

**RECONSTRUCTING DOMESTIC VIOLENCE AS 'TERRORISM  
AGAINST WOMEN': DISRUPTING DOMINANT DISCOURSE**

A THESIS SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY OF  
THE AUSTRALIAN NATIONAL UNIVERSITY

DECEMBER 2011

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## DECLARATION OF ORIGINAL WORK

I declare that, except where otherwise stated, the work contained in this thesis and submitted for the Doctor of Philosophy, is my own original work and not the work of any other person.

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Date:

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## ACKNOWLEDGMENTS

Although a thesis is, in the end, the work of one person, it is the product of many influences. That is certainly true for my thesis, and I can only reflect on what it might have been had I not been fortunate enough to benefit from the combined wisdom of so many people.

I owe a debt of gratitude to many people in relation to the completion of my PhD submission. It is the culmination of six years of part-time study, interwoven with full-time work at, first, the Office of the Commonwealth Director of Public Prosecutions, and subsequently the Office of the ACT Director of Public Prosecutions. At both places, I benefited from the support and encouragement of my work colleagues, and particularly from the encouragement and flexibility of Jon White, now ACT Director of Public Prosecutions.

Many people generously gave of their time to read earlier draft chapters, or to discuss ideas with me. Thank you to Peter Carter, Miriam Gani, Robyn Holder, Nicola Lacey, Kathy Mack, Judge Richard Maidment SC, Mary-Jane Mossman, Tim Moloney, Mark Nolan, David Ormerod, Carolyn Strange, Gregor Urbas, Andrew Vincent and Justice Margaret White for their various contributions and influences on my thinking. I very much appreciated that such busy people, with important agendas of their own, gave so freely of their time to help me. Thank you also to the many participants at the 'Shoot to Kill' (Onati, 2009) and Australian Women and Gender Studies Association Conference (Adelaide, 2010) who contributed useful feedback on my presentations, and helped to direct my thinking. I am also grateful for the comments provided by the anonymous examiners of this thesis, many of which I have incorporated.

Thank you to my wonderful friends, who have been so supportive over the years, and endured complicated explanations about exactly what the topic of my thesis was. I won't name you all, but you know who you are. Special thanks must go to my 'homes away from home' – to those who kindly gave me comfortable accommodation, and copious quantities of food (and wine) on my many visits to Brisbane – Bridget Boyle and Neil Foster, and Ewan and Alice,

Michelle Muirhead, and in particular Samantha and Terry Cook, and Darcy, Reuben and Matthew, who were the lights at the end of some very long days of study and research. Thank you also to Mel Davies and Saskia Hufnagel for their support and encouragement.

A big thank you to Dr Jonathan Crowe, my long-time friend and inspiring feminist, who contributed important ideas and constructive criticism on various drafts, and as always, helped me to believe that everything would turn out in the end when I wasn't so sure. Thanks also to Cicely Bonnin for her support and talking through ideas with me.

To my sister Daena Scheuber and my brother-in-law Ken Leslie, thank you also for your support, and to Ken, for much-needed assistance in formatting, margins and other technical, computer-related things that are far beyond my capabilities. The births of my nephew Colin and niece Fern have been highlights for all our family, and I look forward to spending plenty of time with them as they grow up.

To my parents, Henry and Judi Scheuber, thank you for your endless love and support, in this as in all things. Two better parents a person could not wish for. Thank you both for your editing assistance. Mum, thank you for reading an entire draft and contributing a valuable 'layperson's perspective' in between sessions of chemo, when a good murder mystery must have seemed a better option. You never cease to amaze me. And you were right – it did need many more commas.

I owe a massive debt of gratitude to my two supervisors, Professor Simon Bronitt, and Professor Margaret Thornton. Simon – I remain in awe of the depth and breadth of your knowledge of all things legal, historical and otherwise. I can certainly say that my thesis would have been an entirely different beast if it weren't for your many suggestions as to fruitful avenues of investigation. Had I followed them all, this would probably be several theses, rather than one. But I have taken from you a desire, and I hope an ability, to see the connections between what might initially seem unrelated concepts – something which is, after all, at the heart of this thesis.

Margaret – I re-read the other day the response that you sent to my email requesting your agreement to be one of my supervisors. I am now, as I was then, humbled by your acceptance of the role. Thank you sincerely for all the time you spared me, for giving me the benefit of your considerable knowledge and experience, and for your honest assessments of my work. That you considered my research interesting and worthwhile was in large part what kept me going through what at times seemed a daunting process.

Last, but not least, to my partner Kerry O'Brien, thank you for the hot dinners, lengthy conversations (sometimes one-sided) and making me smile through the dark times. One of the best things about the process of writing this thesis is that we could share the experience as PhD students together. Most of the ideas expressed here I discussed and debated with you, at one point or another, and it was often our conversations that helped my ideas take shape. I can honestly say that, if there were more men like you in it, the world would be a much better place.

*Kylie Weston-Scheuber*

*Canberra*

*December 2011*

## THESIS ABSTRACT

This thesis examines the different ways in which violence is constructed within legal discourse. Two specific types of violence are compared – domestic violence and terrorism. While on the face of it, these appear to be very different types of violence, in the second section of my thesis, I argue that there are significant parallels between the two.

In particular, in Chapter 2.2 I argue that serious domestic violence is often committed with a particular ideological motive, that of masculinist ideology. Ideological motive is the first element of the legal definition of terrorism. In making this argument, I draw upon definitions of domestic violence that point to the elements of power and control inherent in some domestic violence, which is committed predominantly by men against women. I also argue that this type of violence is a manifestation of masculinist ideology in a broader sense, which permeates Australian society.

In Chapter 2.3, I also argue for the reconceptualisation of domestic violence as a crime committed against women as a ‘section of the public’. This accords with the second aspect of the legal definition of terrorism, as a crime committed with the intention of coercing a government, or intimidating the public, or a section of the public. This reconceptualisation contrasts with the usual conceptualisation of domestic violence as a crime committed in the private sphere, a feature of domestic violence which has been the subject of significant feminist critique.

Having reconstructed domestic violence as fitting within the two key parameters of the legal definition of terrorism, in Section 3 I go on to consider some of the various ways in which the law differentially treats terrorism and domestic violence. In Chapters 3.1 and 3.2, I consider the treatment of preparatory forms of violence, and prevention of violence. In Chapter 3.1, I examine the regulation of incitement to violence, through the national system for classification of publications and films, and also through the regulation of hate speech in Australian and various overseas jurisdictions. Chapter 3.2 contains an

examination of the civil regimes for the control and prevention of violence, specifically terrorism control orders and domestic violence protection orders.

Chapters 3.3 and 3.4 consist of an examination of the treatment of more serious forms of violence. In Chapter 3.3 I compare sentencing decisions in Australian terrorism cases with sentences for male-perpetrated homicides against intimate partners, exploring the ways in which the concepts of 'ideology' and 'public' interact with the various considerations to be taken account of upon sentence.

In Chapter 3.4, I examine cases in which female victims of domestic violence respond with lethal violence against their abusers, and how they are constructed in legal discourse, in comparison with law enforcement agents who respond to terrorism and other types of violence that threaten the safety of police or the community. I argue that the construction of domestic violence as a 'private' crime devoid of ideological aspects affects the ways in which female perpetrators of defensive homicide are treated in the legal system.

Throughout each of these chapters, I consider how the differential constructions of domestic violence and terrorism serve to reflect and reinforce existing power relationships within society. In particular, the continued trivialisation of domestic violence serves masculinist interests in ways that I explore in each chapter.

Finally, in Chapter 4, I draw upon some of the themes from these various chapters and discuss possibilities for legal reform and further ways in which reconceptualising domestic violence as an ideological/public crime may influence the way it is dealt with in the legal system.



## SECTION ONE





## CHAPTER 1.1 INTRODUCTION

This is the question: when will opposition to terrorism include the daily terrorism against women as women that goes on day after day, worldwide? ... Why does the whole world turn on a dime into a concerted force to face down the one, while to address the other squarely and urgently is unthinkable?<sup>1</sup>

It is commonly asserted that the terrorist attacks of 11 September 2001 in the United States 'changed everything'.<sup>2</sup> Although we cannot yet know if 9/11<sup>3</sup> will have a lasting impact on Western culture,<sup>4</sup> certainly in the decade or so since, the political and legal landscape has changed dramatically. Events such as the wars in Afghanistan and Iraq, the deaths of Saddam Hussein and Osama bin Laden, and the controversy of Guantanamo Bay have all been part of the ongoing response to 9/11 that shows no sign of ending any time soon.

Yet as Catharine MacKinnon notes, the number of people killed as a result of the attacks of 9/11 is very similar to the number of women killed by men in America *every year*.<sup>5</sup> Women killed at the hands of male intimates in the same year, she notes, could have filled one whole World Trade Tower.<sup>6</sup> As she observes, this 'war against women' has not generated the kind of immediate and sustained legal response that followed 9/11. It is this anomaly, encapsulated in MacKinnon's question quoted at the beginning of this introduction, which provides the general context for my thesis. However, while MacKinnon makes her comparison with violence against women more broadly, I am concerned specifically with the kind of violence commonly referred to as 'domestic violence'. It is domestic violence, as I outline below, which shares a range of particular similarities with terrorism that provide the basis for a useful comparison of the two.

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<sup>1</sup> MacKinnon (2002), p 429.

<sup>2</sup> For an interrogation of this claim see the essays in Nardin and Sherman (2006).

<sup>3</sup> Throughout my thesis, I will sometimes refer to the events of 11 September 2001 by the common American conjunction to '9/11'.

<sup>4</sup> Nardin and Sherman (2006), p 1.

<sup>5</sup> MacKinnon (2006), p 4.

<sup>6</sup> MacKinnon (2006), p 4.

Reconceptualising domestic violence as terrorism, as MacKinnon does, serves as the point of departure for the analysis I conduct in this thesis. Although MacKinnon's question relates to *why* there exists such opposition to terrorism and not domestic violence, my thesis focuses upon *how* these two types of violence are differentially constructed within legal discourse, and how their treatment within the legal system occurs within the context of this differential construction.

There are of course multiple experiences that could fairly be described as invoking 'terror' in their various victims, but the word 'terrorism' is reserved in political, social and legal discourse for a very specific type of experience, and one not associated with the terror experienced by women targeted in the intimate sphere. In subsequent chapters, I consider a number of questions that follow from this observation, building on two related points. First, the names we give to things are not value-free but reflect pre-existing social assumptions and understandings about what it is we are describing. That is, when we experience terrorism, we do so in a context in which we already understand what terrorism *is* and bring that understanding to our naming of it. Naming is one aspect of the processes of discourse, discussed below, by which all concepts are constructed and come to be understood.

Secondly, the ways in which we define concepts within the discursive process also serve to *influence* in a significant way how we react to the events and actions to which we attach those labels. In this way, labelling is a dual process: calling something 'terrorism' reflects how we understand it, but the labelling itself also helps to determine what we *do* about it.

Further, I explore how this dual process is not value-free but operates in a way that privileges certain interests over others. Broadly, the processes described above are reflective of what I will describe as 'masculinist ideology', that is they reflect and reinforce common understandings and assumptions about men and women and the relationship between them in a way that serves to privilege the former and disadvantage the latter. I describe this masculinist ideology and its operation in detail in Chapter 2.2.

Feminists have long recognised that the power to name is key to defining a problem and taking control of it.<sup>7</sup> Marcus writes: 'Naming and categorizing is not a neutral activity; it is a deeply political one. For language exposes as well as masks.'<sup>8</sup> My hope is that in interrogating the similarities between domestic violence and terrorism, and examining their construction in legal discourse, I can contribute to the process of exposing some of the ways in which the law privileges some forms of violence, and some victims, over others.

Through an examination of different aspects of the legal treatment of domestic violence and terrorism then, I consider how the state differentially constructs and responds to these two categories of violence. In the next section, I outline my conceptualisation of 'the state' in more detail. Although my focus is primarily on construction through legal discourse, I consider the law to be an aspect or instrument of the state. Where relevant, I consider social and political discourse as they interact with legal discourse.

My analysis focuses primarily on legal and social discourse in Australia, however I also draw upon research from other jurisdictions, particularly the United States and United Kingdom, for the purpose of drawing comparisons and distinctions, where relevant. Although the treatment of domestic violence internationally is not my focus, international monitoring has revealed that many nations consistently fail to fulfil their obligations to prevent, investigate and prosecute such violence.<sup>9</sup> Observations as to the construction of domestic violence in Australian legal discourse may therefore have a broader relevance to legal discourse in other countries.

Chapter 1.2 sets out my theoretical and methodological framework. In this introductory chapter, I first provide a general definition of some of the concepts to be discussed, and outline the rationale for my topic. I then go on to consider the work of others who have drawn a comparison between domestic violence and terrorism and outline my own justification for doing so.

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<sup>7</sup> Rich (1980), p 644.

<sup>8</sup> Marcus (1994), p 25.

<sup>9</sup> UN Special Rapporteur on Violence Against Women (1999).

## *Some Key Concepts*

At the outset, it is appropriate to explain what I mean when I refer to concepts such as ‘domestic violence’ and ‘terrorism’. In Chapter 2.1, I explore the historical process by which these terms came to achieve recognition and use in Australia and elsewhere, as well as other considerations regarding the use and ‘choice’ of these terms to describe different phenomena. In subsequent chapters, I also explore their legal definitions. However a general definition at the outset will create a useful starting-point.

### *Domestic Violence*

I use the term ‘domestic violence’ to refer to a broad range of behaviours, both physical and non-physical, perpetrated (usually) by a man against a woman with whom he is in an intimate relationship, as part of an ongoing pattern of behaviour directed at exercising control over her.<sup>10</sup> This description reflects a ‘control-based’ definition of domestic violence, which is not necessarily reflective of psychological,<sup>11</sup> sociological,<sup>12</sup> or legal definitions of the concept.<sup>13</sup>

‘Domestic violence’ is also commonly used to refer to violence perpetrated within the family more broadly; indeed the term ‘family violence’ is sometimes used to reflect this broader interpretation.<sup>14</sup> However, I use the term domestic violence specifically to refer to violence perpetrated by a man against a woman in an intimate relationship. Although aspects of power and control will often be present in violence perpetrated within the family context more broadly, I limit the

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<sup>10</sup> Pence and Paymar (1993), Chapter 1. See in the US context also Bograd (1988), p 14; Fischer et al (1992-3); Schneider (2000), Chapter 4.

<sup>11</sup> Psychological research in relation to domestic violence has focused on ‘phases’ in the battering relationship, and victim responses, including the controversial ‘learned helplessness’ response outlined by Lenore Walker: Walker (1984).

<sup>12</sup> Johnson describes the ‘family violence approach’, based on sociological research into family violence as a type of violence perpetrated within the family and committed by both men and women: Johnson (1995).

<sup>13</sup> Legal definitions of ‘domestic violence’ in the Australian context are discussed in Chapter 3.2. As observed there, most legal definitions lack a recognition of the gendered aspect of domestic violence.

<sup>14</sup> The Coalition of Australian Governments (COAG) uses this term in contrast to ‘domestic violence’ to encompass violence amongst family members having similar features to domestic violence: COAG (2011), p 3. ‘Family violence’ is also a term preferred by some Indigenous communities: Graycar and Morgan (2002), p 314.

use of 'domestic violence' as described in order to reflect the specific power dynamics inherent in the intimate relationship. These dynamics are underpinned by social understandings about the roles of men and women and intimate relationships. This is central to the argument advanced in Chapters 2.2 and 2.3 that this kind of violence is, contrary to popular understandings, both gendered and ideological.

Consistently with 'control-based' and feminist definitions of domestic violence,<sup>15</sup> I use the concept to refer to a range of behaviours aside from physical violence that serve to establish and reinforce control over a partner's behaviour, including emotional, psychological, economic and social abuse. For particular purposes, for example the analysis conducted in Chapters 3.3 and 3.4 in relation to lethal domestic violence and self-defence responses, I largely limit the discussion to domestic violence in the form of physical violence, though other forms of abuse are discussed as relevant. I examine the justification for so limiting the analysis in more detail in those chapters.

In writing of domestic violence, I generally refer to the victims of domestic violence by the female pronoun and perpetrators by the male pronoun, to reflect the gendered dimension of this type of violence as referred to above.<sup>16</sup>

### *Terrorism*

As discussed in Chapter 2.1, there is no universally agreed legal or political definition of terrorism. In particular, there continues to be political debate in relation to whether states, as opposed to non-state actors, can themselves be responsible for acts of terrorism.<sup>17</sup> However, elements upon which there is some agreement amongst political and legal scholars are that it refers to an act of violence directed against the civilian population for political or ideological

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<sup>15</sup> Although there is not of course a unitary feminist perspective on domestic violence, Johnson distinguishes the 'feminist approach' as one focused on power dynamics inherent in the male/female intimate relationship from the 'family violence approach', which focuses on violence perpetrated within the family more broadly: Johnson (1995).

<sup>16</sup> Johnson (1995) (unlike 'common couple violence', serious domestic violence is committed predominantly by men against women); Miller (2005), pp 14-37; Australian Government (March 2009), p 27.

<sup>17</sup> Abi-Saab (2004), pp xix-xx.

ends,<sup>18</sup> that the act instils fear in the population,<sup>19</sup> and that it is intended to influence a government or intimidate or coerce a section of the public.<sup>20</sup>

For the most part, when referring to terrorism in this work, I am referring to it as it is commonly understood in contemporary Western political, social and legal discourse. In other words, I refer to terrorism as an act (or planned act) of violence, that will result in harm to persons or property, perpetrated by unofficial non-state actors,<sup>21</sup> carried out for political or ideological purposes, and intended to influence a government directly, or indirectly through the impact the act has on the civilian population.

The concept of terrorism, as outlined in Chapter 2.1, has a lengthy history and has been associated with a wide and diverse range of acts and actors. These include the hijackings of the 1960s and 1970s carried out by Palestinian liberation groups, the anti-capitalist activities of the Italian Red-Army Brigade and the German Baader-Meinhof group, and of the Irish Republican Army in Ireland and the United Kingdom.

Although the history and definitions of terrorism are broad, terrorism in contemporary political and legal discourse is commonly associated with Islamic extremism.<sup>22</sup> Although there is certainly nothing in the legal definition of terrorism that would restrict the concept in such a fashion, the aforementioned association provides the context for analysing contemporary discourse about terrorism. Because my analysis focuses on legal constructions of terrorism and domestic violence post-9/11, most of my discussion of terrorism will be of Islamic extremism as it features in contemporary discourse. In focusing my analysis in such a way, I do not of course overlook the lengthy and varied history of terrorism, which is discussed in more detail in Chapter 2.1.

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<sup>18</sup> Hancock (2002); Dupuy (2004), pp 4-5.

<sup>19</sup> Frey and Morris (1991), p 2.

<sup>20</sup> Hancock (2002).

<sup>21</sup> Carr (2006), p 4.

<sup>22</sup> Carr (2006), p 239; Chaliand and Blin (2007), p 253; Robert McClelland, 'Untitled' (speech delivered at 3<sup>rd</sup> Annual Counter-Terrorism Summit), Hilton on the Park East Melbourne, 28 October 2008, <<http://www.tamilsydney.com/content/view/1506/37/>>. It should be noted, however, that the situation of Muslims in Australia is very different to that of Muslims in Britain, where particular cultural factors have contributed to the rise of extremism in some quarters: Bergin (2009), pp 4-5.

## *The State*

As indicated above, my thesis addresses the various ways in which the state differentially treats terrorism and domestic violence. I consider this treatment largely through a focus on the legal system, and also on legal discourse. However I do, where relevant, consider political and social discourse, and how they interact with legal discourse in differentially constructing violence.

In referring to 'the state', I refer to the various mechanisms of government – the legislature, the executive and the judiciary, as well as the broad variety of structures, policies and practices through which the objectives of the state are implemented.<sup>23</sup> While individual decision-makers and bodies play a role in the functioning of the state, I accept Smart's observation in relation to the law that the whole is more than the sum of its parts.<sup>24</sup> In other words, those individuals and organisations who make decisions do so in the context of pre-existing social and institutional structures and practices.

I also accept the feminist observation that the state is a 'powerful masculinist force that is also raced, hetero-sexed, able-bodied and classed'.<sup>25</sup>

Although I do at times refer to the legal system and 'the state' interchangeably, the legal system, while part of the state apparatus, is more than simply an arm of the state.<sup>26</sup> Importantly, the law has its own practices, procedures, rules and discourse which, while often reflecting the interests of the state, are at the same time separate to it. The law is not simply reflective of social norms; it acts in a 'constitutive' way by actively altering discourse to find new means of justifying existing power inequalities.<sup>27</sup>

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<sup>23</sup> This is broadly consistent with radical feminist and liberal/Marxist definitions of the state: Watson (1990), pp 26-9. Watson herself notes that influences that impact on regulation in women's lives do extend beyond the state. See also Lacey (1993), p 95 regarding the influence of non-state 'public' organisations.

<sup>24</sup> Smart (1995), pp 140-1. McLaren (2002), p 38 notes that decision-makers act with certain intentions but cannot necessarily control what the outcome of their decisions will be.

<sup>25</sup> Thornton (2006), p 152.

<sup>26</sup> Smart notes that to use the terms 'law' and 'state' interchangeably is to cede too much power to the law: Smart (1989), pp 80-2.

<sup>27</sup> Siegel (1995), pp 2183-7.

## *Rationale*

At the outset, a project to compare the treatment afforded to two types of violence commonly understood to be very different demands explanation. Although, as discussed in Chapter 2.1, naming is itself an exercise of power, to attempt to reframe domestic violence as terrorism without justification is to risk that the exercise will be dismissed as ‘metaphorical, hyperbolic, and/or rhetorical’.<sup>28</sup> There are, I suggest, a number of similarities between domestic violence and terrorism that justify a comparison in the terms I undertake here.

Underpinning the Western liberal legal tradition is the so-called ‘harm principle’ – the idea that people’s conduct should only be regulated to the extent necessary to prevent harm to others.<sup>29</sup> Both terrorism and domestic violence, at the most basic level, are manifestations of harm. Each, in its most serious form, results in the loss of human life, and each is also capable of generating more and less serious forms of injury, as well as property damage.

Of course, there are also differences in the type and nature of harm generated. A first apparent point of distinction is the scale and actuality versus potentiality of violence.<sup>30</sup> While 60 women on average die every year in Australia as a result of domestic violence,<sup>31</sup> Australia has not witnessed an actual terrorist attack on its soil since the 1978 Hilton Hotel bombing.<sup>32</sup> The risk of an Australian citizen being a victim of a terrorist attack has been described as ‘miniscule’.<sup>33</sup> However, as evidenced by events such as the Bali and London bombings and 9/11, the scale of a terrorist attack, when it does occur, is potentially massive in terms of

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<sup>28</sup> MacKinnon notes that this argument is made in relation to the use of the phrase ‘war against women’: MacKinnon (2006), p 5.

<sup>29</sup> Originally expressed in Mill (1974), p 68. For discussion of the influence of the harm principle see Bronitt and McSherry (2010), pp 57-9.

<sup>30</sup> For an attempt to use factors such as the extent and likelihood of harm in calculating offence seriousness see Von Hirsch and Jareborg (1991).

<sup>31</sup> Mouzos and Rushforth (2003), p 2. Summers (2003), p 79 gives a higher estimate of 77 women per year.

<sup>32</sup> Morgan notes that in cost-benefit analysis terms terrorism is ‘low probability’ but with high impact consequences: Morgan (1989), p 47.

<sup>33</sup> Leithner (2003), p 36.



the loss of life and damage caused.<sup>34</sup> More recently, members of an alleged conspiracy to commit terrorist acts in Sydney discussed the possibility of there being 500 victims of their plot.<sup>35</sup> Taking MacKinnon's 9/11 example above as illustrative, the issue is perhaps not a disparity in the numbers of victims so much as a difference in the number and scale of attacks.<sup>36</sup>

Of course, a quantitative comparison in and of itself is not useful, given that there is a range of violent acts, such as stranger assault and negligent driving, that result in fatalities each year. Some similarities between domestic violence and terrorism also apply to other types of violence. For example, domestic violence and terrorism are acts perpetrated overwhelmingly by men, the former by men against women, and the latter by men against both men and women.<sup>37</sup> However, this is true of most types of violent crime.

However, domestic violence and terrorism also share a psychological aspect to the harm caused that distinguishes them from other types of violence. An important part of the debilitating effect of domestic violence, aside from the harm caused by the violence itself, is the psychological impact on the victim of constantly waiting for and anticipating the next attack.<sup>38</sup> This psychological effect has received most attention in the context of the controversial 'battered woman's syndrome', which hinges on the 'learned helplessness' women are said to develop due to their experiences of repeated cycles of battering by their

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<sup>34</sup> The estimated number of victims of the Bali bombings in 2002 is 202: 'Bali death toll set at 202', *BBC News Online*, 19 February 2003, <<http://news.bbc.co.uk/2/hi/asia-pacific/2778923.stm>>; the death toll from the 1 October 2005 attacks in Bali was 20: Chulov (2006), p 266; the death toll from the London bombing of 7 July 2005 was 56: Chulov (2006), p 281; the estimated number of victims of 9/11 is 2,823: Tom Templeton and Tom Lumley, '9/11 in numbers', *The Observer (online)*, United Kingdom, 18 August 2002, <[http://911research.wtc7.net/cache/sept11/victims/guardian\\_numbers.html](http://911research.wtc7.net/cache/sept11/victims/guardian_numbers.html)>.

<sup>35</sup> Ian Munro, 'Sydney terror-plot accused "spoke of 500 casualties"', *The Age (online)*, 15 September 2010, <<http://www.theage.com.au/victoria/sydney-terrorplot-accused-spoke-of-500-casualties-20100915-15c16.html>>.

<sup>36</sup> Though of course given the absence of any terrorist attacks on Australian soil, any quantitative comparison can only be speculative.

<sup>37</sup> This is not to say that women cannot be and are not perpetrators both of domestic violence and terrorism, but in statistical terms both are examples of harm perpetrated largely by men. While women perpetrate less serious 'common couple violence' the majority of serious domestic violence is committed by men: Johnson (1995).

<sup>38</sup> In writing of his own and his mother's experiences, Ian Leader-Elliott notes: 'In this relationship, as in many others, the essence of terrorism was to be found in the unpredictability of violent attack': Leader-Elliott (1993), p 430. Note however that a proposal to include psychological harm in the definition of 'terrorism' was rejected by the Parliamentary Joint Committee on Intelligence and Security (December 2006), pp 60-2. A subsequent proposal to include psychological harm in the definition was not taken up: Attorney-General's Department (July 2009), pp 45-7.

partners.<sup>39</sup> Similarly, terrorism, even in the absence of a terrorist act, uses psychological impact on the public as a key strategy,<sup>40</sup> which in turn has significant consequences in terms of how people live their lives as well as on government policy. Both have the effect of undermining security and stability; domestic violence in the home/family context and terrorism in the general community.

Further, both frequently involve the suicide of the perpetrator as part of the violent act; terrorist 'suicide-bombings' are notorious,<sup>41</sup> and suicide of the perpetrator is also a common feature of domestic homicides.<sup>42</sup> The willingness of perpetrators to give their lives in pursuit of their cause can be interpreted as an extreme form of ideological commitment, to which more consideration is given in Chapter 2.2.

Most importantly for my purposes, domestic violence and terrorism share aspects in common which might initially be perceived as points of difference. The defining features of terrorism, which are examined in Chapters 2.2 and 2.3, are the ideological motivation of its perpetrators, and its characterisation as a crime directed against the public, either randomly through the targeting of individuals in public places, or more directly in the form of its government or state representatives.

At first blush, these characteristics would seem to clearly distinguish terrorism and domestic violence as different phenomena. Terrorists, as we know them in the post-9/11 context, are motivated by a wish to advance the cause of Islam, or by a desire to end the involvement of Western forces in wars such as Afghanistan and Iraq.<sup>43</sup> These objectives are pursued through attacks on public

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<sup>39</sup> The concept of 'learned helplessness' was developed by Lenore Walker (1984). It has been the subject of extensive critique: see for example: Easteal (2001), Chapter 3.

<sup>40</sup> Saul (2006), pp 15-6; Chaliand and Blin (2007), pp 31-3. Schlenger (2002) found that probable PTSD was higher amongst individuals in New York than elsewhere in the United States in the one to two months following 9/11.

<sup>41</sup> Suicide bombings emerged in the 1980s and between 1980 and 2003 made up more than a quarter of all deaths related to international terrorism: Carr (2006), pp 259-60.

<sup>42</sup> In her study of data from the National Homicide Monitoring Program from 1989-1991, Easteal found that perpetrators committed suicide in 21.3 percent of intimate homicides: Easteal (1993), p 94. The most recent Australian research found that five perpetrators of intimate homicide (of 80 such homicides) committed suicide in 2007-08: Virueda and Payne (2010), p 31.

<sup>43</sup> Carr (2006), p 289.

targets such as the Twin Towers in New York, the Sari Nightclub in Bali, and public transport networks in London and Madrid.<sup>44</sup>

Domestic violence, on the other hand, is commonly conceptualised as something caused by the ordinary frustrations and problems of personal relationships, the antithesis of ideological crime. However, perpetrators of domestic violence, I will argue in Chapter 2.2 by building on the control-based definition of domestic violence, are also motivated by ideology. Although the law frequently constructs acts of physical violence in the domestic context as random acts committed in the heat of passion, domestic violence scholarship demonstrates that violence used in the intimate sphere is indeed tactical, strategic, and perpetrated with the aim of establishing and reinforcing men's control within the family context.<sup>45</sup> This differentiates both terrorism and domestic violence from other acts of violence, such as nightclub brawls, or violence inflicted for personal gain or retribution.<sup>46</sup>

In Section 2.3, I argue that the gendered aspect of domestic violence is overlooked within legal discourse and its construction of the public and the private. Domestic violence, despite its conceptualisation as something that takes place in the private sphere, also has a public dimension, in the sense that victims are predominantly members of a particular social group.<sup>47</sup> Modern terrorist acts tend to be executed upon the public at random,<sup>48</sup> and upon people whom the perpetrators have not met, while domestic violence is inflicted against a person with whom the offender is in an intimate relationship. However, just as the victims of 'random' terrorism are in some way symbolic of the terrorists' target, individual victims of domestic violence also represent the victimisation of women as a group defined by gender. The fact that as victims they are also

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<sup>44</sup> Such targets are chosen because of their identity as symbols of the society that is targeted for attack: Carr (2006), p 293.

