sup> Ibid 380-381.

about how he seemed to always know where she was and would send messages, sometimes via text or Facebook, even via friends or children, that showed that he knew what she was doing and where she was going.

Other times the messages may be more covert. For example, one of Sandra's real pleasures, while she coped with going through the family law system, was riding her horse. Her ex-partner threatened to harm the horse so she moved it to a new paddock. The next time she went to the new paddock for a ride there were several empty beer cans, an obscure brand that her ex-partner drank, lined up along the fence. Needless to say, for Sandra this was intimidating and she saw this as a clear message from her partner 'you are unable to escape me'. Some have described this kind of behaviour as 'gaslighting'.<sup>20</sup> This is when the abuser creates a sense in the victim that the abuser is omnipresent but it is difficult to be completely sure it is him. Sometimes it makes women feel like they are crazy.

These women's experiences highlight the importance of understanding the complex web of coercive and controlling behaviours that underlie domestic violence, but there is still some way to go in making sure justice officials also understand this. Last week I received an email from a father who was trying to help his daughter escape from a violent relationship. He wrote: 'The issue of coercive control is so important in understanding domestic violence, yet the police, lawyers, and judges seem to have little awareness of the mechanics involved and how it drives the behaviour of the perpetrator.' Clearly we need to keep up the training and education around this issue.

### **Protection order system**

One of the most common ways women engage with the law in response to domestic violence is through the protection order system. Slowly parliaments have been trying to improve this system so that it works better for people in need of protection. At the end of last year, legislation was introduced across the country to make sure protection orders issued in one state are recognised and function in another state.<sup>21</sup> This means that when women move from one state to another they don't have to reapply for yet another protection order and that's a positive thing. We know that women who have experienced violence often have to move around to stay safe and find appropriate housing, so the interstate recognition of protection orders is one less thing they have to worry about.

---

<sup>20</sup> *Gaslight* (Directed by George Cukor, Metro-Goldwyn-Mayer, starring Ingrid Bergman, 1944)

<https://www.youtube.com/watch?v=0TolFQU2xmg>.

<sup>21</sup> Department of Social Services (Cth), 'The National Plan to Reduce Violence against Women: Immediate Government Actions' (Report, April 2009) 5.

In Queensland we have also seen the introduction of a specialist domestic and family violence court in some communities including Southport and more recently in Beenleigh and Townsville. A recent review of the Southport court one year in suggested that the model was successful in many respects.<sup>22</sup> The specialist court includes dedicated courtrooms and registry, specially trained magistrates, registry staff and prosecutors and an information desk staffed by volunteers. At the Southport court there is a weekly stakeholder meeting including magistrates, court staff, prosecutors, Legal Aid and relevant services. The review found there good coordination between the stakeholders, there was better support for parties and a perception that there was a higher sense of perpetrator accountability. The main work for the specialist court is protection orders.

### **Protection orders and policing**

Protection orders work by setting out a number of conditions that the abuser must abide by. If the order is breached the abuser can be charged with a criminal offence of breaching or contravening the order. In theory, this can ultimately lead to imprisonment. Enforcing protection orders and charging breach offences relies on police to do their job diligently. Lots of women I have spoken to had a positive experience with the police response: police came quickly, they were polite, they took the complaint seriously and responded appropriately. Some police checked back with the women a day or two after the call out to see if she was alright.

However, there were many negative experiences. These included coming late, an hour or more after being called, or not coming at all, laughing at the woman and siding with the abuser and refusing to assist. One police officer recommended a woman get a security guard as she was calling too often. A very consistent comment was that police often refused to intervene where there were children in the relationship. In some cases, protection order conditions were interpreted narrowly in favour of the abuser or family law orders were cited as trumping the state-based protection order, despite clear incidents of domestic violence that police always have a responsibility to respond to. Some women became so frustrated with inadequate police responses that they opted out and stopped calling them.

