

FAMILY VIOLENCE AND PROTECTION ORDERS IN THE AUSTRALIAN CAPITAL TERRITORY

SHAWNI-ROSE FISHER

I. INTRODUCTION

On 2 April 2015 the Attorney-General of the ACT Government, Simon Corbell, announced the ACT Government will embark on a major family violence legislative reform program that will address the recommendations of the 2010 report *Family Violence – A National Legal Response* prepared by the Australia Law Reform Commission.¹ The report² was published on 11 November 2010 and relies on prior research that is likely to be dated. This begs the question: why is the ACT government only now looking to the recommendations of this report, five years later?

This article will discuss the calls for procedural reform in respect of the issuing and enforcement of Domestic Violence Orders in the Australian Capital Territory. This article identifies a number of procedures requiring reform, more particularly the aid and abet provisions that allow the applicant of the domestic violence order to be liable for the respondent's breach; the lack of protection provided to victims during the high risk period after service of the domestic violence order; and the current sanctions for breaching a domestic violence order.

II. THE CURRENT CLIMATE

According to the World Health Organization (WHO), one in three women throughout the world will experience physical and/or sexual violence by a partner or sexual violence by a non-partner.³ The 2013 WHO report explains:

Violence against women is not a small problem that only occurs in some pockets of society, but rather is a global public health problem of epidemic proportions. It pervades all corners of the globe, puts women's health at risk, limits their participation in society, and causes great human suffering.⁴

In their analysis of domestic violence and sexual violence in Australia, Phillips and Vandebroek recognised that 'domestic, family and sexual violence is found across all

¹ ACT Government, 'Community action to drive family violence law reforms' (Media Release, 2 April 2015) < http://www.cmd.act.gov.au/open_government/inform/act_government_media_releases/corbjust_howell/2015/community-action-to-drive-family-violence-law-reforms>

² Australian Law Reform Commission, *Family Violence – A National Legal Response*, ALRC Report 114 (2010).

³ World Health Organisation - Department of Reproductive Health and Research, London School of Hygiene and Tropical Medicine & South African Medical Research Council, 'Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence' (Report 978 92 4 156462 5, World Health Organisation, 2013) 5 < <http://who.int/reproductivehealth/publications/violence/9789241564625/en/>> .

⁴ Ibid, 5.

cultures, ages and socio-economic groups, but the majority of those who experience these forms of violence are women'.⁵

It is extremely difficult to comprehend the prevalence of family violence globally or within a community. Any family violence statistics are limited due to a long culture of non-reporting by victims and its occurrence in the private sphere.⁶ The statistics at least serve as an indication that family violence is indeed a problem of epidemic proportions.⁷ For example, in the ACT region police attended 3,309 family violence incidents during the 2013/2014 financial year. This means 'the ACT police are being called to reports of family violence on average nine times a day.'⁸ By itself this is an alarming figure yet it only represents reported incidents of family violence in the ACT where Police have been called out.

According to the 2013 WHO report 'globally, as many as 38% of murders of women are committed by an intimate partner'⁹. In the ACT region, there have been a total of four homicides this year and of those four, three involved a man killing a partner or former partner.

This year alone in Australia, two women have died every week at the hands of a partner or ex-partner. The ACT has seen three family violence-related deaths in three weeks; two involving a man allegedly killing a partner or ex-partner, and the other a man allegedly killing his mother's partner in Wanniasa.¹⁰

From the data available, many homicides committed by a partner or ex-partner tend to show a history of domestic violence¹¹ with the fatal incident being 'a beating gone too far'.¹² Unfortunately, recent occurrences suggest when protection orders are in place they are not always effective in preventing domestic violence. This was the case with the death of 11-year-old Luke Batty and with the death of Canberra mother of three, Tara Costigan in February 2015.

In February 2014, Luke was tragically murdered by his father Greg Anderson. At cricket practice his father hit him over the head with a cricket bat and stabbed him with a knife.¹³ During the inquest into Luke's death, it was found that Luke's mother, Ms Rosie Batty, had been before the court 10 times in the previous year. On these occasions Ms Batty had been

⁵ Janet Phillips and Penny Vandenbroek, 'Domestic, family and sexual violence in Australia: an overview of the issues' (Research Paper, Parliamentary Library, Parliament of Australia, 14 October 2014).

⁶ Alison Wallace, 'Homicide: The Social Reality' (Research Paper, New South Wales Bureau of Crime Statistics and Research Attorney General's Department, August 1986) 110 <<http://crg.aic.gov.au/reports/1-81.pdf>>.