<sup>45</sup> Pence and Paymar (1993), Chapter 1. See in the US context also Bograd (1988), p 14; Fischer et al (1992-3); Schneider (2000), Chapter 4.

<sup>46</sup> Jenny Morgan (2002), pp 23-24 notes that 'male against male' homicides in the context of sexual rivalry can also be characterised as 'jealousy/control' homicides, although I note that the other aspects of controlling behaviour present in the domestic violence context will not be present in these scenarios.

<sup>47</sup> I note that the same argument that is made here in relation to domestic violence could potentially be made in relation to rape: I am indebted to Dr Jonathan Crowe (UQ) for pointing this out to me.

<sup>48</sup> It is noted that this is a feature of modern terrorism, whereas previously terrorists favoured symbolic targets such as heads of state: Chaliand and Blin (2007), p 33.

known to their perpetrators does not change this gendered aspect of domestic violence. Women victimised by domestic violence are only victims *because they are women*. This is particularly illustrated by the fact that perpetrators of domestic violence frequently inflict violence upon victims in subsequent relationships.<sup>49</sup>

It has also been suggested that some of the aspects of terrorism, namely that it is premeditated, politically-motivated violence against non-combatants, are shared by a range of crimes beyond domestic violence, including rape, child abuse, sexual harassment, economic exploitation, homophobic violence, educational discrimination and religious manipulation.<sup>50</sup> To the extent that is correct, to observe that similarities with other crimes may exist does not detract from the strength of the argument I make here. However, while other crimes may also constitute a manifestation of certain belief structures and a sense of entitlement to use violence, domestic violence shares with terrorism an aspect of instrumentality. In other words, the ideological aspect of domestic violence, drawing on control-based definitions, is not only that perpetrators believe themselves entitled to use violence, but that they use violence strategically and on an ongoing basis to achieve their objectives, namely control and obedience within the intimate relationship.

Hate crimes and sexual violence may also be said to constitute instrumental uses of violence. Hate crimes are considered further in Chapter 3.1, although as discussed there, hate crimes based on gender are rarely recognised as such. Domestic violence provides such an interesting contrast with terrorism from a feminist viewpoint because gender is at the core of its ideological nature. Sexual assault, which might similarly be characterised as ideological and instrumental, would provide another interesting comparison, however the

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<sup>49</sup> For a discussion of cases involving domestic violence inflicted upon multiple victims see the cases cited at note 139, Chapter 2.3.

<sup>50</sup> Morgan (1989), p 36.

ongoing nature of domestic violence, which also includes sexual violence, makes it a better vehicle for comparison with terrorism.<sup>51</sup>

None of this is to suggest that terrorism and domestic violence are one and the same thing, or that they should be treated identically. However, as outlined above, there are a number of similarities between them that constitute a basis for questioning their differential treatment in political, social and legal discourse. In particular, in the chapters that follow, I will argue that the criteria of ideological motivation and public crime mark terrorism out as especially serious in the catalogue of crimes. If one accepts the premise outlined above, and developed further in Chapters 2.2 and 2.3, that these criteria in fact can also be applied to domestic violence, then this raises questions as to the differential treatment of the two types of crime under the law.

### *Previous Comparisons of Domestic Violence and Terrorism*

I do not purport to be breaking new ground in drawing a comparison between domestic violence and terrorism. Most recently, Catharine MacKinnon has argued that violence against women is 'women's September 11'.<sup>52</sup> According to MacKinnon, violence against women and terrorism share in common a horizontal legal architecture, large number of victims and masculinist ideology – both are 'dispersed forms of armed conflict'.<sup>53</sup> Both are premeditated rather than spontaneous, ideologically and politically rather than criminally motivated, and involve civilian victims and sub-national agents as perpetrators.

Isabel Marcus makes an argument similar to the point I develop in Chapter 2.2, that perpetrators of both domestic violence and terrorism utilise strategies of control and domination in order to achieve their goals.<sup>54</sup> Marcus argues that

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<sup>51</sup> In other words, because the behaviour of domestic violence perpetrators is usually repeated over time, it provides a better vehicle for a study of ideology than sexual assault, where frequently only a single act of a perpetrator will be identified within the legal system.

<sup>52</sup> MacKinnon (2006).

<sup>53</sup> MacKinnon (2006), p 12.

<sup>54</sup> Marcus (1994), pp 32-4.

domestic violence should be reconceptualised as ‘terrorism in the home’ for the purpose of applying an international human rights framework to the problem.<sup>55</sup>

Michael Johnson refers to ‘patriarchal terrorism’ in his study of domestic violence in addressing the argument that domestic violence is perpetrated by women against men as much as by men against women.<sup>56</sup> He distinguishes ‘common couple violence’ – more trivial forms of violence inflicted by both men and women in intimate settings, from ‘patriarchal terrorism’ – violence commonly resulting in serious injury, which is perpetrated predominantly by men against women. He defines patriarchal terrorism as:

... a product of patriarchal traditions of men’s right to control “their” women ... a form of terroristic control of wives by their husbands that involves the systematic use of not only violence, but economic subordination, threats, isolation, and other control tactics.<sup>57</sup>

In the case of at least MacKinnon and Marcus, the choice of ‘terrorism’ as a substitute term for domestic violence is strategic; both use it to question why international legal frameworks should not be utilised to address the problem of violence perpetrated against women. In a similar vein, I hope to challenge the common assumptions about domestic violence and terrorism that are generated by the words used to describe them.

However, unlike MacKinnon and Marcus, I do not investigate the potential of utilising international law to improve responses to domestic violence. My aim is to delve further into these two concepts, and to examine the ways in which legal discourse actively constructs terrorism as opposed to domestic violence in ways that provide a basis for their differential treatment in the criminal justice system. My attempt to reconstruct domestic violence as a form of terrorism is not merely strategic; it is an exercise in exploration of legal discourse and how it operates to perpetuate existing power relations and social inequalities.

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<sup>55</sup> Marcus (1994).

<sup>56</sup> Johnson (1995).

<sup>57</sup> Johnson (1995), p 284.

## *Justification*

The approach I take in this thesis is one that inevitably asks more questions than it answers. Such an approach creates a need to justify the asking of questions as a valuable process in and of itself. Adrian Howe talks about the strategy of ‘problematism’ – calling into question common assumptions and deconstructing them to reveal new possibilities.<sup>58</sup> I adopt Howe’s view that problematisation is an important strategy in terms of encouraging people to question common assumptions and taken-for-granted phenomena. Doing so has the potential to create new opportunities to re-examine perceptions about domestic violence and terrorism, and generate fresh ideas about how we should deal with them, both inside and outside the legal system.

In the sense that equality before the law is one of the tenets of Western legal systems, an analysis that calls into question perceived differences in criminality is also of importance. If two things are in fact alike, yet are treated differently, this calls into question whether their differential treatment is in fact conducive to the achievement of justice. If one class of perpetrators is the beneficiary of more lenient treatment according to law, this begs the question whether such leniency is at the expense of a particular class of victims.<sup>59</sup>

The problematisation approach is therefore at the forefront of my research. My thesis is not a normative one, in that I am not concerned to make recommendations about how domestic violence and terrorism should be properly dealt with within the criminal justice system. My goal in contributing to the vast body of research in relation to domestic violence is to open up new possibilities for examining both terrorism and domestic violence, particularly within the legal context.

In undertaking this examination, I consider four different aspects of the law’s disparate treatment of terrorism and domestic violence:

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<sup>58</sup> Howe (2008), pp 6-14, 27-32. This is a technique also applied by Robin Morgan (1989).

<sup>59</sup> Howe (2008).

- In Chapter 3.1, I consider the regulation of material that incites violence. While material perceived as inciting or encouraging terrorist activity is criminalised under Australian laws, material that can be said to encourage or incite violence against women is regulated by discourses of 'morality' that leave a significant amount of such material unregulated.
- Chapter 3.2 concerns police prevention of violence, and the different mechanisms available to individuals and government agencies to control the violence of those who are suspected of, but not charged with, planning acts of violence.
- Sentencing for those convicted of violent offences is the subject of Chapter 3.3. Although to date there has only been a small number of prosecutions for terrorism offences in Australia, they provide an interesting source of analysis and comparison with domestic homicide cases, in terms of both patterns of sentencing and the construction of violence within legal judgments.
- Finally, in Chapter 3.4, legal responses to those who defend themselves and others against violence are considered, with a particular focus on the treatment of women who act in self-defence against their abusers.

In these four chapters that constitute Section 3, I aim to demonstrate that the differential construction of terrorism and domestic violence is not of mere rhetorical significance; it has real and practical implications for how such violence is dealt with at law. In each case, I also explore how the 'way things are' is a product of, and also reinforces, masculinist interests. In exploring a possible reconstruction of domestic violence as terrorism, I also hope to open up new ways of conceptualising and treating domestic violence, which I examine in the conclusion in Chapter 4.



## CHAPTER 1.2      THEORY AND METHOD

In Chapter 1.1, I outlined the purpose and rationale for my thesis. In this chapter, I outline the theoretical and methodological framework of my research.

My method falls into three main categories: literature review, legislation and case identification and selection, and discourse analysis. I examine each of these in turn.

### *Literature Review*

#### *Empirical Research and Background Reading*

Literature review has constituted an important part of my research as, in conducting the discursive analysis contained in Sections 2 and 3, I needed to draw upon critiques and research in a number of areas. Most importantly, my analysis needed to be informed by the large body of research in relation to violence against women from Australia and also from the United States and United Kingdom.<sup>1</sup> I also reviewed a vast amount of literature relating to terrorism, predominantly from these three different jurisdictions, but from other international writers where relevant or pertinent.

The literature I reviewed in relation to domestic violence fell into the following main categories:

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<sup>1</sup> I have focused upon these countries as they share a legal tradition with Australia, however I have also referred to empirical research from other countries where relevant. In particular, I have drawn upon some case law from New Zealand.

1. Official documents, often in the form of government reports, documenting the occurrence and extent of domestic violence in different jurisdictions, as well as government approaches to addressing violence;
2. Empirical research into domestic violence, including studies of perpetrator behaviour and victim characteristics, as well as investigation of effectiveness of different perpetrator programs and treatments;
3. Feminist literature on domestic violence, generally providing an overview of feminist constructions of violence against women and the failures of the state in addressing the problem;
4. Psychological and sociological literature on domestic violence, to provide background understanding to different approaches to addressing domestic violence, and to provide a contrast with feminist or 'control-based' approaches.

In relation to the first of these categories, it was necessary to locate and review a large body of government reports that have been commissioned in Australia in relation to domestic violence. As domestic violence is generally addressed at a state/territory rather than a national level, this necessitated examining reports available in a range of Australian jurisdictions.

In relation to terrorism, literature reviewed can be categorised as follows:

1. Australian, United Kingdom and United States government documentation in relation to terrorism, particularly background or explanatory material to counter-terrorism legislation;
2. Psychological and political works on terrorism, in particular outlining the characteristics, history and evolution of terrorism;
3. Empirical research in relation to terrorism, in particular studies involving perpetrators and their characteristics and beliefs, and the impact of terrorism on the general public.

In relation to each of the parts of Section 3, I reviewed sources associated with specific aspects of the law's engagement with domestic violence and terrorism, as follows:

- Chapter 3.1 – literature in relation to incitement of violence against women, particularly radical feminist texts on pornography as a form of violence against women and Dworkin and MacKinnon's *Anti-Pornography Ordinance*, and pro-pornography and postmodern feminist perspectives on pornography. I also reviewed a range of legal and academic research in relation to hate speech and hate crimes;
- Chapter 3.2 – research and critique on the engagement of police with domestic violence victims and perpetrators, primarily in Australia but also some United Kingdom and United States research in this area, as well as scholarly articles outlining and critiquing aspects of terrorism control orders legislation;
- Chapter 3.3 – general critiques of criminal law and sentencing practices, and in particular mainstream and scholarly writings on the operation of the law of provocation in domestic homicides, and analysis of sentencing decisions in domestic homicide cases;
- Chapter 3.4 – the large body of research conducted in relation to women who kill in response to violence against them, critiques of Australian self-defence law, critiques of women's treatment within the criminal justice system, Lenore Walker's seminal work on 'battered woman syndrome' and the critiques that it has generated, history of police shootings in Australia, and documentation regarding the shootings in the United States and United Kingdom of suspected terrorists Rigoberto Alpizar and Jean-Charles de Menezes.

### *Theoretical Perspectives*

In writing this thesis, I have been informed by a number of different theoretical perspectives, which I outline here. In reading and applying theoretical

perspectives, I have been mindful of one of the problems of theory that Anne Bottomley has described.<sup>2</sup> This problem is that in their quest to ‘do theory’, feminists will adhere to traditional modes of practising theory and impose it from outside and above the thing that they are studying. Rather than simply reading or analysing theory, Bottomley suggests, feminists should explore theory. The strategy Bottomley describes herself as using is to take those aspects of theory she finds to be useful and implement those in her work while leaving behind other aspects, rather than ‘adopting’ a theory wholesale and applying it in a totalising way.

I have tried to adopt Bottomley’s approach in my research. Doing so also hopefully avoids the problems associated with what Carol Smart refers to as ‘grand master theory’, by which she refers to theory that attempts to explain all means of oppression by reference to one mode of explanation. In doing so, I hope to avoid the problem she identifies, of promoting a classless, white feminist perspective on the law.<sup>3</sup>

## Feminist Perspectives on Foucault

My thesis in large part focuses on the ways in which violence is constructed in legal discourse. Theories of discourse, based on postmodern feminist interpretations of Michel Foucault’s work, are therefore a key theoretical underpinning of my research.<sup>4</sup> While feminist engagement with Foucault is by no means unproblematic,<sup>5</sup> his critiques of power and its relationship with discourse have provided fertile ground for postmodern feminist critiques.

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<sup>2</sup> Bottomley (2000).

<sup>3</sup> Smart (1995), Chapter 10.

<sup>4</sup> Though note that Foucault himself rejected the label ‘postmodern’ in relation to his work: McNay (1992), p 130.

<sup>5</sup> For some of the problems of feminist engagement with Foucault, see McLaren (2002), Chapter 1.

By discourse, Foucault refers not only to language, but to social rules and practices that create meaning. Hall writes that discourse means:<sup>6</sup>

... a group of statements which provide a language for talking about – i.e. a way of representing – a particular kind of knowledge about a topic. When statements about a topic are made within a particular discourse, the discourse makes it possible to construct the topic in a certain way. It also limits the other ways in which the topic can be constructed. ... Discourse is about the production of knowledge through language. ... Since all social practices entail *meaning*, all practices have a discursive aspect. So discourse enters into and influences all social practices.

Postmodernism poses a significant dilemma for feminist theory. A central tenet of postmodernism is that it is not possible to 'know' something independently of the way it is constructed, and the position of the knower. All knowledge is therefore subject to challenge. However, feminism is rooted in the desire for change and improvement in the position of women, therefore the concept of 'woman' is central to feminist theory.<sup>7</sup> If it is not possible to 'objectively' and reliably describe women's position in general terms, this begs the question how it is possible to lobby for changes that would improve that position.<sup>8</sup>

Postmodern critique therefore carries the risk of fracturing the feminist movement to the extent that it is not practically possible to formulate any strategies for change. It has certainly contributed to divisions between those who see the perspectives of 'women' and their experiences as integral to the feminist cause, and those who wish to explore the possibilities that postmodernism opens up for challenging essentialism and creating new meanings for categories such as 'woman'.

However, concerns about postmodernism's destabilising capacities do not diminish the value of discourse analysis as a tool for disturbing and displacing common assumptions and understandings about violence within law and the

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<sup>6</sup> Hall (1992), p 291.

<sup>7</sup> Davies (1997), pp 45-6.

<sup>8</sup> Hennessy suggests that the crisis in knowledge and the category of 'woman' in feminist discourse may be *the* critical issue for Western feminism in the 1990s and beyond: Hennessy (1993), p xi.

community. Although it remains important to acknowledge women's real and lived experiences,<sup>9</sup> adopting discourse analysis as a tool means recognising that all things are constructed through discourse, and through deconstructing discursive processes, new possibilities for rethinking and reconstructing things can be imagined.

Foucault, and those feminists who have engaged with his work, focus upon discourse and the ways in which it constructs social reality.<sup>10</sup> Foucault described his goal as:

... wearing away certain self-evidences and commonplaces about madness, normality, illness, crime and punishment; to bring it about together with many others, that certain phrases can no longer be spoken about so lightly, certain acts no longer, or at least no longer so unhesitatingly performed, to contribute to changing certain things in people's ways of perceiving and doing things, to participate in this difficult displacement of forms and sensibility and thresholds of tolerance.<sup>11</sup>

Following in these footsteps, Foucauldian feminists seek to challenge the meaning of certain commonly-accepted terms, such as 'woman', 'feminine' and 'masculinity'. A concept with which I am particularly concerned in this thesis is 'ideology', and in the same vein as Foucault, I seek to bring about a change in thinking such that the distinction drawn in legal and social discourse between ideological and non-ideological motivation ceases to be so clearly drawn, and new possibilities for the meaning of ideology are opened up.

Drawing on Foucault's concept of genealogies, some feminists restrict these analyses to the local and specific, while others attempt to link discursive analysis to broader social and structural phenomena.<sup>12</sup> Foucault's work on the relationship between discourse and power is also important;<sup>13</sup> while Foucault

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<sup>9</sup> As Mary Hawkesworth notes: 'Rape, domestic violence and sexual harassment ... are not fictions ... The victim's account of these experiences is not simply an arbitrary imposition of a purely fictive meaning on an otherwise meaningless reality': Hawkesworth (1989), p 555.

<sup>10</sup> Smith (1990), especially Chapters 3 and 4; McLaren (2002), pp 7-8.

<sup>11</sup> Foucault (1981).

<sup>12</sup> For example McLaren (2002). Thornton notes that the valid critiques of radical feminism should not mean that a focus on the 'macro' and the 'political' is abandoned: Thornton (2004).

<sup>13</sup> McNay (1992), pp 24-5.

himself saw power as a 'relationship' and not belonging to any particular person or group,<sup>14</sup> those who have used his work as a springboard have developed the idea of the discourse/power relationship to incorporate patriarchal and other influences on discourse.<sup>15</sup> In expanding the scope of analysis to include not only written and spoken language but other rules and practices that generate meaning, Foucault provided a rich basis for combining the examination of discursive practices with structures and relationships of power.

Foucault's analysis of the relationship between power and discourse is important in the context of my research. Although I am not focusing on the question of *why* particular constructions of terrorism and domestic violence have emerged, I am interested in examining *how* different phenomena are constructed, and how that in turn reflects existing power relationships within law and society. In this way, my research reflects the second post-Foucauldian approach described above, of attempting to relate discourse to broader social and structural phenomena.

Foucault also discussed the concept of 'games of truth' – a process of subjugated discourses creating challenges for dominant discourse, and creating potential for new meanings.<sup>16</sup> This is important in the context of my research, as it acknowledges that, despite the power relations underlying discourse, these are not fixed and immovable, and possibilities for change and resistance do exist.

## Case Construction Theory

A theoretical domain that links usefully with postmodern feminist theory is that of 'case construction' formulated by the so-called 'Warwick school'.<sup>17</sup> The theory of case construction is not concerned with discourse analysis but with the practical ways in which investigators, prosecutors and other players in the

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<sup>14</sup> McLaren (2002), Chapter 2.

<sup>15</sup> Smith (1990), Chapters 3 and 4; Hennessy (1993).

<sup>16</sup> McNay (1992), pp 135-8.

<sup>17</sup> McConville et al (1991).

criminal justice system operate within the parameters set by the law. In doing so, those players actively participate in the construction of cases by asking questions, and selecting and discarding evidence, within the confines of their understandings of the law. Case construction theory is a broadly structural approach which also takes into consideration micro-approaches to the way cases are developed within the criminal justice system.

The work of the Warwick school interacts usefully with techniques of discourse analysis, because it demonstrates how the practical work involved in the investigation and prosecution of cases before courts follows from, and reinforces, the work done by legal discourse. Legislation and case law construct the meaning of legal concepts, and these meanings are perpetuated and given life through the work of the criminal justice agencies which operate within the parameters of legal discourse.

In examining the ways in which terrorism and domestic violence are constructed within legal discourse, I am therefore also concerned with the ways in which this discursive process influences the process of case construction. In other words, the way these concepts are defined in law determines what evidence is brought before the court and the way in which cases are presented. In turn, I am interested to examine how the process of case construction also reinforces and perpetuates the discursive construction of domestic violence and terrorism, so that the two processes work in tandem to construct the different types of violence.

## Theories of the Public and Private

As explored in more detail in Chapter 2.3, the differentiation between public and private is a key aspect of the way in which terrorism and domestic violence are constructed in legal discourse. Traditionally, the law has treated domestic violence as a 'private' issue and one best addressed within the confines of the



home.<sup>18</sup> In the case of *State v Oliver*,<sup>19</sup> a North Carolina court stated, 'If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive'.<sup>20</sup> This line of thinking historically resulted in an absence of legal regulation of domestic violence or, where regulation existed, a reluctance to enforce the law.<sup>21</sup>

By contrast, the targeting of the government or sections of the public for violent attacks is a key aspect of legal definitions of terrorism in Western and other legal systems,<sup>22</sup> and in that sense it is by definition a 'public' crime.

The public/private dichotomy, and its historical and continuing role in privileging masculinist interests, has also constituted a rich source of critique for feminist scholars. In my research, therefore, it is inevitable that critiques of the 'public' and 'private' will be of importance.

In its simplest conception, the public sphere incorporates those aspects of the world in which people engage in public life, including the world of work, politics and the economy.<sup>23</sup> The private sphere, on the other hand, denotes home and family – aspects of life normally lived away from the public gaze.

Despite the appeal of this simple conception of the public/private dichotomy, the boundaries between the two spheres are permeable and constantly in a state of flux.<sup>24</sup> The meanings of the terms 'public' and 'private' are always changing, contested and subject to context.<sup>25</sup> Susan Gal describes the spheres as 'co-constitutive cultural categories' and also 'indexical signs that are always relative, dependent for part of their referential meaning on the interactional

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<sup>18</sup> Siegel (1995), noting that the doctrine of 'marital privacy' took over from the concept of 'marital chastisement' as a justification for law's non-intervention in familial violence.

<sup>19</sup> 70 NC 60, 61-2 (1874).

<sup>20</sup> Cited in Brown (1987), p 167.

<sup>21</sup> Smart (1995), 156-7; Nicolson and Bibbings (2000), pp 246-7.

<sup>22</sup> Hancock (2002). Hogg notes that within the context of political crime, the state, once associated with the sovereign or monarch, has come to be increasingly associated with the civilian population: Hogg (2007), p 87.

<sup>23</sup> Thornton notes that although both the polity and the market have traditionally excluded women, including both under the umbrella of the 'public sphere' is overly simplistic: Thornton (1995a), pp 6-7.

<sup>24</sup> Schneider (1994), p 38. See also Lacey (1993) and the collection of essays in Scott and Keates (2004).

<sup>25</sup> For example, Ben and Gaus discuss how publicness and privateness can each be understood in three-dimensional contexts of access, agency and interest and a particular object may exhibit aspects of both: Benn and Gaus (1983).

context in which they are used.’<sup>26</sup> Even when conceived purely in terms of physical space, an example utilised by Gal illustrates this point, using the terminology ‘fractal distinctions’ to describe the way in which a single pattern (in this case the public and the private) recurs inside itself.<sup>27</sup>

A familiar, everyday example of how this works is the common conceptualization of American bourgeois domestic space. At a first look, the privacy of the house itself contrasts with the public character of the street around it. If we focus, however, on the inside of the house, then the living room becomes the public, that is, the public part of a domestic private space. Thus the public/private distinction is reapplied and now divides into public and private what was, from another perspective, entirely “private” space. But even the relatively public living room can be recalibrated – using this same distinction – by momentary gestures or utterances, voicings that are iconic of privacy and thus create less institutionalized and more spontaneous spatial divisions during interaction (Goffman). The whispered aside, the confidential turn of bodies toward each other at a company party, come to mind as familiar examples of privacy fleetingly created.

From this example, it is apparent that any one thing may be ‘private’ in one sense and simultaneously ‘public’ in another; an object or space, institution or practice can be viewed from multiple perspectives and conceptualised in varied ways in terms of its publicness or privateness. This recognition of malleability is significant, because it follows from this that ‘public’ and ‘private’, like other phenomena, do not pre-exist the discourse that constructs them. This also means that the public/private dichotomy can be used as ‘an ideological device’ with the state invoking the notion of ‘public’ in relation to those areas of social life where it wishes to intervene.<sup>28</sup>

A number of feminist critiques have focused on the difference between the spheres in terms of legal regulation.<sup>29</sup> It has been suggested that while the public sphere is characterised by legal regulation, the private sphere remains,

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<sup>26</sup> Gal (2004), p 264.

<sup>27</sup> Gal (2004), p 265, drawing upon Gal and Irvine (1995) and Irvine and Gal (2000).

<sup>28</sup> Thornton (1995a), p 11.

<sup>29</sup> For example, in the context of sex discrimination see Thornton (2008). In relation to privatisation of family disputes see Astor (1995).

with the support and encouragement of liberal theorists, a realm largely free of regulation – a bastion of privacy and unchecked abuse.<sup>30</sup> Thornton argues that keeping the private sphere immune from regulation is a ‘central project of the masculinist state’ as the private sphere therefore remains a site where male citizens are largely free from equality requirements.<sup>31</sup> Because women (in comparison to men) spend a significant proportion of their lives in the private sphere, the lack of legal regulation in this area equates to a lack of legal protection for women.

Others have pointed out that the separation between public and private spheres cannot be described simply in terms of regulation or absence thereof. Regulation of the family and the private sphere does occur, for example in the form of legislation dealing with marriage, divorce, custody, taxation, social security and abortion, all of which make their impact on the family felt.<sup>32</sup> Equally, an absence of regulation can constitute regulation in itself (albeit the means and methods of regulation are left to somebody else, who may be a private actor).<sup>33</sup> Administrative and judicial decisions are also ‘public’ in the sense that they take place in the open and using formal, state-sanctioned procedures and protocols. Where a decision is made by a police officer not to investigate a matter, by a prosecutor not to prosecute, or by a judge to dismiss a case, these instances of ‘non-regulation’ take place in the public sphere, although they may have significant private consequences.<sup>34</sup>

The concept of ‘public’ also has significance within the context of what is said to constitute the ‘public interest’. This can mean different things in different contexts: it may constitute the interests of the general public in contradistinction to the privateness of the interests of specified individuals, or it may be

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<sup>30</sup> MacKinnon (1983), pp 654-8; O’Donovan (1985), especially pp 8-15; Charlesworth and Chinkin (1994), p 14.

<sup>31</sup> Thornton (2006), p 158.

<sup>32</sup> Naffine (1990), pp 69-71; Lacey (1993), pp 95-6; Barnett (1998), pp 128-34; Graycar and Morgan (2002), pp 12-15.

<sup>33</sup> Olsen notes therefore that it is pointless to talk about intervention and non-intervention: Olsen (1985), pp 842-3.

<sup>34</sup> Schneider (1994), pp 44-45.

construed as the interest of the 'collective whole' as against the interests of particular social groups.<sup>35</sup>

This in turn leads to the question of what or who decides what is in the public interest. Feminist legal theorists have pointed to the ability to delineate what is public and what is private as a form of power.<sup>36</sup> It has been suggested that the public interest in any society is determined by the patriarchal state, whether that be defined as a group of white, middle-class, heterosexual men who hold the vast bulk of power in our society, or more ethereally as an entity in and of itself.<sup>37</sup> The state categorises what it is in the public interest to treat as public and what is not.<sup>38</sup> Judges play an important role in determining what constitutes the 'public interest', for example in the context of determining the scope of criminal law defences to particular offences of violence. As Smart has pointed out, the legal system does not simply decide what is in the 'public interest'; it actively contributes to the production of consensus around issues of law and order.<sup>39</sup>

Margaret Thornton notes that there is a hierarchy between the private and public spheres, in which the public is elevated above the private.<sup>40</sup> The public sphere is associated with those characteristics normally classified as 'masculine' – rationality, logic, culture – while the private sphere is typically associated with the 'feminine' – emotion, empathy and nature.<sup>41</sup> The public sphere has historically been regarded as a sphere of universal rationality, while matters of the specific and particular are relegated to the private sphere. For Rousseau and Hegel, for example, the civic public was a place where people's particular desires were placed second to participation in the general will of the community.<sup>42</sup> Because women have traditionally been associated with nature and thus with the human body, and the body is a site of the specific rather than

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<sup>35</sup> Benn and Gaus (1983).

<sup>36</sup> Lacey (1993), p 98; Landes (1998), p 3.

<sup>37</sup> The distinction is made by Carol Smart (1995), pp 140-1.

<sup>38</sup> Schneider (1994), p 38.

<sup>39</sup> Smart (1995), p 144.

<sup>40</sup> Thornton (1995a), pp 11-6.