Another common complaint was that police did not take behaviours such as obsessive text messaging seriously. Sometimes they referred to these kinds of breaches as 'technical' or 'trivial' breaches. However, obsessive texting is a

---

<sup>22</sup> C Bond et al., 'Evaluation of the Specialist Family Violence Court Trial in Southport' (Report, Griffith Criminology Institute, 2017).

form of stalking and we know that stalking is a red flag for increased risk of abuse.<sup>23</sup>

The Queensland Death Review and Advisory Board examines deaths associated with domestic violence and they documented a recent salutary example. Joshua and Monique had been together for only a few months when Monique's former violent partner, Grant killed Joshua.<sup>24</sup> Police had served a temporary protection order on Monique's ex-partner, Grant, earlier that day but Grant had told the police the order would not stop him. Grant had a long history of abusing and stalking Monique, including texting Monique on multiple occasions on the afternoon of the killing. In this case, the death review report notes that it appeared that the police failed to take timely action, failed to make appropriate resources available to the case and did not connect complaints and reports made across different police stations. Problems with police data have been identified in other ways also. For example, in July and August this year the papers reported that a police officer sent the address of a Gold Coast woman to her abusive former partner and advised the man to 'just tell her you know where she lives and leave it at that.'<sup>25</sup>

Police are often first responders in domestic violence cases. Victims of violence must be able to trust them to focus on making them safe. Cases like Monique and Joshua's and the revelations in recent newspaper articles about Queensland police officers misusing online data, undo important improvements made by police. We have some way to go to ensure that we have consistent police responses, officers that uniformly understand the tactics and behaviours of domestic abusers and who are squarely focussed on safety. Researchers in NSW found that almost one third of complaints about police were related to domestic violence.<sup>26</sup> Keeping up training about relevant law

---

<sup>23</sup> M B Mechanic, T L Weaver and P A Resick, 'Risk factors for physical injury among help-seeking battered women: An exploration of multiple abuse dimensions' (2008) 14(10) *Violence Against Women* 1148; J McFarlane, J Campbell and K Watson, 'Intimate Partner Stalking and Femicide: Urgent Implications for Women's Safety' (2002) 20(1-2) *Behavioral Sciences and the Law* 51.

<sup>24</sup> Domestic and Family Violence Death Review and Advisory Board, '2016–17 Annual Report' (Report, Queensland Government, 2017) 23.

<sup>25</sup> A Brown, 'Queensland woman terrified as ex-partner who threatened to strap bombs to their children goes on run' *Brisbane Times* (online), 29 July 2018

<<https://www.brisbanetimes.com.au/national/queensland/queensland-woman-terrified-as-ex-partner-who-threatened-to-strap-bombs-to-their-children-goes-on-run-20180724-p4zta0.html>>; Ben Smees,

'Queensland police computer hacking: No action taken in nearly 90% of cases' *The Guardian* (online) 3 August 2018 <<https://www.theguardian.com/australia-news/2018/aug/02/queensland-police-computer-hacking-no-action-taken-in-nearly-90-of-cases>> .

<sup>26</sup> J Goodman-Delahunty and A Corbo Crehan, 'Enhancing police responses to domestic violence incidents: Reports from client advocates in New South Wales' (2016) 22(8) *Violence Against Women* 1007.

and policy should help, but strong responses to negligent behaviour and misconduct are also extremely important. Indeed, it may be appropriate to rethink the common law approach to police negligence. Associate Professor Shircore and Victoria Morland and I have argued that increased police powers around domestic violence may suggest that police also have increased responsibility in this context.<sup>27</sup> Currently in Victoria there is a case on foot.<sup>28</sup> A woman is suing police in negligence. She alleges that police failed to take appropriate care in her case – often failing to attend or act when called, eventually the applicant had given up calling the police.<sup>29</sup>