⁷ World Health Organisation, above n 3.

⁸ Scott Hannaford, 'Figures reveal nine cases of family violence in Canberra every day of the year', *The Canberra Times* (online), 25 March 2015 <<http://www.canberratimes.com.au/act-news/figures-reveal-nine-cases-of-family-violence-in-canberra-every-day-of-the-year-20150324-1m5m1q.html>>.

⁹ World Health Organisation, above n 3, 2.

¹⁰ Christopher Knaus, 'Justice System failing domestic violence victims: expert', *The Canberra Times* (online), 3 April 2015 <<http://www.canberratimes.com.au/act-news/justice-system-failing-domestic-violence-victims-expert-20150403-1m7xd4.html>>.

¹¹ Mouzos J, *Homicidal Encounters: A study of homicide in Australia 1989–1999* (Canberra: Australian Institute of Criminology, 2000) 173–74.

¹² A. Browne, *Violence Between Intimate Partners: Patterns, Causes, and Effects* (Allyn and Bacon, 1997).

¹³ Melissa Davey, 'Luke Batty: killed by a father no one truly knew', *The Guardian* (online) 2 November 2014. <<http://www.theguardian.com/australia-news/2014/nov/02/-sp-luke-batty-killed-by-a-father-no-one-truly-knew>>.

seeking and clarifying intervention orders against Luke's father for family violence matters.¹⁴ Anderson had also been arrested for breaching the family violence intervention order against him and threatening to kill Luke's mother. Anderson was released on bail.¹⁵ Luke's brutal murder by his father raised national concern as to the rising level of family violence in Australia and the limitations of protection orders.¹⁶ Luke's mother, Rosie Batty, was named the Australian of Year of 2015 and has used her public position to continue the dialogue nationally.

In February 2015, Canberra mother Tara Costigan was brutally axe-murdered by her former partner. Tara's murder left her two boys, Rhily aged eleven, Drew aged nine, and one-week-old baby Ayla without a mother. Since this tragedy, the process for obtaining protection orders in the ACT and their effectiveness once in place, have been questioned for reform. The concern about the procedures arose where Ms Costigan had obtained an interim domestic violence order the day before her death.¹⁷

III. WHAT IS DOMESTIC VIOLENCE?

'Domestic violence' is more recently referred to as 'family violence'. Family violence is considered more inclusive of all the family relationships in which violence is known to occur, not just the typical husband and wife arrangement. As this paper is based on research and commentary from various sources, these terms will be used interchangeably.

In recent years Australian jurisdictions have expanded the legislative definition of family violence to include a wider range of relationships, such as same sex, de facto and elderly parent and child. The definition was also expanded to include various forms of violence such as verbal, emotional, economic and sexual abuse. These forms of violence more accurately reflect the experiences of victims.¹⁸

Family violence protection orders are titled differently in each jurisdiction. In the Australian Capital Territory ("the ACT"), the *Domestic Violence and Protection Orders Act 2008* (ACT) authorises the Court to issue a Domestic Violence Order ("DVO"), a Personal Protection Order or a Workplace Order¹⁹. This article is primarily concerned with Domestic Violence Orders within the context of family violence.

Section 13(1) of the *Domestic Violence and Protection Orders Act 2008* (ACT) defines domestic violence as any conduct or threat to cause physical or personal injury to a partner, former partner, a relative, a child of a partner or former partner or a parent of the person's child²⁰. It includes conduct that causes damage to property; is harassing or offensive; is directed at a pet and constitutes an animal violence offence; or constitutes a contravention of

¹⁴ Adam Cooper, 'Rosie Batty felt like throwing herself under a bus after dealing with the Court system', *The Canberra Times* (online) 28 October 2014 < <http://www.canberratimes.com.au/victoria/rosie-batty-felt-like-throwing-herself-under-a-bus-after-dealing-with-court-system-20141028-11czhv.html> >.

¹⁵ Melissa Davey, above n 13.

¹⁶ Susan Metcalfe, 'Luke Batty death challenges us to address violence', *The Canberra Times* (online) 17 February 2014 < <http://www.canberratimes.com.au/comment/luke-batty-death-challenges-us-to-address-violence-20140216-32ttq.html> >.

¹⁷ Christopher Knaus, 'Calwell murder accused Marcus Rappel also charged with breaching domestic violence protection order', *The Canberra Times* (online), 3 March 2015 < <http://www.canberratimes.com.au/act-news/calwell-murder-accused-marcus-rappel-also-charged-with-breaching-domestic-violence-protection-order-20150303-13sen6.html> >.

