

One Circuit Sal

The new Domestic and Family Violence Act in the bush

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It may come as a shock to some readers that there are now mandatory criminal sanctions for beating up members of your family more than once, after the Court has ordered you not to do it.

Some may even be shocked to find out that this has not always been the case.

It may be a surprise to learn that, of the incarcerated criminal population in the Northern Territory, about 80% are Aboriginal males. Of those 80%, more than 70% are incarcerated for family violence.

In plain English, this means spending lots of our money, and that's only for the incarcerated ones. We do not appear as a community to be getting much of a return on our investment.

Not practising in the criminal jurisdiction, I had not had the opportunity in my many years of practice in the Northern Territory to do a bush circuit.

I was delightfully surprised to be briefed by the North Australian Aboriginal Family Violence Legal Service to go to Nhulunbuy for the criminal circuit during Melbourne Cup week 2008.

The new Act came into law on 1 July 2008, and has some real teeth in theory. Section 121 of the Act relates to penalty for contravention of Domestic Violence Orders, and has two aspects to it.

Non mandatory breach (first breach)

This occurs if the adult perpetrator breaches a Domestic Violence Order. It is a strict liability offence (s120(3)) and carries a penalty of 400 penalty units or imprisonment for two years. This applies despite the *Sentencing Act*.

Mandatory breach (second breach plus harm)

Mandatory minimum seven days in jail on the second breach doesn't seem unduly harsh. There is a way out, if you don't "harm" the victim the second time you breach the Court order, then you don't automatically have to go to jail. As you can imagine, it is a common occurrence for perpetrators to unwittingly breach an order of the Court (by asking the person who they have beaten senseless for years out for dinner and a reconciliation so they can start again, or just dropping by to see the kids or some such other act of non harm breach).

Harm is defined in s1A of the Criminal Code as follows:-

- (1) Harm is physical harm or harm to a person's mental health, whether temporary or permanent.
- (2) Physical harm includes unconsciousness, pain, disfigurement, infection with a disease and any physical contact with a person that a person might reasonably object to in the circumstances, whether or not the person was aware of it at the time.
- (3) Harm to a person's mental health includes significant psychological harm, but does not include mere ordinary emotional reactions such as those of only distress, grief, fear or anger.

(4) Harm does not include being subjected to any force or impact that is within the limits of what is acceptable as incidental to social interaction or to life in the community.

This aspect of the new Act is really the problem. You can theoretically



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distress or terrify your victim by threatening to kill them by telephone a number of times, but the law says that's not harmful so there is no mandatory sentencing. I think the parliament can do a bit better than that. If the victim has to be physically assaulted or prove by expert evidence of psychological injury for the perpetrator to get a minimum of seven days in jail, it kind of defeats the purpose to my mind.

Women seeking protection find it difficult to understand why they have to prove over and over again that they are in danger, and seeking protection from conduct that has been historically proven many times before this Act came into force.

Fortunately, on this occasion, the presiding Magistrate, Mr Cavanagh SM, had physical bashings constituting the second breach. The Police and the DPP Prosecutor refused to drop the charges on the breaches, and the perpetrators got their mandatory sentences on top of their criminal

conviction sentences.

One of the women who had been brutally bashed for many years came to the police station the night before the hearing seeking to drop the charges. This pressure had been brought on her by the perpetrator's relatives in town. We were able to talk her out of it and arrange for her to be taken to a safe family community 2 hours drive out of town after the hearing and conviction of the perpetrator.

The logistics of keeping Aboriginal women safe in the bush are mind boggling. Often women and children are kept prisoner at outstations. They have no transport and are hundreds of miles from services and safety. When they finally escape and have the courage to seek assistance they are usually alienated from family, country and terrified of further attacks from the perpetrator and/or his family. Many of the women have been beaten and burned with sticks, raped in front of their children and physically and emotionally degraded in other sickening ways. Often there is insufficient evidence to sustain a criminal conviction.

The police do a wonderful job in very difficult circumstances, and the AGPO's are slowly turning around the culture of despair by making it easier for the women to report. Often and properly, there is insufficient evidence for criminal charges to be successfully prosecuted. This is where the new Act has its greatest strengths. It can be used to protect women from further attack, it is reasonably easy to administer and the Court has the clout to make breaches of Court Orders mean something.

The police are the key to the effectiveness of the legislation. They have the capacity to take out the orders, (not leaving it to the victim to decide if she needs protection from someone who had broken her arm, teeth or nose) to serve the

orders (this is very important as there is no breach for an unserved order), and then prosecute for the breach.

Of course incarceration is not the answer but it gives some respite for victims to try with the other government agencies to find accommodation, get the kids into school and provide some stability. These support services are seriously under-funded and overstretched.

In the Nhulunbuy township, there are great schools, a good hospital and a nice community but there is a severe shortage of houses for people to live in, let alone emergency accommodation to stabilise the traumatised family and help get the kids to school. The women themselves are emotionally

damaged by their experiences and need support services to help them build their lives. Those support services are simply not there to meet the demand of women and children escaping violence. However, my one circuit experience, which I am sharing with you in this article, helped three women to escape and try for something better.

Melbourne Cup week will always remind me of those courageous women and all the people who contributed to give them and their children a chance at a better life.

The challenge now is for the Court to determine what view it wishes to take about a breach of its own Order. The effectiveness of this legislation will, to a large extent, depend on that outcome.

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