### **Legal Systems Abuse**

Victims' connections with the legal system do not stop with police. After separating, many victims end up in court. In many cases, victims of violence make applications to seek protection for themselves and their children via civil protection orders and family law orders and through complaints to police that might lead to criminal charges. Post-separation both the parties may have important and legitimate reasons to engage with the legal system. Sometimes various orders will state that the victim and abuser do not have on-going contact with each other with some specific exceptions, usually around child contact. This can result in a loss of opportunity for abusers to abuse their victim in the way they did prior to separation. The loss of opportunity, coupled with engagement in litigation that can co-occur around separation, creates a kind of perfect storm. While litigation maybe an important part of women's search for safety and relationship closure, litigation can provide a new opportunity for an ex-partner to continue to perpetrate abuse in a way that is apparently legally justified.

In my interviews with women, at least 30 of them identified that litigation was being used by their ex-partner as a tool or tactic for the purpose of continuing the abuse post-separation.<sup>30</sup> For example, when I first met Alex she had been to court on 50 occasions in the past six months. Alex had concurrent matters in the Family Court, Magistrate's Court and District Court; she also had issues with the police, the child protection system and with the child support system. Gordon had subpoenaed many of Alex's family and friends to give evidence. She said:

---

<sup>27</sup> M Shircore, H Douglas, Victoria Morwood, 'Domestic and Family Violence and Police Negligence' (2017) 39(4) *Sydney Law Review* 539.

<sup>28</sup> *Smith and Ors v State of Victoria* [2018] VSC 475 (27 August 2018).

<sup>29</sup> M Shircore and H Douglas, [Court opens door to domestic violence victim to sue police for negligence \(20 August 2018\)](https://theconversation.com/court-opens-door-to-domestic-violence-victim-to-sue-police-for-negligence-102336) The Conversation <<https://theconversation.com/court-opens-door-to-domestic-violence-victim-to-sue-police-for-negligence-102336>>.

<sup>30</sup> In this section I draw on material in: H Douglas, 'Legal systems abuse and coercive control' (2018) 18(1) *Criminology and Criminal Justice* 84.

He's using the law as a tool to abuse me. How do you get out of that, because you can't just not turn up - I'm not at the stage where I can't just not turn up, because we haven't had final orders yet.

Alex had obtained a protection order that prohibited her ex-partner Gordon from contacting her and a family court order requiring Gordon's contact with their child should take place in a contact centre. Gordon had breached the protection order on numerous occasions and police charged him with several offences. He started an appeal in the District Court against the protection order being made, he appealed the family court order, had an application for return of money in the small claims tribunal, sought serial adjournments of all the cases and had asked for the breach offences to be dealt with in separate court cases. All of these applications provided opportunities for Gordon to be in close proximity to Alex and were designed as part of program of intimidation. Ultimately, Gordon failed with all of these applications but as Alex said:

His purpose is to keep me engaged by going to court. In fact, he actually has said it ... in two separate court appearances. [For example] he has said 'I don't want those two breaches to be heard together because the more I get her into court the better it is for me'... There was a gasp ... it's the only way he has access to me.

Alex has never received child support and complaints made to child protection services about Alex's ability to parent were unsubstantiated, but still, the department of Child Safety investigated her, a process she found extremely distressing. As for her relatives and friends who were subpoenaed to court, many attended because they were worried about what would happen if they did not. Ultimately, none of the proposed witnesses were required to give evidence but they still had to make all of the arrangements with work and family to attend court for the day. In some of these cases Alex was awarded costs so she could be reimbursed for her legal fees but these have never been paid. Alex has explained that she won't be pursuing them as this would require her returning to court and this is just what the abuser wants.

Many of the legal options that are available to women to fight this kind of systems abuse will require the victim to go through the trauma of engaging with police, giving evidence against the perpetrator and to navigate further complex litigation, often taking significant time and requiring legal advice and support that is regularly unavailable and unaffordable. Further, any relaxation of the procedures associated with preventing a person from litigation could have unintended consequences for abused women. Many survivors of abuse need to make frequent applications to courts to change conditions of orders in

response to the changing behaviours of the perpetrator and to enforce parenting orders and maintain their safety.

