Rescinding the Hitting Licence: Compelling Victims of Domestic Violence to Testify

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> Men are so much stronger. Women cling to them. It's natural. The man is definitely the boss. There are privileges attached to this; men have the right to keep the woman in line.[1]

A prospective uniform national legislative response to domestic violence

On 18 April 1995 the *Evidence Act* 1995 (Cth)[2] came into force. The Commonwealth Act provides for a single law of evidence for the federal courts,[3] and is "the end product of a thirty year project to replace most of the common law of evidence with a single statutory restatement."[4] The New South Wales Evidence Bill 1995 was passed with bipartisan support in June following the New South Wales election. *The Evidence Act* 1995 (NSW)[5] came into force on 1 September 1995. These Acts constitute a comprehensive restatement of the law of evidence, and it is not surprising that the legislation impacts upon the position of the wife[6] of a defendant charged with a domestic violence offence committed upon that wife. The legislation changes the pre-existing position in this area and it is, therefore, timely to explore again the fundamental legal, intellectual and political issues that arise, when in an attempt to rescind the hitting licence, the law makes the wife of an accused person charged with a domestic violence offence committed upon that wife a compellable witness.[7]

The first part of this paper offers a brief review of the common law, a cursory discussion of the feminist movement's politicisation of the problem of domestic violence and an analysis of the Australian statutory reforms as they currently stand. The second part considers the rationales underpinning the reformed law of compellability, while the third is devoted to a discussion of both the practical and inherent limitations of the current legal response to domestic violence. The paper concludes by outlining a more appropriate legal

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1 Police officer quoted by Hatty, S E, "Policing and Male Violence in Australia" in Hanmer, J (ed), *Women, Policing and Male Violence: International Perspectives* (1989) at 79.

2 Hereafter referred to as "the Commonwealth Act".

3 With the agreement of the Australian Capital Territory Government the Act also applies in ACT courts.

4 Aronson, M and Hunter, J, *Litigation: Evidence and Procedure* (1995) at xvii.

5 Hereafter referred to as "the NSW Act".

6 In this essay a reference to the wife of an accused includes a reference to a person living with the accused person as the wife of the accused on a bona fide domestic basis although not married to the accused person: see *Crimes Act* 1900 (NSW), s407AA(1)(a).

7 Completely different issues can arise, for example, when compelling the wife in the aforementioned situation to testify for the defence or when the accused is charged with a child assault offence committed upon a child living in the household of the accused person, or is a child of the accused person and that wife.

response to the problem, while also suggesting that the law is ultimately a limited and deficient tool for effecting genuine social change.

Language

It is important to note that the very language of "domestic violence" is problematic, in that it can be viewed as bordering on the oxymoronic. The term "domestic" is said to promulgate the social convention that what happens within the family home is private, and feminists argue "the home and hearth connotations of 'domestic' colour and soften our repugnance towards the concept of violence".[8] This choice of language can be viewed as undermining the very aim of the legislative reform in this area — that is, to have assaults in the home taken seriously.

The vagaries of language, however, are not easily defeated. The terms "wife beating" or "wife abuse" are said to be disempowering for women in that they portray them in the role of the eternal victim,[9] and the term "spousal abuse" is said to suggest a non-existent neutrality in its failure to disclose the sex responsible for the majority of the battering.[10]

The law

At common law

It was a rule of general application at common law that married persons were inadmissible as witnesses either for or against each other in civil or criminal proceedings. The common law exclusionary rule first appeared in *Coke's Commentary upon Littleton,* published in 1628, where Sir Edward Coke noted that:

> it hath been resolved that a wife cannot be produced either for or against her husband *quia sunt duae animae in carne una* and it might be the cause of implacable discord and dissension between them and a means of great inconvenience.[11]

The rule was based on the apparently inconsistent reasoning that it would be impossible for a spouse's testimony to be impartial in any matter affecting the spouse, while on the other hand acknowledging that, because of the legal union of the persons effected upon marriage, it would contradict the maxim that no one is bound to incriminate himself or herself. Most obviously the rule was also based on the belief that such a policy was necessary to foster family peace "not only for the benefit of the husband, wife and children, but for the benefit of the public as well".[12]

Important exceptions to this general exclusionary rule of evidence were the competence of a spouse to testify in proceedings involving abduction, treason, rape or any violence

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8 Thornton, M, "Feminism and the Contradictions of Law Reform" (1991) 19 *International Journal of the Sociology of Law* at 460.

