

# ANNA'S STORY

## Law's Response to Domestic Violence

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Domestic violence is a very real problem for contemporary Australia. The physical, psychological and economic ramifications of domestic abuse are far-reaching and alarming. The role the legal system has played, currently plays and perhaps should play in this multifaceted problem is the central theme of this article. The author uses the narrative of Anna, a fictional character who suffers abuse at the hands of her husband, Chris. It discusses the social-psychological and sociocultural literature on domestic violence and outlines the civil and criminal law applicable to Anna in Queensland. This is done in an attempt to provide a framework for a critique of the law's response to Anna's story, and to convince the reader that the law must overcome its patriarchal past and acknowledge its fundamental role in the fight against domestic violence.

### Introduction

Domestic violence has reached epidemic proportions in many jurisdictions throughout the world.<sup>1</sup> For instance, reports from the Australian Bureau of Statistics indicate that almost half a million women in Australia experience an incident of domestic violence per year.<sup>2</sup> Considering the low reporting rates of domestic violence, even this may be a gross under-estimate.<sup>3</sup> While it is acknowledged that intimate relationships can often be mutually violent,<sup>4</sup> the majority of research suggests that the victims of domestic violence are most commonly female.<sup>5</sup> Commentators almost unanimously agree that the psychological and physical consequences of domestic violence on women are

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<sup>1</sup> Seymore (1996), p 1032.

<sup>2</sup> Refer

[www.abs.gov.au/ausstats/abs@.nsf/94713ad445ff1425ca25682000192af2/31df595e4acb035eca2569bb00164f7d!OpenDocument](http://www.abs.gov.au/ausstats/abs@.nsf/94713ad445ff1425ca25682000192af2/31df595e4acb035eca2569bb00164f7d!OpenDocument)

<sup>3</sup> Seymore (1996), p 1037.

<sup>4</sup> Some scholars argue, for example, that bidirectional patterns of aggression are more predominant than research suggests, asserting that men are actually victimised at least as often as their female partners: Fitzpatrick et al (2004), p 91.

<sup>5</sup> McCloskey and Grigsby (2005), p 264. Such gender asymmetry will be assumed in this paper, with the victim of domestic violence portrayed as female and the perpetrator as male. However, refer to Peterman and Dixon (2005) for a discussion of the significant problems of domestic violence faced by same-sex couples.

both acute and chronic.<sup>6</sup> The flow-on-effect for the community is also bleak, with domestic violence placing a considerable strain on the workforce and the economy.<sup>7</sup> What must not be forgotten, however, is that behind these neutral statistics are stories of women and children who have felt the pain, degradation, terror and despair of domestic violence.<sup>8</sup>

Scholars have long recognised the potential of the law to act as an agent of social change.<sup>9</sup> Jane Murphy contends that one of the means by which the legal system can effect this change is by integrating powerful human stories (or narratives) into efforts at law reform.<sup>10</sup> While the narrative has always played a central role in legal discourse,<sup>11</sup> the skill of 'storytelling' has more recently been adopted by women's rights advocates in their fight against subordination.<sup>12</sup> Those commentators assert that storytelling provides a catalyst through which the sexually and/or racially oppressed can voice the 'real' dynamics of their subjugation.<sup>13</sup>

Thus narrative scholars have told and retold real women's stories in an effort to transform abstract claims of women's oppression into something more tangible.<sup>14</sup> Similarly, this is the aim of telling you Anna's story. The reader is provided with an opportunity to connect with Anna. Although her experiences may be very different from one's own, the real and human nature of her plight allow the recognition of oneself within her story. This is a particularly important task in the area of domestic violence, which has historically been misconceived, silenced and ignored by both the law and the greater community.<sup>15</sup> The narrative is therefore used in this paper and elsewhere to

<sup>6</sup> Samuelson and Campbell (2005), p 276. The physical consequences of domestic violence are wide-ranging, including bruises, broken bones, scars, physical disability, and at the extreme, death: Samuelson and Campbell (2005), p 276. The psychological problems associated with domestic violence are equally as varied and include such things as depression, post-traumatic stress disorder, anxiety, panic disorder, sexual dysfunction, suicidality and substance abuse disorder: Chemtob and Carlson (2004), p 209.

<sup>7</sup> For example, data suggest that women experiencing domestic violence regularly miss work or are late, are harassed at work, have difficulty concentrating at work, are often terminated from employment, and have difficulty sustaining jobs over the long term: Swanberg and Logan (2005), p 3; Wettersten et al (2004), p 447.

<sup>8</sup> Murphy (1993), p 1260.

<sup>9</sup> Murphy (1993), p 1244.

<sup>10</sup> Murphy (1993), p 1245.

<sup>11</sup> See Cover (1983), pp 4-5; Cover (1986).

<sup>12</sup> Littleton (1989), p 50.

<sup>13</sup> Mahoney (1991), p 1; Murphy (1993), p 1245.

<sup>14</sup> For example, Martha Mahoney uses a mix of autobiographical stories and those told by others to demonstrate how 'serious harm to women results from the ways in which law and culture distort our experience': Mahoney (1991), p 2. See also Littleton (1989); Murphy (1993); Katzen (2000).

<sup>15</sup> Balos (2004), p 77.

challenge conventional legal understandings and ‘create a bridge across gaps in experience, thereby eliciting empathic understanding’.<sup>16</sup>

In order to achieve such an aim, this paper discusses the social-psychological and sociocultural literature on domestic violence, and outlines the law applicable to Anna in Queensland. This is done in an attempt to provide a framework for a critique of the law’s response to Anna’s story, and to convince the reader that the law must overcome its patriarchal past and acknowledge its fundamental role in the fight against domestic violence.

### **Anna’s Story<sup>17</sup>**

Suppose for a moment that you are Dr Davina, a psychiatrist who takes an eclectic approach to assessment, drawing on both psychology and sociology. Anna comes to you to tell her story:

I was born in Sydney and moved to Brisbane in my teens. I was running away. Away from a childhood filled with fear and violence. My father was a ‘military man’ and he ruled the house with a *very* heavy hand. I can’t remember now how many bouts of drunken rage my mother and I put up with over the years. Not long after I arrived in Brisbane I met Christopher. We fell in love and got married. Chris’s childhood was much like mine. His father left when he was five years old. Chris said his father told him the day he left that he had never wanted a child anyway. Chris’s stepfather was really abusive to both him and his mother, so he ran away when he was 14 years old.

Our marriage started so happily. We had two children, Joy and Eddie, pretty much straight away. I stayed at home to look after the kids ... but when they were a bit older I wanted to get a job. Chris often laughs at such a ‘ridiculous idea’ and says I am too stupid to control any money. He takes care of all of the money and gives me a small allowance every fortnight. I manage to save a bit sometimes and use it to pay for computer courses and stuff like that through the kids’ school. I haven’t told Chris about that. I don’t think he would like the fact that I do the courses with Jaye — she’s a good friend of mine. Chris doesn’t like Jaye much and is really jealous of my friendship with her.

Not long after the kids started school, Chris and I began to regularly exchange very heated and nasty words. Then the fighting got worse and Chris started to hit me. I would often be left with huge bruises all over my body. I was embarrassed to go out! It got really bad a couple of times. Once he hit me in the chest with a baseball bat and broke five of my ribs. Chris would always apologise for hitting me, though. I guess I can be too stubborn some times. Chris often tells me that he wishes I wouldn’t defy him, because then he wouldn’t have to hit me. Maybe he has a point, but it seems anything sets him off these days. Like, when his football team loses a match, he comes looking for a fight with me. I take Joy and Eddie to the park during Chris’s football time now, just in case his team loses.

<sup>16</sup> Minow (1990), p 1688.

<sup>17</sup> Anna’s narrative is loosely based on stereotypical stories of domestic violence and is the imaginary creation of the author.

Not long ago, I suggested that maybe the kids and I could go on a holiday to visit their grandmother in Sydney. Chris was furious at the idea and accused me of being 'an absolute moron' for even suggesting it. I didn't give up, though, and Chris finally agreed to let me go, but only if I didn't take the kids. Then a couple of days later he said that if I went I shouldn't expect him or the children to be there when I got back. I told him that I didn't believe him and that I was going to Sydney. Chris grabbed me by the hair, dragged me outside and punched and kicked me over and over again. I think my neighbour eventually called the police. When Constables Carter and Nicholls arrived, Chris was still in a very bad rage ... and I was lying beaten and bleeding on the stairs. The police officers arrested Chris.

Chris came home from work a few days later, his arms filled with dozens of roses. He promised me a thousand times that it would never happen again and pleaded with me not to help the police send him away. I'm worried about the kids, but I don't want to be responsible for sending Chris to gaol. What do I do? I don't have any money to just leave, where am I supposed to go if I do leave? I don't know anyone who can help me. Besides, Jaye always tells me that Chris is not that bad a guy and the kids need their father. So I decided to stay and drop the court thingy. Constable Carter rang a few days ago to remind me that I needed to go to court soon for the hearing. I told him that everything was OK now and that I thought Chris really meant the apology this time. Mum insisted that I come and see you though, so here I am.