<sup>41</sup> Thornton (1986). See also Baker (1999), p 7.

<sup>42</sup> Young (1998), pp 427-433.

the universal, this has been another reason for women's traditional exclusion from the public sphere.<sup>43</sup> As the male-gendered subject takes his place within the public sphere as a 'universal', issues such as childcare and domestic violence, associated with women, are relegated to the specifically-gendered private sphere.<sup>44</sup>

Just as the masculine has no meaning without the 'other' of the feminine to reflect off,<sup>45</sup> the public sphere is given meaning by the private sphere.<sup>46</sup> It is the malleability of the public/private concept, and its inter-referential nature as referred to by Thornton, that I am interested in for the purposes of my research.

As illustrated by some of the critiques referred to above, it is overly simplistic to state that the private sphere is demarcated by an absence of regulation. In the sense of physical space, domestic violence occurs largely in 'private' but is regulated both by criminal law and also civil law in the capacity of parties to a relationship to seek protection orders, which may impose significant restraints upon the behaviour of the violent perpetrator. However, the argument that I explore in Chapter 2.3, and further in Section 3, is that domestic violence is regulated as a *private harm* in contradistinction to the public harm that terrorism is constructed as. Regulation and criminalisation of terrorism is constructed as serving the public interest in a way that regulation and criminalisation of domestic violence is not.

This construction of domestic violence as a private harm in comparison to the public harm of terrorism has consequences in terms of the seriousness with which domestic violence is regarded, and the legal consequences that flow for perpetrators and victims, which I explore in Chapters 3.3 and 3.4.

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<sup>43</sup> Davidoff (1998), pp 168-171; Purdom (2000), p 215.

<sup>44</sup> Carver (1996).

<sup>45</sup> Carver (1996).

<sup>46</sup> Thornton (1996), pp 11-16.

## Carol Smart

In undertaking my analysis, I have drawn substantially upon the work of Carol Smart. Although Smart does not refer to herself as a 'materialist feminist', her work resonates with Hennessy's definition of materialist feminism as 'a way of reading that need not shrink from naming social totalities in order to address the complex ways in which subjectivities are differentiated'.<sup>47</sup> While others have explored the ways in which legal processes exclude or distort the experiences of women, it is Smart who has particularly drawn attention to the power of the law to construct the 'truth' of things.<sup>48</sup>

Smart employs the concept of 'phallogentrism' as a means of explaining the ways in which law continues to serve patriarchal interests, notwithstanding the absence of an identifiable body of decision-makers or power-brokers guiding its development.<sup>49</sup> Within this paradigm, law does not *create* patriarchal relations but reproduces the material and ideological conditions under which they survive.<sup>50</sup> Smart writes:

Precisely because law is powerful and is, arguably, able to continue to extend its influence, it cannot go unchallenged. However, it is law's power to define and disqualify which should become the focus of feminist strategy rather than law reform as such. It is in its ability to redefine the truth of events that feminism offers political gains. Hence feminism can (re)define harmless flirtation into sexual harassment, misplaced paternal affection into child sexual abuse, enthusiastic seduction into rape, foetal rights into enforced reproduction, and so on. Moreover the legal forum provides an excellent place to engage this process of redefinition. At the point at which law asserts its definition, feminism can assert its alternative.<sup>51</sup>

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<sup>47</sup> Hennessy (1993), p xiii. It is noted that Smart's more recent work has focused on family life and personal relationships: see for example Smart (2001) and Smart (2007).

<sup>48</sup> Graycar and Morgan (1998), pp 190-1.

<sup>49</sup> Smart (1995), pp 78-83, 140-1.

<sup>50</sup> Smart (1984), pp 18-23.

<sup>51</sup> Smart (1989), pp 164-5.

Thus, Smart's work resonates with my research project not only for its focus upon law's power to define the truth of events, but also in its focus on the ways in which legal discourse reflects masculinist influences within the law. In the same way, my project aims to explore the power relationships inherent in differential constructions of violence.

## Radical Feminism

The so-called 'radical feminism' of the 1970s and 1980s, which was particularly influential in the United States, has largely fallen out of favour in the postmodern era. Its structural approaches, focused on gender as *the* primary means of explaining the oppression of women, are largely inconsistent with the vast array of contemporary feminist analyses, which have roundly criticised the essentialist and totalising nature of radical feminism.<sup>52</sup>

Notwithstanding these critiques, the work of radical feminists such as Catharine MacKinnon, Adrienne Rich, Andrea Dworkin and Mary Daly continues to have significant implications within the Foucauldian project of problematising commonly accepted concepts and assumptions.<sup>53</sup> In many ways, postmodern approaches, with their focus on the importance of discourse, intersect usefully with radical feminist critiques of language, and their explorations into using language in ways that disrupt dominant discourse.

For example, Mary Daly in her ground-breaking book *Gyn/Ecology* sought to reclaim words associated with derogatory depictions of women, such as 'Crone', 'Spinster', 'Harp' and 'Fury' and recreate them in ways that evoke positive female traits – a practice she describes as 'pirating'.<sup>54</sup> Indeed, the very

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<sup>52</sup> For critiques of the essentialising nature of feminism see in particular in the Australian context the work of Huggins (1994) and Moreton-Robinson (2000), and in the American context the work of Angela Harris (1990); Barnett (1998), pp 189-94.

<sup>53</sup> MacKinnon (1987); MacKinnon (1989); MacKinnon and Dworkin (1997); Rich (1980); Dworkin (1981); Dworkin and MacKinnon (1988); Daly (1990).

<sup>54</sup> Daly (1990), pp xx-xxiv.

title of her book represents her chosen strategy of using language and particularly naming in a transformative way.

Daly also engaged in a critique of 'writing that erases itself' – a process of describing atrocities against women in such a way that they gloss over the horrific acts they describe, creating a form of 'partially-suppressed truth'.<sup>55</sup> This 'glossing over' of harm strikes a useful parallel with my focus on the privatisation of domestic violence – effectively downgrading it to a string of isolated instances of harm against individual women. Adrienne Rich's work, also, is concerned with investigating alternative meanings for words, however she is more focused on the problem of 'language in use' and on the particular context in which language is used.<sup>56</sup>

Similarly, aspects of MacKinnon's work have centred on reworking and redefining legal terms for harms against women. She argues for the redefinition of 'rape', for example, on the basis of women's experiences of violation.<sup>57</sup> She also argues for use of the term 'violence against women' as an umbrella term for physical abuse, rape, sexual harassment and pornography, to counter the law's tendency to separately define and fragment them as harms.<sup>58</sup>

Meaghan Morris distinguishes between radical feminism as 'politics' that works on the basis of what women have in common, and as 'theory' of the determining role played by sex in the oppression of women.<sup>59</sup> It is the former aspect of radical feminism – the focus on the use of language and the creative possibilities for reworking and reconstructing meaning – that I am interested to exploit in relation to my research, rather than the totalising or essentialising aspects of its structural approaches to women's oppression, which have been substantively critiqued by postmodern feminists.

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<sup>55</sup> Daly (1990), p 120.

<sup>56</sup> Hedley (1992).

<sup>57</sup> MacKinnon (1987), pp 82-4.

<sup>58</sup> MacKinnon (1987), pp 82-4.

<sup>59</sup> Morris (1988), p 46.



## Combining the Theoretical Perspectives

Although I do at points in this thesis canvass possibilities for legislative change, I adopt the second-wave feminist scepticism of the potential for law reform, given the role played by law in the legitimation and perpetuation of women's oppression.<sup>60</sup> What is offered here is a broader ideological framework for understanding how violence against women is constructed and treated in society and in the legal system.

Legal discourse, like other discourses, does not passively represent phenomena that exist independently of that discourse. Discourse actively constructs the phenomena it seeks to describe. In doing so, it both reflects and perpetuates relations of power that exist within society. It is important in examining these power relations to focus on particular historical contexts rather than attempt broad over-arching structural explanations, as power relations are constantly changing and are not static over time. However, this does not mean that it is not possible to link discursive phenomena to structural forces in a particular context.

The active work that legal discourse does has practical implications, in that players within the criminal justice system work within the constraints of that discourse. Investigators, prosecutors, defence lawyers and judges all work within the framework created by legal discourse so that facts and evidence are collected and presented in a way that makes sense within the parameters of discourse. This works to perpetuate the construction of violence in different ways. The concepts of 'public' and 'private', which have been the subject of so much feminist critique, play an integral role in the way domestic violence and terrorism are constructed within legal discourse.

So-called 'radical feminism', as a structural critique of society with gender as the primary tool of analysis, is at odds in many ways with post-modern feminist analysis. However, some of the radical feminist critique of language intersects

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<sup>60</sup> Smart (1989), Chapter 1; Thornton (2003), p 6.

with the possibilities that discourse analysis presents for rethinking and disrupting accepted ways of thinking and speaking about violence. For example, Margaret Davies has referred to the argument that women are constructed 'according to masculine images, because men have the power to define reality'<sup>61</sup> as a central tenet of both MacKinnon's radical feminism and of post-modernist critiques of femininity.

### *Discourse Analysis*

The theory of discourse, as outlined above, is largely associated with the work of Foucault and those inspired by him, however discourse analysis is itself a method of analysis. As a method, it takes different forms, for example it may involve a quantitative analysis of how many times a particular word appears in a text. It may also involve a study of the particular structural or grammatical patterning of a text or other media. Smart has also pointed out the importance of analysing 'talk' including the significance of non-verbal communication, feelings and emotions.<sup>62</sup>

I draw upon some of these techniques in the analyses I conduct in Section 3. For example, in Chapter 3.3, in which I compare judicial decision-making in sentencing for terrorism and domestic homicide, I consider the extent to which written reasons for sentence contain references to particular sentencing criteria such as 'prospects for rehabilitation' and 'risks of reoffending'.

However, the method of discourse analysis I predominantly utilise is best represented by the work of Adrian Howe. In analysing the various cases selected through the methods described above, I have sought to 'problematise' the way that particular forms of violence are constructed in legal discourse.<sup>63</sup> This is performed by examining the texts for information or 'facts' that are used to justify particular constructions within the texts. It also involves identifying

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<sup>61</sup> Davies (1994), p 218. See also the discussion of Davies' work in Graycar and Morgan (1998), p 192.

<sup>62</sup> Smart (2009).

<sup>63</sup> Howe (2008), pp 6-14, 27-32.

other 'facts' within the texts that point to possible alternative reconstructions of the truth.

One of the limitations of such an analysis is that it relies upon the construction given to particular information within the text that is the focus of study – these facts are therefore subject to the same discursive practices that are being critiqued. However, adopting this approach reflects a recognition that (a) it is not possible to 'objectively' discern facts outside of the discourse that constructs them and (b) within the kind of analysis envisaged here, the practical impossibility of attempting to obtain evidence external to the texts themselves is obvious.

Utilising facts that are embedded in the texts themselves also has the advantage of reinforcing that alternative interpretations are available to decision-makers without necessarily having recourse to sources outside those traditionally available to a court of law.

Howe also utilises Hillary Allen's concept of 'discursive manoeuvres' in examining criminological texts to deconstruct the 'truth' presented therein.<sup>64</sup> She uses this technique to reveal practices of victim-blaming and also 'strategies of recuperation' i.e. making resistant discourses harmless through labelling them as 'hysteria' or something similar. In a similar vein, I am concerned to deconstruct the 'discursive manoeuvres' through which victim-blaming occurs, particularly in the context of Chapter 3.3 (examining sentencing processes in domestic homicides and terrorism cases). Howe's 'strategies of recuperation' are of relevance particularly in Chapter 3.4, where I examine the law's construction of battered women who kill as suffering from mental illness, therefore providing merciful outcomes while simultaneously defusing the potential for resistance that women's self-defence violence poses.

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<sup>64</sup> Howe (2008), pp 54-6 referring to Allen (1987b).

## *Legislation and case identification and selection*

My analysis in Chapter 3 involves the examination and analysis of a range of primary source material, primarily legislation and legal decisions. The sources for my analysis of the differential treatment of domestic violence and terrorism were selected as follows.

### *Chapter 3.1*

Chapter 3.1 considers the laws applicable to incitement of violence against women and the incitement of violence in the terrorist context. This involved a search of the Commonwealth Criminal Code<sup>65</sup> and Crimes Act<sup>66</sup> for laws potentially applicable to the incitement of violence in a terrorist context, as well as a review of all terrorism protection order and sentencing cases in Australia and relevant cases in the United Kingdom to date for convictions in relation to incitement of violence.

I also conducted a review of the criminal provisions of all states and territories, to identify laws potentially applicable to the incitement of violence against women. Each state and territory has laws against vilification based on certain characteristics of the victim, and I reviewed each of these laws, as well as laws (where applicable) creating particular offences or creating an aggravating factor where a crime was motivated by hatred based on particular characteristics. I created a table of these various provisions, which is appended as Annexure A.

I also examined the Australian Classification Review Board website, and associated resources, including legislation and Guidelines for the Classification of particular media, and classification decisions made by the Australian Classification Board, in order to compare the rules for classification of materials

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<sup>65</sup> *Criminal Code Act 1995* (Cth).

<sup>66</sup> *Crimes Act 1914* (Cth).

inciting terrorist violence with the rules for classifying material depicting or encouraging violence against women. Corresponding legislation in all states and territories was searched for the purpose of determining whether possession of offending material, or only publication or sale of such material, was prohibited.

## *Chapter 3.2*

Chapter 3.2 compares the civil legal mechanisms available for controlling violence with or without a criminal conviction. This is constituted by a scheme of 'protection orders' (known by various names) available in all Australian state and territory jurisdictions, and a federal scheme of 'control orders' available in relation to those considered to constitute a risk of planning terrorist acts. I reviewed the most current legislation in each Australian jurisdiction relating to protection orders, and summarised the relevant provisions in a table that is appended at Annexure B. I also reviewed the provisions of the Criminal Code<sup>67</sup> relating to the making of terrorism control orders.

To examine the way in which these laws have been applied by courts, I reviewed the Attorney-General's website, which (by legislative mandate) records all control orders made in Australia.<sup>68</sup> I considered the only two cases to date in relation to control orders, the Federal Magistrate's Court decision in relation to a control order for David Hicks, and Jack Thomas's constitutional challenge to the control order scheme.<sup>69</sup>

In relation to protection orders, I conducted a search on the legal database 'Casebase' for Australian and New Zealand cases using the search terms ['protection orders' and domestic], which yielded 39 results, of which 17 were

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<sup>67</sup> *Criminal Code Act 1995* (Cth).

<sup>68</sup> Details of control orders made are available in annual reports issued by the Attorney General's department. See AG's Department (2008); AG's Department (2009). The report for 2009 was the most recent available on the Attorney-General's website as at 25 September 2011: see <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Nationalsecurity\\_Controlordersandpreventivedetentionorders?open&query=control orders](http://www.ag.gov.au/www/agd/agd.nsf/Page/Nationalsecurity_Controlordersandpreventivedetentionorders?open&query=control%20orders)> (viewed 25 Sept 2011).

<sup>69</sup> *Jabbour v Hicks* (2007) 183 A Crim R 297; *Thomas v Mowbray* (2007) 233 CLR 307.

relevant.<sup>70</sup> I also searched for ['domestic violence order' and breach], which yielded 51 hits, of which 31 were relevant (not including cases that had also appeared in the results list from the previous search).<sup>71</sup> I restricted my search to cases from 2000 onwards. Where additional cases falling within the relevant time period that had not appeared in the previously-mentioned search results were referred to within these cases, those were also reviewed.

In total, this resulted in 55 cases concerning breaches of protection orders in Australian and New Zealand jurisdictions since 2000. I analysed and summarised each of these cases: a list of them is included at Annexure C.

### *Chapter 3.3*

In Chapter 3.3, I analyse and compare the reasons for sentence in domestic homicide (male offenders/female victims) and terrorism cases. I chose to focus upon domestic homicides as opposed to other forms of domestic violence sentencing (such as assault, causing grievous bodily harm, etc) because, as the ultimate manifestation of 'harm', the domestic homicide cases provide a useful comparison with the terrorism sentencing decisions. Particularly given that most of the terrorism sentences in Australia to date have been passed in relation to fairly preparatory conduct, I felt that the juxtaposition of these sentences against those imposed for the taking of human life would enable an interesting comparison to be made between the way the two forms of violence are judicially treated during the punishment phase.

In relation to terrorism sentences, I reviewed all decisions passed since the introduction of the first counter-terrorism legislation in 2002 until the end of

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<sup>70</sup> Search carried out 22 October 2009. Two of the search results actually involved domestic homicides and were included in the analysis in Chapter 3.3: *R v Hunt* [2002] NSWSC 66 (Unreported, Dowd J, 19 February 2002) and *R v Kumar* [2002] 5 VR 193.

<sup>71</sup> Search carried out 5 November 2009. Two cases involved domestic homicides and were included in the analysis in Chapter 3.3: *R v Vu* [2005] NSWSC 271 (Unreported, Barr J, 1 April 2005) and *R v Badanjak* [2004] NSWCCA 395 (Unreported, Wood CJ, McClellan AJA and Smart AJ, 25 October 2004). I excluded from the 51 cases instances where significant other offences had been committed (e.g. serious injury) as treatment of protection orders tended to be peripheral to the other offences in those cases.

2010. As most cases have been reasonably high profile, it was not difficult to ensure that I had considered all relevant decisions. The Australian Parliamentary Library website also refers to a number of terrorism decisions to date.<sup>72</sup> A list of terrorism sentencing decisions is included at Annexure D.

In searching for domestic homicides, I searched for cases involving the use of lethal force by a man against his intimate partner. I used the following search terms in a search of the legal database 'Casebase', yielding results as follows:

- [Manslaughter and partner]: 54 hits of which eight were relevant;<sup>73</sup>
- [Manslaughter and wife]: 187 hits of which 37 were relevant and 36 not yielded by previous search (the 187 hits included a number of cases that appeared multiple times as well as cases involving female perpetrators);<sup>74</sup>

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<sup>72</sup> Australian Parliamentary Library, 'Law Internet Resources: Terrorism Law', <<http://www.aph.gov.au/library/intguide/law/terrorism.htm#court>> (viewed 23 October 2011).

<sup>73</sup> *DPP v Egan* [2007] VSC 485 (Unreported, Teague J, 26 November 2007); *R v Verdins*; *R v Buckley*; *R v Vo* (2007) 16 VR 269; *Tyne v Tasmania* (2005) 15 Tas R 221; *R v Walkington* [2003] NSWSC 517 (Unreported, Newman AJ, 6 June 2003); *R v Tran* [2003] NSWSC 373 (Unreported, Greg James J, 2 May 2003); *R v Sievers* [2002] NSWSC 1257 (Unreported, Sully J, 18 December 2002); *R v Hurley* [2001] NSWSC 1007 (Unreported, David Levine J, 2 November 2001); *R v Smith* [2000] QCA 169 (Unreported, McPherson JA, Davies JA and Mackenzie J, 9 May 2000). Where a sentence was the subject of appeal, the appeal decision was not counted in case numbers.

<sup>74</sup> *R v Mills* [2008] QCA 146 (Unreported, Keane, Holmes and Fraser JJA, 28 May 2008); *R v Frost* [2008] NSWSC 220 (Unreported, Barr J, 17 March 2008); *R v Jagroop* [2008] VSC 25 (Unreported, Teague J, 13 February 2008); *R v Ferguson* [2007] NSWSC 949 (Unreported, Michael Grove J, 27 August 2007); *Vella v WA* (2007) 33 WAR 411; *DPP v Rhodes* [2007] VSC 55 (Unreported, Curtain J, 8 March 2007); *R v Massei* [2005] NSWSC 1030 (Unreported, Adams J, 2 September 2005) and *R v Massei* [2006] NSWSC 1298 (Unreported, Adams J, 2 November 2006); *R v Lem* [2005] SASC 405 (Unreported, Doyle CJ, Bleby and Gray JJ, 28 October 2005); *R v Nicol* [2005] NSWSC 547 (Unreported, Hulme J, 27 May 2005); *Spencer v R* [2005] NTCA 3 (Unreported, Martin CJ, Thomas and Riley JJ, 29 April 2005); *R v Williams* [2004] NSWSC 189 (Unreported, O'Keefe J, 22 March 2004) and *R v Williams* [2005] NSWCCA 99 (Unreported, Tobias JA, Buddin and Hall JJ, 24 March 2005); *R v Grief* [2005] VSC 60 (Unreported, Teague J, 10 March 2005); *R v Newling* [2005] VSC 54 (Unreported, Teague J, 8 March 2005); *R v Daniels* [2004] NSWSC 1201 (Unreported, Hidden J, 14 December 2004); *R v Ramage* [2004] VSC 508 (Unreported, Osborn J, 9 December 2004); *R v Schubring*; *Ex parte AG* [2005] 1 Qd R 515; *DPP v Sypott* [2003] VSC 537 (Unreported, Redlich J, 5 September 2003) and *DPP v Sypott* [2004] VSCA 9 (Unreported, Vincent JA, Smith and O'Brien AJJA, 13 February 2004); *R v Huynh* [2003] NSWSC 1066 (Unreported, Kirby J, 21 November 2003); *R v Laures* [2003] NSWSC 785 (Unreported, Studdert J, 27 August 2003); *R v Mehmet* [2002] NSWSC 1154 (Unreported, Bell J, 12 December 2002); *Jacovic v R* [2002] WASCA 149 (Unreported, Murray, Parker and Miller JJ, 7 June 2002); *R v Hunter* [2002] VSC 162 (Unreported, Teague J, 14 May 2002); *R v Goodwin* [2001] VSC 519 (Unreported, Coldrey J, 21 December 2001); *R v Lever* [2001] NSWSC 1131 (Unreported, Bell J, 13 December 2001); *R v Butay* [2001] VSC 417 (Unreported, Flatman J, 2 November 2001); *R v Raccanello* [2001] VSC 258 (Unreported, Teague J, 25 July 2001); *R v Hawkins* [2001] NSWSC 420 (Unreported, O'Keefe J, 24 May 2001); *R v Matheson* [2006] NSWSC 332 (Unreported, Mathews AJ, 28 April 2006); *R v Jones* [2001] VSC 186 (Unreported, Teague J, 20 February 2001); *R v Olig* [2000] NSWSC 1246 (Unreported, Adams J, 21 December 2000); *R v Gordon* [2000] WASCA 401 (Unreported, Kennedy, Anderson and Wheeler JJ, 15 December 2000); *R v Culleton* [2000] VSC 559 (Unreported, Vincent J, 27 November 2000); *R v Tjami* (2000) 210 LSJS 309; *R v Bateman* [2000] NSWSC 867 (Unreported, Barr J, 30 August 2000); *R v Jans*

- ['Domestic violence' and manslaughter]: 8 relevant results (of which 2 were results that had not been yielded by earlier searches) – restricted to 2001 onwards;<sup>75</sup>
- ['Domestic violence' and murder]: 16 relevant results (of which 12 were results that had not been yielded by earlier searches) – restricted to 2003 onwards.<sup>76</sup>

All searches were restricted to cases from 2000 onwards (except as noted above) up to and including the Victorian Supreme Court decision in *Robinson* delivered on 29 January 2010.<sup>77</sup> I also reviewed the NSW Public Defenders' website, which includes lists of cases in particular categories and obtained additional references to murder and manslaughter cases listed involving male perpetrators and female victims in domestic scenarios since 2000.<sup>78</sup> I limited my search in this way to ensure that cases were roughly contemporaneous with terrorism sentencing decisions.

Where cases reviewed as a result of these searches referred to other cases from 2000 onwards that had not been yielded by the searches, or where I came across references to relevant cases in my general reading, I included these also. In total, 113 cases were reviewed and analysed.<sup>79</sup>

A complete list of domestic homicide cases analysed is included at Annexure E.

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[2000] NSWSC 525 (Unreported, Groves J, 14 June 2000); *R v Baggott* [2000] QCA 153 (Unreported, McMurdo P, McPherson JA, Mackenzie J, 3 May 2000).

<sup>75</sup> *R v Andrew* [2008] VSC 138 (Unreported, Forrest J, 1 May 2008); *R v Zammit* [2008] NSWSC 317 (Unreported, Howie J, 9 April 2008).

<sup>76</sup> *R v Robinson* [2007] NSWSC 460 (Unreported, Hall J, 11 May 2007); *R v Conway* [2005] VSC 205 (Unreported, Bell J, 10 June 2005); *R v Vu* [2005] NSWSC 271 (Unreported, Barr J, 1 April 2005); *R v Yasso* [2005] VSC 75 (Unreported, Hollingworth J, 21 March 2005); *R v Johnson* [2005] SASC 1 (Unreported, Perry J, 13 January 2005); *R v Keir* [2000] NSWSC 111 (Unreported, Adams J, 29 February 2000) and *R v Keir* [2004] NSWSC 1164 (Unreported, MW Campbell AJ, 13 December 2004); *R v Badanjak* [2004] NSWCCA 395 (Unreported, Wood CJ, McClellan AJA and Smart AJ, 25 October 2004); *R v Brown* [2004] NSWSC 194 (Unreported, Hulme J, 6 February 2004); *R v Joseph* [2003] NSWSC 1080 (Unreported, Greg James J, 21 November 2003); *R v Doherty* (2003) 6 VR 393; *R v Cao* [2003] NSWSC 715 (Unreported, 8 August 2003, Kirby J); *R v Andrews* [2003] NSWCCA 7 (Unreported, Heydon, Hulme and Hidden JJ, 6 February 2003).

<sup>77</sup> *R v Robinson* [2010] VSC 10 (Unreported, Whelan J, 29 January 2010).

<sup>78</sup> NSW Public Defenders' Office, 'Murder – Wife/Girlfriend Killings' and 'Manslaughter-Provocation', located at <<http://www.lawlink.nsw.gov.au/pd>> (viewed 14 October 2008).

<sup>79</sup> Where a case proceeded to appeal, the sentencing decision and appeal decision together count for one case.



## Chapter 3.4

In the final chapter of Section 3, I consider the legal treatment of women who kill abusive partners in cases where the circumstances of the killing suggest that actions were taken in self-defence.

Between July and October 2008, I conducted a search for cases involving murder/manslaughter by female accused against male partners where the facts indicated previous abuse by the victim. A search of the database 'Casebase' using the search term ['Battered woman syndrome'] and restricted to 2000 onwards yielded one result only across both reported and unreported decisions.<sup>80</sup> The search terms referred to in Chapter 3.3 also yielded some results relating to domestic homicides with female perpetrators and male victims as follows:

- [Manslaughter and partner]: 2 relevant hits,<sup>81</sup>
- [Manslaughter and wife]: 4 hits (of which two relevant and not yielded by earlier search),<sup>82</sup>
- ['Domestic violence' and manslaughter]: 4 relevant hits,<sup>83</sup>
- ['Domestic violence' and murder]: 1 relevant result.<sup>84</sup>

In the course of reading generally I came across some other decisions that fell into the category of cases outlined above, and fell within the timeframe between 2000 and October 2008. I also included these in my analysis.<sup>85</sup> A list of those cases examined is included at Annexure I.

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<sup>80</sup> *R v McKenzie* (2000) 113 A Crim R 534 (date of search 2 October 2008).

<sup>81</sup> *DPP v Felsbourg* [2008] VSC 20 (Unreported, Teague J, 12 February 2008); *R v Cavanough* [2007] NSWSC 561 (Unreported, Whealy J, 7 June 2007) (date of search 22 July 2008).

<sup>82</sup> *R v Gazdovic* [2002] VSC 588 (Unreported, Teague J, 20 December 2002); *R v Denney* (Unreported, Supreme Court of Victoria, Coldrey J, 4 August 2000) (date of search 22 July 2008).

<sup>83</sup> *R v Russell* [2006] NSWSC 722 (Unreported, Newman AJ, 21 July 2006); *R v Trevenna* [2003] NSWSC 463 (Unreported, Buddin J, 29 May 2003); *R v Yeoman* [2003] NSWSC 194 (Unreported, Buddin J, 21 March 2003); *R v Melrose* [2001] NSWSC 847 (Unreported, McClellan J, 31 August 2001) (date of search 2 October 2008).

<sup>84</sup> *R v Evans* [2004] QCA 458 (Unreported, McPherson and Davies JJA, Fryberg J, 26 November 2004) (date of search 2 October 2008).

<sup>85</sup> *R v Ferguson* [2008] NSWSC 761 (Unreported, Barr J, 25 July 2008); *R v Kennedy* [2000] NSWSC 109 (Unreported, Barr J, 1 March 2000); *R v Ko* [2000] NSWSC 1130 (Unreported, Kirby J, 12 December 2000); *R v Vandersee* [2000] NSWSC 916 (Unreported, James J, 18 September 2000); *R v Weatherall*

I also drew on observations made by Rebecca Bradfield in her doctoral thesis for the University of Tasmania, in which she conducted an analysis of 76 decisions involving women who killed intimate partners in Australia between 1980 and 2000, and which I refer to extensively in Chapter 3.4.<sup>86</sup>

My original goal was to undertake an assessment of the law's treatment of female victims of abuse who kill in self-defence with those who respond to terror in an official capacity. However, there was insufficient terrorism-related material for me to undertake such a comparison, as there has been only one terrorism-related operational shooting in Australia to date and I was unable to find any material in relation to this other than general media reporting.<sup>87</sup>

I therefore compiled a body of material to use as a basis for comparison with the self-defence cases in the form of legal treatment of lethal police shootings carried out 'in the line of duty' on the basis that similar (if not more favourable) treatment would be afforded to those who responded to a terrorist threat with lethal force. I examined the coroners' websites for each Australian state and territory and reviewed all reported coronial decisions in relation to domestic homicides (where available) and police shootings from 2000 to June 2009. Coronial reports for all jurisdictions were available with the exception of Victoria (reports only published since 1 November 2009) and Western Australia (reports available by request only).<sup>88</sup> In relation to Victoria, however, I did happen upon

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[2006] NSWSC 486 (Unreported, Patten AJ, 18 May 2006). Some of these cases were located on the NSW Public Defenders' website, 'Manslaughter-Provocation': <<http://www.lawlink.nsw.gov.au>> (viewed 14 October 2008).