9 See Kelly, L and Radford, J, "The Problem of Men: Feminist Perspectives on Sexual Violence" in Scraton, P (ed), *Law, Order and the Authoritarian State: Readings in Critical Criminology* (1987) at 247.

10 A survey conducted by the Office of the Status of Women in 1987 confirmed that throughout Australia up to 90 per cent of domestic violence occurs against women by men with whom they live with: see Community Law Reform Committee of the Australian Capital Territory, *Domestic Violence: Discussion Paper No 2* (1992) at 7.

11 Quoted in Jackson, C, "The Competence and Compellability of Spouses as Witnesses" (1986) 18 *Dublin University Law Journal* at 47.

12 Quoted in Jackson, C, "Evidence — Competence and Compellability of Spouses as Prosecution Witnesses" (1989) 11 *Dublin University Law Journal* at 152.

against the person of the spouse.[13] However, in 1978 the House of Lords in *Hoskyn v Commissioner of Police for the Metropolis*[14] held that under these common law exceptions the spouse was rendered merely competent to give evidence, in contradistinction to competent and compellable. It is worth noting Claire Jackson's submission that the conclusions of the majority in *Hoskyn* are indefensible on both legal and historical grounds:

> The distinction between competence and compellability was not one known to the common law. It is thus not surprising that the early cases simply referred to spouses being competent; it was assumed that they were compellable.[15]

Be this as it may, in the wake of *Hoskyn*, the general opinion appeared to be that the weight of authority favoured the view that under the common law, a spouse is never compellable to testify for the prosecution.[16]

Feminist activism

The issue of men's violence against women in the home was put on the public agenda in Britain and North America in the early 1970s by the refuge/shelter movement.[17] Feminist activists contended that battery was not a personal, domestic problem, but a systemic, political one: "its etiology was not to be traced to individual women's or men's emotional problems but, rather, to the ways these problems refracted pervasive social relations of male dominance and female subordination."[18] The idealised construction of the family as being "a haven in a heartless world" was shattered by the exposition of the reality of the family — a site of oppression, exploitation and often violence.

In so doing, feminist activists contested established discursive boundaries and politicised a previously depoliticised phenomenon. The reality of the matter is simply that, as Nancy Fraser points out, "there are no a priori constraints dictating that some matters simply are intrinsically political and others simply are intrinsically not."[19] By the mid 1970s domestic violence was recognised by governments internationally as a problem requiring urgent and systematic attention.[20]

The pervasiveness of domestic violence has subsequently been confirmed in many studies. Straus observed in 1976 that:

> available knowledge ... suggests among other things that a marriage licence is for many people a hitting licence, that physical violence between family members is probably as common as is love and affection between family members, and that if one is truly concerned with the level of violence in [society], the place to look is in the home rather than on our streets.[21]

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13 Id at 150.

14 [1979] A.C. 474, hereafter referred to as *Hoskyn*.

15 Above n11 at 50.

16 *Hoskyn* was followed in Australia in *R v Kaye* [1983] 2 Qd R 202.

17 See Morley, R and Mullender, A, "Hype or Hope? The Importation of Pro-arrest Policies and Batterers Programmes From North America to Britain as Key Measures for Preventing Violence Against Women in the Home" (1992) 6 *International Journal of Law and the Family* at 265.

18 Fraser, N, *Unruly practices: Power, Discourse and Gender in Contemporary Social Theory* (1989) at 175.

19 Id at 166.

20 Above n17 at 265.

21 Chappell, D and Strang, H, "Domestic Violence: Findings and Recommendations of the National Committee on Violence" (1990) 4 *Australian Journal of Family Law* at 212.