### How Would Dr Davina Assess Anna's Plight?

Scholars have identified a range of factors that are thought to contribute to the occurrence of domestic violence, including a history of childhood exposure to violence,<sup>18</sup> alcohol abuse,<sup>19</sup> attachment deficits,<sup>20</sup> low self-esteem,<sup>21</sup> social skills deficits,<sup>22</sup> and strong sex role stereotypes,<sup>23</sup> to name a few. However, the exact reason as to why women remain in, or perhaps return to, violent intimate relationships, or why men are often violent towards their partners, is not fully understood.<sup>24</sup> The following analysis will focus on these unresolved issues and discuss a wide range of factors identified by psychologists as influential in the

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<sup>18</sup> Bandura (1973), p 4.

<sup>19</sup> The high prevalence of drinking problems among men who are violent against their partner is often explained by the disinhibitory effect of alcohol on the mechanisms that prevent perpetrators from reacting aggressively in certain situations: Fals-Stewart et al (2005), p 240. Although this effect is thought to be moderated by personality factors and the circumstances under which the intoxication occurs: Fals-Stewart et al (2005), p 239.

<sup>20</sup> Babcock et al (2004), p 433.

<sup>21</sup> Schumacher and Leonard (2005), p 28.

<sup>22</sup> Dodge, Bates and Pettit (1990), p 1679.

<sup>23</sup> Puzella (1997), p 42.

<sup>24</sup> Herbert et al (1991), p 312.

aetiology of domestic violence. Given the unresolved state of the literature, however, Dr Davina's assessment of Anna cannot be conclusive or definitive.

## Diagnosis Under the Social-Psychological Model

### *Antecedents: The Role of Childhood Abuse*

Given her affinity to social psychology, Dr Davina is likely to place a large emphasis on any environmental factors that may be impacting on Anna and Chris. At the core of such a focus is the proposition that both Anna's dysfunctional behaviour and Chris's aggressive behaviour have been learned.<sup>25</sup> On a general level, social learning theorists such as Albert Bandura argue that children who grow up in an abusive family are taught that the use of aggression is a viable means of dealing with interpersonal conflicts, and that they are therefore more likely to employ or tolerate violent tactics as adults.<sup>26</sup> According to this theory, the painful events Chris experienced in childhood, such as being rejected by his father, as well as shamed and abused by his stepfather, have manifested in his adult life as delusional jealousy, an inability to trust, and violent mood cycles.<sup>27</sup> For Anna, a long history of familial violence has taught her to employ complex cognitive strategies, such as positive appraisal, in an effort to normalise her pain and suffering, thus allowing her to view the current relationship with Chris as acceptable.<sup>28</sup>

More recently in the literature, this process has been labelled the 'intergenerational transmission of relationship violence' (ITRV).<sup>29</sup> The concept has subsequently gained support as one of the most likely explanations for domestic violence, with empirical studies consistently showing a relationship between growing up in an abusive family and becoming involved in a violent interpersonal relationship.<sup>30</sup> Notwithstanding the prominence of the theory, the psychological literature on intergenerational transmission does little to inform Dr Davina as to the precise path of Anna and Chris's development. However, it does offer some explanation. One of the most plausible of these explanations is that presented by Kenneth Dodge and his colleagues, who suggest that early maltreatment has a detrimental effect on an individual's social information processing, which results in deficits in interpersonal functioning and ultimately leads to peer rejection.<sup>31</sup> Feiring and Furman draw on Dodge's work to conclude that peer rejection leads individuals such as Anna and Chris to seek out and join a group constituted by

<sup>25</sup> Puzella (1997), p 39.

<sup>26</sup> Bandura (1973), p 4.

<sup>27</sup> Puzella (1997), p 40; Simon (1995), pp 53–54.

<sup>28</sup> Herbert et al (1991), p 311. In other words, the cognitive strategy of positive appraisal allows Anna to change the meaning of stressful situations in order to cast them in the best possible light, allowing her to avoid the harsh reality of her plight: Herbert et al (1991), p 313.

<sup>29</sup> Kwong et al (2003), p 288; Ehrensaft et al (2003), p 741.

<sup>30</sup> Stith et al (2000), p 640.

<sup>31</sup> Dodge et al (1990), p 1679.

people who share their lack of social skills. It follows that individuals select a partner from within this group, and consequently experience conflictual and abusive romantic relationships.<sup>32</sup>

While the commonsensical nature of this theory may make it particularly appealing to Dr Davina, she should be wary that many of the empirical studies linking childhood experiences and adult behaviour have been severely criticised for their use of small, unrepresentative samples.<sup>33</sup> This methodological flaw curtails the generalisability of the theory and throws considerable doubt on its applicability to Dr Davina's current assessment. In addition, scholars have questioned the merit of the ITRV theory on the basis that it fails to adequately explain the causal link it proposes.<sup>34</sup> In particular, while Anna and Chris have fulfilled the stereotypical future prophesied for them by social learning theorists, many who grow up in very similar circumstances do not.<sup>35</sup> The reason for such divergence is not explained by the theory, leaving open the question as to why some people who are abused as children develop into abusers themselves, while others assume a functional developmental process.<sup>36</sup>

### *Learned Helplessness and the Cycle of Violence*

In accordance with the social-psychological model, Dr Davina's assessment is also likely to focus on the cyclic and repetitive nature of Chris and Anna's abusive relationship. While many would question why Anna remains in such a relationship, research indicates that she is not alone. In fact, half of all women who flee to domestic violence shelters in the United States are likely to return to their abusive partner.<sup>37</sup> Lenore Walker hypothesises that this 'failure to leave' is induced by a powerful 'cycle of violence'.<sup>38</sup> The cycle comprises four distinct phases: the tension-building phase; the standover phase; the remorse phase; and the period of contrition, or 'honeymoon' phase.<sup>39</sup> The first phase is marked by verbal arguments and increasing tension between the partners.<sup>40</sup> During the standover phase, the male asserts his perceived sense of power, using control and fear to lower the female's sense of self-esteem.<sup>41</sup> This is

<sup>32</sup> Feiring and Furman (2000), p 297.

<sup>33</sup> Ornduff et al (2004), p 323.

<sup>34</sup> Stith et al (2000), p 275.

<sup>35</sup> Stith et al (2000), p 275.

<sup>36</sup> Stith et al (2000), p 275.

<sup>37</sup> Coop et al (2004), p 331.

<sup>38</sup> Walker (1989), p 695; Walker (1979), p 55. Walker was the first to propose the cycle of domestic violence, and her ground-breaking work has been developed and adopted by both the psychological and legal field: Seldon (2001), p 7.

<sup>39</sup> Randall (2004), p 121.

<sup>40</sup> Simon (1995), p 60. These tensions may be anything from a bad day to major life changes, such as the loss of a job: Walker (1989), p 695.

<sup>41</sup> Simon (1995), p 60.

followed by an acute battering incident in which the perpetrator becomes physically and/or verbally abusive.<sup>42</sup> Following this incidence of violence the relationship enters the 'honeymoon' phase, which is characterised by the batterer's remorse and promises never to be violent again.<sup>43</sup> Despite the abuser's pledge, the cycle eventually begins anew, resulting in further violence.<sup>44</sup>

Evidence of this pattern can be seen in Chris and Anna's relationship. For example, in the days leading up to the latest incident of physical violence, tension built up between the pair concerning the possibility that Anna might take the children on a holiday. After refusing to allow the children to leave, Chris attempted to exert control over Anna by verbally attacking her intelligence and threatening to harm the children if she left. This underlying tension eventually escalated into a serious violent assault, which was followed by days of reconciliatory behaviour. Amongst the flowers and promises to refrain from violence in the future, Chris somehow blamed Anna for forcing him to hit her, an absurdity that she seemed to accept. While Anna expressed a belief that Chris 'really meant the apology', history attests that this latest occasion will most likely not be the last time Anna suffers abuse at the hands of Chris.

Underpinning the perpetuation of the cycle of violence is a sense of 'learned helplessness', a concept adapted from Martin Seligman's research into the behavioural effects of administering electrical shocks to animals.<sup>45</sup> Seligman found that laboratory dogs which were subjected to repeated shocks over which they had no control 'learned' that they were helpless.<sup>46</sup> After initial attempts to escape their cages proved futile, the dogs became complacent and passive, making no effort to flee even when experimenters made it possible for

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<sup>42</sup> During this period, the abuser may hit, attack, verbally assault, threaten or scream at their partner: Simon (1995), p 60. In modern theoretical conceptions of the cycle, this 'explosion' of violence is not a phase in itself: cf Walker's (1979) original work.