¹⁸ Karen Wilcox, 'Recent Innovations in Australian Protection Order Law – A Comparative Discussion' (Topic Paper, Australian Domestic Violence & Family Violence Clearinghouse, 2010) 7 < http://www.adfvc.unsw.edu.au/PDF%20files/Topic_Paper_19.pdf >.

¹⁹ *Domestic Violence and Protection Orders Act 2008* (ACT) s 7.

²⁰ *Domestic Violence and Protection Orders Act 2008* (ACT) s 15.

an existing protection order²¹. In these circumstances a protection order may be sought from the Court.

IV. PROTECTION ORDERS

Australian States and Territories have enacted protection order legislation in an effort to prevent family violence and increase the safety of victims. Protection orders straddle civil and criminal court procedures. They are a civil order but breaches are considered a criminal offence.²² In a comparative analysis of Australian protection order law, Karen Wilcox identifies the need for the hybrid nature of protection orders:

The strategic value of protection orders in Australia has rested on the fact that they function injunctively rather than punitively, and are available in emergency situations. This means that protection orders can supplement criminal justice interventions or provide a remedy when the criminal law does not apply; for example, in the event of future likelihood of violence. They are also invaluable as a legal strategy for victims who want the violence to stop but are not interested in engagement with the criminal justice system.²³

A person can apply to the ACT Magistrates Court for a non-emergency domestic violence order to protect themselves and their children if they are exposed or at risk of being exposed to domestic violence. A police officer may apply for an emergency domestic violence order on behalf of a person if it is required in the circumstances.²⁴

For a non-emergency domestic violence order, the aggrieved person submits an application to the Court and the Registrar sets a first return date for the matter to be heard before the Court.²⁵ The Registrar may also order the parties to attend a preliminary conference or mediation prior to the first return date in the hope of settling the matter by consent.²⁶ In the meantime, the Court may grant an interim domestic violence order for the protection of the applicant.²⁷ The application and the interim order are served on the respondent by the Police.

The applicant and the respondent are both required to attend the first return date of the application. If the respondent does not attend the first return date, the Court may decide the application in the respondent's absence.²⁸ If the respondent does appear, the respondent will be given the opportunity to indicate if they consent to the domestic violence order being made on a final basis. If they consent the Magistrate will make the final domestic violence order that day and both parties will receive a copy of the order. If the respondent objects to the domestic violence order being made, then the matter will be listed for final hearing. An interim domestic violence order will usually remain in place until the next court date. The 'paramount consideration' by the Court in deciding an application for a protection order is

²¹ *Domestic Violence and Protection Orders Act 2008* (ACT) s 90.

²² Karen Wilcox, 'Recent Innovations in Australian Protection Order Law – A Comparative Discussion' (Topic Paper, Australian Domestic Violence & Family Violence Clearinghouse, 2010) 3 <http://www.adfvc.unsw.edu.au/PDF%20files/Topic_Paper_19.pdf>.

²³ Karen Wilcox, 'Recent Innovations in Australian Protection Order Law – A Comparative Discussion' (Topic Paper, Australian Domestic Violence & Family Violence Clearinghouse, 2010) 1 <http://www.adfvc.unsw.edu.au/PDF%20files/Topic_Paper_19.pdf>.

²⁴ *Domestic Violence and Protection Orders Act 2008* (ACT) Part 9.

²⁵ *Domestic Violence and Protection Orders Act 2008* (ACT) s 22.

²⁶ *Domestic Violence and Protection Orders Act 2008* (ACT) ss 24, 25.

²⁷ *Domestic Violence and Protection Orders Act 2008* (ACT) s 29.

²⁸ *Domestic Violence and Protection Orders Act 2008* (ACT) ss 26, 36.

‘the need to ensure that the aggrieved person, and any child at risk of exposure to domestic violence, is protected from domestic violence.’²⁹

A domestic violence order may restrain the respondent from contacting, harassing, threatening or intimidating the aggrieved person or damaging their property. A domestic violence order may prohibit the respondent from being within a physical proximity of the applicant or prescribe conditions on which the respondent may be on particular premises; be in a particular place; approach or contact the applicant. If necessary, the protections awarded by the domestic violence order can encompass the applicant’s dependent children.³⁰ The domestic violence order remains in force generally for two years however it may be extended upon application to the Court if justified in the circumstances.³¹