A survey conducted by Avery in 1978 led to the conclusion that "family violence and domestic disturbances consume more time than any other call on police services except for street accidents."[22] In a more recent study it was estimated that in the Australian Capital Territory approximately 30 per cent of all calls to the police concern domestic disputes.[23] These figures should be read in light of the fact that most incidents of domestic violence are not reported to the police.[24] The New South Wales "Costs of Domestic Violence Survey" estimates that 100 000 women each year are involved in violent domestic relationships, which is equivalent to one in every 10 women in the State.[25]

While the incidence of domestic violence is apparently high, the severity of domestic violence was also exposed as a problem of great seriousness. Wallace's 1986 study showed that 43 per cent of homicides between 1968 and 1981 in New South Wales were within the family, with 23 per cent of these occurring between spouses.[26] A more recent study conducted by Strang of the Australian Institute of Criminology found that 36 per cent of homicides occurred between family members.[27]

Law reform

The common law can be viewed as being essentially positivistic, acontextual and conservative in nature. Not surprisingly, a "marked scepticism towards the courts as a loci of social change has been evinced by Australian feminist reformers in contradistinction to their American sisters".[28] As Thornton points out, "[i]n Australia, law reform invariably means legislative reform."[29]

Australian statutory changes to the law of evidence, as it relates to the compellability of witnesses, have been largely guided by the comprehensive review of the area performed by several Australian law reform commissions during the 1970s. Common proposals were that the category "spouse" should be widened to include other family members, that spouses be made compellable in criminal proceedings and that the court should excuse the spouse from testifying upon satisfying certain criteria. The circumstances in which a spouse would be excused from giving evidence for the Crown were designed to take into account specific factors relating to the community's need for evidence and the gravity of the offence as weighed against the actual or likely harm to a relationship worth protecting.

In the Commonwealth Act, the basic proposals of the law reform commissions are generally reflected in its provisions. The category of "spouse" was widened so that family members are now compellable by the prosecution.[30] Section 18 provides for a discretionary family member privilege not to give evidence in criminal proceedings generally. The witness,

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22 Avery, J, *Police Force or Service?* (1981) at 43.

23 Above n10 at 6.

24 Stubbs and Powell refer to studies in Australia which show reporting rates vary from 27 per cent to 47 per cent, and overseas studies showing reporting rates from 27 per cent to two per cent· quoted in Astor, H, "Swimming Against the Tide: Keeping Violent Men Out of Mediation" in Stubbs, J (ed), *Women, Male Violence and the Law* (1994) Institute of Criminology, Sydney at 156.

25 New South Wales Domestic Violence Committee, *Costs of Domestic Violence* 1991, Sydney at 3.

26 Above n10 at 7.

27 Id at 6.

28 Above n8 454.

29 Id at 454. For an overview of the main thrust of the new legislation see Chappell, above n21 at 219–20.

30 Family members include spouses, defacto spouses, parents, and children of the accused: s18(2). It includes adoptive parents and (for ex-nuptial children) the natural parents as well: cl. 10(2), Part 2 of the Dictionary. The privilege does not extend to homosexual relationships.

in order to obtain the benefit of the privilege, must satisfy the court that there is a likelihood that harm would or might be caused to the person or to the relationship between the person and the accused, if the person gives the evidence; and that the nature and extent of that harm outweighs the desirability of having the evidence given.[31] The factors which the court may take into account in determining the desirability of having the evidence given include the nature and gravity of the offence, the importance of the evidence, the weight of the proposed witness's evidence, the nature of the relationship and whether any breach of confidence would be involved.[32]

Most importantly, the discretionary family member privilege of section 18 does not apply in proceedings for offences listed in section 19, namely particular offences against children and domestic violence offences. In essence the Act therefore creates a presumption in favour of compellability of spouses, provides a discretionary privilege of general application, and then withholds the availability of this privilege on the basis of a "list approach" to certain domestic violence offences.