<sup>86</sup> Bradfield (2002).

<sup>87</sup> Suspected terrorist Omar Baladjam was shot in Sydney in November 2005 after disobeying an order to stop, however he was not killed: Les Kennedy and Andrew Clark, 'Shot man appeared on Home and Away', *Sydney Morning Herald (online)*, 9 Nov 2005, <<http://www.smh.com.au/news/national/shot-man-appeared-on-home-and-away/2005/11/08/1131407637642.html>>.

<sup>88</sup> Websites visited containing coronial cases are as follows:

<<http://www.courts.act.gov.au/magistrates/page/view/597/title/selected-findings>> (ACT - reviewed all cases on 'Selected findings' page);

<[http://www.lawlink.nsw.gov.au/lawlink/coroners\\_court/ll\\_coroners.nsf/pages/coroners\\_deathsincustody](http://www.lawlink.nsw.gov.au/lawlink/coroners_court/ll_coroners.nsf/pages/coroners_deathsincustody)> (NSW – reviewed all cases referred to in annual reports);

<<http://www.nt.gov.au/justice/courtsupp/coroner/inquestlist.shtml>> (NT – reviewed all 'Inquest findings');

<<http://www.courts.qld.gov.au/1680.htm>> (Qld – reviewed all cases on 'Findings' page);

<<http://www.courts.sa.gov.au/courts/coroner/findings/index.html>> (SA - searched all coronial findings for 'shot' – 5 of 38 hits related to police shootings);

<[http://www.magistratescourt.tas.gov.au/divisions/coronial/findings\\_alpha\\_listing](http://www.magistratescourt.tas.gov.au/divisions/coronial/findings_alpha_listing)> (Tas – reviewed all 'Decisions');

<<http://www.coronerscourt.vic.gov.au/wps/wcm/connect/justlib/Coroners+Court/Home/Case+Findings/>>

(Vic – reports now published on current website);

a small number of coronial judgments in the course of general reading, which I included in my analysis.<sup>89</sup>

I also located a useful body of material from overseas in relation to two infamous counter-terrorism shootings:

1. The shooting of Brazilian citizen Jean-Charles de Menezes in London in July 2005 by special forces (de Menezes was suspected of being a terrorist carrying an explosive device);
2. The shooting of Rigoberto Alpizar in the US in 2006 by air marshals after Alpizar (who had a mental illness) departed the aircraft he had just boarded while making a reference to having a bomb in his bag.

An outline of the facts of these two shootings is contained at Annexure H.

Although the exercise conducted in Chapter 3.4 is therefore not a direct comparison of 'like against like', the body of material chosen by way of a comparison provides a useful contrast for the purpose of investigating the construction in legal discourse of women's self-defence responses in situations of abuse.

## *Conclusion*

In this chapter, I have outlined the theoretical and methodological basis for my research. In Section 2, I consider the three key concepts that are used in the legal system to construct terrorism – terror, ideology and the public. Drawing upon some of the jurisprudence that I consider in more detail in Section 3, I examine how these three concepts are used to construct 'terrorism' as a

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<[http://www.coronerscourt.wa.gov.au/l/inquest\\_findings.aspx?uid=9349-4756-3915-2531](http://www.coronerscourt.wa.gov.au/l/inquest_findings.aspx?uid=9349-4756-3915-2531)> (WA- findings available by written request).

<sup>89</sup> A list of coronial cases is included at Annexure J. In total, including cases reported in the NSW State Coroner's Annual Report, the findings from 25 coronial inquiries into police shootings were analysed (multiple victims in the one coronial report counted as one case only). See also Police Integrity Commission (June 2001).

phenomenon and by contrast, how domestic violence is constructed as a concept that is in many ways the legal antithesis of terrorism. I also draw upon some of the social research in relation to domestic violence and feminist critiques of the public/private dichotomy to call into question the law's construction of violence in the ways described. I consider possible alternative reconstructions that form the basis for a problematisation of the law's differential treatment of violence in Section 3.

## SECTION TWO



## CHAPTER 2.1 LAW'S DIFFERENTIAL CONSTRUCTION OF VIOLENCE

Here is the question: what will it take for violence against women, this daily war, this terrorism against women as women that goes on every day world-wide, this everyday, group-based, systematic threat to and crime against the peace, to receive a response in the structure and practice of international law anything approximate to the level of focus and determination inspired by the September 11<sup>th</sup> attacks?<sup>1</sup>

The process of applying labels to different phenomena is not politically-neutral. This is the case in law as it is in other areas of social activity. In fact, in law, the politics of naming takes on extra significance. The labels that we give to things influence how we conceptualise and discuss them, but in law labels also determine rights and responsibilities. What the law labels a 'crime' will be treated differently to what is not labelled a crime. Phenomena, social or legal, do not pre-exist the names that are given to them; language 'is a dynamic medium that both represents, and actively constitutes, that reality'.<sup>2</sup>

The process by which those names are given is a political one that reflects relationships of power. Feminists such as Andrea Dworkin have particularly focused on the ability to use language to determine how things are described as an aspect of male power.<sup>3</sup> In a postmodernist vein, Carol Smart uses the term 'phallocentrism' to describe the way in which naming occurs in the context of masculinist power, and this is explored in further detail below.<sup>4</sup>

The question at the beginning of this chapter, posed by Catharine MacKinnon, brings into focus the political process of naming in the context of violence against women. MacKinnon refers to this violence as 'war' and 'terrorism'. These are not words that the law in Australia (or elsewhere) uses to describe gendered violence. As I will argue in this chapter, and the two that follow, that is

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<sup>1</sup> MacKinnon (2002), p 19.

<sup>2</sup> Mason (2002), p 5.

<sup>3</sup> Kelly and Radford (1988), p 199. For naming as a form of power see Dworkin (1981), pp 17-8 and Spender (1990), especially Chapter 6.

<sup>4</sup> Smart (1995), p 78.

not because violence against women does not share features in common with terrorism that would warrant it being given the name 'terrorism' – it is because the law constructs violence in different ways, and it constructs terrorism very differently to domestic violence.

Once something is defined as criminal activity by the legal system, the political process of labelling continues.<sup>5</sup> Legal discourse encompasses a process within which different crimes are constructed,<sup>6</sup> reinforced by investigative and prosecutorial processes in which various facts are selected or discarded as part of the case construction process.<sup>7</sup> The names given to different types of violence, which are reflected in the names used in other discourses, are an important aspect of how the law constructs violence.<sup>8</sup>

The labels given to offences are important for two reasons. First, they determine how phenomena to which a particular label is applied will proceed through the criminal justice process. Violence labelled as 'terrorism' will travel a different route to violence labelled as 'domestic violence'. The penalties applicable to terrorism offences are different to those available for a crime such as manslaughter.<sup>9</sup> The investigation of terrorism also involves the exercise of police powers of arrest and detention not applicable to other (ordinary) crimes.<sup>10</sup>

Secondly, the labels applied both reflect and recreate the differential treatment of violence in social and other discourses.<sup>11</sup> Labelling conduct as 'terrorism' constructs the conduct in such a way that it is understood in the context of other discourses about 'terrorism'. It channels and directs debate and discussion about the conduct in a particular way. That is, when something is labelled as

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<sup>5</sup> Lacey discusses 'labelling' as a means by which law differentiates between different offence types, for example various labels are attached to different homicide offences: Lacey (2000), pp 109-11.

<sup>6</sup> For an examination of how rape is constructed through legal discourse see Marcus (1992).

<sup>7</sup> McConville et al (1991).

<sup>8</sup> For a discussion of the importance of naming the problem of domestic violence see Genovese (1998), pp 11-3.

<sup>9</sup> See the tables of murder/manslaughter and terrorism offences at Annexure F.

<sup>10</sup> The *Anti-Terrorism Act (No 2) 2005* (Cth) introduced a scheme of preventative detention orders applicable to terrorist offences. The *Crimes Act 1914* (Cth) provides for different powers of detention and investigation for terrorism and non-terrorism offences: e.g. see ss 23D and 23DA. This reflects developments in other national legal codes from the 1970s onwards expanding police powers in relation to terrorism: Chaliand and Blin (2007), pp 246-7.

<sup>11</sup> Lacey notes that legal discourse cannot be considered independently of constructions in broader social discourse: Lacey (1998), p 203; see also Heathcote (2010), pp 281-2.



'terrorism', it creates a context for understanding and discussing that conduct that is different to the context for understanding and discussing conduct labelled as 'domestic violence', and that different context applies to both legal and non-legal discourse.<sup>12</sup>

In examining how these discursive processes work in practice, it is necessary to examine them in their specific historical contexts.<sup>13</sup> The evolution of the processes by which particular labels come to apply to different phenomena allows us to better understand them.

In this chapter, I investigate the means by which 'domestic violence' and 'terrorism' acquired their names in Australian legal discourse, which are bound up with, though not identical to, the processes by which these terms acquire meaning in political, social and other discourses.<sup>14</sup> This will hopefully facilitate a deeper understanding of how the law differentially constructs violence in different contexts.

### *Development of 'Terrorism' as a Legal Concept*

#### *The Historical Development of Terrorism as a Concept Internationally*

Given that Australia's exposure to terrorism is relatively recent, it is useful to consider the evolution of the word 'terrorism' in Australian legal discourse in the context of its development internationally. The term is said to have originated as a reference to the period of 'Terror' accompanying the French Revolution between 1793 and 1794.<sup>15</sup> Since then, it has been used in reference to a wide range of violent acts, whether perpetrated by states, groups of non-state actors

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<sup>12</sup> Barnett (1998), pp 36-8 notes that the law has an impact on conduct and attitudes, therefore there is scope for the law to shape public opinion.

<sup>13</sup> For discussion of this aspect of Foucault's work see Hennessy (1993), pp 40-2.

<sup>14</sup> Collier (1995), pp 67-72.

<sup>15</sup> Hancock (2002); Carr (2006), pp 4-5; Chaliand and Blin (2007), p 95 (although as noted at pp 268-70 militant Islamism traces its roots to the 11<sup>th</sup>-13<sup>th</sup> century Assassins of the Middle East).

seeking control of the state, or individuals with aspirations other than state control.

The historical origins of the word 'terrorism' are significant given ongoing political debate as to whether states can themselves be responsible for terrorism.<sup>16</sup> The usage of the word in the context of the French revolution reflected the fact that the 'terror' generated by the revolutionaries was directed squarely at the state in the form of the aristocracy. The ongoing reluctance of some states to accept that states can themselves be responsible for terrorism reflects in part the perception that terrorism is any form of harm that constitutes a threat to the state.<sup>17</sup>

Although there has to date been no international consensus on a legal definition,<sup>18</sup> this has not prevented the development of a body of international instruments and resolutions requiring states to take action to suppress and punish terrorism.<sup>19</sup>

The fact that international instruments relating to terrorism have proliferated while nation states fail to reach agreement on a legal definition of terrorism is illustrative of how legal discourse actively constructs rather than simply labels pre-existing phenomena. As this continuing international debate demonstrates, the naming of terrorism is itself a political process in which differences between

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<sup>16</sup> Abi-Saab (2004), pp xix-xx.

<sup>17</sup> Carr (2006), p 5. Coleman (2010), p 92 writes: '(T)he naming of 'terrorism' provides an alien other against and through which the shape and substance of the state is clarified and subsequently barricaded, thereby targeting a clearly defined enemy rather than the state's complicity in creating the conditions for violent nonstate global politicking in the first place.'

<sup>18</sup> Some of the key problems that have arisen include the desire of smaller states to include state-sponsored terrorism in the definition, and a view on the part of some states that 'freedom fighters' should be excluded from the definition: Abi-Saab (2004), pp xix-xx.

<sup>19</sup> *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 10 January 2000, 2178 UNTS 197 (entered into force 10 April 2002); *International Convention for the Suppression of Terrorist Bombings*, opened for signature 12 January 1998, 2149 UNTS 256 (entered into force 23 May 2001); *Convention for the Suppression of Unlawful Acts against the Safety of Marine Navigation*, opened for signature 10 March 1988, 1678 UNTS 222 (entry into force 1 March 1992); SC/RES 1269, UN SCOR, 54th sess, 4053<sup>rd</sup> meeting, UN Doc S/Res/1269 (19 October 1999), para. 4; SC/RES 1368, UN SCOR, 56th sess, 4370<sup>th</sup> meeting, UN Doc S/Res/1368 (12 September 2001), para. 3; SC/RES 1373, UN SCOR, 57th sess, 4385<sup>th</sup> meeting, UN Doc S/Res/1373 (28 September 2001), paras 1-2; *Condemnation of Terrorist Attacks in the United States of America*, GA Res 56/1, UN GAOR, 56<sup>th</sup> sess, 1<sup>st</sup> plenary mtg, Agenda Item 8, UN Doc A/RES/56/1 (12 September 2001).

nations in terms of their history and social constitution determine their position in relation to what they do and do not call 'terrorism'.<sup>20</sup>

Despite the lack of an agreed definition, there are elements of terrorism upon which there is some agreement amongst political and legal scholars. These are: an act of violence directed against the civilian population for political or ideological ends,<sup>21</sup> that the act instils fear in the population,<sup>22</sup> and that it is intended to influence a government or intimidate or coerce a section of the public.<sup>23</sup> This is consistent with the definition adopted by the United Nations.<sup>24</sup>

The absence of an agreed legal definition of terrorism has also not prevented its widespread adoption in political and social discourse. Since the 1960s, international terrorism has been associated with hijackings, embassy sieges and assassinations, which, thanks to advances in communications technology, have been broadcast to an ever-growing audience.<sup>25</sup> In fact, the media plays a pivotal role in the psychological warfare that constitutes an important part of terrorist activity.<sup>26</sup> From the 1960s onward, the Western media increasingly used the term 'terrorism' to describe acts that would previously have been labelled as 'bombs and bomb plots', 'kidnapping' or 'guerilla actions'.<sup>27</sup> The concept of terrorism also became associated with acts of violence by separatist or nationalist movements such as the Irish Republican Army (IRA) in Ireland,<sup>28</sup> and the ETA in Spain.<sup>29</sup>

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<sup>20</sup> Hancock (2002).

<sup>21</sup> Frey and Morris (1991), p 2; Dupuy (2004), pp 4-5. Note that the Attorney-General and Commonwealth Director of Public Prosecutions both argued in support of removing this element from the Australian definition following the prosecution of Zaky Mallah: Saul (2007), p 33. This element is not accepted by all legal scholars or organisations: Saul (2007), p 29. The motive element was struck down as being in violation of constitutional rights in Canada in *Khawaja* (2006) 214 CCC (3d) 399, however this was overturned in *Khawaja* (2010) 2010 ONCA 862 (Unreported, Doherty, Moldaver and Cronk JJA, 17 December 2010). It is an element of the terrorism offences in New Zealand, Canada and South Africa: Security Legislation Review Committee (2006), pp 54-5.

<sup>22</sup> Frey and Morris (1991), p 2; cf Held (1991), p 65.

<sup>23</sup> Hancock (2002).

<sup>24</sup> *Measures to Eliminate International Terrorism*, GA Res 51/210, UN GAOR, 52<sup>nd</sup> sess, 88<sup>th</sup> plen mtg, UN Doc 51/210 (17 December 1996).

<sup>25</sup> Carr (2006), pp 197-206.

<sup>26</sup> Bianchi (2004), p 249.

<sup>27</sup> Carr (2006), pp 206-8, citing Crelinsten (1989).

<sup>28</sup> For example, the *Prevention of Violence (Temporary Provisions) Act 1939* (UK) was re-enacted as the *Prevention of Terrorism (Temporary Provisions) Act 1974* (UK).

<sup>29</sup> ETA stands for *Euskadi ta Askatasuna*, meaning 'Basque Fatherland and Liberty'. For an overview of the history of the ETA see Hamilton (2007).

From the mid-1970s onwards, books and articles about terrorism proliferated, 'terrorology' became a subject for research and discussion, and 'terrorism as entertainment' in the form of Hollywood movies flourished.<sup>30</sup> Increasingly, from this period, the conception of terrorism moved away from one specific to individual conflicts, and towards an idea of international terrorism as a threat to world order.<sup>31</sup>

Since the term first came into use, terrorism has taken a variety of forms, largely dependent upon the social and political context in which it is used as a strategy. Acts that have been described as terrorism range from economic sabotage against the South African apartheid regime by the African National Congress in the early 1960s, to the detonation of bombs by the IRA against British targets, to the urban guerrilla warfare of the Baader-Meinhof gang in Germany in the 1970s.

In the 1980s suicide bombings emerged as a key terrorist strategy, and between 1980 and 2003 it accounted for more than a quarter of all deaths caused by international terrorism.<sup>32</sup> Suicide bombings have a particularly significant impact on the public psyche, reinforcing the fear that attacks can happen anywhere at any time, and that terrorists will stop at nothing to advance their goals.

By the end of the Cold War, terrorist groups claiming religious motivations had emerged, and these have been associated in Western consciousness with fundamentalist Islam more than any other religion.<sup>33</sup> 'Islamist terrorism' refers to the use of violence (either indiscriminate or targeted) to impose Islamist views on a group of people.<sup>34</sup> Within this conception of terrorism, 'bombs, kidnappings

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<sup>30</sup> Carr (2006), pp 215-19. Examples include *Under Siege* (1992) Directed by Andrew Davis, Warner Bros Pictures; *Under Siege 2* (1995) Directed by Geoff Murphy, Warner Bros Pictures; *Die Hard* (1988) Directed by John McTiernan, 20<sup>th</sup> Century Fox Film Productions; *Die Hard 2* (1992) Directed by Renny Harlin, Gordon Company; *Die Hard With A Vengeance* (1995) Directed by John McTiernan, Cinergi Pictures Entertainment; *Live Free or Die Hard* (2007) Directed by Len Wiseman, 20<sup>th</sup> Century Fox Film Productions; *Raid on Entebbe* (1976) Directed by Irvin Kirshner, Edgar J Scherick Associates and *Delta Force* (1986) Directed by Menahem Golan, Golan-Globus Productions.

<sup>31</sup> Carr (2006), p 197.

<sup>32</sup> Carr (2006), pp 259-60.

<sup>33</sup> Carr (2006), pp 237-9. In 2008, all but one of 19 terrorist organisations proscribed under regulation in Australia were Islamic organisations: Hogg (2008), p 307.

<sup>34</sup> Chaliand and Blin (2007), p 259.

and hijackings were increasingly seen as the contemporary instruments of an aggressive Islamic holy war whose ultimate aim was global religious domination'.<sup>35</sup> It has been suggested that this form of terrorism differs from previous types in the sense that perpetrators are more loosely organised, there is a tendency to maximise rather than minimise civilian casualties, and there is an international rather than a localised focus to modern terrorism.<sup>36</sup> However, despite the changing nature of terrorism, the nomenclature remains consistent.

In the 1990s, despite the number of terrorist attacks declining, there emerged an increasing consensus in the United States that terrorism was becoming more dangerous and unpredictable.<sup>37</sup> Terrorism has also retained its association with fundamentalist Islam, cemented by the first attack on the World Trade Centre in 1993.<sup>38</sup> The word 'terrorism' acquired 'such dreadful potency that its semantic application appeared to be limitless, even if its actual meaning became increasingly difficult to determine'.<sup>39</sup> This semantic malleability allows for the word 'terrorism' to be used for political purposes – as a label to describe and categorise acts of violence the state deems a threat to its interests, and to justify broad-ranging government intervention. Indeed, in more recent years, counter-terrorism powers in the United States have been used to justify surveillance in relation to so-called 'Domestic Advocacy Groups', a development made possible by the broad definition of terrorism under American law.<sup>40</sup>

By the time the events of 11 September 2001 occurred, there had already been intense speculation about the prospects of biological or chemical attacks in the United States on a vast scale. US President George Bush and other commentators repeated the message that the US had been attacked by 'enemies of human freedom' and that this was a 'new kind of evil'.<sup>41</sup> This is a

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<sup>35</sup> Carr (2006), p 239.

<sup>36</sup> Security Legislation Review Committee (2006), p 8.

<sup>37</sup> Carr (2006), p 268.

<sup>38</sup> Carr (2006), pp 269-70.

<sup>39</sup> Carr (2006), p 269.

<sup>40</sup> Bronitt (2011), pp 14-5.

<sup>41</sup> Carr (2006), pp 293-4.

message that continues to be reinforced to the public by Western governments into the first two decades of the 21<sup>st</sup> century.

In post-9/11 America, the use of the term 'terrorist' has arguably been expanded to encompass those involved in mainstream political activity of a non-violent nature.<sup>42</sup> This illustrates the malleability of the term and the way in which the meaning of the concept can be varied to suit political interests.

Despite the long and diverse history of the evolution of terrorism, summarised only very briefly here, Australia's association with the phenomenon is relatively recent. The events of 9/11 were the first terrorist acts that really impacted on Australians in the sense of both the involvement of a small number of Australians as victims,<sup>43</sup> and Australia's sense of affiliation with the US. These were followed by the Bali bombings in 2002 and 2005, which involved a number of Australian victims, and the July 2005 London bombings. It is these terrorist attacks, associated with fundamentalist Islam, that have most directly impacted on the development of terrorism in social and legal discourse in Australia.

### *The Evolution of Terrorism in Australia*

The recognition of terrorism as a legal concept in Western countries has largely followed specific acts of violence impacting on particular nations. Terrorism certainly existed as a concept in public discourse in Australia prior to 9/11, and the Hilton Hotel bombing in 1978 was used to justify a range of increased surveillance and intelligence measures, including the formation of the AFP and domestic Special Air Service (SAS) units.<sup>44</sup> However, it was only in the

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<sup>42</sup> US Department of Justice (2010), pp 23, 88, 188-90, noting that although classification of activities of such groups as 'domestic terrorism' did not violate definitions contained in legislation, Attorney-General's guidelines and FBI policies, the term was used in relation to activities not commonly regarded as terrorism.

<sup>43</sup> There were an estimated 10 Australian victims of the 9/11 attacks: 'The Australians who Perished', *Sydney Morning Herald (online)*, 21 Aug 2002, <<http://www.smh.com.au/articles/2002/08/22/1029114157312.html>>.

<sup>44</sup> Head (2008).

aftermath of 9/11 that specific anti-terrorism legislation was enacted.<sup>45</sup> By contrast, the United Kingdom had passed anti-terrorism legislation (though not expressed as such) as early as 1939 in response to the continuing violence from the IRA.<sup>46</sup> In Northern Ireland, emergency legislation allowing for the detention without trial of suspected terrorists was in operation from 1921.<sup>47</sup> The United States had specific anti-terrorism legislation dating back to 1984, and also passed further legislation in response to the Oklahoma City Bombing in 1995.<sup>48</sup>

Prior to 9/11, 'terrorism' had been mentioned in a number of Australian statutes, and had been defined in relation to 'security' in the *Australian Security and Intelligence Organisation Act 1979* but removed and merged with the definition of subversion in 1986.<sup>49</sup> In a 1979 Protective Security Review, it was defined as 'acts of small groups of persons who use criminal violence to obtain publicity for their political views, or to achieve or to break down resistance to their political aims, by the intimidation of governments or of people'.<sup>50</sup> 'Terrorism', defined as 'an extreme form of politically motivated violence', was also incorporated into the National Anti Terrorist Plan of 1993.<sup>51</sup> However, it was not the subject of specific criminal offences until the raft of legislation enacted in the aftermath of 9/11.

Within two weeks of 9/11, which impacted dramatically upon the Australian psyche, the federal government had established an inter-departmental committee to review the need for counter-terrorism laws.<sup>52</sup> Over the next two or

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<sup>45</sup> See references to legislation at note 52 below. Prior to the fall-out from 9/11, the only terrorism legislation in Australia had been a provision in the NT Criminal Code: Hancock (2001-2).

<sup>46</sup> The initial *Prevention of Violence (Temporary Provisions) Act 1939* (UK) formed the basis for the *Prevention of Terrorism (Temporary Provisions) Act 1974* (UK). Hancock (2002).

<sup>47</sup> Spjut (1986), p 713.

<sup>48</sup> Hancock (2002).

<sup>49</sup> Hancock (2001-2).

<sup>50</sup> Hope (1979); Hancock (2002).

<sup>51</sup> Hancock (2001-2).

<sup>52</sup> Darryl Williams, 'Review of Counter Terrorism Arrangements', Press Release, 26 September 2001, <[http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=\(Id:media/pressrel/sy056\);rec=0;](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=(Id:media/pressrel/sy056);rec=0;)>.

three years, a significant amount of legislation specifically addressing the prevention, investigation, financing and suppression of terrorism was enacted.<sup>53</sup>

Following the bombings that occurred in London in 2005, the federal government announced further terrorism laws. Legislation passed subsequently included the *Anti-Terrorism Act 2005* and the *Anti-Terrorism Act (no 2) 2005*, which introduced control orders (discussed in Chapter 3.2), provided for suspects to be held in preventative detention and created offences for inciting hostility (discussed in Chapter 3.1).

It appears that a significant part of the justification for enacting separate terrorism offences post-9/11 was the need to address the perceived public view that a terrorist act was an attack on society, and therefore terrorist violence was more serious than ordinary violence.<sup>54</sup> The new legislation was enacted despite legal opinion to the effect that terrorism could effectively be prosecuted under existing legislation.<sup>55</sup> As further terrorism legislation has been introduced over time, terrorist attacks in the US and other countries, and the risk of such attack occurring in Australia, have been a recurring theme in political discussion of the statutory measures.<sup>56</sup>

In turn, the enactment of legislation containing specific terrorism offences sends a message to the public that terrorist violence is particularly serious and cannot

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<sup>53</sup> For a full overview of this legislation, see the Parliamentary Library's 'Terrorism Law' website, <<http://www.aph.gov.au/library/intguide/law/terrorism.htm#2001>> (viewed 31 July 2010). The most important among these have been the *Australian Security and Intelligence Organisation Legislation Amendment (Terrorism) Act 2002* (Cth), *Security Legislation Amendment (Terrorism) Act 2002 (no 2)* (Cth), *Suppression of the Financing of Terrorism Act 2002* (Cth), *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* (Cth), *Border Security Legislation Amendment Act 2002* (Cth) and the *Telecommunications Interception Legislation Amendment Act 2002* (Cth), *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth), *Australian Security and Intelligence Organisation Legislation Amendment Act 2003* (Cth), *Anti-Terrorism Act 2004* (Cth), *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth), and the *Anti-Terrorism Act (no 2) 2004* (Cth). The Australian Security Intelligence Organisation Amendment Bill 2002 (Cth) was withdrawn following criticism by a Parliamentary Joint Standing Committee: Head (2002). For a discussion of some of the key aspects of the legislation see Renwick (2007).

<sup>54</sup> Hancock (2001-2), [2.3.5].

<sup>55</sup> See the submissions cited at fn 1, Senate Legal and Constitutional Legislation Committee (2002), p 19; see also Head (2002). Cf Rose and Nestorovska (2007).

<sup>56</sup> See for example Interview with Christopher Pyne, 'Pyne discusses changes to anti-terrorism bill', *Lateline*, 4 June 2002, <<http://www.abc.net.au/lateline/stories/s573826.htm>>; John Howard, *Counter Terrorism Review*, Press Release, 24 Oct 2002, <[http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=\(Id:media/pressrel/1sp76\);rec=0](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=(Id:media/pressrel/1sp76);rec=0)>; Darryl Williams, *Reference of Terrorism Power*, Press Release, 8 Nov 2002, <[http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=\(Id:media/pressrel/ppu76\);rec=0](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=(Id:media/pressrel/ppu76);rec=0)>.



be accommodated within existing laws. This illustrates the way in which legal and other forms of discourse reflect and reinforce each other.

The word 'terrorism' itself is illustrative of the fear it evokes in the general public, and the seriousness with which it is regarded as a crime. This sense of fear connects terrorism with its historical roots, and the horror of random slaughter associated with the French Revolution. Mary Zournazi writes.<sup>57</sup>

Terror has become one of the most ominous words in English. ... Terror is the name of an experience evoked by dread or fear of something. From its early usage, it has been associated with the terrible and hence describes a feeling or reaction to that which provokes fear of a person, object or thing. When terror is moved from the individual to the cultural sphere, where culture is understood as a state of shared understandings, symbols and relationships, then its current meaning in contemporary politics and the media becomes clear.

Terrorism has, particularly since the events of 9/11, more specifically become associated with concepts of 'the foreign' and with 'evil':<sup>58</sup>

In this scenario, the enemy is everywhere at all times, a situation that produces a pervasive and omnipotent fear. ... what we witness is an upsurge of hostility and a general abhorrence for other cultures, religions, and traditions that are seen as morally deficient and lacking the social and political values of Western modernity.

As an inherently political process however, discourse does not simply reflect existing conceptions of phenomena; it actively creates them. While the label 'terrorism' might be said to reflect the public fear that surrounds the threat of terrorist attack, the use of the word 'terrorism' and terror discourse also serves to create and perpetuate the fear. While alternative discourse about terrorism, aimed at conceptualising terrorism as a product of broader social and structural

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<sup>57</sup> Zournazi (2007), p 165.

<sup>58</sup> Zournazi (2007), pp 167-8.

inequalities, does exist,<sup>59</sup> it is peripheral to official representations of terrorism as a manifestation of evil and threat to humanity.<sup>60</sup>

In the Australian context, therefore, the evolution of special counter-terrorism legislation in the wake of the shocking events of 9/11 both reflected and perpetuated a public conception that terrorism was a particularly serious form of violence that could not be effectively managed within an existing legal framework. This is in contrast to the development of a discourse of 'domestic violence', discussed below.