<sup>43</sup> The batterer is likely to have experienced a physiological release of tension, and will typically make attempts at reconciling the relationship, while also minimising the violence and blaming the victim: Walker (1989), p 695. At this stage, it is also common for the victim to blame themselves for the violence, which increases the likelihood that they will remain in the relationship: Walker (1989), p 695. Coop et al (2004), p 332 assert that forgiveness is a mediating link between an individual's attributions of responsibility to his or her partner for negative partner behaviour and the individual's own negative behaviours in marriage. In a study of the reasons why women return to abusive partners (2004), p 332, they discovered that the less an individual finds his or her partner responsible for the offensive behaviour, and the greater the extent to which the individual has a forgiving stance toward his or her partner, the less likely the individual is to engage in retaliatory behaviour, and the more likely the individual is to engage in reconciliatory relationship behaviour.

<sup>44</sup> Simon (1995), p 60.

<sup>45</sup> Randall (2004), p 120.

<sup>46</sup> Seligman (1968), p 258.

them to do so.<sup>47</sup> Walker draws an analogy between the dogs in Seligman's experiments and the situations experienced by 'battered women' in order to explain why they do not break the cycle of violence. She argues that women who are unable to control or stop the violence perpetrated against them learn to become helpless in the face of it.<sup>48</sup>

### *Social Exchange Theory*

In attempting to understand Anna's situation, Dr Davina may also consider the 'investment decision-making model' proposed by social exchange theory.<sup>49</sup> At its most basic level, this model suggests that Anna's decision to remain romantically involved with Chris is based on a cost-benefit ratio analysis, where the insurmountable barriers to leaving the relationship (the costs) outweigh the clear physical and mental health benefits of escaping the abuse.<sup>50</sup> In reaching this decision, it is likely that Anna has succumbed to the internal pressures present in the model, such as fear of the alternatives of being alone or not being able to find another partner; threat of loss of emotional investment, her home, the children or emotional energy; and the obstacles created by Anna's position as a female in society.<sup>51</sup> Kirk Williams proposes that the more general social barriers to Anna leaving centre around three key concepts: privacy, inequality and legitimisation.<sup>52</sup> Williams conceptualises privacy as Anna's accessibility, or lack thereof, to community resources aimed at handling the domestic violence. He proposes that Anna is not accessing these resources because she is unaware of them, unwilling to make her 'private' problems public, or perceives herself as socially isolated through Chris's coercive actions of detachment.<sup>53</sup> In addition, inequality is conceptualised by Williams as 'differential power through the domination of economic resources'.<sup>54</sup> Thus Chris's actions in controlling the family's money place Anna in a position of dependence from which she can exercise no control. Finally, the fact that both Anna's close friend Jaye, and Chris himself, appear to condone the violence acts to legitimise and normalise its occurrence, presenting the final barrier.<sup>55</sup> These factors work together to effectively trap Anna in her current situation.

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<sup>47</sup> Seligman (1968), p 256.

<sup>48</sup> Walker (1979), p 48.

<sup>49</sup> Ruben (1998), p 308.

<sup>50</sup> Emerson (1976), pp 347-48.

<sup>51</sup> Coop et al (2004), p 331.

<sup>52</sup> Williams (1992), p 621.

<sup>53</sup> For example, Chris may have been able to convince Anna not to call the police in the past by telling her that *she* will be arrested and the kids removed from her care, detaching her from this source of help.

<sup>54</sup> Williams (1992), p 621.

<sup>55</sup> Williams (1992), p 621.

## Diagnosis Under the Sociocultural Model

Given the central role that society plays in social exchange theory, Dr Davina would also be wise to consider cultural and historical attitudes towards women.<sup>56</sup> Of particular relevance is the fact that both Chris and Anna may be acting in accordance with sex role stereotypes<sup>57</sup> or traditional gender-role ideologies. For instance, many feminists argue that women are subordinated by widespread stereotypes as to how members of each gender 'should' behave.<sup>58</sup> Psychologists have supported this contention, identifying a range of influential patriarchal stereotypes that depict men as dominant, powerful, strong, rational and authoritarian and women as dependent, weak, submissive, passive and non-rational.<sup>59</sup> Psychological research indicates that mere knowledge of a stereotype such as those mentioned above, coupled with its activation, may cause individuals to behave in stereotype-consistent ways.<sup>60</sup>

Similarly, one's gender-role ideology — that is, one's attitudes and beliefs about the proper roles of men and women — have been linked to both the propensity to commit aggressive acts against one's partner and/or to be victimised by one's partner.<sup>61</sup> For example, men who endorse the traditional gender-role ideology that women should assume the conventional position of homemaker, wife and mother report an approval of domestic violence and the use of violent tactics in domestic situations.<sup>62</sup> Women who adhere to this ideology show more tolerance of domestic violence.<sup>63</sup> Research also indicates that a high gender-role conflict is positively related to physical abuse.<sup>64</sup> More specifically, if a male perceives their masculine identity as being under threat, they are likely to engage in traditional gender-role patterns to avoid appearing feminine.<sup>65</sup>

Applying this theory to Dr Davina's current assessment, it may be that Chris's well-embedded stereotype of the male role in society was activated by his perception that Anna was attacking his dominance, and therefore masculinity, by disobeying him. This may have caused Chris to act in a manner that was consistent with his stereotypical beliefs and to lash out at Anna in order to re-establish his position as 'head of the household'. In the

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<sup>56</sup> Puzella (1997), p 41.

<sup>57</sup> Stereotypes are defined as 'widely shared and simplified evaluative images of a social group and its members': Vaughan and Hogg (1998), p 210.

<sup>58</sup> Cahn and Meier (1995), p 353; Epstein (1999), p 39; Marin and Felipe Russo (2005), p 72.

<sup>59</sup> Puzella (1997), p 42.

<sup>60</sup> Wheeler and Petty (2001), p 797. Research shows that individuals do not have to personally believe the stereotype in order for it to impact their behaviour; knowledge of its existence is enough: Vaughan and Hogg (1998), p 210.

<sup>61</sup> Fitzpatrick et al (2004), p 92.

<sup>62</sup> Fitzpatrick et al (2004), p 93.

<sup>63</sup> Fitzpatrick et al (2004), p 93.

<sup>64</sup> Schwartz et al (2005), p 109.

<sup>65</sup> Schwartz et al (2005), p 112.

same way, Chris's conduct leading up to and during the assault may have activated Anna's stereotypes about the 'proper' role of women as weak and submissive.

Historically, these theories were thought to provide a sound explanation, although not a justification, for Chris and Anna's behaviour. However, the fundamental underpinnings of the gender-role ideology model and stereotype model have been attacked in recent times.<sup>66</sup> The main criticism emerging in the literature is that the theories fail to account for the fact that Anna may well be in the same predicament if she were intimately involved with 'Christine' rather than 'Christopher'.<sup>67</sup>

### **What Strategies has Anna Used in Responding to the Domestic Violence?**

Dr Davina's assessment so far indicates that Anna may be using 'dysfunctional' strategies such as denial or suppression in order to cope with her abusive partner.<sup>68</sup> However, a deeper analysis may reveal that Anna is actually employing some useful tactics according to the demands of her situation. Research shows that women who experience violence devise and carry out a range of complex strategies of resistance.<sup>69</sup> For instance, Dutton argues that women may attempt to talk with the batterer about ending the violence, temporarily evade the batterer, physically resist the violence, solicit help from friends, neighbours or the police, seek a protection order, or seek professional help from a domestic violence support group or agency.<sup>70</sup> While no single strategy is the most effective in all situations and for all victims, many women are able to avoid or end domestic violence through utilising tactics such as these.<sup>71</sup> Anna, for example, effectively avoids potential violence by escaping from Chris's presence when his football team has lost a game.<sup>72</sup> While many may question whether such avoidance is 'healthy', the point for Anna is that it works, albeit temporarily.

### **The Law's Varied Responses to Domestic Violence — Anna's Plight Continues**

Suppose now that you are Constable Carter, the investigating officer in Anna's case. As a member of the Queensland Police Service, you have a range of

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<sup>66</sup> Puzella (2000), p 42.

<sup>67</sup> Peterman and Dixon (2005), p 48. This suggests that, while a gender role analysis may be necessary in Dr Davina's current assessment, it is not sufficient for an analysis of domestic violence in all intimate relationships: Dutton (1993), p 1211.

<sup>68</sup> Breitholtz et al (1998).

<sup>69</sup> Randall (2004), p 124.

<sup>70</sup> Dutton (1993), p 1228.

<sup>71</sup> Dutton (1993), p 1228.

<sup>72</sup> Another example of Ann's resistance is her attendance in educational courses, which suggests that she is unwilling to accept Chris's repeated proposition that she is a 'moron'.

options, powers and responsibilities in domestic violence 'call outs', which are discussed below.