Apparently this provision is a manifestation of a deliberate policy choice to favour the interests of the wider community over the interests of the individuals concerned. By employing the list approach the considerations of an individual case at hand can be ignored by the imposition of a blanket rule in favour of compellability. In essence, the interests of the wider community in providing a general deterrence to certain domestic violence offences operates to over-ride any concern for the attitudes of either of the parties involved, or for that matter the judge. As Simpson J of the New South Wales Court of Criminal Appeal commented in a recent case:

> Until it is recognised that domestic violence will be treated with severe penalties ... no progress is likely to be made in its abolition or reduction. ... Protection of the particular individual is a step towards protection of other victims in other cases.[33]

The provisions of the NSW Act relating to compellability formally differ from those in the Commonwealth Act. Section 18 of the NSW Act is identical to that found in the Commonwealth Act. This effects in New South Wales a substitution for the presumption against compellability, found in section 407 of the *Crimes Act* 1900 (NSW) of a general presumption in favour of compellability, subject to a discretionary family member privilege.[34] However, under section 19 of the NSW Act the discretionary family member privilege contained in section 18 does not apply in proceedings for an offence referred to in section 407AA of the *Crimes Act* 1900 (NSW).

Section 407AA was inserted into the *Crimes Act* 1900 (NSW) by the *Crimes (Domestic Violence) Act* 1982 (NSW). This 1982 amendment is narrower in its scope, in that it was made to apply only to husband and wife, but includes as husband and wife persons living together on a bona fide domestic basis, and applied only in relation to child assault or domestic violence offences.[35] While the legislation does not require the express weighing or balancing of factors for and against exemption, it still allows for a potential witness to apply for an exemption from being compelled to testify. Under the section, a potential witness who

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31 s18(6).

32 s18(7).

33 Simpson J in *R v Peter James Glen,* NSW Court of Criminal Appeal (unreported -- 19 December 1994), at 3.

34 s407 is omitted from the *Crimes Act* 1900 (NSW) by cl. 1.5 in Schedule 1 of the *Evidence (Consequential and Other Provisions) Act* 1995 (NSW).

35 s407AA(1).

voluntarily requests an exemption should be excused if the offence is minor and the evidence is not important or other evidence is available.[36]

The effect of the requirement that the evidence be either unimportant to the case or adducible from other sources renders, in Nyman's view, the entire procedure unworkable and defeats the purpose of having any such exemption:

> If a wife complainant can give no valuable evidence to assist the prosecution, or if the evidence she gives can be adduced from some other source, there is no point in her seeking to be excused, is there? I know of no cases in which the statutory procedure to be excused has ever been successful.[37]

The practical effect of the absence in real terms of any exemption from compellability in the case of domestic violence victims is that the New South Wales Act also employs a list approach to domestic violence offences, substantially in correspondence with the Commonwealth Act.[38]

Creighton, in a review of the United Kingdom equivalent of section 407AA,[39] criticised the approach of simply listing the offences considered serious enough to justify compellability. Among other problems, it will always be open to debate as to which offences should be included in this list. Moreover, offences of the same description, such as assault, may vary greatly in their seriousness, while the effect of compellability on a particular spousal relationship may range from catastrophic to beneficial. Creighton believed that the approach of simply listing compellable offences required "decisions to be made at too high a level of generality".[40]

In contrast, the 1978 Victorian legislative amendments, as now the provisions of both Evidence Acts 1995, rendered spouses competent and compellable for the prosecution in *all* criminal proceedings. This was subject to a right to apply for an exemption which would be granted if the interest of the community in obtaining the evidence "is outweighed by" likelihood of damage to the relationship or harshness to the witness in light of all the circumstances of the case.[41] The balancing of considerations for and against compellability made in light of the facts of each individual case, was considered by Creighton to offer "a more rational and sophisticated response to the problem".[42]

Yet in charging the list approach with being inflexible and general in application, Creighton may be ignoring the fact that these attributes seemingly lie at the heart of the appeal of this approach. By employing the list approach, consideration of an individual case at hand are ignored in the interests of the wider community in providing a general deterrence to domestic violence offences.

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36 s407AA(4).