Domestic violence orders taken out in one jurisdiction are not automatically recognised in other jurisdictions therefore creating enforcement issues. At the COAG meeting held April 2015 it was agreed a national domestic violence scheme is necessary to enable such orders to be recognised across all States and Territories. The legal framework for this national scheme is said to be in place by the end of the year.³²

V. THE ADVERSARIAL APPROACH TO DOMESTIC VIOLENCE PROCEEDINGS

Over the past decade reforms to Australian State and Territory family violence legislation were victim safety focussed. The reforms included expanding the definitions of ‘family’ and ‘domestic’ violence and the relationships covered therein; increasing access to protection orders; provision of emergency protections; and recognising the needs of the children³³. However, it is the procedural application of the law and the enforcement of the orders that now require reform. A 2015 report by the Victims of Crime Commissioner ACT suggests many of the procedures for domestic violence proceedings in fact act as a disincentive to victim’s considering whether to seek protection from the legal system.³⁴

In 2008 the ACT Magistrates Court and the ACT Supreme Court underwent reforms to implement case management procedures in civil matters. In the traditional adversarial system, it is the primary responsibility of the parties to define the issues, conduct the investigations and advance the case in preparation for trial, where the matter is finally ‘played-out’ before a Judge. The Court’s traditional role was passive in the pre-trial preparation of the case, only intervening in specific circumstances such as when an interlocutory application was made.

²⁹ *Domestic Violence and Protection Orders Act 2008* (ACT) s 7.

³⁰ *Domestic Violence and Protection Orders Act 2008* (ACT) s 48.

³¹ *Domestic Violence and Protection Orders Act 2008* (ACT) s 55.

³² Australian Broadcasting Corporation, ‘Domestic violence order national scheme promised, says Minister Assisting Prime Minister for Women’, *The 7.30 Report*, 17 April 2015 (Sabra Lane) <<http://www.abc.net.au/7.30/content/2015/s4218864.htm>>.

³³ Karen Wilcox, ‘Recent Innovations in Australian Protection Order Law – A Comparative Discussion’ (Topic Paper, Australian Domestic Violence & Family Violence Clearinghouse, 2010) 1 <http://www.adfvc.unsw.edu.au/PDF%20files/Topic_Paper_19.pdf>.

³⁴ Victims of Crime Commissioner ACT, ‘Reforming the Framework for Applying for a Domestic Violence Order in the ACT’ (Position Paper, March 2015) 2 <http://cdn.justice.act.gov.au/resources/uploads/New_Victim_Support/Position_Paper_Protection_Orders_FINAL2.pdf>.

High costs, extensive delays and congested courts called for procedural reform. Case management schemes were implemented in an effort to reduce cost and delay.³⁵

Contrastingly, domestic violence proceedings in the ACT continue to operate according to the traditional adversarial system. Victims of Crime ACT suggest this is an inappropriate system for domestic violence proceedings:

The adversarial approach of domestic violence order proceedings, particularly beyond a conference, can have the effect of re-traumatising or re-victimising vulnerable people. Applicants have reported experiencing the following at court, in particular at final hearings: encountering the respondent in the court precinct, difficulty in obtaining experienced legal representation, delays in the matter being heard, aggressive cross-examination by barristers on behalf of the respondent to the order, personal cross-examination by the respondent if not legally represented, and difficulty accessing the option to give their evidence via closed circuit television.³⁶

Similar criticisms have been made internationally. For example, Fritzier and Simon made the following comment in review of United States procedure:

The adversarial system may be better suited to litigating crimes between strangers and certain other issues brought before our court system. However, it may be less effective when dealing with crimes between intimate partners where the adversarial approach may exacerbate the problem and increase the danger to victims.³⁷

A hallmark of our criminal justice system is the presumption of innocence. The onus lies with the prosecution to rebut this presumption and prove beyond all reasonable doubt the guilt of the respondent. In domestic violence proceedings, this presumption puts the applicant at a disadvantage as it fails to take into account the nature of family violence and the vulnerability of the victim. Imagine a victim who has been locked in a physical and abusive relationship for tens of years. Imagine the emotional taunts the victim hears regularly, 'who are you going to tell? No one will believe you. You're no one'. Then imagine seeking help from a system that is virtually telling you the same thing: 'Prove it!' The legal system is exposing the victim to the same intimidation tactics their tormentor does.

The legal system is inherently apprehensive of the applicant's integrity, motives and intentions in bringing a claim against the respondent. This was the experience of Rosie Batty. Ms Batty said on ABC's Q&A program that harsh judgments and criticism from people who were meant to support victims were not uncommon. Ms Batty reflected from her own experiences:

³⁵ Bernard Cairns, *Australian Civil Procedure*, (Thomson Reuters, 10th ed, 2014.), 50.