It is worth noting at this point that the term 'domestic violence' in Australia historically referred to conduct that posed a threat to the security of the nation. Section 119 of the Australian Constitution provides that 'the Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.'<sup>61</sup> More recently, the amendments to the *Defence Act 1903* (Cth), contained in Part IIIAAA introduced in anticipation of possible terrorist attacks at the 2000 Sydney Olympics, pertain to utilisation of the defence force to protect Commonwealth interests and states and self-governing territories, against domestic violence.<sup>62</sup> 'Domestic violence' in this context is given the same meaning as in section 119, which, it is suggested, means that there must be a significant danger to the polity beyond the resources of the police (be they Commonwealth, state or territory) to meet.

There is, therefore, strong legal precedent for using the term 'domestic violence' to refer to activities of renegade groups that threaten the security of the nation. Notwithstanding that legal precedent, the raft of counter-terrorism legislation passed in Australia in response to the attacks of 9/11 has used the word 'terrorism' in relation to new offences and powers. The use of terrorism in preference to 'domestic violence' reflects the terminology of the international conventions on terrorism, and also the increasingly international aspect of

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<sup>59</sup> For example, Ehrlich (2002).

<sup>60</sup> Carr (2006), p 1.

<sup>61</sup> Constitution of the Commonwealth of Australia 1901 (Cth), s 119.

<sup>62</sup> For a discussion of these provisions, see Bronitt and Stephens (2008).

terrorism that is not encompassed by the terminology of 'domestic violence'. However, it also reflects the construction of terrorism within legal and popular discourse as the most serious of crimes, a purpose for which 'domestic violence' is, in the present era, discursively unsuitable.

### *Development of 'Domestic Violence' as a Legal Concept*

The 1970s in Australia saw the beginning of a concerted campaign by feminists to highlight the problem of male violence against women, including both rape and domestic violence.<sup>63</sup> The naming of the problem of 'domestic violence' in Australia was significant in giving a label to what had essentially been a 'problem with no name' following its identification as an issue by feminists in the late nineteenth century.<sup>64</sup> Since it was first coined, the use of the term has been a point of contention amongst feminists. A key aspect of the concern some feminists have with the label is that the use of the word 'domestic' trivialises the violence and obscures the serious harm associated with it.<sup>65</sup> 'Domestic' implies a private issue, a problem pertaining to the parties involved, rather than something that affects society more broadly and enlivens the responsibility of the state.<sup>66</sup> Serious crimes, such as rape and murder, are often not reported as 'domestic violence', even though they are (when committed against an intimate partner) simply the most serious forms of that kind of violence.<sup>67</sup>

In considering these concerns, it is important to understand that the term 'domestic violence' was deliberately chosen by Australian feminists who were keen to agitate for the recognition of the issue and realised the necessity of doing so in a way that would secure the support of male-dominated governments.<sup>68</sup> The focus of refuge workers and feminist groups was on the need to obtain funding for refuges and other forms of practical support for

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<sup>63</sup> Mason (1998).

<sup>64</sup> Genovese (1998). Dowse notes that the women's movement of the 1970s tended to distance itself from early feminists, who were perceived as 'quaint' or largely irrelevant: Dowse (1983), p 202.

<sup>65</sup> Schneider (2000), pp 42-6; Graycar and Morgan (2002), p 313; Douglas (2003-04), pp 80-1; First and Agnon-Gonnen (2009), p 138.

<sup>66</sup> Marcus (1994), p 26; Noonan (1996), p 191; Barnett (1998), pp 263-4.

<sup>67</sup> Parker et al (1999), p 350.

<sup>68</sup> Thornton (1995a), p 7; Genovese (1998), pp 146-9; Genovese (2006), pp 123-4.

victims. 'Domestic violence' was chosen in preference to 'violence against women' and other terms that were perceived as too confrontational and likely to be counter-productive in achieving political support required to achieve these aims.<sup>69</sup> In this respect, the Australian experience differs somewhat from that in the United States, where 'wife-battering' has generally been the term of choice to describe the problem of male violence against women in the intimate sphere,<sup>70</sup> although Miller notes that some US refuges were forced to obscure their feminist orientations in order to obtain funding.<sup>71</sup>

During the same period that feminists were active in Australia in relation to domestic violence, women's groups were drawing attention to the problem in the United Kingdom and the United States.<sup>72</sup> Refuges were established in Sydney and elsewhere and public funding was obtained to support women who were victims of intimate violence.<sup>73</sup> The very act of giving a name to something that had hitherto been hidden from public view was significant in allowing for the recognition of women's shared experiences of violence rather than its perception as an individual problem.<sup>74</sup>

The efforts by the women's refuge movement to obtain government funding were followed by a series of government-commissioned reports in the 1980s. These inquiries led to legal reforms in dealing with domestic violence, including the introduction of new offences, expanded police powers for investigating domestic violence, changes to the compellability of spouses in domestic violence proceedings, and the introduction of civil protection orders for the protection of women.<sup>75</sup> The use of the term 'domestic violence' in legal terminology followed on from the work of the women's refuge movement in raising awareness of the problem. The concept of 'domestic violence' in legal

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<sup>69</sup> Genovese (1998), p 147-9.

<sup>70</sup> For examples see Walker (1984); Ptacek (1999). However, the term 'domestic violence' is also used in the US: see, for example, Felder and Victor (1996).

<sup>71</sup> Miller (2005), pp 6-13.

<sup>72</sup> Belknap (1996), pp 171-2; Ptacek (1999), pp 42-6 (noting that the 1970s was the third wave of public attention after the 17<sup>th</sup> and 19<sup>th</sup> centuries); Walklate (2008), pp 39-40.

<sup>73</sup> Genovese (1998), Chapter 4.

<sup>74</sup> Genovese (1998), p 11.

<sup>75</sup> Laing (2000), pp 1-16; Stubbs and Wallace (1988).

discourse therefore reflects the origins of the term in Australian social and political discourse.

The tactical decision to frame intimate violence as 'domestic violence', however, has had the effect of obscuring its political and ideological aspects. While some feminists have highlighted the systemic nature of male violence against women, the liberal state has generally been resistant to the recognition of structural or systemic discrimination.<sup>76</sup> For pragmatic reasons, therefore, the focus of women's groups in the 1970s was on the plight of victims of violence, rather than the behaviour of the perpetrators. As Otto von Bismarck famously remarked, 'Politics is the art of the possible', and emphasising male responsibility for violence may well have been counter-productive in the political struggle to obtain masculinist support for addressing the issue of intimate violence against women. This obviously limited the extent to which the movement could focus on male responsibility for systemic violence.<sup>77</sup>

The ways in which the naming and treatment of domestic violence have been constrained as described above effectively illustrate the phallogentric, or masculinist, nature of Australian legal and political discourse.<sup>78</sup> Smart explains the concept of phallogentricism as follows:<sup>79</sup>

Phallogentricism is a term which is now familiar in feminist psychoanalytic literature and which is becoming widely adopted. It is deployed to refer to a culture which is structured to meet the needs of the masculine imperative. However, it is a term which is meant to imply far more than the surface appearance of male dominance which is all that is captured by concepts like inequality and discrimination which, in turn, are the standard (inadequate) terms used where law is concerned. The term 'phallogentricism' invokes the

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<sup>76</sup> Thornton (1990), p 7. In the US context, Schneider notes that there has consistently been resistance to the recognition of the link between the personal and political aspects of violence against women: Schneider (2000), pp 45-6.

<sup>77</sup> Professor Margaret Thornton notes that although individual men such as then NSW Premier Neville Wran were sympathetic to the feminist movement and supportive of initiatives to secure gender equality, there was also significant resistance from many men to recognition and naming of male violence against women: Margaret Thornton, personal communication, 17 September 2010.

<sup>78</sup> Here I use the term 'phallogentric' interchangeably with the term 'masculinist' as utilised by feminists such as Thornton (2006). By contrast, the term 'patriarchal' is associated more closely with '... the form of political right that all men exercise by virtue of being men': Pateman (1988), p 20.

<sup>79</sup> Smart (1995), p 78.

unconscious and raises profound questions on the part that the psyche and subjectivity play in reproducing patriarchal relations. Phallogocentrism attempts to give some insight into how patriarchy is part of women's (as well as men's) unconscious, rather than a superficial system imposed from outside and kept in place by social institutions, threats or force. It attempts to address the problem of the construction of gendered identities and subjectivities. Law must, therefore, be understood both to participate in the construction of meanings and subjectivities and to do so within the terms of a phallogocentric culture.

The construction of violence against women as domestic violence reflects the way in which masculinist influences operate within the law, and within society more generally. Although the recognition of domestic violence as a problem has benefited women generally, the need for activists to construct their arguments and claims for support in a way that would appeal to masculinist interests reflects the way in which meaning is constructed 'within the terms of a phallogocentric culture'. Smart also uses the term 'phallogocentric' to describe the combination of phallogocentrism and logocentrism, the latter indicating the production of knowledge under conditions of patriarchy.<sup>80</sup> That domestic violence is conceptualised as a problem of individual dysfunctional relationships serves patriarchal interests because it obscures the fact that it is a form of violence used strategically by men to exercise control over women. It serves patriarchal interests that men are not constructed as a 'class' of perpetrators in the way that, for example, men of Middle Eastern appearance are constructed as terrorists through processes such as racial profiling.<sup>81</sup>

That it was the women's movement itself that 'chose' the term 'domestic violence' to refer to men's systematic violence against women does not undermine the argument that social discourse is reflective of masculinist interests. Rather, it illustrates the complex and intersecting ways in which phallogocentrism operates within discourse. In this respect, it is worth remembering that discourse is not only about words, but also systems and rules

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<sup>80</sup> Smart (1989), p 86.

<sup>81</sup> Racial profiling in transport was reported by respondents to HREOC (2003), p 69. The association of ideology with the 'Other' in legal discourse is discussed in more detail in the next chapter.

about who is entitled to speak and when.<sup>82</sup> Discourse not only describes the words chosen, but also the framework within which 'choices' about language are made. Pervasive phallogocentric influences within the political and legal spheres in Australia dictated the choice of 'domestic violence' as a term that would not put political power-brokers off-side.<sup>83</sup> However, the legacy of the term is one that ensures the gendered nature of such violence remains hidden.

Public discourse in relation to domestic violence has been marked by ambivalence and uncertainty that further reflects the operation of masculinist power and the feminist struggles against it. Through the work of feminist activists from the 1970s onwards, highlighting the structural nature of domestic violence as rooted in the inequality of women, the idea of domestic violence as a crime perpetrated by men against women came to influence government responses to violence.<sup>84</sup> By the mid 1980s there was a degree of public recognition of domestic violence as an issue predominantly affecting women.<sup>85</sup>

However, under the conservative Howard government, from the mid 1990s the focus was actively moved away from the gendered nature of domestic violence, consistent with the government's focus on 'family values' and political correctness. Official discourse favoured the Intergenerational Transmission of Violence theory, which promoted the idea of violence as an ongoing problem experienced within dysfunctional families, rather than an issue of gender.<sup>86</sup>

In the climate of ambivalence that these changes produced, other terms for domestic violence, such as 'family violence'<sup>87</sup> and 'violence against women',<sup>88</sup>

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<sup>82</sup> Howe (2008), pp 21-7. In the UK, searches under terrorism powers increased for all racial groups between 2001/02 and 2002/03 but more for those classified as 'Asian' including Indian and Pakistani origin (302 percent) than for 'White' (118 percent): Home Office UK (2004), p 28.

<sup>83</sup> As Spender notes, women have to 'tell it slant' in order to translate their experiences into the male register: Spender (1990), pp 81-4.

<sup>84</sup> Mason (1998), 339. 'Criminal Assault in the Home' (Women's Policy Coordination Unit, NSW, 1985) was the first official attempt to explain the gendered nature of domestic violence: Webster (2007).

<sup>85</sup> Webster (2007), pp 57-8. Victorian Health Promotion Foundation (2009), p 33, notes that recognition of the gendered nature of domestic violence diminished between the 1995 and 2006 surveys.

<sup>86</sup> Webster (2007).

<sup>87</sup> For a critique of the degendering effect of the term 'family violence' see Behrens (1996), p 38; Bograd (1988). COAG uses this term in contrast to 'domestic violence' to encompass violence amongst family members having similar features to domestic violence: COAG (2011), p 3.

<sup>88</sup> This term was chosen by the National Committee on Violence Against Women as a means of differentiating violence perpetrated against women from other violence in the home: NCVAW (1991), and see Genovese (1998), p 12.

came to represent diverging philosophies about the origins and causes of violence. These debates have focused on whether or not violence inflicted upon women by their partners should be classified with violence against the family more broadly, and indeed whether domestic violence as a concept should reflect abuse by women of their partners as well as violence by men. Use of the term 'family violence' represents a move away from the feminist structural approach to violence that gained some traction during the 1970s and 1980s, and toward the degendered concept favoured by the Howard government.<sup>89</sup>

Notwithstanding the recognition of the gendered nature of domestic violence produced by feminist activism from the 1970s onwards, contemporary public discourse is largely absent recognition of the systemic nature of the violence, and how it is tolerated in Australian society.<sup>90</sup> This reflects the continuing masculinist influence in Australian society, as illustrated by the popular notion advanced by former Prime Minister John Howard that Australia is now a 'post-feminist' society.<sup>91</sup>

Notably, there has not been any Australian equivalent to the attempts in the United States to have violence against women legally recognised as a form of terror.<sup>92</sup> It is significant that the discourse of radical feminists, which has focused upon the systematic and gendered nature of violence against women, and may have worked to counteract some of the degendering of domestic violence, has been largely absent from political discussion of violence in Australia.<sup>93</sup> In the United States, radical feminists such as the late Andrea Dworkin and Catharine MacKinnon have been highly visible and politically active in drawing attention to the need for radical legal reform to address the

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<sup>89</sup> Phillips (2006), pp 200-10.

<sup>90</sup> ALRC (2010a). A study of community attitudes towards violence against women found that a significant proportion of the community believe that domestic violence can be excused if it results from temporary anger or results in genuine regret, and believe that rape results from men not being able to control their need for sex: Taylor and Mouzos (2006), p 66.

<sup>91</sup> Webster (2007), p 61.

<sup>92</sup> See references in Chapter 1.1 in 'Previous comparisons of domestic violence and terrorism'.

<sup>93</sup> Although note that radical feminists such as Daly had their followers particularly in the Radical Lesbian movement in Sydney in the early 1980s: Genovese (1996), p 141. Genovese describes Daly's visit to Sydney in 1981 and the dissonance between her supporters and those who felt that her work was essentialising or racist.



issue of violence against women.<sup>94</sup> MacKinnon and Dworkin have strategically employed the language of terror in their campaigns and drawn attention to the numbers of women harmed by abuse, and the horrific nature of the harm.

However, an express reframing of violence against women as a form of ‘terror’ à la MacKinnon and Dworkin is almost unthinkable within the current Australian social and political environment. In the following section, the unavailability of the language of terror in describing domestic violence is illustrated through the social and legal construction of the perpetrators of violence.

### *Construction of the ‘Terrorist’ Versus the Perpetrator of Domestic Violence*

Legal discourse, as well as popular discourse, constructs not only the phenomena of terrorism and domestic violence but also the perpetrators of these offences. As Carr notes, ‘Whereas the noun “criminal” may simply be a statement of fact, “terrorist” is always a pejorative expression of an attitude rather than the depiction of an objective phenomenon’.<sup>95</sup>

In contemporary legal and popular discourse, the terrorist is primarily represented in the form of the ‘menacing Arab’. Edward Said has written of contemporary constructions of the Arab as ‘oriental’ and the ways in which he (for it is ‘he’ in these representations) is frequently presented as dishonest, menacing and lecherous.<sup>96</sup> Said writes, ‘Lurking behind all of these images is the menace of *jihad*. Consequence: a fear that the Muslims (or Arabs) will take over the world.’<sup>97</sup>

Since 9/11, Western media has actively participated in this construction of the terrorist as the ‘Arab other’ – a dangerous amalgam of fundamentalist Islamic belief, dislike of Western values, and failure to assimilate into the Australian

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<sup>94</sup> A key example is MacKinnon and Dworkin’s ‘Anti-Pornography Ordinance’ which was enacted into legislation in Indianapolis before being struck down by the Seventh District US Court of Appeals in 1985, as confirmed by the Supreme Court: see Smart (1989), pp 134-6.

<sup>95</sup> Carr (2006), p 7.

<sup>96</sup> Said (2003), especially pp 284-93.

<sup>97</sup> Said (2003), p 287.

community.<sup>98</sup> Using the 'us and them' metaphor of war, this 'Other' is always constructed in opposition to a nationalised 'us'.<sup>99</sup> This both reflects and reinforces fear within the Australian community about the threat to society posed by outsiders who are perceived not to share our cultural values.

The construction of the perpetrator of terrorism as 'other' is also reflected in legal discourse in a way that highlights offenders' affiliation to an ideologically-motivated group and juxtaposes the shared values of that group against those of mainstream Australian society.<sup>100</sup> In their analysis of legal and media reports of convicted terrorism offenders, Porter and Kebbell note that one theme of the reports was a sense of identity perpetrators had with Muslims generally and a feeling that this group was being persecuted or mistreated.<sup>101</sup> In sentencing the offenders in *Benbrika*, the court made note of intercepted telephone calls in which Benbrika had promoted jihad against the 'kuffar' (unbelievers) who resisted the expansion of Islam and rule of Shariah law in Australia. It was noted that the group referred to themselves as 'brothers', 'mujahedeen (warriors)' and 'doing something' for the cause, and that members of the group praised those responsible for earlier terrorist attacks.<sup>102</sup> In the Melbourne trial of those accused of conspiring to attack the Holsworthy Army Barracks, two of the accused were said to have referred to Australians as 'spiteful' and 'enemies' who were targeting Muslims.<sup>103</sup> Membership of, and loyalty to, a central group are emphasised, even though some members of the 'group' may never have met. Although sentencing judgments pay regard to individual backgrounds and characteristics, they are a secondary feature to the focus on group identity.

In contrast with the perpetrator of domestic violence, a terrorist is the 'enemy', the 'other', the personification of evil – he is not someone's brother, father,

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<sup>98</sup> Poynting et al (2004). See also the collection of articles in Griffith University's 2003 special edition of *Media International Australia* 'The New "Others": Media and Society Post September 11' in particular Padgett and Allen (2003) and Poynting and Noble (2003); see also Heathcote (2010) pp 294-5.

<sup>99</sup> Poynting et al (2004), p 62.

<sup>100</sup> Post-9/11 legal discourse exhibits features of Garland's 'expressive punitivism' by demonising particular sectors of the community and portraying criminality as a feature of 'evil' individuals: Bull and Craig (2006), pp 209-11.

<sup>101</sup> Porter and Kebbell (2010), pp 9-10.

<sup>102</sup> *R v Benbrika & Ors* (2009) 222 FLR 433, [19]-[24].

<sup>103</sup> 'Terror suspect walked around base: court', *Ninemsn*, 14 Sept 2010, <<http://news.ninemsn.com.au/article.aspx?id=7961116>>.

husband or neighbour.<sup>104</sup> No doubt much of the evidence of the ‘otherness’ of offenders in terrorism cases is available to the court due to the use of covert surveillance, which is much more likely to be used in relation to terrorist offences than domestic violence.

However, in domestic violence settings, verbal abuse is a common feature,<sup>105</sup> including the use of language by which the abuser (as male) constructs himself in opposition to his victim (as female) by use of gendered terms such as ‘slut’, ‘bitch’ and ‘whore’.<sup>106</sup> The use of such language would potentially mark the perpetrator as a hater of women and therefore imbue his actions with a discriminatory aspect. However, the common usage of these terms effectively obscures their gendered nature, and ensures that where present, they will not be given the interpretation that is offered here, as terms illustrative of gender bias or hatred.<sup>107</sup> The law, consistent with its masculinist nature, treats the use of these terms as politically-neutral, failing to recognise the gendered dimensions to the use of misogynist language. The neutralisation of gendered hate speech is considered in more detail in Chapter 3.1.

In this respect, the law de-genders domestic violence in a similar fashion to the de-gendering process that takes place in the media. Howe has noted that the media largely shies away from laying blame at the feet of domestic violence perpetrators, obscuring the gendered nature of the problem. Domestic violence is constructed as a genderless crime;<sup>108</sup> research in South Australia found that

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<sup>104</sup> Saul (2006), p 1 notes of the term terrorism that ‘its peculiar semantic power is its capacity to denigrate and dehumanise those at whom it is directed’. Although the familial relationships of terrorism perpetrators are mentioned in sentencing judgments, such relationships are usually mentioned only in passing; by contrast, domestic homicide offenders are commonly portrayed in sentencing judgments as model fathers and even husbands/partners.

<sup>105</sup> Mouzos and Makkai (2004), pp 9-11.

<sup>106</sup> For examples of domestic violence cases involving use of these terms see *R v Hill* [2006] VSC 149 (Unreported, Hollingworth J, 2 May 2006); *R v Troselj* (unreported, ACTSC, Spender J, 22 June 2007); *R v Andrew* [2008] VSC 138 (Unreported, Forrest J, 1 May 2008); *R v Dowley* [2009] NSWSC 722 (Unreported, Hidden J, 30 July 2009); *R v Shepherd* [2009] NSWDC 386 (Unreported, Nicholson SC DCJ, 11 September 2009) [10].

<sup>107</sup> It has been noted that in the football domain sexualisation of women is so normalised as to be unremarkable: Waterhouse-Watson (2007), p 158.

<sup>108</sup> Howe (1998).

gender was rarely mentioned as a factor in news reports of domestic violence.<sup>109</sup>

The absence of gender from the construction of domestic violence is not merely an oversight; it is the product of a deliberate strategy to 'de-gender' the problem of domestic violence. The 'Australia Says No' campaign against domestic violence was reconfigured from its initial focus on the responsibility of perpetrators to a focus on victims, because it was perceived to blame men for domestic violence.<sup>110</sup> Berns has described the way in which violence against women is de-gendered in the media through strategies that include running stories about women's violence against men, blaming victims for the abuse inflicted upon them, and using female writers to pen stories minimising the impacts of domestic violence.<sup>111</sup> In relation to sexual assault specifically, the media constructs the perpetrator as a deviant, individual figure, despite the fact that approximately 40 percent of sexual assault is perpetrated by men against their partners and children.<sup>112</sup>

To the extent that a face is given to perpetrators of violence against women, it is characterised as a problem associated with 'minority ethnic culture', sweeping aside the fact that mainstream culture is also associated with the perpetration of violence against women.<sup>113</sup> Rarely do we see the face of domestic violence perpetrators splashed across the newspaper or television screen like the faces of terrorism perpetrators; on the rare occasion this occurs it is usually because of the high profile of the perpetrator or victim and is treated akin to a celebrity scandal.<sup>114</sup>

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<sup>109</sup> Power and Mackenzie (2010).

<sup>110</sup> Dux and Simic (2008), p 12.

<sup>111</sup> Berns (2001). See also Howe (1998).

<sup>112</sup> Howe (1998), pp 42-3.

<sup>113</sup> Volpp (1994); Weston-Scheuber (2007). In relation to violence against women more broadly see Elder (1998). This also resonates with the state's treatment of violence in late nineteenth and early twentieth century America: Siegel (1995), pp 2138-9.

<sup>114</sup> Examples include media coverage in 2010 of Australian actor Matthew Newton's violence against girlfriend Rachel Taylor; Newton had previously been found guilty of violence against former girlfriend Brooke Satchwell. It has been noted that the media has focused more on Newton's mental illness than on the fact he is a perpetrator of domestic violence: Rhiana Whitson, 'Matthew Newton: He Did it Again', *The Dawn Chorus – Feminist Blog*, 5 Sept 2010, <<http://thedawnchorus.wordpress.com/2010/09/05/media-moguls-look-after-the-perpatrators-of-domestic-violence/>>. OJ Simpson's alleged murder of his partner

The consequence of how perpetrators of terrorism are constructed is that an identifiable target is created for state and public scrutiny – a class of persons towards whom fears and concerns about terrorism can be directed. The use of the term ‘terrorist’ to describe a group serves a political purpose: it effectively allows all activities of that group to be opposed regardless of political motivation.<sup>115</sup> By contrast, the result of the de-gendering of domestic violence is that there is no identifiable class of perpetrators to focus upon. This is not surprising, as the kind of ‘moral panics’ that circulate in relation to ethnic gang crime are, as Howe notes, not possible when the perpetrators include members of the dominant group.<sup>116</sup>

The construction of an identifiable perpetrator group in relation to terrorism also makes it much easier to characterise acts carried out by that group as being ideological in nature, as ideology is associated with belief systems that are considered unusual or outside the mainstream. This is explored in more detail in Chapter 2.2.

### *Conclusion*

While MacKinnon’s question cited at the beginning of this chapter is focused upon international law responses to violence against women, the question is apposite in relation to domestic legal responses also. I have argued that the names given to the two phenomena I am here concerned with – domestic violence and terrorism – are an important part of understanding the different structural and practical responses to them.

In this chapter, I have examined the ways in which the concepts of ‘domestic violence’ and ‘terrorism’ have evolved in legal discourse in specific contexts: the former as a result of a deliberate and strategic choice by feminist activists in the

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Nicole Brown in June 1994 (he was found not guilty) generated huge media interest, however the focus was primarily on the racialised aspects of the trial rather than any analysis from a gender perspective.

<sup>115</sup> Hogg (2007), pp 100-1.

<sup>116</sup> Howe (1998), pp 37-8.

1970s to obtain support for women victims of domestic abuse, and the latter as a result of international events, particularly the terrorist attacks of 9/11.

As outlined in the introduction to this chapter, the process by which names are ascribed to social and legal phenomena is not a neutral one. The fact that domestic violence is socially and legally defined as such and not as terrorism reflects a process whereby violence committed against women in the private sphere is separated off from other violence and designated for different treatment. However, as I argue in the following two chapters, domestic violence and terrorism, despite their legal constructions, do in fact have significant aspects in common.

The historical developments outlined here provide the context for exploring the ways in which the key concepts that distinguish terrorism and domestic violence – the ideological and the public – have acquired the meanings that they bear today in legal discourse. In the following two sections, I examine these concepts and their construction in legal discourse in detail.

## CHAPTER 2.2      LAW'S CONSTRUCTION OF IDEOLOGY AND OF THE 'OTHER'

However muted its present appearance may be, sexual dominion obtains nevertheless as perhaps the most pervasive ideology of our culture and provides its most fundamental concept of power.<sup>1</sup>

In the previous chapter, I noted the importance of labels in determining how different phenomena are treated both within and outside the law. Labelling occurs within the law both in terms of what acts are defined as criminal, and how elements of particular offences are defined and constructed. Concepts that are integral to the determination of legal rights and responsibilities – such as 'reasonable' and 'justifiable' – are not capable of definition outside of the legal discourse that constructs them. The same relationships of power that determine what is considered reasonable or justifiable outside the law also operate to determine what is so defined under the law.

In this chapter, I explore the concept of ideology and the significant role that it plays in the construction of terrorism and the terrorist. As an element of terrorism offences, ideology plays a crucial part in distinguishing terrorism from other forms of violence (including domestic violence) and creating for it a special place in the catalogue of crimes.<sup>2</sup>

I first consider the peripheral role played by motive within the law generally, noting that the inclusion of a specific motivation as a requirement of terrorism offences is exceptional. I then consider the meaning/s of ideology to provide a context for discussion of how the term is constructed in legal discourse. I proceed to consider various 'indicia' of ideology as extrapolated from Australian terrorism sentencing decisions (where ideology must be found to exist as it is an element of the terrorism offences) and how ideological motivation is constructed in these cases.

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<sup>1</sup> Millett (2000), p 25.

<sup>2</sup> Saul (2007), p 29; UN General Assembly (1994).

In relation to each of these indicia, I argue that an alternative (feminist) construction of serious domestic violence cases is that its perpetrators are also ideologically motivated, although this is not recognised by the courts. As Millett notes in the opening quotation to this chapter, the ideology of sexual dominion is pervasive, but it is also 'muted'. I am therefore also concerned to de-construct domestic homicide sentences to examine how these indicia of ideological motivation, where present, are ignored or obscured.

### *The Role of Motive in the Law Generally*

Within the criminal law, motive generally refers to the emotion prompting an act, as distinct from the *mens rea*, which is the state of mind necessary to establish criminal responsibility.<sup>3</sup> Crimes of domestic violence, which comprise 'ordinary' crimes such as assault, wounding and manslaughter, do not require the prosecution to establish any particular motive on the part of the perpetrator. While intention (or other requisite fault element) is usually required to establish criminal responsibility, motive is not.<sup>4</sup> Rather, motive may help evidentially to establish the fault element by providing a reason for the conduct, and explaining how a particular state of mind came about.<sup>5</sup> Motive can also be relevant to the existence of a legal defence, such as self-defence, necessity or provocation. It is also considered in terms of mitigation or aggravation at the sentencing stage.<sup>6</sup> However, motive is rarely included as a necessary element of a criminal offence.<sup>7</sup>

The irrelevance of motive to criminal liability is consistent with the traditional positivist view of law, pursuant to which law is a system of rules created by

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<sup>3</sup> Bronitt and McSherry (2010), pp 199-200.

<sup>4</sup> *Hyam v DPP* [1975] AC 55 per Lord Hailsham at 73; McSherry (2004b), pp 359-64.

<sup>5</sup> Bronitt and McSherry (2010), p 200.

<sup>6</sup> Lacey, Wells and Quick (2003), pp 54-5; Bronitt and McSherry (2010), p 733.