Better understanding of the dynamics of coercive control may help. Judges, lawyers and police who understand the coercive and controlling dynamics of domestic violence will not begin their considerations and decision-making with an assumption that a legal application is, in itself, a neutral behaviour. Better understanding of these dynamics may ensure more appropriate decisions in response to adjournment applications, in dealing with applications for separate trials, in rejecting subpoenas and disallowing matters to proceed.

When decision makers understand domestic abuse as coercive control they will more readily look for evidence of the power and control dynamics of the relationship and take more care in their scrutiny of past conduct of the parties and the allegations of abuse that are made. Such consideration should lead to more accurate assessment of how the legal system can appropriately respond.<sup>31</sup> Proper consideration takes time and time is a limited resource for police, lawyers and magistrates. But insufficient time for case preparation may be short-sighted because it might actually contribute to delays and extend the experience of abuse. In the US, research concluded that careful judicial attention to materials before trial helps judges address the risk to survivors posed by alleged abusers and results in quicker case resolution and a decrease re-abuse by defendants.<sup>32</sup>

Increasingly resources have been developed that aim to assist those working in the justice system to better understand and respond to cases involving domestic violence. Nationally we have developed the *National Domestic and Family Violence Bench Book*.<sup>33</sup> While this is primarily a resource aimed at magistrates and judges to help them respond to domestic violence appropriately and consistently it is open access and online so it is available to everyone. The Queensland Law Society has also developed best practice guidelines for solicitors.<sup>34</sup> I think slowly we are beginning to understand better what's to be done and we are seeing some small improvements.

---

<sup>31</sup> L Neilson, 'Assessing mutual partner-abuse claims in child custody and access cases' (2004) 42(3) *Family Court Review* 411.

<sup>32</sup> A Klein, 'Practical implications of current domestic violence research: For law enforcement, prosecutors and judges' (Report, National Institute of Justice (US), 2009).

<sup>33</sup> Australasian Institute of Judicial Administration, above n 5.

<sup>34</sup> Queensland Law Society, *Domestic and Family Violence Best Practice Guidelines* (2016)

<[http://www.qls.com.au/For the profession/Advocacy/Domestic and Family Violence Best Practice Guidelines](http://www.qls.com.au/For_the_profession/Advocacy/Domestic_and_Family_Violence_Best_Practice_Guidelines)>.

## Criminal law

One area where people have suggested there is more room for improvement is in the criminal law. Lately, for example, there has been discussion in Australia about whether we have appropriate criminal offences available to respond to domestic violence.

In 2016, Queensland introduced a specific criminal offence of non-fatal strangulation. Why did we do this?

Non-fatal strangulation is commonly reported by women who have experienced domestic violence. One US study found that up to three quarters of women in domestic violence shelters reported non-fatal strangulation from their previous partner.<sup>35</sup>

Non-fatal strangulation is both an extremely risky behaviour and a risk factor for future serious harm and fatality. So just how is it risky behaviour of itself? Victims who have survived a strangulation incident report all sorts of clinical symptoms including a sore throat, long-term vocal change and shortness of breath. Loss of consciousness, paralysis, loss of sensation, vision changes, memory loss, anxiety and post-traumatic stress are also not uncommon.<sup>36</sup> Some women have had a pregnancy miscarriage after strangulation. 'Thyroid storm' is a life-threatening condition, associated with strangulation, and can occur days after the incident. Even where there are no visible injuries, some victims have died as long as several weeks after the attack, as a result of stroke and brain damage caused by lack of oxygen during the strangulation.<sup>37</sup> Strangulation can cause unconsciousness within seconds and death within minutes. That's why this behaviour is of itself highly risky and dangerous.