³⁶ Victims of Crime Commissioner ACT, 'Reforming the Framework for Applying for a Domestic Violence Order in the ACT' (Position Paper, March 2015) 2 <http://cdn.justice.act.gov.au/resources/uploads/New_Victim_Support/Position_Paper_Protection_Orders_FINAL2.pdf>. See also: Megan Gorrey, 'Domestic Violence Sufferers 'unnecessarily re-victimised' under the ACTs protection order laws', *The Canberra Times* (online) 30 March 2015 <<http://www.canberratimes.com.au/act-news/domestic-violence-sufferers-unnecessarily-revictimized-under-acts-protection-order-laws-20150330-1maqf8.html>>.

³⁷ Randal B. Fritzier and Leonore M.J. Simon, 'Creating a Domestic Violence Court: combat in the trenches' (Court Review, 2000) 33 <<http://aja.ncsc.dni.us/courtrv/cr37/cr37-1/CR9FritzierSimon.pdf>>.

You can't always trust the response from the people that you need to turn to [to] help you in a way that is non-judgmental...So your journey is as tough going through that process as it is for the abuse that you've been subjected to.³⁸

The ACT Law Society has commented that 'applications for Domestic Violence are sometimes made in order to gain some tactical advantage over an ex-partner in Family Court proceedings'³⁹ indicating that the ACT Law Society is sceptical of some applicant's motives for seeking a domestic violence order.

Once proceedings have commenced, the adversarial system allows the respondent to lead cross-examination of the victim if the respondent is self-represented. Retired Chief Justice of the Family Court Alastair Nicholson told the ABC that 'men accused of physically or sexually abusing their partner are able to directly cross examine their victim in court, because they lack legal representation'.⁴⁰ The same ABC story notes that Legal Aid groups say this is so traumatising that 'some women are too frightened to leave their abusive partners and go through the family court system'.⁴¹ If there are concurrent proceedings arising out of the same conduct⁴² then the victim may be required to give their evidence twice before the Court and be cross-examined twice. The legal system is effectively enabling the respondent's emotional abuse of the victim.

In response to the Victims of Crime ACT report cited above, Attorney General Simon Corbell announced on 11 May 2015 the ACT Government will introduce a new class of interim domestic violence orders to counter the reported re-victimisation of domestic violence victims.⁴³ This class of interim orders are to apply when the respondent has been charged with criminal offences in concurrent proceedings. Though there is little information available as to how this new regime will operate, this is a step in the right direction.

VI. AID & ABET PROVISIONS

Incredulously, in some Australian States, including the ACT, the applicant may be charged for aiding and abetting the defendant's breach of the domestic violence order. The Law Reform Commission noted the following:

Until fairly recently, the long established common law position was that a person could not be convicted of aiding and abetting the commission of an offence of which he or she was the victim. In *Tyrell* [1894] 1 QB 710, the defendant, a girl under the age of 16, was charged with aiding and abetting the principal to have unlawful sexual intercourse with her. The court

³⁸ Editorial, 'Anti-domestic violence campaigner Rosie Batty says the process for reporting abuse 'has to change' to help victims break their silence' *ABC News* (online) 24 February 2015 < <http://www.abc.net.au/news/2015-02-24/anti-domestic-violence-campaigner-rosie-batty-reporting-change/6232718>>.

³⁹ ACT Law Society, 'Protection Orders Legislation Review' (Discussion Paper, 2004) 1 < <https://www.actlawsociety.asn.au/documents/item/225>>.

⁴⁰ Sally Sara, 'Claims cuts to Legal Aid putting women in distress' *ABC News* (online) 8 April 2013. < <http://www.abc.net.au/pm/content/2013/s3732375.htm>>.

⁴¹ *Ibid.*

⁴² Such as criminal proceedings for assault brought by the Crown and then the domestic violence proceedings brought by the victim.

