

# STOP in the name of *LOVE*

Helen Spowart and Rebecca Neil

## *Reality and rhetoric in the domestic violence debate.*



### **NT Men bashed by drunk wives**

Territory Men telephoned a police domestic violence hotline this week, saying they were being bashed by alcoholic wives. Mothers had also called to tell how their sons were being beaten by their daughters-in-law. Acting Sergeant, Mal Warren, of the Police Domestic Violence Unit, said yesterday he had been surprised at the number of men who had called the phone in on Thursday. He said 74 people had called the service, 7 of them men.

NT News, 22 June 1996.

On 20 June 1996 the Northern Territory Government's Office of Women's Policy conducted a domestic violence phone-in designed to assess current levels of domestic violence in the community. This is how the Territory's only daily newspaper, the NT News, chose to report the issue. This attention grabbing headline was a gross misrepresentation of the results of the phone-in. It reflects an intersection of the NT News' pulp fiction journalism (other headlines have included 'Man Stabbed to Death By a Fish' and 'Wife Tells: Night Of The Rat Bite'), and popular perceptions of the nature of domestic violence. It also illustrates how the Government's highly acclaimed 'Domestic Violence Strategy' has failed to effectively address such understandings, allowing the realities of domestic violence to be distorted and trivialised.

Unfortunately, the 'NT men bashed by drunk wives' mentality is evident in the actions of a number of agencies administering the criminal justice system. The NT Government's Domestic Violence Strategy does little to address this problem as the understanding of domestic violence it promotes is contradictory and ambivalent.

This article examines the recent actions of magistrates in restraining order applications under the *Domestic Violence Act 1992* (NT), and the police in enforcing these orders in the context of the aims and assumptions of the Government's Strategy.

### **'It's got to Stop' — The NT Government's Domestic Violence Strategy**

The NT Government's 'Domestic Violence Strategy' (the Strategy) is considered a model response to the issue of domestic violence because of its integrated and comprehensive approach. The Strategy promotes the concept that domestic violence is a crime and focuses on increased services for victims, improving the criminal justice response to perpetrators, establishing court mandated perpetrator programs, training for service providers and community education. The Strategy includes an Aboriginal Family Violence Strategy and special policies for NESB victims.

Helen Spowart and Rebecca Neil are solicitors at Domestic Violence Legal Help which is a service of the Darwin Community Legal Service.

This article expresses the personal views of the authors.

The implementation of the Strategy is the responsibility of the Office of Women's Policy within the Department of the Chief Minister and is overseen by the Domestic Violence Co-ordinating Committee, a committee of government and non-government workers in the area. The Strategy's catchphrase, 'It's Got To Stop', is publicised through a series of television and radio advertisements, posters, and publications. The Strategy has raised the profile of domestic violence issues in the community to almost equal the level of drinking awareness and quit smoking campaigns, and has been responsible for the provision of a range of services for victims of domestic violence.

The Domestic Violence Strategy, launched in April 1994 with a budget of \$3 million aims:

- to reduce the incidence of domestic violence in the Northern Territory
- to prevent the recurrence of domestic violence
- to work towards the elimination of violence against women

[Office of Women's Policy, Domestic Violence Information Kit, October 1995, Fact Sheet 1]

These are admirable aims. However, the way in which 'domestic violence' is defined within the Strategy is problematic. The Strategy recognises that domestic violence is a pattern of coercive behaviour intended to control and disempower (Domestic Violence Information Kit, Fact Sheet 5). It acknowledges the historical and social causes of domestic violence. However 'Violence against women' is constructed as different to, and separate from, 'domestic violence'. 'Working towards' the elimination of violence against women is separate to the aims of 'reducing' and 'preventing' domestic violence.

The Strategy acknowledges that statistically, more women are victims of men's violence than vice versa. However, the Government publishes a fact sheet called 'Male Victims and Domestic Violence'. It states that there is very little data available on men as victims of domestic violence and suggests that men may be under-represented in statistics due to the fact that male victims are ridiculed if they admit they have been subjected to violence by a woman. The conclusion in the fact sheet is that:

There are too many people who are, or have been, involved with domestic violence in the NT. The fact that there is significantly more violence perpetrated by men, does not mean that violence by women should be ignored. All victims and survivors of domestic violence need support.