37 Nyman, T, "Compellability of spouses" (1990) 28 *Law Society Journal* 10 at 66. The absence in real terms of any exemption from compellability appears to be in line with the hard line taken by Landa in Legislative Council; see judgment of Simpson J, above n33 at 4–5

38 Compare an offence that is a domestic violence offence within the meaning of the *Domestic Violence Act* 1986 (ACT) and a domestic violence offence within the meaning of the *Crimes Act* 1900 (NSW).

39 Creighton, P, "Spouse Competence and Compellability" (1990) Jan *Criminal Law Review* 34; the relevant provision being s80 of the *Police and Criminal Evidence Act* 1984 (UK).

40 Id at 36.

41 *Crimes (Competence and Compellability of Spouse Witnesses) Act* 1978 (Vic). Similar legislation was adopted in South Australia in 1983: *Evidence Act Amendment Act (No. 2)* 1983 (SA).

42 Above n39 at 36.

Rationales behind the compellability of domestic violence victims

Once one accepts the prevalence and criminality of domestic violence, the result is that the evidence of the victim is usually essential if prosecutions are to be successful. Indeed, the law as to the compellability of spouses supposes that the nature of the special relationship between partners in a domestic relationship will often operate to deprive the court of this most important evidence: "[f]or truth to out and for truth to prevail it may be necessary for spouses to be compellable witnesses, not only for each other but for the prosecution."[43]

Lord Edmund Davies, who dissented in *Hoskyn*, supported this very notion in citing the dicta of Geoffrey Lane LJ in the Court of Appeal to the effect that the state and members of the public had an interest in seeing that all relevant evidence of a crime should be freely available to the court. In cases where domestic violence has occurred, "the court of trial ... is not dealing merely with a domestic dispute between husband and wife, but is investigating a crime".[44]

At the most obvious level, the courts are deprived of this essential evidence when wives are pressured by their husbands not to give evidence, a fact recognised by the New South Wales Parliament's then Vice President of the Executive Council, the Honourable D P Landa:

> in many of the cases on record of spouses finally withdrawing their wish to testify it has been proved subsequently that that was done under duress and threat of further incident occurring, either before or after giving evidence.[45]

Even in the absence of an express threat, many women might simply be too frightened to complain and seek to have charges pressed, especially after interaction with institutions that fail to take their abuse seriously. Numerous studies have documented a consistent failure of a wide range of institutions, including the police, the judiciary, hospitals and the social services, to take the extent, severity and impact of domestic violence seriously.[46]

Should these various institutions actually take the issue seriously, structural or material considerations (such as the potential loss of financial support, accommodation and whatever was still valued within the relationship) provide clear reasons why the woman may choose not to press charges once the incident has come to the notice of officials. As Margaret Thornton points out:

> We know that many women desire a relationship to continue, for it has positive sexual and affective dimensions despite its darker side. The social and economic pressure on women to continue in unsatisfactory relationships also cannot be gainsaid, particularly if there are young children.[47]

Even at the most basic level of the individual herself, the victim's own view of the situation is often one which incites inaction. Busch, when analysing a domestic violence victim's affidavit produced by the defence at the sentencing stage of a New Zealand case, perceptively explains the situation:

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43 Above n11 at 57.
44 [1979] A.C. 474 at 500.
45 Legislative Council and Legislative Assembly, Parliamentary Debates (Hansard) 24 November 1982 at 2893, 2905.
46 See Kelly and Radford, above n9 at 245–6.
47 Above n8 at 461.