Second, what do we know about risk? In around fifty percent of deaths involving intimate partner violence, women have experienced non-fatal strangulation at least once before they were killed.<sup>38</sup> Although studies vary, Nancy Glass and her colleagues found that an incident of non-fatal strangulation makes the person much more likely to die at the hands of that

---

<sup>35</sup> M Joshi, KA Thomas and SB Sorenson, "'I didn't know I could turn colors": health problems and health care experiences reported by women who were strangled by an intimate partner' (2012) 51 *Social Work in Health Care* 798.

<sup>36</sup> A Foley, 'Strangulation: Know the symptoms, save a life' (2015) 41(1) *Journal of Emergency Nursing* 89, 89.

<sup>37</sup> H Douglas and R Fitzgerald, 'Strangulation, domestic violence and the legal response' (2014) 36 *Sydney Law Review* 231, 232-234.

<sup>38</sup> N Glass et al., 'Non-fatal strangulation is an important risk factor for homicide in women' *Journal of Emergency Medicine* (2008) 35(3) 329.

person at a later time.<sup>39</sup> As Gael Strack, an American strangulation educator, says 'strangulation is the last warning shot'.<sup>40</sup>

The criminal law in Queensland was ill equipped to properly recognise this dangerous behaviour. Some charges might be made under traditional offences but there are significant issues with them. For a start it's difficult to prove the intent to kill or cause serious harm associated with a charge of attempted murder. Assault seems too minor to capture the high level of danger associated with non-fatal strangulation. Also in non-fatal strangulation cases it can be hard to prove the level of injury needed for more serious assault and grievous bodily harm charges. Since the offence was introduced over 400 people have been convicted and over 1000 people have been charged.<sup>41</sup> The offence has also raised the profile of the dangers of strangulation.

Others states including Victoria,<sup>42</sup> Western Australia<sup>43</sup> and South Australia<sup>44</sup> are all currently debating whether these laws should be introduced. New South Wales has also recently announced that they will introduce a new strangulation offence for the context of domestic violence.<sup>45</sup> So watch this space!

Another debate is about whether there should be an offence of coercive control introduced in Australia. The strangulation offence is limited as it can only really reflect a single incident of physical violence – rather than the pattern of coercive control that we see in domestic violence cases. There is an offence of emotional abuse operating in Tasmania and a coercive control offence has been introduced in England and Wales but so far we haven't really gone down that path across most of Australia. In Queensland we have an offence of torture which requires a person to intentionally inflict serious harm on a person by one act or a series of acts. It has been charged in many cases involving protracted periods of domestic violence. I think this offence could be

---

<sup>39</sup> Ibid.

<sup>40</sup> J Price, 'This is the 'last warning shot' before a man kills his partner', *Sydney Morning Herald* (online), 9 August 2018, <<https://www.smh.com.au/lifestyle/life-and-relationships/this-is-the-last-warning-shot-before-a-man-kills-his-partner-20180807-p4zvxy.html>>

<sup>41</sup> Ibid.

<sup>42</sup> TMills, 'Strangulation – a red flag for murder – so does Victoria need a new law?', *The Age* (online), 26 May 2018, <<https://www.theage.com.au/national/victoria/strangulation-a-red-flag-for-murder-so-does-victoria-need-new-law-20180526-p4zhpm.html>>.

<sup>43</sup> C O'Connor, *Choking, non-fatal strangulation offences already in Queensland the focus of new push for WA* (23 July 2018) ABC News <<http://www.abc.net.au/news/2018-07-23/non-fatal-strangulation-offences-focus-of-new-push-in-wa/10023184>>.

<sup>44</sup> L Maclennan, *New domestic violence laws being drafted in South Australia* (9 July 2018) ABC News <<http://www.abc.net.au/news/2018-07-09/new-domestic-violence-laws-to-be-introduced-in-parliament/9958950>>.