### *Powers of Arrest and Prosecution for Criminal Offences*

At a crude level, the criminal justice system attempts to specifically deter and punish domestic violence through the imposition of penalties for contravention of the *Criminal Code* (Qld) (*QCC*). Many instances of domestic violence are capable of being prosecuted in this manner, with the most obvious in Chris's case being a charge of assault under section 335 of the *QCC*.<sup>73</sup> However, there is also a range of behaviours that simply fall beyond the reach of the criminal law.<sup>74</sup> For example, Chris's use of tactics such as economic and emotional abuse does not fit squarely within established categories of criminal offences, making them difficult, if not impossible, to prosecute.<sup>75</sup> Nevertheless, Constable Carter must decide in this case whether Chris's behaviour warrants the pursuit of criminal charges. At the very least, Carter must canvass with Anna the possibility that criminal charges could be laid.<sup>76</sup>

In addition to the power to prosecute for criminal offences, Constable Carter is afforded both a general and a specific power of arrest in cases of domestic violence. In particular, under section 198 of the *Police Powers and Responsibilities Act 2000* (Qld), a police officer is permitted to arrest, without warrant, a person he or she reasonably suspects has committed or is committing an offence.<sup>77</sup> Further, section 69 of the *Domestic and Family Violence Protection Act 1989* (Qld) (*DFVPA*) grants Constable Carter specific powers of arrest and detention. In particular, Carter has the power to arrest and detain an individual for up to four hours if he has reasonable grounds to suspect that an act of domestic violence has been committed and that the victim is in danger of personal injury, or the victim's property is in danger of being damaged.<sup>78</sup> Constable Carter also has the specific power to arrest an individual who breaches an order or condition imposed under the *DFVPA*.<sup>79</sup>

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<sup>73</sup> Other examples of domestic violence which may amount to a criminal offence include: assault causing bodily harm (*Criminal Code* (Qld), s 339); wilful damage (*Criminal Code* (Qld), s 469); and threats (*Criminal Code* (Qld), s 359).

<sup>74</sup> Alexander (2002), p 31.

<sup>75</sup> It is noted that some forms of emotional abuse, such as intimidation, harassment or threats, may fall within the criminal definition of stalking contained within Chapter 33A of the *QCC*. Such behaviour must, however, cause the stalked person detriment as defined in the *QCC*, s 359A, which may cause problems for an aggrieved person.

<sup>76</sup> *Queensland Police Service Operations and Procedures Manual* (2005), s 9.3.1.

<sup>77</sup> Police also have the power to arrest under warrant: *Police Powers and Responsibilities Act 2000* (Qld), s 202.

<sup>78</sup> *Domestic and Family Violence Protection Act 1989* (Qld), s 69(1) and (4).

<sup>79</sup> *Police Powers and Responsibilities Act 2000* (Qld), s 198(1)(j).

### *Protection Orders Under the Domestic and Family Violence Protection Act 1989 (Qld)*

Of particular significance to Constable Carter is the operation and effect of the *DFVPA*, especially the Act's prescribed duties and powers. If Carter reasonably suspects that Anna is an 'aggrieved' person — that is, a person for whom a domestic violence order (DVO) has been or could be made,<sup>80</sup> he is under an obligation to investigate a report of domestic violence.<sup>81</sup> While Carter is empowered to apply for a DVO, he is not required to do so under the *DFVPA*.<sup>82</sup> There is, however, an exception to this general rule that applies in Anna's case. Specifically, Chris was arrested under section 69 of the *DFVPA*, on the basis that Constable Carter reasonably suspected that his enraged state at the scene and history of violence placed Anna in danger of further personal injury. In this instance, the Constable *must* prepare an application for a DVO, despite any contrary wish being expressed by Anna.<sup>83</sup> Although not specified in the *DFVPA*, the *Queensland Police Service Operations and Procedures Manual* (2005) (*OPM*) also places a stringent duty on the police to prosecute protection order applications.<sup>84</sup> In effect, the *OPM* insists that a police prosecutor proceed with an application unless otherwise directed by a commissioned officer.<sup>85</sup>

While Anna clearly falls within the category of persons eligible to apply for a DVO,<sup>86</sup> her application will only be successful if the court is satisfied, on the balance of probabilities,<sup>87</sup> that Chris has both committed *and* is likely to

<sup>80</sup> *Domestic and Family Violence Protection Act 1989* (Qld), s 12F(1).

<sup>81</sup> *Domestic and Family Violence Protection Act 1989* (Qld), s 67(1) and *Queensland Police Service Operations and Procedures Manual* (2005), s 9.6.1.

<sup>82</sup> *Domestic and Family Violence Protection Act 1989* (Qld), ss 14(3) and 67(2). Notably, there is a marked divergence between the duty of an investigating officer under section 67 of the *DFVPA* and the duty of an officer under section 9.6.1 of the *OPM*. Specifically, the *OPM* uses more forceful language than the *DFVPA*, stating that an investigating officer who reasonably suspects that the person is an aggrieved and there is sufficient reason to take action 'is to' apply for a protection order for the aggrieved. This is to be compared to section 67 of the *DFVPA*, which states that an investigating officer in this circumstance 'may' apply for a protection order.

<sup>83</sup> *Domestic and Family Violence Protection Act 1989* (Qld), s 71. Section 72 of the *DFVPA* also outlines a range of circumstances in which a police officer is under a duty to apply for a temporary protection order.

<sup>84</sup> *Queensland Police Service Operations and Procedures Manual* (2005), s 9.12.

<sup>85</sup> *Queensland Police Service Operations and Procedures Manual* (2005), s 9.12.

<sup>86</sup> Pursuant to section 14 of the *DFVPA*, all persons in a 'domestic relationship' may apply for a DVO. The term 'domestic relationship' is outlined in section 11A of the *DFVPA* to include a spousal relationship, an intimate personal relationship, a family relationship, and an informal care relationship. Each of these terms is further defined for the purposes of the *DFVPA* to include such persons as married couples, de facto couples, parents of a child and same-sex couples: refer *Domestic and Family Violence Protection Act 1989* (Qld), ss 12, 12A, 12B and 12C.

<sup>87</sup> *Domestic and Family Violence Protection Act 1989* (Qld), s 9.

recommit an act of domestic violence.<sup>88</sup> Section 11 of the *DFVPA* defines domestic violence as: wilful injury or a threat of wilful injury; wilful damage to another person's property; intimidation or harassment of another person or a threat of intimidation or harassment; or indecent behaviour to another person without consent. On the facts of Anna's story, it is clear that Chris's actions in kicking and punching her would be classified as wilful injury and therefore fall within the definition of domestic violence under the *DFVPA*.

Further, while the court is able to stipulate a wide range of conditions in a DVO, section 17(a) of the *DFVPA* requires the court to impose a condition that Chris be of good behaviour and not commit any acts of domestic violence.<sup>89</sup> If Chris knowingly breaches any of the conditions imposed by the court, he is guilty of an offence and is liable to a penalty not exceeding 40 penalty units or 12 months' gaol.<sup>90</sup>

### *The Potential Role of Family Law*

Constable Carter may also consider discussing the applicability of the family law system with Anna. In fact, the intimate nature of domestic violence implicitly suggests that it should assume a significant role within family law. Despite the inherent logic of this assertion, domestic violence issues have only recently become prominent in decisions of the Family Court.<sup>91</sup> The increased willingness of the legal profession to acknowledge the impact of domestic violence has largely stemmed from the *Family Law Reform Act 1995* (Cth), and in particular its requirement that the court consider issues of 'family

<sup>88</sup> *Domestic and Family Violence Protection Act 1989* (Qld), s 20(1). The term 'likely' has been interpreted by Queensland courts to mean a real and not remote likelihood, or something more probable than a mere chance or risk: *McLennan v McLennan* [2003] QDC 398 at 404; *Goss v Swan* [1994] 1 Qd R 40 at 41. It should be noted that Chris does not have to commit the act himself in order to be a respondent. Under section 20(2) of the *DFVPA*, if Chris counsels or procures someone else to commit an act which, if he committed it, would be an act of domestic violence, he will be deemed to have committed that act.

<sup>89</sup> Exactly what sort of behaviour amounts to a departure from the standard of good behaviour remains unclear in most jurisdictions within Australia, including Queensland: refer *Higgins v Goldfinch* (1981) 26 SASR 364 at 366; *Dowse v Gorringer* [2004] QDC 477 at 483. While, there is a paucity of legal doctrine available on this point, McGill DCJ in *Dowse v Gorringer* [2004] QDC 477 has made some attempt to clarify the phrases meaning for the purposes of the *DFVPA*. His Honour stated that 'the mere fact that the aggrieved spouse is unhappy about the conduct of the defendant, or that the defendant is doing something that the aggrieved spouse does not want the defendant to do, or is not doing something that the aggrieved spouse wants the defendant to do, will not without more amount to a failure to be of good behaviour': *Dowse v Gorringer* [2004] QDC 477 at 484.

<sup>90</sup> *Domestic and Family Violence Protection Act 1989* (Qld), s 80.