> The complainant's behaviour is typical of many battered women. She minimised the violence used against her, blamed herself for her partner's violence, said she could not remember what really happened and/or had exaggerated its import, and that everything was fine.[48]

It is therefore in light of the victim's own disposition and circumstance that the state's paternalistic attitude to domestic violence, which is that it is in the interests of justice and social welfare for the state to decide whether or not to prosecute, is revealed and legitimated. The political rhetoric often offered is that leaving the domestic violence victim to choose whether or not to testify casts too great a burden of responsibility upon one individual already in a vulnerable position. As the then Premier of New South Wales, Neville Wran, stated in the second reading speech in the Legislative Assembly:

> it is now recognised that where women are themselves the victims of assault by their husbands, it is harsh and unfair to put upon them the burden of making the decision about whether or not the case should proceed.[49]

Legislative reform requiring the balancing of the risk of harm to the potential witness against society's need for the evidence assumes that the court is in the best position to weigh these interests. As Ligertwood declares:

> The decision to compel involves a weighing of the interests of justice (correct decisions) against a wider public policy protecting marriage. Only a court is in a position to weigh these interests in a particular case.[50]

Indeed, the legislative approach to simply listing compellable offences in fact reveals that individual concerns may be legitimately ignored in light of society's concern for the abolition of the crime of domestic violence.

Limitations of the current legal response

Practical limitations

There are a great number of practical limitations in the use of the law of compellability to respond to domestic violence. The most obvious is that compellability can neither in itself guarantee that the witness will testify, for a wife determined not to testify against her husband may be prepared to risk contempt proceedings, nor can it guarantee that the witness will not display evasiveness or untruthfulness in her answers.[51]

Even access to the criminal justice system can in itself pose a serious hurdle for many women.[52] Once within the legal system, other practical difficulties include a criminal justice system that is "slow, cumbersome and unable to provide long term protection".[53] In a review of the impact of domestic violence legal reform in New South Wales, Stubbs and

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48 Busch, R, "Don't Throw Bouquets at Me ... (Judges) Will Say We're in Love: An Analysis of New Zealand Judges' Attitudes Towards Domestic Violence" in Stubbs, above n24 at 128.

49 Parliamentary Debates (Hansard) 9 November 1982 at 2367.

50 Ligertwood, A, *Australian Evidence* (1993) at [5.97].

51 The prosecution may then apply to treat her as a hostile witness.

52 A study of all cases in NSW Local courts in which apprehended domestic violence orders were sought found that in nearly a quarter of cases the victims appeared without legal representation, leading to the conclusion that it seems very likely that lack of legal representation is an important factor in the decision of some women not to continue with proceedings: see Stubbs, J, "Domestic Violence Reforms in NSW: Policy and Practice" in Hatty, S (ed), *Proceedings of the National Conference on Domestic Violence* (1986) Australian Institute of Criminology, Canberra.

53 Above n1 at 88.

Powell interviewed a number of chamber magistrates "most of whom indicated that they were given little training directly relevant to the role they were required to fill in domestic violence cases, and insufficient support and resources."[54]

Another oft cited practical limitation is the problem of police inaction, that, in the words of Simpson J, "[f]or too long the community in general and the agencies of law enforcement in particular have turned their backs upon the helpless victims of domestic violence."[55] Police are certainly at the front line of dealing with domestic violence, and it must be conceded that there is at least some truth in the adage that the law is only as good as its enforcer. As Seddon remarks, "the effectiveness of criminal prosecutions and protection orders depend on the police and neither will work properly if the police do not enforce the law."[56]

It is not surprising then, to learn that most legislative reform in Australia in the area of domestic violence has had the effect of greatly increasing the powers of the police to intervene in a domestic violence situation. In response to criticisms and their increased powers, police forces throughout Australia "have made significant progress in the past few years in sensitising their officers to the problems in this difficult area, and in training them in techniques of intervention".[57]

While this response is certainly welcome, it would appear that far too much pressure and hope is being placed in the police force's ability to halt domestic violence. It must be recognised that the intense emotional nature of domestic violence makes it one of the most perplexing areas of law enforcement. Police are expected to incorporate innovative techniques and approaches to a domestic violence situation within a police system that stresses law enforcement over the goal of helping people.