<sup>7</sup> The Hope Review cited an opinion by former High Court judge Sir Victor Windeyer: 'terrorism ... is not defined by reference to specific deeds, but in general terms the 'use of violence'; and not with a specific intent, but with an ulterior object, 'for political ends', a most imprecise term ... This would appear to make criminal responsibility depend upon an ulterior intention or motive, an unusual ingredient of a criminal act'. 'Opinion of Sir Victor Windeyer, KBE, CB, DSO on certain questions concerning the position of members of the defence force when called out to aid the civil power', reproduced as Appendix 9 to Hope (1979).



humans that is divorced from considerations of politics and morality.<sup>8</sup> Within the positivist conception of law, murder is defined independently of the perpetrator's reason for committing the act. The use of morally neutral terms to denote fault, rather than terms such as 'malice', occurred in the context of changes in the common law precipitated by the influence of liberal theory in the nineteenth century.<sup>9</sup>

The terrorism offences in the Criminal Code are an exception to this general rule. 'Terrorist act' is defined in the Code as '[a particular act] perpetrated or threat made *with the intention of advancing a political, religious or ideological cause* and with the intention of coercing or influencing by intimidation a government, or intimidating the public or a section thereof' (emphasis added).<sup>10</sup> In this way, the law expressly makes motive a component of terrorist offences, even though the ideological purpose may be that of someone other than the accused.<sup>11</sup> It also reflects the public perception that ideological motivation is an ingredient of terrorism.<sup>12</sup>

With regard to the inclusion of the motivation element, Australian anti-terrorism laws, like the laws of Canada, New Zealand and South Africa, follow the British *Terrorism Act 2000*.<sup>13</sup> The British definition was based on a working definition of terrorism used by the Federal Bureau of Investigation (FBI) in the United States.<sup>14</sup> By contrast, the definition of terrorism in United States legislation does not contain a motivation element.<sup>15</sup> In Canada, a motivational element was

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<sup>8</sup> Hart (1961), pp 181-207.

<sup>9</sup> Bronitt and McSherry (2010), p 295.

<sup>10</sup> *Criminal Code Act 1995* (Cth) s 100.1.

<sup>11</sup> This was confirmed by the NSW Court of Criminal Appeal in *Lodhi v R* (2007) 179 A Crim R 470, [206]-[207]. Motive is also an aspect of hate crime and hate speech offences, considered in detail in Chapter 3.1.

<sup>12</sup> Security Legislation Review Committee (2006), p 57. Though there is also a body of opposition to the 'motive' component of terrorism: see Roach (2007) and the Canadian decision *Khawaja* (2006) 214 CCC (3d) 399, subsequently overturned in *Khawaja* (2010) 2010 ONCA 862 (Unreported, Doherty, Moldaver and Cronk JJA, 17 December 2010).

<sup>13</sup> *Terrorism Act 2000* (UK) s 1, *Terrorism Suppression Act 2002* (NZ), *Criminal Code*, RSC 1985, C-46 (Canada), *Protection of Democracy Against Terrorist and Related Activities Act 2003* (South Africa).

<sup>14</sup> Roach (2007), p 45. The definition is found in *Terrorism Act 2000* (UK) s 1. This definition is noted as being consistent with international comparators and treaties: Carlile (2007), p 47.

<sup>15</sup> *USA Patriot Act*, Pub L No 107-56, § 802, 115 Stat 272 (2001). Note that it may still enter legal discourse as it is still part of the widely-accepted definition of terrorism.

declared unconstitutional by the Superior Court of Justice, but that decision was overturned by the Ontario Court of Appeal.<sup>16</sup>

As Alan Norrie notes, courts have generally taken a narrow approach to intention, focusing on whether the perpetrator has turned their mind to a particular aim, whereas in cases of political violence they have taken a broader approach, focusing upon the moral intention or the intention to do wrong.<sup>17</sup>

The inclusion of ideological motive as an express element of terrorism demonstrates this wider approach of focusing upon the ultimate goal of the terrorist in preference to her or his immediate intention. For example, the terrorist's goal in detonating an explosive may be to publicise her or his cause. He or she may not actually possess the intention to kill, but simply be indifferent as to whether the action results in a loss of life.

The required motivation in terrorism offences is one of politics, religion or ideology. There is scant precedent for the legal interpretation of ideology, which has traditionally been a topic for study in philosophy and sociology rather than law. The absence of precedent creates a broad scope for judges to give their own interpretation to the concept.<sup>18</sup> Given that ideological motivation is an element of terrorist offences, lawyers and judges must focus upon those aspects of the defendant's conduct said to be ideological. This reflects the way in which legal discourse influences how investigators and legal officers gather material and present their cases in court.

Noted feminist sociologist Dorothy Smith, drawing on Marx, argues that people learn about social phenomena (such as domestic violence) not through their own experiences, but through the media and other social reports.<sup>19</sup> In these reports, concepts or assumptions are applied in abstraction from their factual

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<sup>16</sup> *Khawaja* (2006) 214 CCC (3d) 399, overturned by *Khawaja* (2010) 2010 ONCA 862 (Unreported, Doherty, Moldaver and Cronk JJA, 17 December 2010). The Supreme Court has granted leave to appeal the decision: 'Khawaja "terrorist activity" appeal will go to Supreme Court', *CBC News (online)*, 30 June 2011, <<http://www.cbc.ca/news/canada/story/2011/06/30/pol-scoc-kawaja-appeal.html>>.

<sup>17</sup> Norrie (2001), pp 47-56. There is also a claim that the element of dishonesty in property offences makes motive relevant: Bronitt and McSherry (2010), p 733.

<sup>18</sup> Neither the Explanatory Memorandum to the *Suppression of Financing of Terrorism Act 2002* (Cth) nor the Second Reading debates refers to the rationale for defining terrorist act to include a particular motivation. For judicial decision-making as a site of masculinist state power see Thornton (2006), p 158.

<sup>19</sup> Smith (1990).

context; particular 'facts' are then chosen from an example to illustrate or support the concept or assumption. She refers to this as the 'social organisation of facticity' – a process by which the official version of events comes to represent 'what actually happened', stripped of any reference to how that version of events was constructed or created.<sup>20</sup> Potentially conflicting or contradictory facts are erased from the account that is generated through this process.

Smith's theory usefully illustrates the process by which courts construct the actions of perpetrators in terrorism cases as ideologically motivated – 'ideology' is the concept set up in abstraction, and particular aspects of conduct are chosen from the available evidence to support the existence of ideological motivation; this becomes the 'official' version of what happened.<sup>21</sup> There is no longer any question as to whether the perpetrator's actions were ideologically-motivated or not in an 'objective' sense; the version constructed on the court's record becomes the official version of events that is also presented in the media and other reports of 'what happened'.

On the other hand, in domestic violence cases (and here I focus particularly upon intimate homicides as the most serious manifestation of domestic violence), the absence of any ideological component to the offence, and the focus in defences upon the conduct of the victim and the defendant's 'loss of self-control' encourages lawyers and decision-makers to focus upon personal motivations of the accused. Ideological motivation is not officially a component of domestic violence offences, and therefore it is irrelevant within legal discourse. Indicia suggestive of ideological motivation in domestic violence cases are thus ignored in the process of generating the official account of events.<sup>22</sup>

The absence of reference to ideology in cases of domestic violence is both a cause and effect of the phenomenon referred to by Millett above, whereby the

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<sup>20</sup> Smith (1990), pp 65-78.

<sup>21</sup> I describe how this process works in practice below and in Chapter 3.3.

<sup>22</sup> In the sections that follow, I examine how these indicia of ideology can be 'reconstructed' via feminist readings of domestic homicide cases.

dominion of men over women remains obscured despite being ‘perhaps the most pervasive ideology of our culture’.<sup>23</sup> By means of a legally-discursive ‘Catch 22’, the cultural invisibility of this pervasive ideology (‘masculinist ideology’) means that it is absent from discussion in cases of domestic homicide; in turn, the absence of ideology from legal discourse reinforces and perpetuates the invisibility of masculinist ideology in Australian culture more broadly. In the following section, I explore the concept of ideology in more detail.

### *The Meaning of ‘Ideology’*

Section 100.2 of the Criminal Code<sup>24</sup> defines a ‘terrorist act’ to require, *inter alia*, that the perpetrator act with the intention of advancing a political, religious or ideological cause. ‘Ideological’ is not defined in the Criminal Code. ‘Political’ and ‘religious’ are not defined either, but as politics and religion are both forms of ideology,<sup>25</sup> ‘ideological’ serves as a broader category of which the other two are subsets.<sup>26</sup> The Macquarie Dictionary defines ‘ideology’ as ‘the body of doctrine, myth, and symbols of a social movement, institution, class or large group’.<sup>27</sup> On this definition, ideology would appear to require both a group of people (whether large or small) and a set of beliefs and understandings shared by members of the group.

Andrew Vincent, in his treatise on ideologies, writes:<sup>28</sup>

The present position of ideology still remains profoundly contested and open to broad interpretation. ... Ideology is, however, still used pejoratively or negatively, indicating a limited perspective, a *subjective value bias*, a linguistic distortion, a symbolic phantasy, or most commonly, an *illusory view of the*

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<sup>23</sup> Millett (2000), p 25.

<sup>24</sup> *Criminal Code Act 1995* (Cth).

<sup>25</sup> As is apparent from the definitions of ideology discussed in the following section. Vincent notes that the accusation of being ‘political’ usually indicates the manifestation of ideological belief: Vincent (1996), p 111.

<sup>26</sup> The breadth of the term ‘ideology’ means that it may encompass causes that do not fit neatly into definitions of ‘politically’ or ‘religiously’ motivated crime.

<sup>27</sup> The Macquarie Dictionary and Thesaurus (1991), p 200.

<sup>28</sup> Vincent (2009), p 17.

*world*. Furthermore, ideology can simply denote an individual's political perspective, a conceptual map which helps groups to navigate the political world, a *specific set of hegemonic views which tries to legitimate power* (as in the belief structures of a particularly [sic] social class), or indeed all political views. Ideology can also signify the generic ideas of a political party, a total world-view, or indeed human consciousness in general, encompassing all beliefs, including art and science. The latter might imply the politicization of all ideas or simply that interpretative concerns permeate all our claims to knowledge [*emphasis added*].

I suggest that 'ideological', in the sense in which it is used by the law, takes the more specific form referred to, that is as representing a 'subjective value bias' and an 'illusory view of the world'. I explore this in more detail below.

Vincent also notes that central to the modern conception of ideology is the distinction between ideology and 'truth', with many who discuss ideology claiming a 'neutral' or 'truth' basis for their claims (to distinguish themselves from the 'ideology' that they critique).<sup>29</sup> In law, what qualifies as 'ideological' is determined from the perspective of the decision-maker who, although basing decisions on her or his own experience of the world, is imbued by law with the mantle of objectivity.<sup>30</sup>

From this position of objectivity, the law constructs terrorism offenders as possessing a 'particular perspective'. Within contemporary legal discourse, as in the media,<sup>31</sup> 'ideology' comes to be associated with the 'Arab other'<sup>32</sup> – with the angry fundamentalist Muslim seeking to wage *jihad*<sup>33</sup> on the Western world.<sup>34</sup>

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<sup>29</sup> Vincent (2009), p 11. This is also consistent with Marx's treatment of ideology: Heywood (2003), pp 6-7. This practice had its genesis in Marx's distinction between the 'ideology' of the ruling class and the 'truth' of the proletariat.

<sup>30</sup> Naffine (1990), pp 44-7. This is not to say that legal discourse is purely a product of the bias of individual decision-makers, although it is acknowledged that this is a contributing factor.

<sup>31</sup> Dreher notes that racialised framing in the media constructs Islam as an explanation for terrorist activity: Dreher (2007), p 213. Movies such as *True Lies* (1994), *Executive Decision* (1996), *The Siege* (1998) and *Rules of Engagement* (2000) all portray terrorism as the work of the cultural, racial or ideological 'other': Carr (2006), p 273.

<sup>32</sup> In relation to the slippage that has occurred between religion and race in the construction of the Other' since 9/11, see Thornton and Luker (2009), pp 74-5.

<sup>33</sup> Note that '*jihad*' literally means 'effort' but is understood to mean 'holy war': Nebhan (2006), p 132.

<sup>34</sup> Poynting et al (2004). Carr notes that religious terrorism has come to be associated in Western consciousness with fundamentalist Islam more than any other religion: Carr (2006), pp 237-9. See also Said (2003), pp 284-93 and Nebhan (2006), pp 130-40.

Western liberal legal states are not, within the purview of their own systems, based upon ideology, although critical scholarship sets out to reveal and critique the assumptions and values underlying such systems.<sup>35</sup> This process of construction fits within the historical development of terrorism in Australia as outlined in Chapter 2.1, and the modern conception of terrorism both in Australia and internationally as associated with the threat of fundamentalist Islam.<sup>36</sup>

By contrast, perpetrators of 'ordinary' crimes (including domestic violence) are not recognised as possessing any particular ideology; rather, their behaviour is constructed as a problem of individual, dysfunctional relationships.<sup>37</sup> It is unthinkable within the Australian legal system that its white, Anglo-Celtic, heterosexual 'benchmark man'<sup>38</sup> might be characterised as having a 'subjective value bias' – thus he can never be constructed in law as the 'Other'. As the patriarchal influences in the law mean that the masculinist perspective is constructed as the 'norm',<sup>39</sup> behaviour rooted in masculinist ideology is rendered 'normal' rather than ideological through discourse. This process of normalisation is facilitated by the construction of 'domestic violence' as something private and mundane – an aberrant (though understandable) feature of relationships.

However, when one deconstructs the process by which the meaning of ideology is constructed, the masculinist perspective is revealed as ideological in the same way as any fundamentalist belief system. This perspective is, as Millett refers to it (above), the 'most pervasive ideology of our culture'.<sup>40</sup> It is

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<sup>35</sup> Scraton and Chadwick (1996), pp 284-5.

<sup>36</sup> Dept of Prime Minister and Cabinet (2010) states at page ii: 'The main source of international terrorism and the primary terrorist threat to Australia and Australian interests is from a global violent jihadist movement – extremists who follow a distorted and militant interpretation of Islam that espouses violence as the answer to perceived grievances'.

<sup>37</sup> Edwards (1996), pp 178-9. The exceptions to this are men who kill their wives who also fall into the category of 'other' by virtue of their ethnicity: see Cleary (2005), pp 112-5 for discussion of the 'Yasso' case. Maher et al have noted that in domestic violence cases, males of minority ethnic background are also constructed as 'the uncivilised Other' as reflected against mainstream culture, which is portrayed as respectful of women: Maher et al (2005). See also De Pasquale (2002).

<sup>38</sup> Thornton (1990), p 1.

<sup>39</sup> Catharine MacKinnon has described the way in which patriarchy constructs the masculine perspective as objective (point-of-viewlessness) thus rendering alternative viewpoints as 'Other': MacKinnon (1983), pp 635-639. For a critique of the 'unstated norm' see Minnow (1987).

<sup>40</sup> Millett (2000), p 25.

constituted by the same features of 'ideology' outlined above – a group of people with a shared set of beliefs and understandings. Of course, not all men subscribe to masculinist ideology, in the same way that fundamental Islamist beliefs are not held by all Muslims. Nor is it necessary to the concept of ideology that the members of the group know each other and participate in collective activity, just as persons who share a particular political ideology may never meet.

The shared set of beliefs and understandings that form the basis of masculinist ideology include a belief in male superiority and entitlement to control over families, including partners.<sup>41</sup> Indeed, the association of maleness with domination, and femaleness with subordination underlies the social construction of sexual relations.<sup>42</sup> The 'ideology of sexism', which accepts and promotes the idea that differential treatment on the basis of sex is justified because of biological difference, is so successful in part because both men *and women* accept its premise.<sup>43</sup>

Like any ideology, masculinist ideology has its own doctrine, myth and symbols. These include pornography,<sup>44</sup> objectification of women, glorification of war<sup>45</sup> and violent sport,<sup>46</sup> and laudation of physical superiority.<sup>47</sup> It is this belief system, and its supporting propaganda, that underlies much of the violence against women perpetrated in Australian society.<sup>48</sup> The law, replete with the same masculinist influences as general society, reflects this same world-view.

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<sup>41</sup> Andrea Dworkin refers to 'Male sexual domination' as 'a material system with an ideology and a metaphysics': Dworkin (1981), p 203.

<sup>42</sup> Thornton (1990), p 61.

<sup>43</sup> Thornton (1990), pp 62-3.

<sup>44</sup> In relation to pornography as an aspect of masculine ideology, see Dworkin (1981).

<sup>45</sup> See for example Robin Morgan (2002), pp 9-13, arguing that the eroticisation and elevation of violence as a form of manhood and solution to problems was in part responsible for the call to war following September 11. See also in this volume Bunting (2002) pp 26-7, noting that polls showed a higher level of support from men than women for war; see also Ruby (2002), pp 148-50; Ensloe (2002), pp 254-9.

<sup>46</sup> Ryder (1994), pp 84-5; Belknap (1996), p 175; Wolfword (2002), pp 46-7.

<sup>47</sup> Cameron and Frazer (1987), pp 166-9.

<sup>48</sup> See for example in relation to football culture Philadelphoff-Puren (2004). In relation to violence against women as an aspect of male identity, see especially pp 66-9. Howe (1998), pp 42-53, notes that the violence of white men is not socially recognised as culturally-inscribed. American findings of correlation between support for violence against women, and membership of fraternities and sporting groups characterised by intense masculinity and strong gender role differentiation, could be extrapolated to Australia: Flood and Pease (2006), pp 36-7.

Sherry Ortner argues that in every society women are subordinated to men by elements of cultural ideology that explicitly devalue women, symbolic devices that implicitly do the same, and social-structural arrangements that exclude women from participation in some forms of power.<sup>49</sup> I argue here that the actions of domestic violence perpetrators, reconstructed through a feminist lens, reflect masculinist ideology. Although their actions are not conceptualised as such by the courts, perpetrators of domestic violence often act in the pursuit of a cause – namely a desire to establish or reinstate control over their partners (and women generally) and a belief that they are *entitled* to exercise that control forcibly if necessary.<sup>50</sup> In fact, domestic violence perpetrators are arguably more successful than terrorists in using violence to achieve their ends.<sup>51</sup> It is not just the instrumental use of force, but its use in the context of the belief structures referred to above, that warrants its redefinition as ‘ideological’. In other words, the violence is not simply rooted in ideological belief, but is perpetrated to *advance* it.

Possibly because the Australian terrorism cases to date have involved religious motivation, judges have apparently not considered it necessary to expressly define ideology.<sup>52</sup> However, it is possible to extrapolate various indicia of ‘ideological’ motivation by examining the sentencing judgments in which (aside from pleas of guilty) the jury’s verdict reflects the existence of ideological motivation. These indicia are as follows:

1. Commitment to a cause;
2. A belief that violence is justified or legitimate in the pursuit of the chosen cause;

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<sup>49</sup> Ortner (1998), pp 23-5.

<sup>50</sup> See Parkinson and Behrens (2004), p 379. That domestic violence involves a purpose of control was reflected in the *Partnerships against Domestic Violence* Statement of Principles adopted by the Australian Heads of Government at the 1997 Domestic Violence Summit. It was reiterated in the Australian Government report, *Time for Action* (2009), p 186 and also in the recent ALRC report: ALRC (2010a).

<sup>51</sup> Frey and Morris (1991), p 11, suggesting that international terrorism is not very successful in achieving its aims.

<sup>52</sup> In other words, because religious motivation is expressly mentioned in the definition of ‘terrorist act’, it has not been necessary to define what is meant by ideological motivation. In searches of Lexis Nexis Casebase and the UK legal search site ‘Bailii’, I was unable to find any Australian or United Kingdom case where ‘ideology’ had been defined beyond a brief distinction drawn between ideology and purpose in *Rowe v R* [2007] EWCA 635 (15 March 2007).



3. A degree of planning and premeditation of activities carried out in the interests of the cause;
4. Denigration or blame of the victims of terrorist activity justifying their victimisation.

In the following parts of this chapter, I use these indicia to examine the ways in which legal discourse constructs terrorist violence as 'ideological' and other violence as generated by a spontaneous outburst of emotion, while also offering possible alternative reconstructions of domestic violence as ideologically-motivated. Through 'discursive manoeuvres' it is possible to extrapolate alternative versions of the 'truth' from the official record of what occurred in domestic violence cases.<sup>53</sup>

### *The Indicia of Ideology*

#### *Commitment to a Chosen Cause*

It is a feature of the terrorism sentencing judgments to date that offenders are constructed as possessing a commitment to their cause, and the intention to achieve a result of some kind for that cause. By contrast, domestic homicide offenders are usually constructed as motivated by personal feeling or emotion antithetical to the concept of ideology.<sup>54</sup>

Although some terrorist acts are carried out with a specific tactical or political objective – for example the removal of Western troops from Iraq or the release of hostages – many terrorist acts are much less clearly in pursuit of a particular goal. In some cases, terrorism is carried out with the objective simply of expressing support for the cause,<sup>55</sup> or gaining publicity,<sup>56</sup> rather than achieving

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<sup>53</sup> Howe (2008), pp 54-6. This strategy of 'reclaiming' the meaning of ideology is consistent with the methods used by radical feminists such as Daly (1990).

<sup>54</sup> Much research into domestic violence links perpetrator behaviour with factors such as a childhood history of abuse, socioeconomic factors and alcohol abuse: see for example Walker (1984), pp 11-20. My argument does not discount research of this nature, but accepts that such 'risk factors' can co-exist with the forms of ideological belief discussed here.

<sup>55</sup> Lomasky (1991), pp 90-1; Chaliand and Blin (2007), pp 37-8.

<sup>56</sup> Morgan (1989), p 60.

a specific end. Equally, it has been noted that modern terrorism appears to represent a shift from motivations associated with changing government policy to a focus on strategic objectives, or even motivations based on punishment or revenge.<sup>57</sup> Terrorism is thus not necessarily associated with the achievement of a particular concrete objective; rather it may be simply an expression of support for a cause more broadly, or of animosity towards a group perceived as non-sympathetic towards the cause.

Generally, the chosen cause of defendants in Australian terrorism cases to date has been fundamentalist Islam.<sup>58</sup> Courts have drawn particularly on spoken and written propaganda as evidence of perpetrators' ideological motivation.<sup>59</sup> In 2006, Faheem Lodhi was sentenced in the NSW Supreme Court for a range of terrorism offences. There was no evidence that Lodhi had even in a preliminary sense decided on a course of action in respect of any terrorist attack, in terms of target, plan or who would carry it out.<sup>60</sup> However, the sentencing judge found that Lodhi intended to use maps of the electricity supply grid in his possession in connection with a proposal to bomb the supply system, and any bombing would be done to advance the cause of violent jihad and be carried out so as to intimidate the government of Australia and the Australian public; likewise his actions in enquiring as to the supply of certain chemicals and possessing a document that contained instructions on the making of explosives.<sup>61</sup> Given the entirely preparatory nature of Lodhi's conduct, the possession of ideological motive was key to his criminality.

Important evidence establishing Lodhi's ideological motivation was a 'jihadi CD' located at his house glorifying martyrdom. The judge found that the 'truth is that all this material makes it clear that the offender is a person who has, in recent years, been essentially informed by the concept of violent jihad and the glorification of Muslim heroes who have fought and died for jihad, either in a

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<sup>57</sup> Thompson (2002).

<sup>58</sup> With the exception of the pre-terrorism laws case of *Demirian* (1988) 33 A Crim R 441, where the evidence was that the conspirators were members of the Armenian Revolution Federation, dedicated to redressing the genocide of the Armenian people.

<sup>59</sup> In the UK context, see *Rowe v R* [2007] EWCA 635 (video material found promoting the ideology of Muslim extremists).

<sup>60</sup> *R v Lodhi* (2006) 199 FLR 364, [45].

<sup>61</sup> *R v Lodhi* (2006) 199 FLR 364, [17], [33], [35], [52].

local or broader context.<sup>62</sup> He held that the material found in Lodhi's possession reflected the ideas and emotions that must have been foremost in his mind throughout October 2003 and at least until he was arrested:<sup>63</sup>

[These intentions] were, I am satisfied beyond reasonable doubt, intentions he held with great vigour and firmness. They were the consequence of a deeply fanatical, but sincerely held, religious and worldview based on his faith and his attitude to the extreme dictates of fundamentalist Islamic propositions.

Terrorists are often identified by overt statements of justification for their actions – for example by exhortations to violent *jihad* and denigration of 'Western excesses'.<sup>64</sup> In line with the construction of terrorists as 'ideological' in the sense of having a 'subjective value bias' or 'illusory view of the world', the beliefs held by terrorists are always constructed in the judgments as outrageous and incomprehensible.<sup>65</sup>

It is possible that overt statements indicative of ideological belief are also made in domestic homicide cases, however this evidence is rarely available as the only witness is usually no longer alive to tell the tale.<sup>66</sup> Rarely is evidence cited of the kinds of overt expressions found in *Copland*, where the offender told police, 'You watch, I'll be on the front page of *The Age*', and chanted, 'Die, die, die' after slitting the throat of his estranged partner's mother.<sup>67</sup> However, misogynist language is a common feature in domestic violence,<sup>68</sup> therefore it is likely that this extends to fatal instances of it, notwithstanding the absence of a

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<sup>62</sup> *R v Lodhi* (2006) 199 FLR 364, [20].

<sup>63</sup> *R v Lodhi* (2006) 199 FLR 364, [49].

<sup>64</sup> Porter and Kebell record possession of material supportive of jihad as a feature of 16 of the 21 studied cases: Porter and Kebell (2010), p 13. Zaky Mallah was found to have at his home a printed document entitled 'How can I prepare myself for Jihad', a handwritten letter that was apparently a message to ASIO, and a typed manifesto setting out his grievances and identifying ASIO as his target. In *Elomar* expressions of extremist views were captured on telephone intercept: *Elomar & Ors* [2010] NSWSC 10.

<sup>65</sup> This is reflected by the use of words such as 'fanatical' and 'extreme' (*R v Lodhi* (2006) 199 FLR 364), 'extremist' (*R v Benbrika & Ors* (2009) 222 FLR 433 in relation to Raad), 'abnormal' (*R v Roche* (Unreported, Whealy J, 1 June 2004)) and perverted (*R v Javed* [2008] 2 Cr App R 12). This is also reflected in the media's construction of terrorists as madmen and fanatics: Dreher (2007), p 213; and 'uncivilised', 'barbar(ic)' and 'menace to civilised society': Poynting et al (2004), p 39.

<sup>66</sup> For exceptions see the expressions of entitlement written in letters by the offender in *Miles v R* [2002] NSWCCA 276 (Unreported, Stein JA, Bergin J, Carruthers JA, 18 July 2002).

<sup>67</sup> *R v Copland* [2006] VSC 224 (Unreported, Eames J, 23 June 2006).

<sup>68</sup> For examples of domestic violence cases involving misogynist terms see *R v Hill* [2006] VSC 149 (Unreported, Hollingworth J, 2 May 2006); *R v Troselj* (unreported, ACTSC, Spender J, 22 June 2007); *R v Andrew* [2008] VSC 138 (Unreported, Forrest J, 1 May 2008); *R v Dowley* [2009] NSWSC 722 (Unreported, Hidden J, 30 July 2009); *R v Shepherd* [2009] NSWDC 386 (Unreported, Nicholson SC DCJ, 11 September 2009) [10].

surviving victim to verify the assumption. The use of misogynist language such as ‘bitch’ and ‘slut’ in speaking about the target of violence serves a similar purpose to the use of references such as ‘infidels’ – it establishes the victim (in the perpetrator’s mind) as located outside of the ideological paradigm he identifies with.<sup>69</sup>

Nor do domestic homicide cases usually tell us whether offenders are found in possession of material that would indicate the existence of an ideological commitment.<sup>70</sup> It is unlikely that investigators would think to gather material expressive of misogynist views, such as violent pornography or films or literature depicting violence against women, as part of a domestic homicide investigation, given the absence of a motivational element of such offences. However, Australian culture is saturated with propaganda that excuses, normalises or encourages violence against women, including pornography,<sup>71</sup> misogynist language,<sup>72</sup> violence against women in print,<sup>73</sup> television and film,<sup>74</sup> sporting rituals,<sup>75</sup> and other media.<sup>76</sup> The ready availability and commonality of use of misogynist propaganda contributes to its ideological nature being effectively ‘muted’ within legal and popular discourse.

It might be suggested that men who subscribe to masculinist ideology do not do so consciously in the same way that terrorists choose to follow a particular belief system. To some extent, this may be true; a man who possesses a masculinist ideology will not necessarily be making a conscious choice to be part of a group sharing common ideals and beliefs. However, there are examples illustrative of men making conscious decisions to band together in

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<sup>69</sup> Feminists such as Andrea Dworkin have drawn attention to the dehumanising aspect of pornography and in particular the language that is used to describe women: Dworkin (1981), pp 27-8.

<sup>70</sup> In relation to the possession of ideological material in the domestic homicide context, see Chapter 3.1.

<sup>71</sup> Flood and Hamilton (2003), Chapter 3; Evans (2006a).

<sup>72</sup> Eastaugh (1996), p 7; Waterhouse-Watson (2007).

<sup>73</sup> In political debates in 2011, this extended to the use of misogynist language to describe the Prime Minister Ms Julia Gillard: Margaret Thornton, ‘Slogans Loaded with Misogyny’, Letter to the Editor, *The Age (online)*, 25 March 2011, <<http://www.theage.com.au/national/letters/slogans-loaded-with-misogyny-20110324-1c8ml.html>>.

<sup>74</sup> Cameron and Frazer (1987), pp 53-5; A Young (1998).

<sup>75</sup> Philadelphoff-Puren (2004).