⁴³ Michael Inman, 'ACT government announces strengthened interim domestic violence orders' *The Canberra Times* (online) 11 May 2015 < <http://www.canberratimes.com.au/act-news/act-government-announces-strengthened-interim-domestic-violence-orders-20150511-ggytfe.html>>.

found that the defendant could not be guilty of aiding and abetting a crime aimed at protecting girls of her age from sexual intercourse. However, in a number of recent cases, the party for whose benefit an apprehended violence order... was made has been convicted of aiding and abetting the criminal offence of breaching a domestic violence order.⁴⁴

The following case study submitted by National Legal Aid to the Australian Law Reform Commission highlights the ignorance of the aid and abet provisions:

An Aboriginal woman living in the Pilbara had been in a long-term violent relationship. After being physically assaulted again, she obtained an interim violence restraining order against her partner on the advice of the police. Some weeks later after pressure from extended family and her children she allowed her partner to attend her house to see the children. Her partner again assaulted her and the police were called to the house. The police charged her partner with assault and breach of the restraining order. The woman was also charged with breach of restraining order as a party to the offence. She pleaded guilty and was given a fine. She remarked to the refuge that she would never seek a protection order again.⁴⁵

The practice of charging victims of family violence for the respondent's breach of the domestic violence order fails to take into account the nature of family violence. Completely severing ties with the respondent may be impossible for the applicant, particularly if the parties share children, social connections and/or reside in a small town.

If it is clear to the police or the court that the DVO process is being used for other than appropriate reasons, the DVO should be varied or revoked. It is inappropriate to charge a victim of family violence for aiding and abetting breaches based on concern for the misuse of public resources as this undermines the policy intent of family violence legislation. Brown and other criminal law academics pinpoint the flaws of this reasoning:

While the frustration and concern for 'wasted resources' on the part of police can be appreciated, it is questionable whether the practice of laying breach charges against the person for whose benefit the order has been made is likely to advance the preventative objective of apprehended violence laws. The risk of being charged as an accessory to breach is likely to represent a significant disincentive to victims of domestic violence who are considering applying for an order.⁴⁶

The 'control theory' is just one social theory that attempts to explain the complex dynamics of family violence relationships:

Abusers, in an effort to maintain control over other members of the family, may use many forms of intimidation, such as coercion, isolation, economic abuse, and denial of personal blame. The victim(s) typically learn how to respond to the various forms of intimidation, although the struggle to challenge the abuse/abuser may become too overwhelming or dangerous for the victim(s). As a result, the victim(s) may begin to modify his/her/their own behaviour, slowly giving up control in order to survive and avoid continued abuse. Isolating the victim from any social contracts may be the most harmful form of intimidation the abuser

⁴⁴ Australian Law Reform Commission, *Family Violence – A National Legal Response*, ALRC Report 114 (2010).

⁴⁵ National Legal Aid, Submission FV 232 to the Australian Law Reform Commission, *Family Violence – A National Legal Response* (15 July 2010). See also L Kelly, 'Indigenous Women's Stories Speak for Themselves: The Policing of Apprehended Violence Orders' (1999) 4(25) *Indigenous Law Bulletin* 89, 5.

⁴⁶ D Brown and others, *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Material and Commentary on Criminal Law and Process in New South Wales* (4th ed, 2006), 1157.

uses because the possibility of escape for the victim(s) is greatly reduced in the absence of social support.⁴⁷

‘Why didn’t you just leave’ is a common question levelled at victims of domestic violence. American Psychologist Martin E.P Seligman and his colleagues conceptualised the theory of ‘learned helplessness’ to describe the failure of dogs to escape a punitive environment, even when given the opportunity to do so.⁴⁸ Walker then used the learned helplessness theory to explain why victims of family violence remain in volatile relationships.⁴⁹ The repeated exposure to abuse causes the victim to become passive because they feel there is nothing they can do that will result in a positive outcome.⁵⁰ Safety concerns for themselves and their children, isolation, shame and embarrassment and a lack of trust in the police may affect the victim’s decision not to apply for protection from the legal system or report any breaches of the domestic violence orders.⁵¹

Seligman and colleagues criticised the application of the theory of learned helplessness to domestic violence victims. Seligman and colleagues argued that while women may use ‘strategies that seem passive or tantamount to doing nothing, these may actually be active efforts to reduce the risk of violence and abuse to themselves and their children.’⁵² This passivism is therefore a rational defence mechanism calculated by the victim when it is apparent leaving the relationship or seeking legal assistance might only place the victim and their children in greater danger. This was the experience of Rosie Batty as she explained in a live cross with Studio 10:

We keep punishing the person who's already being punished. Women don't leave not because they don't want to. It's because they are potentially too frightened to because of what might happen.

And you know what happened to me? Greg had finally lost control of me and to make me suffer and the final act of control, which was the most hideous form of violence, was to kill my son so don't you ever think that if we don't report it's because we don't want to. It's because we are so scared about what might happen⁵³.

⁴⁷ Rose Fife and Sarina Schrager, *Family Violence: What Health Care Professionals Need to Know* (Jones & Bartlett Publishers, 2011) 9,10.