[Domestic Violence Information Kit, Fact Sheet 10]

In this respect the Strategy is contradictory. The Strategy is auspiced by the Office of Women's Policy, and one of its aims is ending violence against women. Domestic violence is understood as the result of the social and historical oppression of women by men within the family. However, at the same time the strategy asserts that men are also victims, probably in greater numbers than is currently appreciated. The strategy sends confused and contradictory messages to the community. It promotes the view that any violence between family members or people in an intimate relationship is 'domestic violence' regardless of the context. Domestic violence is seen as any acts of random violence by individuals in intimate relationships, rather than a structural effect of the subordination of women.

The aims and effects of the Strategy impact on the arenas of the criminal justice system and popular consciousness,

areas in which inequality is deeply entrenched. The gendered nature of law and the legal system is well documented. Demeaning, sexist and distorted views about women already exist within the community. By failing to recognise and confront this, and promoting 'domestic violence' as a crime committed by women as well as men, the strategy has set itself up for failure. Fundamental problems of inequality and power must be addressed before domestic violence will cease to exist.

Moreover, by bringing domestic violence into the public sphere, but failing to address the fundamental realities of the issue, a practical effect of the Strategy has been to allow perpetrators to publicly and legally continue their abuse of the victim. Similarly, by refusing to confront popular attitudes, including the attitudes of magistrates and police, effective interventions cannot be achieved, and the needs of domestic violence survivors remain unmet. Problematic understandings of domestic violence often lead to legal outcomes which do not promote the interests of the victim of violence. This is illustrated through various recent cases.

### Some recent judicial expressions

#### *Domestic violence as an isolated emotional disorder and a family problem to be resolved within the family*

I am also reinforced in that view by the fact that Mr Lewis has been convicted of two breaches of the restraining order ... he feels he has been hard done by. He has been confronted by a person in the form of Ms Smith who has perhaps not acted in her best interests. I wonder whether at the beginning, if she had had the sense to engineer some counselling, whether the matter would have gone this far. If perhaps Ms Smith had had the sense to think 'Well, if I do talk to him early on with a counsellor, he might come to grips with breakdown in the relationship and I might come to grips with it as well'.

NT magistrate, 29 January 1997

These are some of the comments a magistrate chose to make after hearing the evidence in a recent case. While describing the defendant as irrational, judgmental, argumentative, a person who likes to speak over people, highly strung and given to haranguing and speaking in a loud voice, he described the applicant's behaviour in avoiding the defendant, as fobbing him off: 'I have formed the view today, looking at Ms Smith, that she is the sort of person who feels the best way to handle this situation is to not speak to the defendant and to fob him off'.

The magistrate goes on to say 'I wonder if a little bit of maturity had been exercised at the outset when this relationship finished and if they both attended counselling whether we would be here today because perhaps both of them could have come to grips with the breakdown in the relationship and realised their responsibilities'.

The following conclusions about the nature of domestic violence are evident in the magistrate's comments:

- The defendant's behaviour constitutes an emotional difficulty or problem, caused by external circumstances, such as the stress of separation. With a little attention this behaviour can be corrected.
- The victim should take responsibility for the defendant's behaviour. It is immature and irrational to be seeking a restraining order, or to wish to avoid the defendant.
- The victim also has a problem requiring attention through counselling, presumably, her tendency to 'fob the defendant off'.

- The criminal justice system has no role if counselling professionals can intervene in a domestic violence problem at an appropriate stage. What is best for the parties lies outside the framework of the criminal justice system.
- The behaviour complained about is not criminal, but simply a reaction to relationship problems.

***Not a pattern of behaviour, but isolated incidents of violence***

In order to obtain a restraining order against a defendant, an applicant must show

- the defendant has assaulted or threatened to assault the applicant, or
- the defendant has damaged or threatened to damage property in the applicant's possession, or
- the defendant has behaved in an offensive and provocative manner towards the applicant, *and*
- if not restrained, the defendant is likely to repeat the above behaviour.

***Linda's case***

Linda had been with her de facto, Rob, for 10 years on and off. During that time he assaulted her, raped her, and subjected her to constant emotional, social and verbal abuse. Linda and Rob have separated several times.

Linda left Rob in January 1997 and applied for a restraining order. The last incident of physical violence had occurred in November 1996. Since separation there had been constant verbal abuse and threats over the telephone.

Rob opposed the restraining order, and the case came before a magistrate for hearing on 7 February 1997.

When Linda's solicitor was questioning her about an incident that happened four years ago, the magistrate said:

This is material that has happened over the last several years. I would have thought you'd be satisfying me as to the second limb [that the defendant is likely to repeat the violence, threats or abuse]. Considering the last piece of threat or harassment or violence was in November, I thought you'd be concentrating on what's happened since November, and its likelihood of continuing, rather than looking at matters that have happened in 1990.