Moreover, as Linda McLeod explains, the criminalisation of domestic violence and the emphasis on the protection of the woman through effective crisis intervention "places the major onus for protection on our modern — day knights- the police", and is but "a superficial rescue of the victim from the throes of the crisis, without any long-term commitment to freeing the woman from her isolating dungeon and her susceptibility to future victimisation".[58] Under what is an enormous degree of social pressure, it is not surprising to learn that "police have repeatedly echoed the theme that 'legal intervention provides neither a complete nor an enduring solution to the problem of domestic violence'."[59]

Inherent limitations

The limitations of the law of compellability are but a manifestation of the limitations inherent in the approach of the criminal justice system to crime. Criminal law acts to divorce the

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54 Above n21 at 222.

55 Above n33 per Simpson J at 3. The neglect which tended previously to characterise the police response to criminal assault in the home has been well documented: see in particular Chappell, above n21 or Hatty, above n1.

56 Seddon, N, "Legal Responses to Domestic Violence: What is Appropriate?" in Hatty, above n52 at 396.

57 Above n21 at 220: A study published by the NSW Bureau of Crime Statistics and Research indicated that, since the commencement of the NSW legislation, there has been commensurate increases in the number of protective orders sought by police on behalf of victims, and in the number of charges made in relation to domestic violence offences.

58 McLeod, M C, "Policy as Chivalry: The Criminalisation of Wife Battering" in Hatty, above n52 at 368.

59 Id at 380.

wrong from its social setting to isolate what it perceives as deviant or abhorrent behaviour, and most often to prescribe a punitive response based on an evaluation of this isolated wrong.

The inability of the criminal law to prescribe much beyond a punitive response based upon prosecution for a domestic violence offence means that the "remedy" provided by the criminal law is often a totally inappropriate response to the victim's particular situation. As unpopular as it may be to express this notion, while there is an obvious need for a woman's protection, "most victims do not want their assailant punished so much as they want the abuse to stop and they want their assailant helped."[60] As Brownlee suggests:

> there must be a considerable number of cases where the initial decision to involve the police is taken in situations of extreme distress, even danger, and in complete ignorance of any other source of help. The battered spouse in these situations is calling for aid certainly, but not necessarily for the criminalisation of her partner.[61]

This is not to argue that the criminal law has no role to play in the area. Domestic violence victims may have to look to the state for protection simply because they have no other recourse. And alternatively, as inept as the criminal law may be, "with virtually no remedial, rehabilitative or preventative value, its public role can effectively expose harms endured by women in private which would otherwise remain hidden".[62] Neither is this to suggest that violence inflicted by one person upon another is any less serious simply because the parties have lived together. As Robertson J of New Zealand unequivocally stated:

> Too often we use the phrase "domestic violence" to describe assaults which occur within families as if they are somehow less serious than other assaults. In my judgment they are probably more serious because the home is the one place where people ought to be secure. I reject any suggestion that because there had once been a relationship between this man and this woman, the matter should be viewed in a different way.[63]

The criminality of domestic violence should never be questioned. Yet identifying the resultant neglect of structural and material considerations through the formal intervention and prosecution of the offender by the criminal justice system is no more than a bare recognition of the limitations of the criminal justice system. This is currently the only way in which the criminal justice system can deal with the problem.[64] A domestic violence victim requires practical and moral support beyond the sort of physical intervention initially provided by the criminal justice system, and the criminal nature of the offence is not lessened if one recognises the need for a response that takes into account the wider considerations surrounding the offence:

> To maintain that the fact of cohabitation is irrelevant to the *nature* of the offence, (and it is argued that it must be — violence is violence), does not diminish the argument for a different *response* to cases of domestic violence.[65]

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60 Id quoted at 376.

61 Brownlee, I D, "Compellability and Contempt in Domestic Violence Cases" (1990) 2 *Journal of Social Welfare* at 111.

62 Above n8 at 466.

63 Above 48 at 130.

64 In focussing on the criminal prosecution of domestic violence cases, it is unfortunately outside the realms of this essay to consider the distinct issues which arise in the ability of the police to apply for restraint orders over the phone outside of normal court hours.