<sup>76</sup> A recent example is the Facebook site developed by a college at Sydney University promoting rape and sexual abuse of women: Ruth Pollard, ‘Elite College Students Proud of “Pro-rape” Facebook Page’, *The Sydney Morning Herald (online)*, 9 November 2009, <<http://www.smh.com.au/technology/elite-college-students-proud-of-prorape-facebook-page-20091108-i3js.html>> .

groups that at best exclude and at worst denigrate women, for example male-bonding rituals in sport,<sup>77</sup> and men-only clubs.<sup>78</sup>

Research in relation to the behaviour of perpetrators of domestic violence is also indicative of an ideological commitment to the use of violence as a strategy for maintaining male control and power within an intimate relationship.<sup>79</sup> Serious and systematic domestic violence – what is referred to by Johnson as ‘patriarchal terrorism’<sup>80</sup> – reflects the relationship of power and control that exists between men and women in many intimate relationships, the maintenance of which domestic violence is directed at.<sup>81</sup> Far from being a series of isolated instances of violence, abusive relationships are characterised by a system of rule-making imposed by the perpetrator, which may be express or imposed by a series of gestures and non-verbal communications; control is reinforced by social isolation and physical punishment, and in some cases, the means of control is internalised by the victim.<sup>82</sup>

So pervasive is this power and control that it takes on what Millett refers to as a ‘muted’ appearance.<sup>83</sup> It is further muted or obscured by the discourse of equality within Australian society generally.<sup>84</sup> If (as we are all assumed to know and accept) men and women have achieved equality, how can it be the case that some men exercise control over women in intimate relationships, let alone

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<sup>77</sup> Instances of football male bonding rituals involving women are outlined in ABC, ‘Code of Silence’, 4 Corners, 11 May 2009. Flood and Pease (2006), p 41 found that one of the factors associated with tolerance for violence against women among hypermasculine groups was a commitment to the patriarchal order, and an interest in obtaining peer status rewards through certain behaviour.

<sup>78</sup> An example is the ‘Brocial’ social networking site that attracted 8,000 members before closing down; members were required to post revealing photos obtained from the Facebook pages of female friends, but women were not supposed to be members: Kara Irving, ‘Facebook trade in female images’, *Sydney Morning Herald (online)*, 18 May 2011, <<http://www.smh.com.au/technology/technology-news/facebook-trade-in-female-images-20110517-1erfu.html>>.

<sup>79</sup> The best-known example of this is the ‘Duluth Power and Control wheel’ reflecting physical abuse as one strategy amongst others such as emotional, psychological, financial and social abuse aimed at achieving control over a partner: Pence and Paymar (1993), p 3. See in the US context also Fischer et al (1992-3). Felson and Messner (2000) found that male assaults on female partners were more likely than other types of assault to involve a control motive. For research on ‘maternal alienation’ as a manifestation of control see Morris (2008).

<sup>80</sup> Johnson (1995).

<sup>81</sup> Bograd (1988), p 14; Schneider (2000), Chapter 4.

<sup>82</sup> Fischer et al (1992-3), pp 2127-33; Cohen (1995-1996).

<sup>83</sup> Gramsci argued that the ruling class imposes its will by a process of generating public ‘consensus’ for its beliefs and strategies: Bates (2009).

<sup>84</sup> Evidenced for example by former Prime Minister John Howard’s reference to a ‘post-feminist stage of the debate’: Summers (2003), p 21. Thornton notes that liberal ideology’s upholding of the virtues of individualism and equality serves to obscure relations of inequality and domination: Thornton (1990), pp 13-4.

feel a sense of entitlement to do so?<sup>85</sup> Notwithstanding this discourse of equality, Australian culture is embedded with attitudes of gender inequality.<sup>86</sup>

Moreover, the state, while perpetuating the myth that it is committed to the principle of equality, actually privileges masculinist ideology over equality by its acceptance of religious belief as an exemption from the operation of the *Sex Discrimination Act*.<sup>87</sup> The exemption is called into play where an act or practice conforms to the tenet of a particular religion or is 'necessary to avoid injury to the religious susceptibilities of adherents of that religion'.<sup>88</sup> By implication, through this legislation, the legislature acknowledges that there may be some instances in which adhering to the tenets of one's religion *requires* discrimination against women, which is clearly inconsistent with the principle of equality. As Thornton notes, 'Benchmark men', against whom equality is measured, are white, heterosexual, able-bodied, middle-class, conservative leaning, and at least nominal adherents of Christianity.<sup>89</sup> Given that most leading religions, including Christianity, are patriarchal,<sup>90</sup> it is not surprising that the state reflects the interests of 'Benchmark men' by accepting a measure of discrimination against women as an acceptable part of the practice of religion. The state's simultaneous maintenance of the fiction of equality before the law serves to further obscure the masculinist ideology underlying the exemption.

The manifestation of ideological commitment is reflected in the significant numbers of male-perpetrated domestic homicides connected with possessiveness or jealousy,<sup>91</sup> or retaliation.<sup>92</sup> These types of killing embody the

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<sup>85</sup> In the US, Snyder notes that public perception is still that domestic violence is an individual rather than a social problem: Snyder (2009).

<sup>86</sup> Chappell and Strang (1990), pp 215-6. For a discussion of some of the barriers to achieving equality in Australia see Graycar and Morgan (2004).

<sup>87</sup> *Sex Discrimination Act 1984* (Cth). Thornton (2010), p 333. Other exemptions serve the interests of dominant interest groups: Thornton (1991).

<sup>88</sup> *Sex Discrimination Act 1984* (Cth) s 37(d).

<sup>89</sup> Thornton (2010).

<sup>90</sup> Daly (1990), Chapter 2; Stopler (2005), p 194.

<sup>91</sup> Polk found jealousy to be a common theme in the intimate homicides in his study: Polk (1994), pp 32-3. See also Campbell (1992). For examples see *R v Keir* [2000] NSWSC 111 (Unreported, Adams J, 29 February 2000); *Miles v R* [2002] NSWCCA 276 (Unreported, Stein JA, Bergin J, Carruthers JA, 18 July 2002); *R v Lynch* [2002] NSWSC 1140 (Unreported, Whealy J, 20 November 2002); *R v Johnson* [2005] SASC 1 (Unreported, Perry J, 13 January 2005); *R v Margach* [2006] VSC 77 (Unreported, King J, 8 March 2006); *R v Karageorges* [2006] VSCA 49 (Unreported, Buchanan, Vincent and Neave JJA, 9 March 2006); *R v Copland* [2006] VSC 224 (Unreported, Eames J, 23 June 2006); *R v Verdins*; *R v Vo* (2007) 16 VR 269; *R v Zammit* [2008] NSWSC 317 (Unreported, Howie J, 9 April 2008); *R v Barrett* [2008] VSC 234

principle that 'if I can't have you nobody will'. In popular discourse, possessiveness and violence are often equated with love.<sup>93</sup> However, expressions of love are, in legal discourse, the antithesis of expressions of ideological commitment. To love someone so much that you have to kill them if you can't have them is not perceived as ideological; it is portrayed as romance.<sup>94</sup> Therefore the ideological motivations of domestic homicide perpetrators remain obscured as they are embedded in cultural understandings about the proper conduct of men and women in sexual and romantic relationships.

Equally, familial suicide-killings, in which the (usually male) perpetrator kills his children and sometimes himself, is largely treated as a tragic example of a family situation gone bad, or the manifestation of psychological harm to the perpetrator.<sup>95</sup> This contrasts with the construction of the suicide-bomber as fanatic, representing a continuing danger to the community.<sup>96</sup> Yet the man who portrays a willingness to take the lives of his own children is not constructed as a 'fanatic' or 'extremist' but often as someone deserving of compassion, who has been pushed 'over the edge' by a traumatic family or custody dispute.<sup>97</sup>

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(Unreported, Curtain J, 27 June 2008). Coker notes that jealousy itself is a strategy used by perpetrators in conjunction with other methods to maintain control over a partner and restrict her movements: Coker (1992), pp 86-7 and see Ptacek (1999), p 87.

<sup>92</sup> These have been noted as common themes in familicide: Johnson (2006). See also *R v Mehmet* [2004] NSWCCA 24 (Unreported, Levine, O'Keefe and Whealy JJ, 24 February 2004); *R v Prasoeur* [2006] VSC 41 (Unreported, Bell J, 17 February 2006); *R v Kaiser*; *R v Hunt* [2007] NSWSC 1362 (Unreported, Graham Barr J, 29 November 2007).

<sup>93</sup> Seuffert (1999); Evans (2001), pp 156-7; Puente and Cohen (2003).

<sup>94</sup> Romito notes that Italian newspapers describe men who kill their partners as having 'loved too much': Romito (2008), pp 1, 4. Vandello and Cohen found that Brazilian respondents (as opposed to US respondents) did not think a man who responded violently to infidelity loved his wife less than a man who responded non-violently: Vandello and Cohen (2003). The exception to this is where the perpetrator is cast as 'other' through his non-mainstream cultural identity: see Poynting et al (2004), pp 124-38; Imtaoul (2005).

<sup>95</sup> For example, Kirkwood notes that the media focus following Arthur Freeman's conviction for murdering his four-year-old daughter Darcy by throwing her off a bridge has been on the distress of fathers going through separation and custody disputes: Debbie Kirkwood, 'Men's murderous revenge', *Sydney Morning Herald (online)*, 31 March 2001, <<http://www.smh.com.au/opinion/society-and-culture/mens-murderous-revenge-20110330-1cg80.html>>.

<sup>96</sup> For example in *Barot v R* [2007] EWCA Crim 1119 (16 May 2007), the court commented: 'The fanaticism that is demonstrated by the current terrorists is undoubtedly different in degree to that shown by sectarian terrorists with which the United Kingdom had become familiar ... IRA terrorists were not prepared to blow themselves up for their cause' [54].

<sup>97</sup> In the recent sentence of Arthur Freeman, Coghlan J did give recognition to the fact that the offender killed his daughter 'in an attempt to hurt your former wife as profoundly as possible': *R v Freeman* [2011] VSC 139 (Unreported, Coghlan J, 11 April 2011).

The domestic homicide sentencing decisions examined in my research reflect the discourse of perpetrators as ordinary men who break under extraordinary pressure.<sup>98</sup> One can discern in the cases expressions of sympathy or empathy for some perpetrators,<sup>99</sup> or at the least, a failure to recognise aspects of their conduct that would otherwise mark it as ideologically-motivated and therefore worthy of more severe condemnation.<sup>100</sup> As Smart notes, although phallocentrism is not simply the result of the collective bias of decision-makers, it is likely to resonate with the experiences of many (especially male) judges,<sup>101</sup> who are therefore more likely to empathise with the perpetrator of intimate violence.

### *A Belief that Violence is Justified*

It has been referred to as a defining feature of terrorism that the terrorist considers her or his cause to be morally just.<sup>102</sup> In the Australian terrorism cases, an underlying theme is the belief of the terrorist in the right to use violence in pursuit of his cause.<sup>103</sup>

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<sup>98</sup> For example *R v Hill* [2006] VSC 149 (Unreported, Hollingworth J, 2 May 2006), where the offender's behaviour in killing his ex-partner's new boyfriend in an unprovoked attack was described as an 'inappropriate response' to the end of the relationship. In *R v Margach* [2006] VSC 77 (Unreported, King J, 8 March 2006), the court exhorted companies to reconsider making employees work long hours due to the role played by stress in the killing, notwithstanding evidence that the offender was jealous and possessive to the extent of monitoring his wife's phone calls. In the US context, Coker notes that this construction of perpetrators is at odds with the fact that most domestic homicide perpetrators have prior convictions or arrests for domestic violence: Coker (1992), pp 89-90.

<sup>99</sup> For example in *R v Corry* [2006] QCA 203 (Unreported, Jerrard and Keane JJA, Helman J, 9 June 2006) [23], the offender, who was being sentenced for the manslaughter of a stranger, sought to rely on cases involving domestic manslaughters to argue for a more lenient sentence. Justice Keane stated: 'Those cases were cases of manslaughter in which the killing occurred in circumstances involving the breakdown of the domestic relationships in which offender and victim were involved. *The circumstances of human tragedy which led to the killings involved in these cases* readily distinguish them from this case where the motive for the killing was so trivial.' Sympathy for domestic homicide offenders is also apparent in the media: Romito (2008), p 50.

<sup>100</sup> Lees noted expressions of sympathy towards male perpetrators of domestic homicide, as well as a tendency to characterise such violence as random, irrational and uncontrollable, in Lees (1997), Chapter 7.

<sup>101</sup> Smart (1989), p 31; Smart (1995), pp 140-1.

<sup>102</sup> Narveson (1991). For a discussion of this 'parallel morality' of terrorists see Moghaddam (2005), pp 165-6.

<sup>103</sup> In their study of 21 Australian terrorism cases, Porter and Kebbell found that offenders advocated violence against non-believers in 11 cases, and in 15 cases expressed the view that their religion justified violence against non-believers: Porter and Kebbell (2010), p 11.



To that end, the concept of *jihad* and the adherence of perpetrators to its pursuit is a key focus in the terrorism sentences. In the 2009 sentencing of multiple terrorism offenders in the Victorian Supreme Court, Bongiorno J noted that the group believed that violent *jihad* was part of their commitment to Islam.<sup>104</sup> Zaky Mallah, sentenced in NSW in 2005, was found to have at his home a printed document entitled 'How can I prepare myself for Jihad', a handwritten letter that was apparently a message to ASIO, and a typed manifesto setting out his grievances and identifying ASIO as his target.<sup>105</sup>

However, it is not only terrorism perpetrators who consider that their use of violence is justified.<sup>106</sup> It has been observed that the use of violence to achieve ends that are perceived as legitimate is a principle that is embedded in Australian culture.<sup>107</sup> In a number of domestic violence cases I examined, references in the judgments suggest that the perpetrators acted with a sense of entitlement to use violence to achieve their ends.<sup>108</sup> However, this sense of entitlement is not treated as such, giving preference to a construction of the domestic homicide perpetrator as acting on the spur of the moment. The domestic homicide perpetrator, unlike the terrorist, is also commonly constructed as having acted in a way that is objectively justifiable, or at least comprehensible, based on the behaviour of the victim.<sup>109</sup>

Historically, the law has not only turned a blind eye to violence against women, but actively condoned it. The best illustration of this is the principle whereby a man was legally entitled to physically discipline his wife, provided that he abided by the 'rule of thumb' that the rod used to administer the beating be no thicker

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<sup>104</sup> *R v Benbrika & Ors* (2009) 222 FLR 433, [14].

<sup>105</sup> *R v Mallah* [2005] NSWSC 317 (Unreported, Wood CJ, 21 April 2005), [11].

<sup>106</sup> Black argues that a range of offending (including intimate homicides) can be described as a form of 'self-help' or social control: Black (1983), especially pp 36-7.

<sup>107</sup> Chappell and Strang (1990), pp 215-6.

<sup>108</sup> For examples see *R v Mencarious* [2006] NSWSC 719 (Unreported, Michael Grove J, 17 July 2006); *Goebel-McGregor v R* [2006] NSWCCA 390 (Unreported, James, Hidden and Hislop JJ, 15 December 2006), where the offender was reported to have said in relation to a custody dispute with the victim, 'Now I can understand why some Australian husbands in my situation take their own lives and their wives' and to have stated his intention to shoot his wife (which in fact happened); *R v Biggs* [2007] NSWSC 932 (Unreported, Bell J, 22 August 2007). The sense of justification relied upon by some domestic homicide perpetrators was noted by Adams J in *R v Keir* [2000] NSWSC 111 (Unreported, Adams J, 29 February 2000), [15]. Polk notes that a common theme in intimate homicides is that the perpetrator expresses a sense of justification (i.e. 'the bitch deserved it') rather than any expression of remorse: Polk (1994), pp 33-4.

<sup>109</sup> This aspect of ideological behaviour is discussed below: see 'Denigration or blame of the victim'.

than that appendage.<sup>110</sup> The principle of reasonable chastisement was associated with Christianity and the teachings of the church that the man is the head of the household and has a right to chastise his wife.<sup>111</sup> Although the right was no longer operative by the late nineteenth century in the United States,<sup>112</sup> and was being doubted by Blackstone in the late eighteenth century in England,<sup>113</sup> it lives on in the reluctance of the law and law enforcement agencies to punish men who inflict physical violence upon their partners.<sup>114</sup>

Until quite recently, the law also condoned the sexual abuse by men of their wives through the marital rape exemption. The terms of the exemption, which operated until the early 1990s in Australia, provided that a man could not be prosecuted for raping his wife.<sup>115</sup> The basis for the exemption was that by marrying, a woman gave continuing consent to her husband to access her body if and when he chose.<sup>116</sup> Although the exemption has been abolished,<sup>117</sup> the significant under-reporting of marital rape and the low rate of successful prosecution,<sup>118</sup> mean that an effective entitlement by men to women's bodies remains condoned, indirectly at least, by the law.<sup>119</sup>

A supporting arm to the ideology of masculine dominance is the state's endorsement of the institutions of marriage and the family, which remains in place even in situations where violence occurs.<sup>120</sup> This is evidenced, for example, in the mandated provision of information to separating parties about reconciliation, for which there is no stated exception where family violence has

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<sup>110</sup> For Blackstone's reference to the right of 'domestic chastisement' see Blackstone (1765). See Edwards (1985), pp 185-193. For a contrary interpretation of Blackstone's commentary see Priest (2007).

<sup>111</sup> Crites and Hepperle (1987), p 38. In legal theories such as Rawls' 'veil of ignorance', it is also implicit that the man is the head of the household: Barnett (1998), p 113.

<sup>112</sup> Siegel (1995).

<sup>113</sup> *Davis v Johnson* [1979] AC 264 at 270-1.

<sup>114</sup> Finnane (1994), pp 104-10; Bronitt and McSherry (2010), p 805.

<sup>115</sup> The marital rape exemption was formally abolished in Australia by the High Court in *R v L* (1991) 174 CLR 379, following the House of Lords decision in *R v R* [1992] 1 AC 599. In the US context see Dworkin (1981), pp 101-10. The exemption was repealed in the UK in 1994 and in 1997 in Germany: Romito (2008).

<sup>116</sup> Hale (1971), p 629.

<sup>117</sup> *Crimes Act 1900* (ACT) s 69; *Crimes Act 1900* (NSW) s 61T; *Criminal Law Consolidation Act 1935* (SA) s 73(3); *Crimes Act 1958* (Vic) s 62(2).

<sup>118</sup> Eastaie (2001), pp 133-5. Some of these problems are outlined in ALRC (2010a), Chapter 24.

<sup>119</sup> Male 'proprietaryness' in relation to women's bodies is also evidenced by legal claims such as loss of consortium, alienation of affection and seduction: Wilson and Daly (1992), pp 85-8.

<sup>120</sup> For example, through judges trivialising violence and emphasising the importance of maintaining relationships in family law judgments: Hunter (2006a), p 43. See Andrews (1999).

occurred.<sup>121</sup> Prior to amendments proposed in 2011,<sup>122</sup> the *Family Law Act* contained provisions that operated to privilege the rights of children to a 'relationship with both parties' over the rights of a victim of family violence and her family to safety.<sup>123</sup>

The law of provocation, which represents a concession to male violence as a response to certain behaviour by women, is also imbued with masculinist ideology. The law uses concepts such as 'reason' to carve out a space where violence can be perpetrated legitimately.<sup>124</sup> What the law of provocation represents is the idea that violence is legitimate in certain circumstances, those most commonly experienced by men rather than women.<sup>125</sup> The sentiment is never expressed in these terms. On the contrary, overt expression is always given in murder and manslaughter cases to the principle that the taking of a human life is wrong and must be punished.<sup>126</sup> This serves to make identification of ideology more difficult – because it is always possible to point to words clearly expressing the contrary proposition.

This is the key to the distinction the law makes between ideology and non-ideology; ideology makes an express claim to justification and non-ideology does not. If people who were 'provoked' into perpetrating violence said, 'I thought I was entitled to' it would be much easier to characterise their actions as motivated by ideology. But because that claim to justification is obscured by express statements to the contrary and rhetoric about 'sudden loss of self-control' the actions are not deemed to be ideological. Legal discourse operates

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<sup>121</sup> *Family Law Act 1975* (Cth) ss 12C-12E.

<sup>122</sup> The Family Violence Amendment (Family Violence and Other Measures) Bill 2011. The EM notes that the Bill will provide greater protection for families and children from family violence.

<sup>123</sup> Amendments proposed to ss 60CC and 60D now require more weight to be given to the safety of the child than to the importance of the child having a 'meaningful relationship' with both parents.

<sup>124</sup> Duncan (1996), pp 173-6.

<sup>125</sup> Edwards (1985), pp 137-9. Horder notes that in early modern theory a violent response to adultery was not simply excused but *expected* as an expression of virtue: Horder (1992), pp 44-56.

<sup>126</sup> See for example *R v Lynch* [2002] NSWSC 1140 (Unreported, Whealy J, 20 November 2002), [52]: 'The offence of manslaughter is a particularly serious crime since it involves the taking of a human life, the protection of which is the primary objective of the criminal justice system.' See also *R v Williams* [2004] NSWSC 189 (Unreported, O'Keefe J, 22 March 2004).

in subtle and complex ways; the challenge is to interpret the hidden meanings and assumptions within the text.<sup>127</sup>

The idea that perpetrators of domestic violence feel that they are justified in inflicting violence against women is supported by the views of abusers themselves. Research indicates that male abusers feel justified in meting out violence to their partners as a means of control,<sup>128</sup> or as payback for ‘talking back’ or other behaviour deemed inappropriate or provocative.<sup>129</sup> Research also shows that being male and having conservative gender-role attitudes are associated with victim-blame in domestic assault scenarios.<sup>130</sup> This indicates that a violent response is often not just something that occurs in the heat of the moment – there is a *pre-existing* view that violence is legitimate in some circumstances.

Despite the indications that men’s violence against their intimate partners is a manifestation of ideological belief, courts in Australia have in the past and continue to conceptualise domestic violence as something that occurs on the spur of the moment as an aspect of normal human conduct.

I use the Victorian Supreme Court case of *Tran*<sup>131</sup> to illustrate how masculinist violence is rendered non-ideological through legal discourse. The accused pleaded guilty to the stabbing murder of his daughter and to intentionally causing serious injury to his wife and to his daughter’s partner. Between 2000 and 2002 Tran, who was from Vietnam, had been excluded from the family after his wife obtained an intervention order against him. She allowed him to return to the family home but he had little say in the running of the household; his wife and daughter worked and provided the income while he was unemployed and his wife controlled the finances. His daughter’s partner (Luan Tran) had come to stay and was sleeping in the lounge room, which troubled Tran as ‘according to

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<sup>127</sup> A useful example of the subtleties of legal discourse is outlined in Cleary (2005), p 167 (discussion of the parties’ reference to the victim as ‘Mrs Ramage’ enhancing the power of the discourse of adultery, although the victim had not identified herself in that way since her separation).

<sup>128</sup> Ptacek (1988); Copelon (1993-1994), pp 334-6.

<sup>129</sup> Marcus (1994), pp 22-4; Dobash and Dobash (1996-1997), p 250; McMurray et al (2000), pp 96-7.

<sup>130</sup> Hillier and Foddy (1993). Walker in her research found that conservative gender-role attitudes were associated with higher risk of battering behaviour: Walker (1984).

<sup>131</sup> *DPP (Vic) v Nhat Anh Tran* [2006] VSC 394 (Unreported, Teague J, 26 October 2006).

Vietnamese tradition' there would have been an arrangement made between himself and Luan's father.

On the day that the killing and assaults occurred, Tran's wife accused him of stealing money from her purse and called him a 'water buffalo'.<sup>132</sup> In sentencing Tran to 21 years' imprisonment (18 in relation to the murder) with a non-parole period of 16 years, Teague J said:<sup>133</sup>

... there cannot be the highest level of seriousness attaching where the acts were impulsive rather than pre-meditated. While I readily accept that the legal requirements of provocation would not have been satisfied, *you were subjected by your wife to considerable provocation at a time of considerable vulnerability.* Against a background of circumstances creating low self-esteem, you were *subjected to significant emotional stress.* A number of factors had contributed *to you being at the critical time in a state of low self-esteem.* You had no job. Your wife and daughter were working. You *were at your wife's call* as to living with the family. You *had no say* in any of the arrangements as to Luan Tran. I must too, and do, allow for the *added impact of Vietnamese cultural factors* amplifying the effect of matters going to loss of face and respect. Further, there was more than low self-esteem. I accept the evidence of your having suffered symptoms of depression warranting medical attention prior to your committing these offences. A sensible moderation of the allowance for general deterrence is thus warranted [*emphasis added*].

This passage illustrates the sentencing judge's focus upon 'personal' considerations to the exclusion of ideological motivations. Tran's actions were 'impulsive'; he was suffering 'low self-esteem' and 'significant emotional stress'. The offender's personal living arrangements are referred to as part of the provocation. This ignores the fact that underlying Tran's violent attack was a strong opposition to what he perceived as an affront to his masculine sovereignty over the family. 'Vietnamese cultural factors' said to amplify the effect of these factors are emphasised; while this leans more to pointing out an ideological motivation for the offending, it also has the effect of obscuring the

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<sup>132</sup> Defence counsel informed the court that in Vietnamese culture this was an insult indicating stupidity.

<sup>133</sup> *DPP (Vic) v Nhat Anh Tran* [2006] VSC 394 (Unreported, Teague J, 26 October 2006), [8].

fact that violence as a form of control is a common feature of a phallogocentric Australian culture.<sup>134</sup>

A pattern of violent behaviour by a perpetrator towards a victim might indicate a commitment to the use of violence to achieve objectives. Research suggests that in intimate homicides, a history of violence is a contributing factor in approximately one quarter of cases, and there is evidence of physical battering in approximately 80 percent of cases.<sup>135</sup> However, in some of the domestic murder and manslaughter cases I studied, evidence of past violence that might otherwise suggest a pattern of behaviour based on a belief as to entitlement is minimised or downplayed,<sup>136</sup> or rates only a passing mention.<sup>137</sup> A history of violence by the perpetrator also does not preclude successful reliance upon a defence of provocation.<sup>138</sup> Even where taken into consideration in the sentencing process, a previous pattern of violence is not treated as amounting to a sense of entitlement, or even contributing to establishing the intent to kill or cause grievous bodily harm.<sup>139</sup> The minimisation of the significance of previous violence is consistent with the personalisation of offenders' motivations in domestic homicide cases, as illustrated by the following case examples.

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<sup>134</sup> *Tran* also illustrates the argument that 'cultural' defences are usually successful when they resonate with the dominant paradigm in terms of legitimating violence: see Phillips (2003).

<sup>135</sup> Easteal (1993), p 73. Coker also found that many intimate homicide perpetrators had histories of abuse carried over between relationships: Coker (1992), pp 112-3.

<sup>136</sup> *Miles v R* [2002] NSWCCA 276 (Unreported, Stein JA, Bergin J, Carruthers JA, 18 July 2002). Cf *R v Keir* [2000] NSWSC 111 (Unreported, Adams J, 29 February 2000), where the judge found that the offender considered the victim to be 'his property to be dealt with as he thought it right' and 'believed he had the right to violently punish his wife for not only defying but also for trying to leave him' (but still found that the offender did not have the intention to kill, only the intention to cause grievous bodily harm). See also *R v Zammit* [2008] NSWSC 317 (Unreported, Howie J, 9 April 2008) (the act causing death was 'not an incident in an abusive relationship' despite two acts of violence in two days, precipitated by an argument where the deceased discussed the offender's violence with his previous partner).

<sup>137</sup> For other examples not cited here see *R v Toki* [2003] NSWCCA 125 (Unreported, Levine J, Hidden J, Smart AJ, 13 May 2003); *R v Ferguson* [2007] NSWSC 949 (Unreported, Michael Grove J, 27 August 2007) (acts of violence in preceding days described as 'escalating emotionality'); *R v Andrew* [2008] VSC 138 (Unreported, Forrest J, 1 May 2008).

<sup>138</sup> *R v Williams* [2004] NSWSC 189 (Unreported, O'Keefe J, 22 March 2004); sentence reduced on appeal: *R v Williams* [2005] NSWCCA 99 (Unreported, Tobias JA, Buddin and Hall JJ, 24 March 2005).

<sup>139</sup> *R v Gordon* [2000] WASCA 401 (Unreported, Kennedy, Anderson and Wheeler JJ, 15 December 2000) (Crown accepted a plea to unlawful killing instead of murder for death of partner by infliction of multiple injuries; offender had a previous conviction for manslaughter in 'alarmingly similar circumstances'); *Spencer v R* [2005] NTCA 3 (Unreported, Martin CJ, Thomas and Riley JJ, 29 April 2005) (killing of previous partner by 'dangerous and unlawful act'); *Delavale v WA* [2009] WASCA 111 (Unreported, Owen, Wheeler and Miller JJA, 6 Apr 2009) (Crown accepted a plea to act likely to endanger life, health or safety where offender had engaged in a sustained and brutal attack and there was a prior history of violence); *R v Mahoney* [2009] VSC 249 (Unreported, Hollingworth J, 15 June 2009).