⁴⁸ Encyclopaedia Britannica, *Learned Helplessness*, (2014) <<http://www.britannica.com/EBchecked/topic/1380861/learned-helplessness>>.

⁴⁹ L.E. Walker, ‘Battered Women and Learned Helplessness’ (1977) 2, 3-4 *Victimology* 525-534.

⁵⁰ Rose Fife and Sarina Schrager, *Family Violence: What Health Care Professionals Need to Know* (Jones & Bartlett Publishers, 2011) 13.

⁵¹ State Library NSW, ‘Hot Topics Legal Issues in Plain English: Domestic Violence’ (2013) <http://www.womenslegalnsw.asn.au/wlsnsw/wp-content/uploads/HT87-Domestic-Violence_7.pdf>.

⁵² Mary Ann Dutton, Sue Osthoff & Melissa Dichter, *Update of the ‘Battered Woman Syndrome’ Critique* (2011) National Resource Centre on Domestic Violence <http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=2061>.

⁵³ Mex Cooper, ‘Rosie Batty blasts TV host Joe Hildebrand over family violence’, *The Age Victoria* (online) 2 April 2014 <<http://www.theage.com.au/victoria/rosie-batty-blasts-tv-host-joe-hildebrand-over-family-violence-20140402-35xq7.html>>.

VII. FAILURE TO PROTECT APPLICANTS DURING THE HIGH RISK PERIOD

Once an application for a domestic violence order is made the Court will provide a copy to the ACT Policing Service and Process Team for service on the respondent. This happens as soon as practicably possible, usually within 24 to 48 hours of the order being made. The interim domestic violence order takes effect once the respondent receives their copy from the Police.

Domestic violence orders are sought at a time when the applicant feels most threatened by the respondent. However, in line with the theories outlined above, the act of taking out a domestic violence order against the respondent may heighten the risk to the applicant. For example, Tara Costigan was murdered just 24 hours after she obtained a DVO from the ACT Magistrates Court. It was another victim's experience that after the domestic violence order was served on the respondent threats and vandalism only increased. The victim told the Canberra Times 'so far I have had six DVOs against him, he gets served it and all the threats happen again, I can't prove it, so then I just don't go ahead. If these things are happening to me because of the DVO, then I'm not going to take that risk.'⁵⁴ Experiences such as this are not uncommon, so much so that support workers are advising victims against applying for such orders 'if it is likely to trigger further violence.'⁵⁵

The ACT has no procedures for managing the victim's safety during the high risk period that immediately follows service of the protection order. Once the domestic violence order is served on the respondent, the law graduates from proactive to reactive, waiting for the DVO to be breached before the system can intervene again.

Legislators must consider measures to reduce the likelihood of harm to the applicant and neutralise the defendant during this high risk period. The Court should make it clear to the applicant that this is an especially high risk period for them and their children, and suggest practical ways the applicant can protect themselves. For example, the applicant might be encouraged to stay with family or friends for the 72 hours following service of the DVO. Funding might be provided to domestic violence services to provide respite services of this kind should applicants not have an appropriate support network to facilitate this. However, it is conceded these suggestions place the applicant upon the victim to again protect themselves from the respondent. The government must come up with mechanisms that shoulder this burden with the victim. Perhaps a heightened allocation of police resources during this high risk time is more effective. Consideration might also be given to establishing a domestic violence unit purposed to manage these risks.

No matter what safety mechanisms are devised, the safety of the applicant must be accounted for in policy and in practice during this high risk period. At present, the legal system fails in this regard.

⁵⁴ Scott Hannaford, 'DVOs on their own can make violence worse, warns victim' *The Sydney Morning Herald* (online) 5 April 2015 < <http://www.smh.com.au/act-news/dvos-on-their-own-can-make-violence-worse-warns-victim-20150405-1m8bx4.touch.html>>.

⁵⁵ Christopher Knaus, 'Axe murder accused had breached a domestic violence order against his last girlfriend' *The Canberra Times* (online) 4 March 2015 < <http://www.canberratimes.com.au/act-news/axe-murder-accused-had-breached-a-domestic-violence-order-against-his-last-girlfriend-20150304-13uw4z.html>>.

VIII. WEAK SANCTIONS & SHIFTING THE AUSTRALIAN CULTURE

It is an offence to breach a domestic violence order, the maximum penalty being a fine of \$75,000 or five years imprisonment⁵⁶ and yet a *Canberra Times* article notes that ‘more than half of those breaking domestic violence and protection orders are getting off with a good behaviour order.’⁵⁷ While good behaviour orders may deter the defendant from reoffending, punitive sanctions for domestic violence breaches should also be rehabilitative.