These comments reveal a naive understanding of domestic violence. The magistrate heard evidence of 10 years of constant abuse and violence and deemed it to be of little relevance. Although he accepted that the 'first evidentiary limb', namely, assaults, threats or abuse had occurred, what he believed he had to hear evidence of, in addition to the evidence of violence and abuse, was that the defendant was likely to again be violent or abusive. Domestic violence is not seen as a pattern of coercive behaviour, likely through its very existence to recur. Each incident is to be looked at discretely, in isolation, its relevance determined by how recently it occurred.

The magistrate believed he had to hear evidence of incidents that occurred since November. There was evidence of verbal abuse since that time, and the magistrate had to consider whether that was sufficient to ground a restraining order. The magistrate went on to make the following comments:

Under the provisions now in the domestic violence legislation, whether or not he's been violent but threatened violence, is one thing that may not be so evident in this case. These orders now cover a situation where a person... has behaved in a provocative or offensive manner. So nowadays, people, mostly women it is,

can get domestic violence orders against their de facto or ex de facto, or husband or brother or anything like that, that swore at them, called them sluts, got angry with them, abused them. Now, that, unfortunately, in our society it is not unusual for men, or women, in a break-up situation, to do. But the legislature, in its wisdom, has said if that's the case, on its own that's good enough for a restraining order, where, unless restrained, it's likely to occur again.

In the magistrate's opinion, despite much evidence to the contrary, violence or threatened violence, was not 'obvious in this case', presumably, as it had occurred three months ago or more in the past. However, he was able to recognise that, since separation, there had been some verbal abuse. He sees this in isolation, decontextualised from the previous violence and abuse that occurred. 'It is not unusual' for both men and women to become upset during separation and swear at each other. He acknowledges that it is mostly women who obtain restraining orders, but denies the significance of this fact, going on to speak of both men and women engaging in offensive behaviour. He sees the abuse in this case 'on its own', and 'good enough for a restraining order'. He is unable to see the attempt to control behind the defendant's behaviour, and the verbal abuse that has occurred as a continuation of this attempt to control; that men and women becoming upset during separation cannot be distinguished from a pattern of coercive behaviour, from an ongoing strategy to assert power.

***Rachel's case***

Rachel lived with her de facto, Dan, for 12 years. During that time he repeatedly threatened her, verbally abused her and assaulted her. She has a permanent disability due to one of the assaults and requires on-going medical treatment.

Rachel left the house she and the defendant owned in March 1996. She left Dan with their four children and went to stay with friends. Dan hired a nanny.

In July 1996 Rachel came to see Dan and the children and they had an argument about the behaviour of the nanny. During this argument, Dan abused Rachel, punched her in the face, and threw her down the stairs. In retaliation, Rachel threw some of Dan's clothes, which were on the line, onto the ground and stomped on them. She swore at Dan and the nanny, and later in the day, when Dan and the nanny passed her in the car, she raised the pool cue she was carrying in an angry gesture.

Dan applied for a restraining order against Rachel. The magistrate heard the above evidence. Dan admitted the assaults on Rachel in cross-examination.

The magistrate granted a restraining order against Rachel. He held that by throwing Dan's clothes onto the ground and raising her pool cue in anger, Rachel had behaved in an offensive and provocative manner. He held that Rachel had a 'deep-seated anger' about the relationship and separation issues and may again abuse Dan or the nanny.

The magistrate did not acknowledge in his decision any of the behaviour Dan directed towards Rachel. Rachel's actions were looked at in an abstract way. They were isolated from the context of an abusive relationship, from the assaults that Dan had committed on her that day. By focusing on her behaviour, which can only be described as mild, he trivialises the abuse and violence she has suffered. He appears, by his silence, to legitimise Dan's violence, punishing Rachel for trying to respond, for refusing to remain passive. He fails to distinguish the victim in the situation from the perpetrator.

There is no coercive, unequal relationship, just individuals and isolated incidents.

***Taking a practical approach to domestic violence — Karen's case***

Richard applied for a restraining order against Karen one week after she had been granted a restraining order against him. His grounds for applying included that she had allegedly been to his block of flats on three occasions and he had seen her 'looking at my windows'. Other grounds included that she had behaved provocatively, although what this meant was not elaborated on, presumably she was provoking him simply by being there. Karen had a friend who lived in the block of flats and she saw no reason why she should not visit her friend.