<sup>45</sup> M Brown, *Domestic violence: NSW Government introduces new strangulation laws* (4 September 2018) ABC News <<http://www.abc.net.au/news/2018-09-04/domestic-violence-nsw-government-proposes-new-laws/10199472>>.

adapted so that it can be charged in cases where the harm does not prove to be serious.<sup>46</sup>

### **Child protection and domestic violence**

One of the biggest obstacles for women leaving is having kids with her abuser. Some years ago I did some work with Tamara Walsh investigating the interaction of domestic violence and child protection work.<sup>47</sup> We did focus groups with workers who support mothers. They identified several concerns. For a start, workers said that child protection staff did not understand the coercive and controlling dynamic associated with domestic violence. They provided examples such as child protection workers describing domestic violence as a relationship issue. Another concern was that mothers were being blamed for the abuser's violence. For instance, some women were described as being insufficiently protective. They also reported that some mothers were given an ultimatum to leave the abuser or the children would be removed to state care, yet no support was provided to help them escape. And finally workers described that the women they worked with were fearful of child protection authorities.

Of the 65 women I spoke to in my recent research, 19 (29%) reported that they had interactions with child protection services as a result of the domestic violence they experienced. Of real concern some women were very fearful of the child safety services and sometimes it had implications for their safety. This was the case in particular for some of the Aboriginal women I spoke to. For example Melissa, an Aboriginal woman, knew she was on the child protection 'radar' and for this reason she did not call the police. She believed that any call to the police risked getting child protection involved. She said:

I didn't want any involvement with them. As soon as you hear Child Protection you think, right, no, I don't want any involvement. You think, you automatically - well, I thought kids taken away, that's it, no.

Sometimes women called child protection services for support but were often disappointed. For example Hannah's partner had threatened to kill her in front of the children and her GP recommended she call child safety for support. When she did call them they recommended she meet with the perpetrator and children in a public place for a milkshake. Others talked about the approach of child safety officers being inappropriate – for example openly taking children

---

<sup>46</sup> See H Douglas, 'Do we need a specific domestic violence offence?' (2015) 39(2) *Melbourne University Law Review* 434.

<sup>47</sup> H Douglas and T Walsh, 'Mothers, domestic violence and child protection' (2010) 16(5) *Violence Against Women* 489.

out of class in front of their friends for interviews and removing children from parents just before bed time, on one occasion handcuffing the father to the fence in plain view of the children.

The experience of one immigrant women was particularly concerning. Doya had migrated to Australia with her Australian born partner. Initially she had a tourist visa but this had lapsed. She had experienced severe physical violence from her partner, had no access to finances and was effectively a captive in her home. She had a small baby with her partner and she was breastfeeding. One particular night she was assaulted so badly by her partner that she feared for her life. She escaped to neighbours who called the police and ambulance. With support Doya was able to obtain a bridging visa but despite the serious abuse, Child Safety determined initially to leave the baby with the abuser. It was months before Doya could get a Family Court order to have her son returned to her care.

Some of the women said that their abusers' reporting them to child safety services was another form of systems abuse. Several of the women I spoke to were investigated by child safety and they suspected this was based on reports from abusers although they cannot be sure. While in most situations I encountered reports were unsubstantiated, these investigations are stressful and embarrassing and one woman had to be stood down from work while the investigation took place.

### **Emerging issues**

For these last minutes, I want to mention a couple of forms of domestic violence that are just now starting to be recognised. Of course, I have already mentioned legal systems abuse – but reproductive coercion and technology-facilitated abuse are two other forms I want to consider. Importantly where definitions include coercive control these emerging forms of domestic violence can be captured under the law. Sometimes also, these behaviours can be captured under criminal offences such as stalking or sexual assault and rape.

### ***Reproductive coercion:***

Essentially reproductive coercion is when an abuser uses psychological or physical abuse to interfere with a woman's reproductive autonomy. Sometimes this is done to ensure the women does or doesn't become pregnant or to ensure she terminates her pregnancy. This is a very common aspect of domestic violence but it is rarely spoken about. A number of the women I interviewed talked about this.