<sup>91</sup> In 1995, the former Chief Justice of the Family Court, the Honourable Justice Alastair Nicholson, attributed the lack of legal arguments involving domestic violence to the prevalence of the view within the profession that such issues were simply not relevant under the *Family Law Act 1975* (Cth): Nicholson (1995), p 2.

violence' in specific circumstances.<sup>92</sup> However, a traditional belief that domestic violence issues do not have a place within the family law system continues to fuel political and academic debates.<sup>93</sup> To date, scholars have focused their attention on the impact domestic violence should have on considerations of what is in the 'best interests of the child',<sup>94</sup> how best to distribute property in the event of marital breakup,<sup>95</sup> and how to most effectively deal with family law cases outside the ambit of the laws adversarial court system.<sup>96</sup> The inclusion of issues such as these within the public forum and the vast amount of literature available to inform this debate is evidence of the considerable growth in the political and societal awareness of domestic violence.<sup>97</sup>

While the breadth of reform already achieved in the family law arena must not be under-estimated, what is often forgotten is that the family law system also plays a very direct role in trying to prevent the infliction of violence. In particular, the *Family Law Act 1975* (Cth) (*FLA*) contains provisions for the imposition of non-molestation<sup>98</sup> and non-violence injunctions. The discussion that follows focuses on these remedies in an effort to alert the reader to the similarities and differences between the law's response to domestic violence complaints under the *DVFPFA* and the *FLA*.

### *Non-molestation and Non-Violence Injunctions*

As an alternative to criminal law remedies, Anna may seek an injunction order under section 114 of the *FLA*.<sup>99</sup> However, this process is limited in its application and may only be pursued by parties to a marriage and in circumstances arising out of the marital relationship.<sup>100</sup> While Anna falls

<sup>92</sup> For example, when determining what is in the 'best interests of the child': *Family Law Act 1975* (Cth), s 68F(i) and (j); Dick (1998), p 40.

<sup>93</sup> Behrens (1996), pp 34–35.

<sup>94</sup> Debenham (2004), p 3; Dewar and Parker (1999), p 104; Kaye et al (2003a), p 2; Kaye et al (2003b), p 73.

<sup>95</sup> Middleton (2002), p 1; Middleton (2001), p 230.

<sup>96</sup> Greatbatch and Dingwall (1999), p 174; Altobelli (1997), p 63.

<sup>97</sup> Peirce (2005), p 1; Dick (1998), p 40.

<sup>98</sup> Despite the archaic tone of the word 'molestation', it is commonly used in this area of the law: Alexander (2002), p 61. The term does not necessarily require physical assault and has been interpreted by the Family Court to mean almost all forms of 'abusing, intimidating or harassing' behaviour: *Parry v. Crooks* (1982) FLC ¶91-258 at 77453 (per Mohr J).

<sup>99</sup> *Family Law Act 1975* (Cth), s 114. An individual may not seek an injunction under sections 114 or 68B of the *Family Law Act* if a protection order is being sought or is current under prescribed state or territory domestic violence legislation: *Family Law Act 1975* (Cth), s 114AB(2) and *Family Law Regulations 1984* (Cth), reg 19.

<sup>100</sup> *Family Law Act 1975* (Cth), s 4(e). The category of parties who may seek an injunction is extended in the limited circumstance where the remedy is sought under section 68B of the *Family Law Act* to protect a child. In this latter instance,

within the ambit of the *FLA*, others experiencing domestic violence who are not married, or who are involved in a childless same-sex relationship are not within its protection.<sup>101</sup> Notwithstanding its circumscribed availability, an injunction under the *FLA* is often similar in substance to a protection order made under the *DFVPA*. For instance, an injunction may relate to the protection of a party's person or property, and may include conditions restraining a party from entering, using or remaining in the matrimonial home, place of residence or place of work.<sup>102</sup> Commentators claim that such wide-ranging conditions allow injunctions to be tailored to the individual needs of people like Anna,<sup>103</sup> a notion that has been supported by the Family Court's insistence that section 114 be construed widely.<sup>104</sup> For example, in *Kemsley and Kemsley* (1984) (1984) FLC ¶91-567, the Full Court stated that injunctions should be available to protect against physical *and* mental harm, as well as undue interference by a party.<sup>105</sup>

### *Domestic Violence as a Defence: The Introduction of Battered Women Syndrome*

What would the law's response be to Anna if, instead of relying on the *QCC*, *DFVPA* or *FLA*, she had resorted to self-help measures and, days after the latest incident, killed Chris? For instance, could Anna have a charge of murder mitigated to manslaughter on the basis of 'provocation'?<sup>106</sup> Anna's potential predicament, arguably brought about by her long-standing suffering at the hands of Chris, would not have placed her neatly within the traditional male gendered conceptions of provocation.<sup>107</sup> However, although it would still be a

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a parent or person with an interest in the child's welfare may bring an application: *Family Law Act 1975* (Cth), ss 64C and 65C.

<sup>101</sup> Alexander (2002), p 62. Cf the considerably broader category of people permitted to apply for a DVO under the *DVFPA: Domestic and Family Violence Protection Act 1989* (Qld), s 14.

<sup>102</sup> *Family Law Act 1975* (Cth), s 114.

<sup>103</sup> Harrison and Behrens (1993), p 12.

<sup>104</sup> Alexander (2002), p 70.

<sup>105</sup> *Kemsley and Kemsley* (1984) (1984) FLC ¶91-567 at 79-590. In this case the court construed the words 'personal protection' as 'apt to include such matters as the protection of her right to lead her own life without undue interference from the husband', including preventing the husband from 'interfering with her employment or business or her social life or if it were designed to safeguard her mental or emotional well being': *Kemsley and Kemsley* (1984) FLC ¶91-567 at 79-590.

<sup>106</sup> *Criminal Code* (Qld), s 304.

<sup>107</sup> Kift (2001), p 28 and Yeo (1993), pp 104-05. For instance, the typical case for which the defence of provocation was crafted involved a killing immediately following a sudden quarrel or upon a husband finding his wife in bed with her lover: Yeo (1993), p 106. Also refer *Parker v R* (1964) 111 CLR 665 at 676-77. Also refer to Sheehy et al (1992), p 371-77 for a discussion on how the law has dealt with issues of domestic violence when considering a plea of self-defence.

difficult task,<sup>108</sup> Anna would be more likely to successfully argue mitigating a charge of murder under the contemporary conception of provocation articulated by the High Court in *Masciantonio v The Queen*. In this case, the High Court set out the common law test for provocation, which involves both a subjective and objective element.<sup>109</sup> The subjective component is a question of fact for the jury and involves an assessment as to whether Anna actually lost self-control.<sup>110</sup> According to the objective element of the test, Anna would also have to show some evidence that Chris's conduct was capable of causing her to lose self-control.<sup>111</sup> In *Chhay*, the High Court recognised that such a loss of self-control could develop after a lengthy period of abuse.<sup>112</sup> Further in *Osland v The Queen*, Gaudron and Gummow JJ acknowledged that even a minor act of aggression or slight insult, considered in the context of a battered woman's heightened arousal or awareness of danger, may provide a basis for a provocation defence.<sup>113</sup> In reaching its decision, the High Court also approved the introduction of expert evidence on 'battered woman syndrome' (BWS) for the purposes of acquainting the court with the effects that long-term violence may have on a woman.<sup>114</sup>

While a discussion of the merit of provocation, which has become topical in recent times,<sup>115</sup> extends beyond the ambit of this paper, the impact that evidence of BWS has had on the law and society's depiction of the domestic violence victim remains pertinent to the current analysis.<sup>116</sup> More specifically, the potential misuse and wrongful application of the concept of BWS in many areas of the law must be acknowledged, and it is this aspect which will be discussed in detail later in this paper.

<sup>108</sup> McSherry and Naylor (2004), p 496.

<sup>109</sup> The common law test for provocation was articulated by the High Court in *Masciantonio v The Queen* (1995) 183 CLR 58 at 66 as: 'The provocation must be such that it is capable of causing an ordinary person to lose self-control and to act in the way in which the accused did. The provocation must actually cause the accused to lose self-control and the accused must act while deprived of self-control and before he has had the opportunity to regain his composure.'

<sup>110</sup> *Masciantonio v The Queen* (1995) 183 CLR 58 at 67.

<sup>111</sup> *Masciantonio v The Queen* (1995) 183 CLR 58 at 66.

<sup>112</sup> *Chhay* (1994) 72 A Crim R 1 at 13.

<sup>113</sup> *Osland v The Queen* (1998) 158 ALR 170 at 185 per Gaudron and Gummow JJ. Also see *Osland v The Queen* (1998) 158 ALR 170 at 185–86 for a similar discussion of the role of domestic violence in a claim of self-defence.

<sup>114</sup> *Osland v The Queen* (1998) 158 ALR 170 at 186 per Gaudron and Gummow JJ; at 218–19 per Kirby J; and at 242–43 per Callinan J. However, Kirby J warned of the need for caution in the reception of testimony concerning BWS, stating that 'it is not a universally accepted and empirically established scientific phenomenon': *Osland v The Queen* (1998) 158 ALR 170 at 216.