When the matter came before the court it was set down for hearing on another date and Richard asked for an interim order. The magistrate did not address the issue of whether Richard actually had grounds for an interim order. The magistrate stated that he did not see it as an unreasonable for Karen to be restrained from visiting the block of flats. Karen's solicitor pointed out that the allegations in Richard's application were trivial and possibly not sufficient grounds for a restraining order. The magistrate responded by stating that court time should not be wasted on such trivial matters: Karen had the option of consenting to the order without admissions of liability and it would be wise of her to take this course of action. Karen's solicitor stated that for Karen it was a matter of principle, she was the victim in this case and she strongly felt that she should not be subject to a restraining order. The magistrate saw this as unreasonable and commented 'she wants her own back, is that what she's using the court system for?'. The magistrate went on to suggest that Richard was more likely to keep away from Karen if she agreed to being subject to an order herself. He concluded by saying, 'I think the courts have to take a pragmatic view and a practical approach to matters of this type'. Richard was granted an interim restraining order and the matter was set down for a hearing. The magistrate had not heard any evidence to substantiate Richard's allegations.

In adopting a 'practical approach', the magistrate showed a lack of understanding of the power and control at work in situations of domestic violence. Karen was devastated by his decision to grant Richard an interim order. During their relationship Richard had assaulted her several times, emotionally abused her and on one occasion he had held a knife to her throat and threatened to kill her. She had obtained a restraining order against Richard to protect her in the future. By obtaining a restraining order against him she had felt that the abuse she had suffered was being publicly acknowledged. Richard had been granted an interim order because he alleged that Karen had done little more than look at his windows. By applying for and being granted an interim restraining order Richard was able to use the legal system to equal the legal position between Karen and himself and make a public statement which trivialised the abuse Karen had suffered. Richard did not appear on the hearing date and his application was dismissed. Presumably he had already achieved his purpose on the first Court date.

There have been many recent cases decided in a similar manner to Karen's case. In many cases of domestic violence, as illustrated in Rachel's case above, a woman may retaliate against, or try to defend herself from, the violence of the perpetrator. This may, *prima facie*, give the perpetrator tech-

nical grounds for obtaining a restraining order against the victim.

Many magistrates have in fact seized on the idea of mutual restraining orders, seeing it as a good 'practical measure' to avoid contact between the parties, in some cases actively suggesting to an aggrieved defendant that he take this course of action and putting pressure on victims to agree to mutual restraining orders being in place.

In practice, mutual orders are difficult for the police to enforce. If police are called to incidents where each party has an order against the other, it is extremely difficult for police to assess who is responsible for the breach. Neither party is immediately identifiable as the one in need of protection, as the existence of mutual orders is seen to place them in an equal legal position. This often results in charges being laid against neither or both parties. Most importantly, however, the effect of a restraining order in empowering the victim is lost. The option of a cross-application for a restraining order by a perpetrator is often used as a way for a perpetrator to get even with a victim and indicate to her once again, through the legal system, who is boss. Mutual orders make a statement to a victim that she is responsible for the abuse which has been perpetrated on her.

**A police view of domestic violence: 'The order works both ways'**

In 1994 the NT Government established the police Domestic Violence Unit (DVU) in Darwin as part of the domestic violence strategy. The Unit handles only domestic violence work, and has the job of following up calls to police relating to domestic violence, and providing support and assistance to victims. Officers assist victims in obtaining restraining orders, make appropriate referrals and provide information about criminal law.

In 1996 it became obvious that officers of the DVU were routinely 'warning' domestic violence victims that if they encouraged the defendant to have any contact with them whatsoever they would be charged with aiding and abetting a breach of the restraining order as 'the order works both ways'. This warning has been given in situations which include the following:

- An Aboriginal woman obtained a restraining order against her son. On her birthday, also her daughter's birthday, the son came to visit and everyone got drunk. The son assaulted her, leaving her with bruises. Police from the DVU attended, refusing to arrest the son as the woman had invited him in. They warned her if she wished to make a statement against the son she would also be charged.
- An Aboriginal woman living on a remote community got an order against her husband, after several years of terrible violence. The husband had spent time in prison because of his violence towards her. The husband got very sick and it appeared he may die. The woman went to visit him in hospital, particularly afraid of payback from the man's family if he were to die without her having been with him. The police warned her she would be charged if she did not go back to court to change her order to allow her to have contact with her husband.

In June 1996 officers from the DVU charged an Aboriginal woman, Theresa, with five counts of aiding and abetting a breach of her restraining order. The officers in charge of the prosecution remarked that they felt Theresa was 'thumbing

her nose at the system', and 'messing them around' because she had been encouraging the defendant to have contact with her. Theresa alleged that the defendant would frequently come to her house, saying he wanted to see the children, and would refuse to leave, despite her repeated requests. Theresa could not afford to install a telephone, and in order to report any breach to police she had to walk a kilometre to a public telephone. The defendant would refuse to let her leave the house to do so. Indeed, on the one occasion Theresa did report a breach of the order she was deemed to be drunk by the police and was taken against her will to a sobering up shelter for the night. The defendant was not charged on that occasion.