A reoccurring theme of the national dialogue on domestic violence is the need to change cultural behaviour. Since Luke’s death, Rosie Batty has been a key voice influencing this movement. When awarded as the Australian of the Year 2015, Ms Batty pleaded with the Australian people in her speech:

To the Australian people, look around. Do not ignore what you see and what you know is wrong. Call out sexist attitudes and speak up when violence against women is trivialised. To men, we need you to challenge each other and become part of the solution. Raise the conversation and don’t shy away from this uncomfortable topic. We cannot do this without you. To the women and children who are unsafe, in hiding or living in fear, who have changed their names, left their extended families and moved from their communities to find safety, you do not deserve to live a life that is dictated by violence. You are not to blame.⁵⁸

Ms Batty spoke of proactive campaigns to ‘educate and challenge community attitudes’. Such education programs are vital. The message that domestic violence will not be tolerated must target men, women, children, teenagers, schools and workplaces; it must reach every corner of society. However, it is just as important for resources to be applied to programs that target known offenders. Once an application is made against someone for domestic violence, the respondent should be required to attend some sort of counselling and education program. If they breach the order, greater consideration should be given to punitive sanctions rather than just a good behaviour order as such orders downplay the seriousness of the offence. Further counselling and education programs should be mandatory following any breach. Greater attention to changing the behaviour of known offenders may have a greater impact on changing the culture of domestic violence in Australia.

IX. CONCLUSION

Family violence is thoroughly canvassed by the Australian media and is scheduled on most political agendas. Nevertheless, family violence is ever present in our communities. Rosie Batty comments ‘the statistics are unacceptable, indisputable and, if they did happen on our streets, there would be a public outcry.’⁵⁹

⁵⁶ *Domestic Violence and Protection Orders Act 2008* (ACT) s 90 (as at 21 April 2015).

⁵⁷ Scott Hannaford, ‘Figures reveal nine cases of family violence in Canberra every day of the year’, *The Canberra Times* (online), 25 March 2015 <<http://www.canberratimes.com.au/act-news/figures-reveal-nine-cases-of-family-violence-in-canberra-every-day-of-the-year-20150324-1m5m1q.html>>.

⁵⁸ Editorial, ‘Australian of the Year 2015: Rosie Batty’s speech text, pays tribute to son’ *The Australian* (online) 25 January 2015 < <http://www.theaustralian.com.au/in-depth/australia-day/australian-of-the-year-2015-rosie-battys-speech-text-pays-tribute-to-son/story-fnrjbgk-1227196361078>>.

⁵⁹ *Ibid.*

The family violence legislative reform program announced by Attorney-General Simon Corbell⁶⁰ must address the current Court procedures followed in domestic violence proceedings. In the ACT, domestic violence protection orders are a somewhat effective tool used to protect those at risk of family violence. However, their effectiveness is limited by the procedural deficiencies outlined in this article. Certain adversarial procedures employed by the ACT legal system fail to properly account for the vulnerable state of family violence victims and inadvertently contribute to their re-victimisation. The safety of the applicant is not currently accounted for in the high risk period that immediately follows service of the domestic violence order on the respondent. Certain sanctions downplay the seriousness of domestic violence and aid and abet provisions punish the applicant for the respondent's breaches of domestic violence orders.

Domestic violence orders must be recognised across borders to ensure applicants are protected wherever they are. It is inappropriate to charge a victim of family violence for aiding and abetting a respondent's breach of a domestic violence order based on concern for the misuse of public resources. The aid and abet provisions should thus be repealed. The safety of the applicant must be accounted for in policy and in practice during the high risk period immediately following service of the domestic violence order on the respondent and finally, the sanctions ought to serve both as a sanction for offenders *and* a mechanism for cultural change. This requires the sanctions to be appropriately punitive, to act as a deterrent to offenders and the general public, and include programs rehabilitative in nature.

Family violence is a social evil difficult for any legal system to manage. Commitment by the Government to addressing this epidemic and continual evaluation and reform of current procedures can only lead to positive change. The future generations of this country deserve our best efforts to ensure domestic violence is no part of the culture they are raised in.



⁶⁰ ACT Government, 'Community action to drive family violence law reforms' (Media Release, 2 April 2015) < http://www.cmd.act.gov.au/open_government/inform/act_government_media_releases/corbjust_howell/2015/community-action-to-drive-family-violence-law-reforms>.