<sup>115</sup> For a more detailed discussion on the merit of provocation, refer to Coss (2004) and Victorian Law Reform Commission (2004).

<sup>116</sup> Although not specifically mentioned, this author notes that evidence of BWS may also play a significant role in a plea of self-defence under section 272 of the *QCC*.

## A Critical Analysis of the Law's Response to Anna's Plight

### *Prevailing Legal and Social Ideology: The Law as a Vehicle for Change*

Historically, the legal system has been a collusive force in the prevalence of domestic violence.<sup>117</sup> The law and the community have often expressed their complicity through the unequivocal approval of what could now only be considered heinous crimes against women.<sup>118</sup> A Roman husband, for instance, was endowed with a moral obligation to discipline his wife and was praised rather than punished for beating, or even killing, his wife for the most minor transgression.<sup>119</sup> In Medieval Europe, wives were considered their husbands' chattels and were permitted at law to be publicly and brutally chastised for any form of disobedience.<sup>120</sup> Such hierarchical family arrangements were bolstered by Christianity, which justified the subordination of women on grounds of the religious obligations that attached to the institution of marriage.<sup>121</sup> It was not until the eighteenth century that the struggle for reform began in Britain and America, with laws prohibiting wife beating finally introduced in most countries by the late nineteenth century.<sup>122</sup> However, archaic notions of a husband's absolute right over his wife continued to permeate the law in almost all jurisdictions for many years.<sup>123</sup>

Feminist scholars such as Katherine O'Donovan contend that law's long history of failure to regulate against domestic violence has created, and continues to maintain, an artificial boundary between private domains, such as

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<sup>117</sup> Balos (2004), p 77.

<sup>118</sup> Acikalin (2000), p 1049.

<sup>119</sup> For example, during the peak of the Roman Empire, a knight who had beaten his wife to death for drinking wine was applauded for his exemplary punishment on the basis that any women who consumed alcohol was opening herself to temptation, which warranted severe punishment: Acikalin (2000), p 1050.

<sup>120</sup> Epstein (1999), p 9.

<sup>121</sup> Acikalin (2000), p 1050.

<sup>122</sup> Epstein (1999), p 10.

<sup>123</sup> For example, until relatively recently, legal scholars in Australia were still debating as to whether, by virtue of her marriage, a wife gives her consent to sexual intercourse with her husband, whatever the circumstances, implicitly excluding a husband from a charge of rape. Each principal piece of criminal legislation in Australia now makes it clear that a husband may be found guilty of raping his wife: in the Northern Territory, Queensland, Tasmania and Western Australia, this is by implication, with legislation making it an offence to rape any person/woman (refer *Criminal Code* (NT), s 192; *Criminal Code* (Qld), s 349; *Criminal Code* (Tas), s 185(1); *Criminal Code* (WA), ss 325–28). In all other jurisdictions, the legislation explicitly states that consent of a married woman cannot be assumed from the fact of marriage (refer *Crimes Act 1900* (ACT), s 92R; *Crimes Act 1900* (NSW), s 61T; *Criminal Law Consolidation Act 1935* (SA), s 73(3); *Crimes Act 1958* (Vic), s 62(2)). This was confirmed in *R v L* (1991) 103 ALR 577 at 582, where the High Court expressly stated that there was no such rule at common law that excluded a husband from the offence of rape against his wife, labelling the notion 'anachronistic and offensive'.

the family and the home, and public domains, such as the market.<sup>124</sup> This distinction has often fuelled, and been fuelled by, society's deeply embedded stereotypes concerning the subordinate role of women and the sanctity of the home from intervention by the state.<sup>125</sup> Arguably, such a division has operated to the detriment of women like Anna, who have been left to fend for themselves by a legal system that refuses to 'improperly' intrude into private family matters like domestic violence.<sup>126</sup>

While the theme of male dominance and female subjugation has continued as the paradigmatic family structure within society, the law has made considerable attempts to reform its patriarchal traditions. The legislature has led this charge, but not without vehement prompting by the domestic violence movement initiated in the early 1970s.<sup>127</sup> Since this crusade began, society has moved from an era where terms for intimate violence were absent from the legal lexicon, to a time of substantial public awareness, a growing perception that domestic violence is unacceptable, and an increasing political will to intervene.<sup>128</sup> This shift is evidenced in many different areas of the law. For example, in 1993 Queensland made the legally 'radical' move of introducing stalking offences into the *QCC*.<sup>129</sup> One of the chief reasons for criminalising stalking was to proffer domestic violence victims some recourse against offences that often only involved psychological elements which were committed behind closed doors.<sup>130</sup>

Further evidence of the law's ideological shift is found in the *DFVPA* provisions outlined above.<sup>131</sup> Commentators argue that one of the greatest

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<sup>124</sup> Graycar and Morgan (1990), p 30.

<sup>125</sup> Graycar and Morgan (1990), p 32.

<sup>126</sup> Acikalin (2000), p 1053.

<sup>127</sup> Randall (2004), p 107.

<sup>128</sup> Epstein (1999), p 11.

<sup>129</sup> Refer Chapter 33A of the *QCC*.

<sup>130</sup> Swanwick (1996), p 27. Prior to its introduction, the *QCC* had considered stalking like offences as mere precursors to an ultimate offence, rather than an offence in its own right, leaving little options available to many victims of harassing and intimidating behaviour: Swanwick (1996), p 27.

<sup>131</sup> The *DFVPA* was enacted following the report of the Queensland Domestic Violence Task Force (1988), *Beyond These Walls*, in an attempt to overcome the limitations of the existing legal system. For a general overview of the recommendations made by the Task Force refer to pages xi–xxiii of *Beyond These Walls*. Since its inception, the *DFVPA* has undergone a series of reviews, with the most recent amendments in 2002 significantly expanding the category of individuals to which the Act applies. According to the explanatory notes accompanying the Domestic Violence Legislation Amendment Bill 2001 (Qld), the latest round of amendments, which resulted in the *Domestic Violence Legislation Amendment Act 2002* (Qld), aimed to 'provide a consistent approach to domestic and family violence and personal relationships to ensure an equitable and efficient legislative response to all people affected by domestic and family violence': Explanatory Notes, p 2. For further details on the history of the reforms,

achievements of legislation such as the *DFVPA* has been the criminalisation of domestic violence through the adoption of pro-arrest and pro-prosecution policies.<sup>132</sup> Such policies are thought to break down the public/private dichotomy, thereby reducing the unnecessary gap between domestic violence and the violence that occurs amongst strangers.<sup>133</sup> In particular, requiring police to investigate reports of domestic violence, and in some cases arrest perpetrators, sends a clear message to the criminal justice system that attitudes depicting domestic violence as merely a family matter will no longer be tolerated.<sup>134</sup> By making attempts to change the prevailing ideology of domestic violence, the law is acting as a vehicle for social change.

Research indicates, however, that these policies do not always achieve their purpose. Many commentators blame reluctance on behalf of the police and the judiciary to actively enforce the law.<sup>135</sup> This suggests that the law has not gone far enough in negating the patriarchal mindset and stereotypes it once endorsed.<sup>136</sup> Indeed, some scholars argue that, instead of ridding itself of its patriarchal past through domestic violence reform, the law has actually adopted similar stereotypes to those it supported before, and simply hidden them under the new guise of receptivity to extraneous considerations.<sup>137</sup> This becomes evident in an analysis of the law's use of expert psychological evidence concerning BWS. For instance, if Dr Davina was to testify about Anna's assessment, she is likely to draw on the concepts of learned helplessness and the cycle of violence to provide an answer to the commonly asked question: 'Why didn't she just leave?' In doing so, Dr Davina would be describing Anna as passive, weak and utterly helpless.<sup>138</sup> If Anna in fact failed to conform to this image — that is, if she expressed anger or exercised strength, power or aggressiveness, she may be blamed for somehow causing the abuse.<sup>139</sup> In addition, acting against the stereotype may have the unwanted effect of depicting Anna as somewhat 'deserving' of the violence.<sup>140</sup> The law therefore puts Anna into a dichotomous box from which there is no real escape or relief.<sup>141</sup> This arguably distorts the psychological underpinnings of the concept of BWS, which was crafted in order to help society identify and

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refer to Crime and Misconduct Commission (2005), pp 19–20; Kift (2002), p 20; Chandler (2003).

<sup>132</sup> Epstein (1999), p 4.

<sup>133</sup> Busch et al (1995), p 210.

<sup>134</sup> Katzen (2000), p 133; Coker (2001), p 849.

<sup>135</sup> Refer Busch et al (1995); Epstein (1999); Sherman and Berk (1984). This concept will be discussed in more detail below.

<sup>136</sup> Further evidence of this will be canvassed in a discussion of the deterrence effect of the criminal and civil system.

<sup>137</sup> Cahn and Meier (1995), p 340.

<sup>138</sup> Randall (2004), p 123.

<sup>139</sup> Cahn and Meier (1995), p 354.

<sup>140</sup> Randall (2004), p 123.