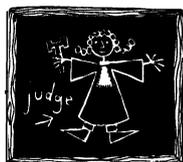
In the police view, these women were equally responsible for the violence and the failure of the defendant to have regard to the terms of the restraining order. Indeed, women have a responsibility to report breaches and a legal obligation to stay away from the defendant. Failure to do so indicates a failure to conform with the norms of appropriate victim behaviour and incurs police resentment. The difficulty that women, particularly Aboriginal women, have in gaining access to the criminal justice system is not acknowledged. The unequal power relationship between the parties is not a factor. There is no room for the notions of acquiescence, compliance or the role of fear. The effect of past violence on the victim is not acknowledged. The perpetrator is excused from responsibility for his behaviour, and, perhaps, the victim is seen to be asking for the violence.

### 'Stop in the name of love'

The Office of Women's Policy (OWP) has recently adopted the slogan 'stop in the name of love' to promote the domestic violence strategy in 1997. The OWP states that this slogan is intended to draw attention to the fact that domestic violence is not an expression of love, it is in fact a crime. The more obvious interpretation of the slogan however, would be that if you loved someone you would not abuse them. The new slogan coincides with the development of the perpetrator's program which appears to emphasise the relationship between the perpetrator and the victim, the commitment of the perpetrator to the relationship and his willingness to change for the sake of the relationship.

The notion 'Stop in the name of love' seems to serve only to locate domestic violence squarely in the private domain, as a relationship problem that needs to be resolved. It might be seen to send the wrong message to the police, the courts and the general community.

The Strategy has been extremely effective in setting up services for victims of domestic violence at many levels. It is working to successfully promote the idea that violence in any form is unacceptable. However, in order to go anywhere near seriously achieving its aims, it must tackle questions of ideology, sexism and the material conditions of women's subordination. Failure to do so will only continue to undermine its effectiveness.



## LEGAL STUDIES

*The suggestions for class work and discussions below are based on the article 'Citizenship in Australia: An Indigenous Perspective' by Michael Dodson on p.57 of this issue.*

### Questions

1. What were the justifications for assimilation. How was the law used during this period to promote its aims?
2. What was the 1967 referendum? What did it mean for Indigenous peoples in Australia? Why do Indigenous Australians believe what was promised by the referendum has not been delivered?
3. Why is the existing Australian Constitution unacceptable to Aboriginal and Torres Strait Islander peoples? What suggestions for its acceptable reform are made in the article 'Citizenship in Australia: An Indigenous Perspective'? How do you think such reform may effect the reconciliation process?
4. What arguments are presented for justifying the continued non-recognition by non-Indigenous culture of Indigenous political, social and legal systems? How do Indigenous peoples challenge these assertions?

5. The *Mabo* and *Wik* decisions have caused great controversy in the Australian community. What were the findings of these decisions with respect to Indigenous rights to land in Australia? What, if anything, do these findings mean for non-Indigenous land law?

### Discussion

In the last year there has been much debate about the 'special treatment' of Aboriginal and Torres Strait Islander peoples. Many argue that 'equality' cannot be achieved unless all people, regardless of race, are treated the same. On the other hand it is asserted that the unique situation of Indigenous peoples in Australia, particularly their disadvantage and their status as this country's First Peoples, necessitates their differential treatment. This second argument contests that different treatment is the only way to ensure that Aboriginal and Torres Strait Islander peoples enjoy out-

comes which are equal to those of other Australians. Discuss this equality of treatment/equality of outcome dichotomy. How does the legal system address this issue? — consider in particular the operation of the anti-discrimination regime.

### Research

Research Indigenous citizenship in Australia. Specifically look at:

- the situation existing before the 1967 referendum and the referendum itself;
- the current economic, social and cultural position of Indigenous Australians and what implications this status has for Indigenous inclusion in the Australian citizenry;
- Indigenous aspirations for citizenship — what Aboriginal and Torres Strait Islander peoples perceive as necessary for their exercise and enjoyment of full Australian citizenship;
- suggestions for reform which would accommodate these aspirations.

### Debate

The recognition of Indigenous systems and structures, including legal systems, will threaten the sovereignty of the Australian nation.

**Catherine Duff**

*Catherine Duff is a Sydney human rights lawyer.*