Kim's story illustrates the long-term effects of this form of abuse. Kim met her partner online and they talked about children and agreed neither of them wanted them. The relationship seemed to start off quite positively. One day while Kim and her partner were having sex he pulled the condom off and continued to have sex with against her will. She became pregnant. For Kim, the pregnancy had the effect of making the relationship more serious. For the sake of her daughter Kim agreed to marry and she quit work to focus on the pregnancy. This is when the abuse became particularly harsh and included beating and rape. He cut off her mobile phone, killed her dog, broke personal things and did demeaning things to her such as showing photos of Kim naked to her father. She felt she had to stay in the relationship because of the child but in the end she feared she would be killed and managed to escape with her child.

Some women talked about how control of their contraception by their abuser was just one aspect of the broader control their partner exercised over all the other aspects of their lives. For example Yvonne had 4 kids with her partner. He micromanaged the family's money, did not allow any media like TV or radio in the home, he wouldn't let anyone visit including friends and family. Refusing contraception was just another part of the control. Yvonne was told she should have babies and shouldn't alter her body. In the end, with the help from some women at her church, Yvonne secretly had an IUD fitted.

Roseanna also talked about a doctor helping her get access to long acting contraception which wasn't visible to her extremely violent partner. Roseanna said he liked her to be pregnant all the time. Roseanna had a baby in each of the 6 years she was with her partner except for one, and this year corresponded to a doctor discussing her fertility with her and providing her with a contraceptive injection. This underlines the importance of screening by health professionals and domestic violence practitioners.

Recently I have undertaken work with Children by Choice to look at their statistics and we have identified that 12 percent of the women who contact the service for pregnancy advice have experienced domestic violence.<sup>48</sup> Unsurprisingly perhaps, research indicates that women who experience partner violence are more likely to seek to terminate their pregnancy<sup>49</sup> and to terminate it at a later time.<sup>50</sup> It is important then the abortion is accessible to these women as this has implications for leaving violent relationships.

---

<sup>48</sup> L Sharman et al, 'Associations between unintended pregnancy, domestic violence, and sexual assault in a population of Queensland women' (forthcoming) *Psychiatry, Psychology and Law*.

<sup>49</sup> A L Coker, 'Does physical intimate partner violence affect sexual health?' (2007) 8(2) *Trauma, Violence, & Abuse* 149.

<sup>50</sup> L Colarossi and G Dean, 'Partner violence and abortion characteristics' (2014) 54(3) *Women and Health* 177.

### ***Technology facilitated abuse:***

It is probably well-known to everyone in this room that technology such as the internet, GPS devices and recording devices are increasingly being used to perpetrate abuse. When I spoke earlier about coercive control creating a sense of the abuser's omnipresence – what better way to do this than with the help of these various technologies. Most of the women I interviewed could identify some form of technology abuse. For many it was obsessive text message – 50 or more each day or Facebook stalking – if not of the woman herself then her friends and family.

Facebook was an all too common problem. Jacinta described a red flag early in the relationship. She said that when she first met her ex-partner she added him on her Facebook account and "he sent out a friend request to every single person I have on my Facebook page." This meant that her partner quickly became embedded in her online social circle.

Colleen had separated from her partner but still he exercised control from afar. She said:

... he checks all my phones, controls all my computer, controls all my phone, controls all that stuff ...The worst bit for me has been that he has controlled all my passcodes for three years since we separated and it has taken me 37 hours with Apple in Melbourne, Singapore and Sydney to unravel the codes and the maelstrom. So basically I couldn't even get emails from people - I was cut off from my entire social circle. He can remotely hack in.

This made it difficult to meet friends, apply for jobs or make appointments.

When Ingrid separated from Scott she moved with her young child into a women's refuge to be safe. During the period of her stay in the refuge Ingrid facilitated contact between Scott and their child. On one occasion when Scott returned the child to Ingrid's care, he told her that she had to take a particular doll because their daughter really liked the doll. Ingrid took the doll with her back to the refuge. At the next child hand-over Scott told Ingrid he knew where she lived and gave the address. This was a breach of security and resulted in Ingrid having to find alternative accommodation with friends. However, at the next child handover Scott disclosed that he knew her new address. She became suspicious and that night she examined the doll. She said 'I unstitched the back ... then I found like this black box underneath the motor of the doll... At first you couldn't even see. You had to really touch it, dig in and get it out.' She

reported the matter to the police and expressed her fear of Scott finding her again and managed to obtain a protection order.