<sup>141</sup> Coker (2001), p 822.

address the complex challenges faced by women who suffer long-term abuse.<sup>142</sup>

In addition, commentators argue that psychological literature is being misused in pro-prosecution policies. Fundamental to Queensland's pro-prosecution policy<sup>143</sup> is the commitment to move ahead with prosecution once an application order has been made or a viable charge has been identified, even if the victim refuses to cooperate.<sup>144</sup> The positive impacts on this area of the law of psychological assessments, like that performed by Dr Davina, are readily identifiable. Specifically, Dr Davina's recognition of Chris's control over Anna has been used by women's rights activists to rally for the shift in control away from the perpetrator and on to the state.<sup>145</sup> It is now widely acknowledged that men who batter often also forcefully convince their victims to withdraw the charges or to recant their story.<sup>146</sup> Proponents of the pro-prosecution policy contend that relieving the victim of responsibility in prosecution additionally relieves them of the psychological guilt about putting their partner in gaol, therefore increasing their willingness to report violence and cooperate with police.<sup>147</sup> However, in a study on women's attitude to mandatory police interventions, Alisa Smith found that women were more likely to be deterred, rather than encouraged, from reporting violence by these policies.<sup>148</sup> In addition, those who advocate against pro-prosecution policies assert that the law has once again placed women in the paradoxical pigeon-hole of 'helpless victim', removing any autonomy they may have, thus playing into the social and legal stereotypes about women's diminished capacity.<sup>149</sup> Further, Deborah Epstein argues that police and prosecutors who fervently abide by the policy 'perpetuate the kinds of power and control dynamics that exist in the battering relationship itself'.<sup>150</sup> This author suggests that psychological information about the difficulties faced by domestic violence sufferers who are coerced into remaining silent should be used to empower, rather than denigrate, women.

### *Deterrence: The Role of the Criminal and Civil Justice System*

By focusing on the provision of civil actions and remedies, such as DVOs and injunctions, in instances of domestic violence, legislators have relegated the criminal law's role to one of enforcer, calling upon it to impose penalties in the

<sup>142</sup> Walker (1979), p 55.

<sup>143</sup> Refer *Queensland Police Service Operations and Procedures Manual* (2005), s 9.12.

<sup>144</sup> Durham (1998), p 650.

<sup>145</sup> Epstein (1999), p 16.

<sup>146</sup> Durham (1998), p 651.

<sup>147</sup> Hanna (1996), p 1865. Proponents also assert that the policy sends a clear message to perpetrators that their behaviour is unacceptable: Durham (1998), p 651.

<sup>148</sup> Smith (2000), p 1384.

<sup>149</sup> Randall (2004), p 132.

<sup>150</sup> Epstein (1999), p 17.

event that a civil order is breached.<sup>151</sup> However, this role must not be underestimated. Effective enforcement is the Achilles' heel of the current DVO system; without it, civil protection orders arguably become mere pieces of paper that can be ignored with impunity. Thus, despite the availability of legal sanctions, the effectiveness of the law remains conditional upon the actions of its gatekeepers.<sup>152</sup> Justice cannot be achieved unless the police utilise their powers of arrest, subsequently prosecute the offender, prove that the offence occurred, and enforce the sanctions (if any) imposed by the court. A system is thus only as strong as its weakest link.<sup>153</sup> In light of the central role that the criminal justice system proposes to play in deterring domestic violence, the presence of flaws within this chain may have dire consequences for individuals such as Anna.<sup>154</sup>

Research identifies one flaw as a failure by the police, despite legislative and procedural guidelines to the contrary, to treat domestic violence as seriously as other non-domestic assault situations.<sup>155</sup> While other studies show little difference in how police approach the two types of offences, there is still evidence to suggest that the pre-existing ideology of domestic violence as a 'non-police matter' persists within the contemporary police service.<sup>156</sup> In addition, excluding the occasions when police are expressly required to apply for a protection order under the *DFVPA*, many officers do not seek out this remedy.<sup>157</sup> Queensland police, surveyed in a recent investigative report released by the Crime and Misconduct Commission (CMC), cited reasons such as excessive paperwork, the time required to process a domestic violence incident, and the proximity of a call-out to their scheduled shift completion as reasons why they do not seek protection orders.<sup>158</sup> While the CMC proposes a range of reforms to try and overcome this problem,<sup>159</sup> it is alarming to think that if Anna's neighbour had contacted Constable Carter just prior to his finishing work, he may have given the incident a cursory investigation with no real intention to follow through with an application for a DVO.

Even larger problems arise, however, when one considers the low enforcement rates surrounding domestic violence. As previously mentioned, many instances of domestic violence may also amount to criminal offences under the *QCC*. However, in their 2002 investigation into the possible decriminalisation of domestic violence in Queensland, Heather Douglas and Lee Godden found that only 1 per cent of files involving an application for a DVO were also criminally investigated.<sup>160</sup> Further, in only 0.4 per cent of these

<sup>151</sup> Douglas and Godden (2002), p 1.

<sup>152</sup> Alexander (2002), p 54.

<sup>153</sup> Busch et al (1995), p 191; Coker (2001), p 815; Wardle (2003), p 791.

<sup>154</sup> Epstein (1999), p 12.

<sup>155</sup> Eigenberg et al (1996), p 42.

<sup>156</sup> Crime and Misconduct Commission (2005), p 17.

<sup>157</sup> Crime and Misconduct Commission (2005), p 38.

<sup>158</sup> Crime and Misconduct Commission (2005), pp 47–48.

<sup>159</sup> Refer Crime and Misconduct Commission (2005), pp 44–67.

<sup>160</sup> Douglas and Godden (2002), p 32.

files criminal charges were actually laid and prosecuted.<sup>161</sup> The statistics for prosecuting breaches of a DVO<sup>162</sup> in Douglas and Godden's study were similar, with only 5 per cent of the files reporting a breach resulting in prosecution.<sup>163</sup> Hayley Katzen reported comparably low prosecution rates for breaches of an Apprehended Violence Order in New South Wales.<sup>164</sup> All three authors suggest, amongst other things, that this low rate of conviction can be traced back to the insidious societal perception that domestic violence is a 'private' matter.<sup>165</sup> Again, this suggests that the law and its enforcers are harbouring patriarchal stereotypes in spite of legislative decrees that this is unacceptable.

The low prosecution rates may also be partially explained by research which suggests that the judiciary is at times unwilling to take domestic violence seriously and to impose meaningful sanctions or sentences on perpetrators.<sup>166</sup> For example, many Queensland magistrates may infer that Anna is bringing an application for a DVO solely as a vindictive tactic in a potential family law matter.<sup>167</sup> However, extensive research suggests that this is not Anna's intention.<sup>168</sup> Arguably, judicial attitudes such as this highlight the law's persistent belief that women are somehow untrustworthy or spiteful, which serves to reinforce archaic notions of the males' need to dominate.<sup>169</sup> This attitude also acts to undermine the stark reality of Anna's plight.<sup>170</sup> A magistrate may also be very reluctant to issue an 'ouster' order removing Chris from the family home, and will only exercise such discretion if he or she believes that Anna's case is one of severe physical violence.<sup>171</sup> This attitude also raises questions as to how 'serious' the violence must be before the full breadth of the law will be utilised.

<sup>161</sup> Douglas and Godden (2002), p 33.

<sup>162</sup> Note, this is a criminal offence under section 80 of the *QCC*.

<sup>163</sup> Douglas and Godden (2002), p 38.

<sup>164</sup> Katzen (2000), p 123.

<sup>165</sup> Douglas and Godden (2002), p 59; Katzen (2000), p 133.

<sup>166</sup> Alexander (2002), p 31.

<sup>167</sup> Belinda Carpenter recently surveyed 38 magistrates in Queensland about their attitude towards domestic violence matters. Seventy-four per cent of the respondents in her study claimed that women use domestic violence proceedings as a tactic in family law matters: Carpenter et al (2001), p 21; Carpenter (2003), p 3.

<sup>168</sup> Refer Carpenter (2003), pp 4–9.

<sup>169</sup> Graycar and Morgan (1990), p 274.

<sup>170</sup> Currie (2000), p 2.

<sup>171</sup> Carpenter (2003), p 11. A magistrate is empowered by section 23(3)(b) of the *DFVPA* to impose a condition on Chris that he vacate and remain away from a stated premises (such as the family home), commonly referred to as an 'ouster' order.