65 Above n61 at 113.

It must also be noted that the criminal law, in only recognising a very limited number of "offences", fails to recognise that domestic violence is but one of a range of tactics utilised by abusers who seek to maintain power and control over their partners. Other tactics of power and control include "emotional and verbal abuse; intimidation; isolation; treating the victim as subservient; ... minimising and trivialising the violence; and blaming the victim for such violence".[66]

Moreover, the criminal justice system, in divorcing the wrong from its social setting, fails to place domestic violence as part of the systematic subordination of women as a class. The National Committee on Violence reported that "attitudes of gender inequality are deeply embedded in Australian culture, both rape and domestic violence can be viewed as expressions of this cultural norm."[67] Domestic violence, instead of being a deviation from the norm, is in fact an expression of a currently existing cultural norm, and so long as the criminal justice system continues to recognise only the deviant individual, it leaves unquestioned wider structural issues of gender, power and institutionalised sexism. As Margaret Thornton explains:

> pruning a few twigs does little to attack the roots. ... That is, women are going to continue to be beaten, raped and harassed regardless of what legal reforms are effected. Men have power in our society and it is this reality which constitutes an intractable obstacle to substantive law reform.[68]

Alternatives

In light of the practical and inherent limitations of the current legal response to domestic violence, it seems illogical to rely on the criminal justice system to "solve the problem" of domestic violence. Yet, when introducing section 407AA into the New South Wales *Crimes Act* the then Vice President of the Executive Council, the Honourable D P Landa, in the Legislative Council described the provisions relating to the compellability of spouses in domestic violence situations as "an integral part of the Government's plan to eliminate domestic violence".[69]

It must be, and is being, realised that a more appropriate legal response to domestic violence will only become a reality through a coordinated and systemic multi-agency response, requiring cooperation between police, courts, departments of corrections and community corrections, departments of housing, education and employment, and community based organisations, such as Women's Aid groups and refuges.[70] In this respect, the observation of the National Committee on Violence in its final report that "the control of violence is a challenge which confronts not only a wide variety of agencies across all levels of Australian government, but private and non-profit sectors, as well as individual Australians"[71] was particularly relevant with respect to domestic violence.

Of course, the coordination of an inter-agency response would require the commitment of extra state resources and probably the abandonment of many professional prejudices — an overall approach which "smacks of 'welfarism".[72] Such an approach will not commend

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66 Above n48 at 105.

67 Above n21 at 216.

68 Above n8 at 467–8.

69 Above n45 at 2905.

70 A particular example which comes to mind is the Hamilton Abuse Intervention Pilot Project developed in Hamilton, New Zealand, which was adapted from the Duluth Abuse Intervention Project of the United States.

71 Quoted in Chappell, above n21 at 216.

itself in many quarters, especially with the decline in interest in gender issues brought about by a swing to the right in the late 1980s. Indeed this may explain the "increasing tendency to view the police, and criminal justice system generally, as being at the forefront of solutions to the problem".[73]

There is no doubt that the criminal justice system has a role to play in the area of domestic violence, especially in affording immediate protection to the victim. The need for law reform in this area is also necessary, since without law reform "social relations will continue to be reproduced within legal discourse as they always have been, that is from a masculinist point of view".[74] However, the little aid the law itself can offer in the construction of a society free from the subordination of women must also be recognised: "[s]ince the law is rooted in and reproduces hegemonic masculinity within its carapace of neutrality, it is more likely to be in the rearguard, rather than the vanguard, of social change."[75]

The reality of the current legal response is that we have tried to convert a deeply social issue into a technical task for a few uncoordinated specialist institutions. Increasing police powers and instigating legislative reform in the area of domestic violence are little more than political attempts to finesse the fundamental failures of the current legal response to the problem of domestic violence. Even with the implementation of a more appropriate legal response to domestic violence through the coordination of an inter-agency response, ultimately the limitations of any legal response must be recognised. The law is a limited and deficient tool through which broader social changes can be effected to render violence in general truly unacceptable in all social relations. This point is nicely encapsulated by the words of Audre Lorde:

> For the master's tools will never dismantle the master's house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change.[76]

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72 Above n61 at 115.
73 Above n17 at 268.
74 Above n8 at 454.
75 Id at 467–8.
76 Quoted in Thornton, above n8 at 453.