Susan described how her partner installed cameras in her home for her safety and convenience. But he would spy on her all day. He would remotely move the cameras around following her. There were a couple of instances where she was breastfeeding her child or had just come out of the shower, naked, and the camera moved, turning towards her to watch.

This also happened to Fiona who described how her ex-partner had broken in to the house and set up cameras throughout the house. She wasn't aware that the cameras were there. They were secretly set up. She eventually found the set top box hidden under pavers under the house.

The Courts have also heard a number of these kinds of cases. For example in one protection order case, called *MAA v SAG*, the abuser posed as a potential friend to his ex-partner's 15 year old daughter.<sup>51</sup> The girl gradually became closer over the internet to this person she believed was a young boy about her age. It was some time before the daughter realized the person she was communicating with was MAA. MAA unsuccessfully appealed against the protection order. In determining that the order should remain in place, Judge McGuinness found that MAA's Facebook deception towards SAG's daughter was designed to gather information about SAG and was part of the abusive behaviour.

The smart home revolution will bring further challenges. I mentioned gaslighting earlier. In the gaslight film of the 1940s the abuser was secretly changing the brightness of the lights, making the woman feel like she was going crazy. Just recently a woman wrote to me and said:

The process however, no longer requires the dimming of gas lights but can be done virtually via Smart technology which makes this form of abuse even more dangerous - for a start how do you even begin to explain to someone that TV is informing your abuser of your every move or that your refrigerator is telling your lights when you come home?! Sounds crazy right? Who wouldn't question someone's sanity if they told you that their heating was spying on them?

Clearly there is much to be done to ensure that technology is used safely and technology companies have a role to play to ensure this.

---

<sup>51</sup> *MAA v SAG* [2013] QDC 31 (28 February 2013).

## Conclusions

I have not mentioned the family law today. You will not be surprised to hear that most of the women I spoke to had had problems with the family law system. These issues ranged from delays, to dangerous contact orders being made, to excessive costs to legal systems abuse. In the US recent research has suggested that women who raise domestic violence in the family courts have their experience discounted.<sup>52</sup> As many of you will be aware the Australian Law Reform Commission is currently doing a full review of this system. I encourage you to get online and link in to the process.<sup>53</sup>

To end I want to leave with a quote from one of the women I interviewed. Colleen said:

Everyone thinks 'she was so loved' - but if they really stopped to ask the question: how bad would the physical, mental and emotional abuse have to be before you would walk away from all you owned, from your home, your possessions and all your money, facing thousands of dollars in debt? How bad would it have to be for you to stare down three and a half years of legal proceedings, court dates, letters and police visits? How bad would it have to be? Nobody wants to ask that question. That's really what is behind every woman's flight.

---

<sup>52</sup> S Schoenberg, *Domestic violence victims struggle in family courts to retain custody of children* (29 July 2018) Masslive <<https://www.masslive.com/expo/news/erry-2018/07/1d8d81b44f6371/domestic-violence-victims-stu.html>>.

<sup>53</sup> Australian Law Reform Commission, *Review of the family law system* (2018) <<https://www.alrc.gov.au/inquiries/family-law-system>>.



## Emmanuel College

within The University of Queensland

*enriching lives since 1911*

Ph: + 61 7 3871 9100

Fax: + 61 7 3870 7183

Email: [enquiries@emmanuel.uq.edu.au](mailto:enquiries@emmanuel.uq.edu.au)

Sir William MacGregor Drive, St Lucia, Qld 4067

[www.emmanuel.uq.edu.au](http://www.emmanuel.uq.edu.au)