### *A Critique of the Role of Family Law in Domestic Violence*

Considering the potentially broad application of Family Court injunctions and the complex web that surrounds Anna's case of domestic violence, the option of seeking an injunction as an ancillary part of Family Court proceedings appears to be an attractive option for her to pursue.<sup>172</sup> Despite this, these injunctions remain the second choice for both legal professionals and domestic violence complainants, who more commonly choose to seek a protection order.<sup>173</sup> It appears that their hesitance is solidly based in the lack of enforceability and substandard protection associated with a Family Court injunction. While the *FLA* does offer avenues of recourse in the instance of a breach, the process required to impose sanctions is extremely difficult and often unachievable. For example, under section 114AA of the *FLA*, a power to arrest without warrant would automatically attach to an injunction issued for Anna's personal protection. However, a breach of the *FLA* is not a criminal offence. Therefore, if Chris was arrested for breaching an injunction, Anna — as the original applicant — must bring proceedings requesting that Chris be dealt with for the breach.<sup>174</sup> If those proceedings are not initiated before Chris (as an arrested person) is brought before the court, he must be released without further action.<sup>175</sup> This process unduly inflicts the costly and taxing burden of enforcement upon Anna, who clearly lacks the financial resources and perhaps confidence to carry out such an onerous duty.<sup>176</sup> The problem may be intensified by the stringent time limits imposed by the *FLA* in bringing an arrested person before the court.<sup>177</sup> Under section 114AA(3)(a)(i) of the *FLA*, a police officer is required to bring an arrested person before the court before the expiration of the 'relevant period', which is defined as the 'period starting when the person is arrested and ending at the close of business on the next day'.<sup>178</sup> For example, in Anna's case, a delay in the filing of paperwork may result in Chris being released without having incurred any form of penalty.

Further, an individual who commits deliberate and persistent serious contraventions involving a 'flagrant challenge to the authority of the court' may be punished for contempt under section 112AP of the *FLA*.<sup>179</sup> The

<sup>172</sup> More specifically, Anna would potentially be able to reduce the total amount of court proceedings by pursuing the matter in the Family Court only.

<sup>173</sup> Harrison and Behrens (1993), p 12; Alexander (2002), p 64.

<sup>174</sup> *Family Law Act 1975* (Cth), s 114AA(4). The same situation applies in the absence of an arrest, with the original applicant invariably carrying the burden of enforcement through initiation of proceedings.

<sup>175</sup> *Family Law Act 1975* (Cth), s 114AA(4)(b).

<sup>176</sup> Cf breaches of protection orders under the *DFVPA*, which are criminal matters prosecuted by the state.

<sup>177</sup> This was a problematic issue identified by the Australian Law Reform Commission as early as 1986: Australian Law Reform Commission (1986), para 82.

<sup>178</sup> *Family Law Act 1975* (Cth), s 114AA(7).

<sup>179</sup> Although repeated breaches are not a prerequisite for a finding of contempt, they will more readily attract the exercise of the Family Court's power under section

problem remains, however, that the original applicant (i.e. Anna) is forced to carry the cumbersome burden of instigating the proceedings.<sup>180</sup>

While it is arguable that the *FLA* includes adequate sanctions to deal with breaches of an injunction, such flaws are exacerbated by judges who are often reluctant to use the limited measures available to them.<sup>181</sup> For instance, in *Stirling and Stirling* (1978) FLC ¶90-463, Lambert J thought it unnecessary to charge the respondent with contempt of court for breaching an injunction restraining him from entering upon or remaining upon any premises occupied by his ex-wife. This was despite the fact that the respondent had entered his ex-wife's premises wielding a shotgun and yelling threats.<sup>182</sup> The general lack of enforcement has resulted in Family Court injunctions being labelled the 'toothless' intervention order.<sup>183</sup>

### 'So Here I Am': How and What Should the Law be Doing for Anna?

Anna's story shows that, through distorting psychological literature on battered women, the law functions to undermine Anna's autonomy, strength and struggle against subordination. While one must not under-estimate the positive role that psychology has played in informing the women's rights movement as well as legal reforms, it must also be acknowledged that Dr Davina's assessment of Anna could be put to much better use than it currently is. In particular, notions such as the intergenerational transmission of relationship violence and the cyclic nature of partner abuse should, at the very least, act as a signal to the law that domestic violence is not something that will simply go away if one ignores it.<sup>184</sup> At present, this is antithetical to the law's reluctance to enforce breaches of DVOs or Family Court injunctions. It also flies in the face of the persistent cultural ideology that domestic violence is somehow not so serious as other forms of more public violence, which is reflected in the attitudes and beliefs of police and magistrates. In addition, the law's depiction of women as 'helpless' fails to take into account the fact that Anna is attempting to implement some skills of resistance.

Even more importantly, the legal system is refusing to acknowledge the various social conditions of inequality imposed upon Anna, including her economic dependence on Chris, her lack of awareness about available resources, and the silencing power of sex role stereotypes and traditional

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112AP(1)(b): *Ibbotson and Wincen* (1994) FLC ¶92-496 at 81-162. In this case, the Full Court stated that the term 'flagrant challenge ... is intended to underline the exceptional or striking nature of the contravention in question and thus to differentiate it from what might be described as the general run of breaches which are intended to be dealt with under s 112AD': *Ibbotson and Wincen* (1994) FLC ¶92-496 at 81-162.

<sup>180</sup> Alexander (2002), p 74.

<sup>181</sup> Australian Law Reform Commission (1986), paras 82 and 83. There is not much to suggest that the situation is any different today: Alexander (2002), p 71.

<sup>182</sup> *Stirling and Stirling* (1978) FLC ¶90-463 at 77-371.

<sup>183</sup> Australia, Law Reform Commission (1986), para 82.

<sup>184</sup> Walker (1979), p 56.

gender-role ideologies. These conditions are identified by social exchange theory and Dr Davina's sociocultural assessment of Anna as a major feature in the maintenance of her current predicament. In failing to adequately recognise the extremely limited range of options available to Anna, the law may well be acting as a hindrance rather than a help. This failing is particularly important in light of the key role that the law can play in bringing about social change.<sup>185</sup> The question therefore becomes: how can society better address domestic violence in light of the intricate psychological dynamics of abusive relationships and the obstacles facing battered women who seek legal protection, and what is the law's role in this?

One of the most obvious answers to this question is that the law must continue to work towards changing patriarchal ideology. Arguably, such a change must begin from within the law itself. While many police policies superficially condemn the private/public dichotomy, evidence suggests that many members of the police service pay little more than lip service to their application.<sup>186</sup> The law must therefore attempt to eradicate both the police and the judiciary's persisting belief in the fallacies surrounding domestic violence. While this is not an easy task,<sup>187</sup> educating members of the legal profession as to the *very* real and complex nature of domestic violence may go a long way to achieving this goal.<sup>188</sup>

Further, it becomes apparent in Dr Davina's assessment that domestic violence requires a coordinated community response that goes beyond the imposition of protection orders and the conviction of perpetrators.<sup>189</sup> Anna needs to be able to access key services such as housing, legal advocacy, support groups and financial resources.<sup>190</sup> This is not to suggest that resources do not already exist which can assist Anna,<sup>191</sup> or that the law must provide all of these services to her. However, it does imply that Anna needs to be made aware of their availability, and that 'law' cannot continue to function in a social vacuum.<sup>192</sup> A system such as this also requires institutional coordination.

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<sup>185</sup> Murphy (1993), p 1244.

<sup>186</sup> Katzen (2000), p 133.

<sup>187</sup> Refer to Huisman et al (2005) for a discussion on the challenges in training police officers about domestic violence.

<sup>188</sup> Epstein (1999), p 44; Kaye and Knipps (2000), p 13; Huisman et al (2005), p 809.

<sup>189</sup> Coker (2001), p 845.

<sup>190</sup> Balos (2004), p 99.

<sup>191</sup> For instance, in her immediate area of Brisbane there are a range of services designed to assist Anna, including: the Brisbane Domestic Violence Advocacy Service (refer [www.dvrc.org.au](http://www.dvrc.org.au)); the DVconnect Womensline (refer [www.dvconnect.org](http://www.dvconnect.org)); Women's Domestic Violence Court Assistance Service (which provides court support to people at the Brisbane Magistrates Court); Relationships Australia (Queensland) (refer [www.relationships.com.au](http://www.relationships.com.au)); Centacare Catholic Family and Community Services (refer [www.centacarebrisbane.net.au](http://www.centacarebrisbane.net.au)); Queensland Domestic and Family Violence Council, amongst others.

<sup>192</sup> Raphael (2004), p 1361.

Considering that the law is often the front-line defence in the fight against domestic violence, it is arguably the most appropriate body to assume the responsibility of 'coordinator'.<sup>193</sup>

## Conclusion

Anna's story and her final words to Dr Davina — 'so here I am' — carry with them more than just their literal meaning. They are intended to remind the reader of the very real, critical and complex nature of domestic violence. Such an appreciation is often lost in legal scholarship. Amidst the debates about the law's historical and contemporary response to domestic violence lies a group of dispirited women, frustrated at the law's misconception of their plight and the psychological research that should act to empower them. Fuelling their frustration is the law's implicit endorsement of archaic patriarchal views, evidenced in the police and the courts inadequate application of domestic violence legislation. While the law should not be held solely to blame for Anna's story, it must acknowledge its position as the gatekeeper within the broader societal framework. So here, too, are we all.

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<sup>193</sup> Coker (2001), p 845; Raphael (2004), p 1364.

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