In *Mills*, the fact that police had been called in response to domestic violence incidents on three separate occasions might have been treated as indicative of a pattern of the offender using violence, culminating in the offender killing his wife by strangling her with electrical cord, squeezing her mouth and sticking his fingers up her nostrils until she stopped breathing.<sup>140</sup> Yet Keane JA, in granting the offender's application to appeal against sentence, and reducing it from ten to nine years, referred to the offender's 'good character' and to there being 'room for considerable doubt as to the practical efficacy of heavy sentences in deterring the kind of crime of passion with which we are presently concerned.'<sup>141</sup> The offender is even described by a psychologist as 'an unassertive and submissive individual who clung onto his wife when she was making it clear she wanted to leave him'.<sup>142</sup>

In *Toki*, the sentencing judge found that the killing by the offender of his partner was the 'culmination of a pattern of violent behaviour towards the deceased', yet he still accepted that 'there was a loss of self-control on his part, such that the level of violence which he inflicted upon her was greater than he had ever exhibited towards her before'.<sup>143</sup> In this way, the court interprets the violence as partly a result of loss of self-control due to the fact it was more serious than previous incidents; this completely overlooks evidence that perpetrators of domestic violence engage in escalating levels of violence in an attempt to control their partners.<sup>144</sup>

Forensic science also plays a role in minimising the degree to which domestic violence perpetrators are held responsible for their beliefs. Psychological and psychiatric evidence often serves to reinterpret broader social and structural problems as personal characteristics of the accused,<sup>145</sup> having a mitigating

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<sup>140</sup> *R v Mills* [2008] QCA 146 (Unreported, Keane, Holmes and Fraser JJA, 28 May 2008). The victim in this case is not referred to by name, simply as the offender's 'wife'. We are not told in the appeal judgment whether the perpetrator of violence was identified on these occasions; presumably it is not considered significant enough to mention.

<sup>141</sup> *R v Mills* [2008] QCA 146 (Unreported, Keane, Holmes and Fraser JJA, 28 May 2008), [29].

<sup>142</sup> *R v Mills* [2008] QCA 146 (Unreported, Keane, Holmes and Fraser JJA, 28 May 2008), [15].

<sup>143</sup> *R v Toki* [2003] NSWCCA 125 (Unreported, Levine J, Hidden J, Smart AJ, 13 May 2003), [23]-[25].

<sup>144</sup> Johnson (1995), p 3.

<sup>145</sup> Chan et al (2005), pp 163-4; Romito (2008), pp 69-70.

effect on sentence,<sup>146</sup> or occasionally resulting in a complete acquittal.<sup>147</sup> For example, in *Barrett*, the offender, who bludgeoned his partner to death following a history of violence spanning some 12 years, was diagnosed by a forensic psychiatrist with ‘morbid jealousy’.<sup>148</sup> In this way, what might otherwise be perceived as a commitment to the use of violence as a strategy for ensuring maintenance of control over an intimate partner is reconceptualised as a symptom of mental illness, making it a mitigating rather than an aggravating factor in sentencing.<sup>149</sup> The medicalisation of the offender effectively transforms him from a responsible agent to someone whose actions are a product of individual psychopathological disorder.<sup>150</sup>

The use of psychological evidence plays a particularly significant role in the construction of behaviour, as it draws attention away from what might otherwise be perceived as commitment to shared beliefs within a masculinist ideology, and reconstructs that as the individual pathology of the perpetrator.<sup>151</sup>

### *A Degree of Planning or Premeditation*

Historically, the existence of ‘malice aforethought’ was a prerequisite for a murder conviction, and a killing in its absence warranted a conviction for a

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<sup>146</sup> Stubbs and Tolmie (2005), p 206. Other examples are *R v Hurley* [2001] NSWSC 1007 (Unreported, David Levine J, 2 November 2001) and *R v Toki* [2003] NSWCCA 125 (Unreported, Levine J, Hidden J, Smart AJ, 13 May 2003).

<sup>147</sup> *R v Biggs* [2007] NSWSC 932 (Unreported, Bell J, 22 August 2007) where the offender was found not guilty on the basis of mental illness where his psychotic condition was said to cause his beliefs that his wife was sleeping with other men; he killed her by inflicting a number of blunt force injuries to her head. There was a history of physical abuse by him in the relationship.

<sup>148</sup> *R v Barrett* [2008] VSC 234 (Unreported, Curtain J, 27 June 2008), [27] where a plea was accepted to reckless murder notwithstanding numerous prior violent acts by the offender against the victim, many of which required her to seek medical treatment. This was also mooted as a possibility by the forensic psychiatrist in *R v Keir* [2000] NSWSC 111 (Unreported, Adams J, 29 February 2000).

<sup>149</sup> See also *Miles v R* [2002] NSWCCA 276 (Unreported, Stein JA, Bergin J, Carruthers JA, 18 July 2002): forensic psychiatrist gave evidence that murders were the result of an inability on the part of the offender to cope with rejection and control his emotional reactions. See also *R v Lever* [2001] NSWSC 1131 (Unreported, Bell J, 13 December 2001).

<sup>150</sup> Ptacek (1988), pp 152-3; Cleary (2005), pp 205-7. See also Coker (1992), pp 116-24 for an outline of how psychiatric evidence was used in *The People v Berry* 556 P 2d 777 (Cal, 1976).

<sup>151</sup> Smith (1990), Chapter 6 notes that in psychiatric renderings of subject behaviour, certain facts consistent with symptoms of mental illness are isolated from their context, discarding other aspects of the account that are not consistent with psychological interpretations of behaviour.



lesser offence, and a corresponding less severe penalty.<sup>152</sup> During the nineteenth century, the focus moved from 'malice' or 'wickedness' to concepts such as intention and recklessness.<sup>153</sup> However, in terrorism offences, the previous focus on motivation re-emerges, and with it an examination of the degree of planning and preparation involved in the offence. In *Lodhi*, the judge referred to evidence of planning and the use of false names and details as showing a degree of premeditation and deliberation.<sup>154</sup> In *Benbrika*, the sentencing judge referred to the evidence that members of the group knew that the organisation was fostering and/or preparing a terrorist attack on the basis that they were supplying instructions to members about explosives and also *jihadi* literature, including material desensitising members to violence.<sup>155</sup>

Because of the intelligence and surveillance that usually accompanies terrorism investigations, evidence of planning and premeditation will commonly be gathered. By contrast, in domestic homicide cases, evidence of planning and premeditation is rarely referred to,<sup>156</sup> although elaborate planning is a common feature of domestic homicides.<sup>157</sup> A review of the sentencing decisions reveals a tendency to downplay indications of planning even where the circumstances of the killing indicate that the offender had been contemplating violence for some time,<sup>158</sup> or had a reason to kill aside from a sudden emotional response.<sup>159</sup> Similarly, offenders have successfully relied on provocation or

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<sup>152</sup> Bronitt and McSherry (2010), pp 293-4. Green notes that until the 12<sup>th</sup> century, capital punishment was reserved for premeditated killing, rather than killing in the heat of the moment: Green (1975-1976), p 416.

<sup>153</sup> Bronitt and McSherry (2010), p 295.

<sup>154</sup> *R v Lodhi* (2006) 199 FLR 364, [39].

<sup>155</sup> *R v Benbrika & Ors* (2009) 222 FLR 433, [45].

<sup>156</sup> Cf *R v Andrews* [2003] NSWCCA 7 (Unreported, Heydon, Hulme and Hidden JJ, 6 February 2003); *R v Matheson* [2006] NSWSC 332 (Unreported, Mathews AJ, 28 April 2006); *R v Robinson* [2007] NSWSC 460 (Unreported, Hall J, 11 May 2007); *R v Galante* [2008] NSWSC 319 (Unreported, Adams J, 11 April 2008).

<sup>157</sup> Polk (1994), pp 29-31.

<sup>158</sup> See for example *Gardner* (1989) 42 A Crim R 279 (previous threats to kill and offender took a baseball bat to the victim's house); *R v Baggott* [2000] QCA 153 (Unreported, McMurdo P, McPherson JA, Mackenzie J, 3 May 2000); *R v Toki* [2003] NSWCCA 125 (Unreported, Levine J, Hidden J, Smart AJ, 13 May 2003). Scutt also cites the example in a rape case of *R v Stanbrook* (unreported, 1992, VSC) in Scutt (1997b), pp 94-101.

<sup>159</sup> *R v Diver* [2008] VSC 399 (Unreported, Coghlan J, 24 September 2008) (offender eavesdropped on conversation of victim where she indicated she wanted him gone from her house but was frightened as to what his reaction might be; he argued with her and strangled her); *R v Aytugrul* [2009] NSWSC 275 (Unreported, Hulme J, 16 April 2009). See also *R v Hunt* [2002] NSWSC 66 (Unreported, Dowd J, 19 February 2002), where the offender's actions in killing the victim after she obtained an AVO when he had threatened to kill her if she did so was said to amount to 'some level of forethought'. In *R v Vu* [2005] NSWSC 271 (Unreported, Barr J, 1 April 2005), the killing was found not to be premeditated despite

diminished responsibility, or been allowed to raise defences,<sup>160</sup> even though there is evidence that their conduct is premeditated, the antithesis of a 'sudden loss of self-control'.<sup>161</sup> As Coker notes, the claim of 'loss of self control' in domestic homicides is belied by the fact that often perpetrators only ever use violence against their partner and not other family members or associates, that they do in fact commonly control the extent of their violence, and that they make statements indicating that the use of violence is purposive.<sup>162</sup>

Although premeditation does not in and of itself indicate the existence of ideological motivation, it is a feature that is more consistent with behaviour that is planned and rationalised, than a spontaneous response to a stressful situation. The following case examples illustrate the minimisation of this aspect of the conduct of domestic homicide perpetrators.

In *Mehmet*,<sup>163</sup> the offender was angered by the fact that his wife had left him and commenced a relationship with another man. Two days before he killed her, he said to her sister, 'Watch my eyes. If they get big, I am going to kill her'. He had also discussed the affair with a friend and sought her advice about what he should do, and phoned the deceased's new boyfriend to seek his help in winning his wife back. Despite this evidence of premeditation, and the fact that the trial judge rejected his account of the provocative words the deceased allegedly said to him, she found that he was under very considerable emotional strain and had to some degree lost his self-control. She described the attack as 'unpremeditated and an uncharacteristic, violent response flowing from a loss of control brought on by "his frustration and distress"'.<sup>164</sup>

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offender repeatedly attending house and assaulting victim in breach of AVO and having previously broken into the house and raped her.

<sup>160</sup> *R v Miguel* [1994] QCA 512 (Unreported, Fitzgerald P, McPherson JA, Derrington J, 25 October 1994) (jury convicted of manslaughter on the basis of diminished responsibility despite evidence of 'cold-blooded' premeditation); *R v Hurley* [2001] NSWSC 1007 (Unreported, David Levine J, 2 November 2001); *R v Toki* [2003] NSWCCA 125 (Unreported, Levine J, Hidden J, Smart AJ, 13 May 2003) (provocation left to the jury despite a history of domestic violence – jury convicted of murder).

<sup>161</sup> *Schubring; ex parte Attorney-General* [2005] 1 Qd R 515. To similar effect an acquittal of murder and conviction of manslaughter by dangerous and unlawful act in *R v Olig* [2000] NSWSC 1246 (Unreported, Adams J, 21 December 2000).

<sup>162</sup> Coker (1992), pp 95-6.

<sup>163</sup> *R v Mehmet* [2002] NSWSC 1154 (Unreported, Bell J, 12 December 2002).

<sup>164</sup> *R v Mehmet* [2004] NSWCCA 24 (Unreported, Levine, O'Keefe and Whealy JJ, 24 February 2004), [38].

In *Goebel-McGregor*,<sup>165</sup> the NSW Court of Criminal Appeal, in dismissing the offender's appeal against conviction and refusing leave to appeal against sentence, did not expressly refer to the crime as unpremeditated, but equally it did not draw upon the available evidence of planning. In sentencing remarks, it was noted that Goebel-McGregor had said to the victim on a previous occasion:<sup>166</sup>

I am going to break you. If you ever win custody of these two boys I will put a bullet right between your eyes. I was going to do it the other day when you were at my place. I had a loaded rifle there then. You will never see England or your family again. I could do the time. I will only get five years for manslaughter. You will never see your children grow up. You will never see England again.

Goebel-McGregor subsequently killed his ex-wife by shooting her in the back of the head; he claimed he had only intended to frighten her by pulling the trigger. The Court refused leave to appeal against the sentence of 20 years with a non-parole period of 15 years. However, they also indicated that 'a lighter sentence ... might have been imposed' and that the offence did not fall within the worst class of cases.<sup>167</sup>

Planning and premeditation are not always features of domestic homicide cases. Of the cases I studied, there were many where there was no indication of premeditation. However, the consistent minimisation or obscuring of evidence of premeditation where it does exist reflects the important role that legal discourse plays in constructing the offender and the offending behaviour. Planning as part of a domestic homicide is consistent with the existence of ideological motivation on the part of offenders. Minimising these aspects reinforces the message created through legal and other discourses that male violence against women, where it occurs, is an anomaly – it is a question of

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<sup>165</sup> *Goebel-McGregor v R* [2006] NSWCCA 390 (Unreported, James, Hidden and Hislop JJ, 15 December 2006).

<sup>166</sup> *Goebel-McGregor v R* [2006] NSWCCA 390 (Unreported, James, Hidden and Hislop JJ, 15 December 2006), [17].

<sup>167</sup> *Goebel-McGregor v R* [2006] NSWCCA 390 (Unreported, James, Hidden and Hislop JJ, 15 December 2006).

something dysfunctional about *this* relationship, or commonly, *this* victim.<sup>168</sup> It is not, within this conceptualisation, an example of systemic violence perpetrated by men against women. Thus the pervasive ideology of male violence is further muted.

### *Denigration or Blame of the Victim*

The final feature of ideological activity as identified in the terrorism cases is the denigration or blame of victims by those who seek to justify their ideological activity. In the terrorist context, this is illustrated by the targeting of so-called 'Western infidels' and those who represent the 'excesses of the West', exemplified in the Bali bombings.<sup>169</sup>

Porter and Kebbell describe denial of the suffering of the victim as an aspect of 'neutralisation' – a technique designed to indoctrinate followers in relation to certain attitudes and beliefs.<sup>170</sup>

For example, Jack Roche, in a letter to his son, wrote:<sup>171</sup>

As we see today, the disbelievers are now out of control and believe that their ways based on inequality, arrogance, et cetera, are right. I hate them for that and need to learn more about how to combat them.

Similarly, Benbrika made phone calls in which he promoted jihad against the 'unbelievers' who resisted the expansion of Islam and the adoption of shariah law in Australia.<sup>172</sup>

The victims in many domestic murder and manslaughter killings are also perceived by offenders as in some way responsible for their own deaths.<sup>173</sup>

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<sup>168</sup> Schneider notes that conceptualising the problem in this way means that we do not have to address the issue of violence as an integral part of the relations between men and women: Schneider (1994), p 42.

<sup>169</sup> For example, in 2002, Abu Bakr Bashir gave a sermon in Java condemning the lifestyles of non-Muslims, including the victims of the Bali bombings: see Chulov (2006), pp 21-2.

<sup>170</sup> Porter and Kebbell (2010), p 16.

<sup>171</sup> *R v Roche* (Unreported, Healy DCJ, 1 June 2004).

<sup>172</sup> *R v Benbrika & Ors* (2009) 222 FLR 433, [19]-[21].

Within the sentence proceedings, victims are sometimes constructed as having acted provocatively, by inappropriate behaviour, adultery or criticism of their partners, and this theme is then taken up and carried on in the reasons for sentence.<sup>174</sup> Victim-blaming is sometimes overt, but is also illustrated more subtly by the portrayal of violence in the domestic context as ‘marital discord’, ‘marital disharmony’ or ‘tension between parties’.<sup>175</sup> This also occurs through the use of phrasing that portrays the offender as a victim of circumstance rather than a perpetrator responsible for his actions.<sup>176</sup> This has the effect of neutralising violence, and sharing the blame for the violence between the perpetrator and the victim. It also serves to explain the criminal act as the product of individual deficiencies (of the victim),<sup>177</sup> rendering invisible the pattern of gendered violence underlying many domestic homicides.

The most obvious examples of victim-blaming conduct occur in the context of provocation cases, where claims are made that victims taunted or insulted the accused, resulting in a loss of self-control.<sup>178</sup> The underlying message behind the provocation defence is that the victim ‘got what he or she deserved’.<sup>179</sup> Not surprisingly, the words alleged to have been spoken by the victim are often words that threaten the man’s control or self-esteem, such as taunts relating to

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<sup>173</sup> *R v Hurley* [2001] NSWSC 1007 (Unreported, David Levine J, 2 November 2001); *R v Sievers* [2002] NSWSC 1257 (Unreported, Sully J, 18 December 2002); *R v Walkington* [2003] NSWSC 517 (Unreported, Newman AJ, 6 June 2003) (offender claimed provocation by adultery and planning to take his children); *R v Lem* [2005] SASC 405 (Unreported, Doyle CJ, Bleby and Gray JJ, 28 October 2005); *R v Copland* [2006] VSC 224 (Unreported, Eames J, 23 June 2006).

<sup>174</sup> For example, see Coker (1992), pp 96-7; Lees (1997), pp 154-74. Smart discusses the role of legal discourse in the construction of different ‘types’ of woman: Smart (1995), pp 192-3. For a case in this study where adultery was raised on sentence see *R v Daniels* [2004] NSWSC 1201 (Unreported, Hidden J, 14 December 2004).

<sup>175</sup> *R v Barry* [2000] NSWCCA 138 (Unreported, Stein JA, Dunford and Sperling JJ, 13 April 2000) (association of the couple had been ‘attended by violence’); *R v Bell* [2000] QCA 485 (Unreported, Williams JA, Pincus JA, Cullinane J, 23 November 2000) (previous history of violence referred to as ‘marital disharmony’); *R v Gordon* [2000] WASCA 401 (Unreported, Kennedy, Anderson and Wheeler JJ, 15 December 2000) (‘domestic argument’ and see Wheeler J at [23] disputing the appropriateness of this term); *R v Gojanovic (No 2)* [2007] VSCA 153 (Unreported, Ashley and Kellam JJA and Kaye AJA, 14 August 2007) (‘tension’ between the parties).

<sup>176</sup> For example in *Gojanovic* [2002] VSC 118, the judge stated at [11]: [evidence of a prior assault by the offender] ‘may be seen as providing cogent evidence of a relationship which had the capacity to generate a high level of antagonism between the parties; antagonism which manifested itself in an equally highly level of violence.’ See also *R v Aytugrul* [2009] NSWSC 275 (Unreported, Hulme J, 16 April 2009), where the court found something happened during a confrontation with the victim ‘that caused him to vent his feelings in the most violent, callous, brutal and inhumane way’ notwithstanding the evidence that he had stalked her to the extent she needed to move.

<sup>177</sup> Meloy and Miller (2009), p 31.

<sup>178</sup> For an examination of the way victim-blame works in provocation see Cleary (2005), especially at 132-40 (the ‘Ramage’ case).

<sup>179</sup> Greene (1989).

his sexual prowess,<sup>180</sup> or capabilities as a breadwinner,<sup>181</sup> challenges to the paternity of his children,<sup>182</sup> defiance or failure to behave as the offender thinks appropriate,<sup>183</sup> or affirmations that the victim does not intend to return to the relationship.<sup>184</sup> These accusations are usually made in circumstances where the only source of evidence as to what was said is the accused and it is not possible to verify that the provocation actually occurred.

The characterisation of the victim's behaviour in *Lynch*<sup>185</sup> is a good example. In the sentencing judgment, the victim is subtly constructed as having effectively provoked her ex-husband to attack her by her engagement in a new relationship:<sup>186</sup>

Elizabeth Lynch *regarded herself* free to have relationships with other men if she wished to do so in the period of time prior to August 2001. *From her perspective*, she and her husband were "in a separation ready for divorce."  
[emphasis added]

In assessing that the degree of provocation offered was 'high', the judge also took into account 'Elizabeth Lynch's resolve to have a relationship with other men if she so chose notwithstanding that she was still living under the same roof as the prisoner'.<sup>187</sup>

And further:<sup>188</sup>

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<sup>180</sup> *R v Gardner* (1989) 42 A Crim R 279; *R v Farfalla* [2001] VSC 99 (Unreported, Vincent J, 7 May 2001); *R v Leonboyer* [2001] VSCA 149 (Unreported, Phillips CJ, Charles and Callaway JJA, 7 September 2001); *R v Butay* [2001] VSC 417 (Unreported, Flatman J, 2 November 2001); *R v Mehmet* [2004] NSWCCA 24 (Unreported, Levine, O'Keefe and Whealy JJ, 24 February 2004); *R v Margach* [2006] VSC 77 (Unreported, King J, 8 March 2006).

<sup>181</sup> For a discussion of two such cases see Easteal (1993), pp 161-163.

<sup>182</sup> *R v Mehmet* [2004] NSWCCA 24 (Unreported, Levine, O'Keefe and Whealy JJ, 24 February 2004); *R v Karageorges* [2006] VSCA 49 (Unreported, Buchanan, Vincent and Neave JJA, 9 March 2006); and see Easteal (1993), p 164.

<sup>183</sup> *R v Gojanovic (No 2)* [2007] VSCA 153 (Unreported, Ashley and Kellam JJA and Kaye AJA, 14 August 2007); *R v Stevens* [2008] NSWSC 1370 (Unreported, Hall J, 18 December 2008) (failing to fulfil responsibilities as a mother due to substance abuse). Smart notes that saying 'no' may be perceived as a challenge to manhood that resonates in the minds of lawyers, judges and juries: Smart (1989), pp 28-32. For research into views of perpetrators in the US see Anderson and Umberson (2001).

<sup>184</sup> *R v Auberson* [1996] QCA 321 (Unreported, Fitzgerald P, Pincus JA, de Jersey J, 3 September 1996); *R v Wallace* [2006] NSWSC 897 (Unreported, James J, 8 September 2006). Separation is a common theme in intimate homicides: Polk (1994), pp 41-4.

<sup>185</sup> *R v Lynch* [2002] NSWSC 1140 (Unreported, Whealy J, 20 November 2002).

<sup>186</sup> *R v Lynch* [2002] NSWSC 1140 (Unreported, Whealy J, 20 November 2002), [15].

<sup>187</sup> *R v Lynch* [2002] NSWSC 1140 (Unreported, Whealy J, 20 November 2002), [36].

<sup>188</sup> *R v Lynch* [2002] NSWSC 1140 (Unreported, Whealy J, 20 November 2002), [23].

It is quite apparent that the behaviour of the deceased and Elizabeth Lynch in the bar, no doubt coupled with that which had happened earlier at the barbecue, *brought the prisoner to a state of anger and resentment* [emphasis added].

*Gardner* is another example of the way in which legal discourse parallels the defendant's strategy to blame the victim for her own death.<sup>189</sup> Brian Gardner was convicted of the manslaughter of his ex-partner Sylvana Marino and the murder of her friend John Shears. Following their separation initiated by Marino, Gardner had told a number of people of his plans to kill her, and he had previously produced a knife and threatened to kill her; Marino had the locks changed on her house and asked Shears to move in with her to provide protection. Gardner called the house and made threats against Shears and continued to tell people of his plans to kill Marino. Gardner entered Marino's house and killed both Shears and Marino (Marino's body was never found).

Despite the numerous threats made by Gardner and the lengths to which Marino had gone to protect herself, the judge found that there was ample evidence to show that the killings were carried out in a 'jealous rage'. The finding was based on Gardner's unsworn evidence that he had gone to the house at 4am to collect some tools; Marino had (notwithstanding her obvious fears of the defendant and his previous threats) 'taunted' him, talking about how she had had intercourse with Shears and denigrating his sexual prowess. It was therefore open to the jury to find that Gardner had killed Marino in a jealous rage, and there was also sufficient proximity between Marino's provocative words and the fact of Shears sleeping in a nearby bedroom for provocation by Marino to be applicable in relation to the killing of Shears.

The discursive technique of 'victim-blaming' not only reflects certain attitudes about women as victims; it also perpetuates them. It has been noted that where news stories about violence against women are written in the passive voice, male readers attribute less victim harm and less offender responsibility, and

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<sup>189</sup> *R v Gardner* (1989) 42 A Crim R 279.

both male and female readers are more accepting of abuse.<sup>190</sup> When articles imply that women are partly responsible for violence readers express more lenient attitudes towards punishment of perpetrators.<sup>191</sup> Thus legal discourse reinforces the perception that perpetrators of domestic homicide are somehow less culpable than perpetrators of crimes such as terrorism where victims are randomly-targeted and 'blameless'.<sup>192</sup>

## *Conclusion*

As described above, the motivations of domestic violence and terrorism perpetrators are constructed very differently in legal discourse, with the latter portrayed as ideologically motivated and the former as acting on the basis of emotion or passion. However, a reconstruction of the facts of domestic violence cases indicates that many domestic violence cases exhibit similar indicia of ideological motivation to the terrorism cases.

In this chapter, I have outlined possible alternative reconstructions of perpetrator behaviour as ideologically-motivated – evidence that violence is used purposively and with a sense of entitlement, that it is planned and premeditated, and that victims are blamed for provoking their own demise in the same way that terrorists target 'infidels' or unbelievers for attack. From a feminist perspective, these attitudes represent the 'illusory view of the world'<sup>193</sup> that is characteristic of ideological commitment. However, legal discourse operates to ignore and obscure these indicia of ideology, thus reinforcing the message that domestic violence is anomalous, and not part of a pattern of male

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<sup>190</sup> This point is made by Meloy and Miller (2009), p 31 citing research by Henley et al (1995); Lamb and Keon (1995).

<sup>191</sup> Meloy and Miller (2009), p 31.

<sup>192</sup> For reference to the 'blameless' nature of terrorism victims (and potential victims) see *Barot v R* [2007] EWCA Crim 1119, [32] quoting the sentencing judge in Woolwich Crown Court. In the US context, research has noted that in mass-murder contexts, children and bystanders are constructed as innocent victims, while partners and ex-partners are usually constructed as 'culpable victims' because they knew about the perpetrator's violent tendencies in advance, took him back or in some way contributed to their own death: Heeren and Messing (2009), pp 217-20.

<sup>193</sup> Vincent (2009), p 17.



violence against women. Thus, as Millett notes, masculinist ideology remains obscured, despite its pervasiveness.<sup>194</sup>

Domestic violence also shares with terrorism that it constitutes violence committed by one group of persons identified by reference to political or ideological belief with another group of persons victimised on the basis of their membership of a different group. In this sense, I argue that domestic violence, like terrorism, is a form of discriminatory violence. In particular, the victims of terrorism are defined collectively in legal discourse; terrorist violence is constructed as directed against 'the public' in contradistinction to domestic violence, which is constructed as a private crime notwithstanding that its victims belong to one group defined by a particular characteristic, namely gender.

In the next section, I examine the ways in which legal discourse also differentially constructs violence in terms of the public/private domain before I go on to consider the practical consequences of this differential treatment in more detail.

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<sup>194</sup> Millett (2000), p 25.



## CHAPTER 2.3 LAW'S CONSTRUCTION OF 'PUBLIC' CRIME

If the leading newspapers were to announce tomorrow a new disease that, over the past year, had afflicted from 3 to 4 million citizens, few would fail to appreciate the seriousness of the illness. Yet, when it comes to the 3 to 4 million women who are victimized by violence each year, the alarms ring softly.<sup>1</sup>

The second aspect of the legal definition of terrorism that sets it apart from other crimes, following on from the motivation of the perpetrator discussed in the previous chapter, is its 'public' element. For an act of violence to constitute an act of terrorism, the perpetrator must act with the intention of coercing or influencing by intimidation a government, or intimidating the public or a section of the public.<sup>2</sup>

Acts that the law, as well as popular discourse, constructs as 'directed against a section of the public' are acts that target victims in the public arena as they go about their lives – on planes, on trains, and in public buildings.<sup>3</sup> These are acts that infringe on the rights of '... the people as a whole, the community, the common good ...'<sup>4</sup> and therefore contribute to a particular sense of social vulnerability.<sup>5</sup> It is 'indiscriminate' violence and therefore in law warrants a more severe approach than more specifically targeted violence.<sup>6</sup>

Terrorism is by nature a political crime.<sup>7</sup> To the extent that terrorism incorporates violence inflicted with the intention of advancing a political cause, and violence directed towards the seat of government, it possesses a political dimension. Acts of violence intended to coerce a government, for example kidnapping a head of state, or attacking a government institution, are political by virtue of their targets. However, acts intended to intimidate citizens in the public

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<sup>1</sup> Biden (1993), p 1059.

<sup>2</sup> *Criminal Code Act 1995* (Cth) s 100.1.

<sup>3</sup> In this respect note that the terrorism legislation of the last decade was enacted as a result of the events of 11 September 2001, and the subsequent Bali bombings in 2002. Howie notes that the attacks in New York, Madrid and London were attacks on the working population: Howie (2005).

<sup>4</sup> Landes (1998), p 2.

<sup>5</sup> Spilerman and Stecklov (2009).

<sup>6</sup> Norrie (2001), pp 54-8.

<sup>7</sup> Saul (2006).

domain also have a political aspect to them, due to the historical association of politics with the public sphere.<sup>8</sup>

However, the concept of public violence is not a straightforward one by any means. The abundance of feminist critique in relation to the so-called 'public' and 'private' spheres has rendered the distinction problematic.<sup>9</sup> Far from constituting labels that can be attached to pre-existing social phenomena, 'public' and 'private' are terms that represent highly malleable constructs,<sup>10</sup> and do so in a way that reflects masculinist interests.<sup>11</sup> In this chapter I bring some of this critique to bear on the way in which the public is constructed in relation to crimes of terrorism, and by contrast, how crimes of domestic violence (focusing on intimate homicide as the most severe form) are constructed as non-public.

In doing so, one of my aims is to interrogate the conundrum referred to by Joe Biden above – the seeming failure on the part of the state to recognise domestic violence for the epidemic that it is, constructing it instead as a multiplicity of isolated instances. When an act legally recognised as terrorism occurs – for example, a bomb is detonated on board a bus – that is easily recognised as a public crime because of its location and because the victims are randomly targeted, albeit sometimes chosen as representatives of a targeted racial or social group.<sup>12</sup> However, when a significant number of seemingly unconnected acts occur every day – perpetrated by one group (men) against another group (women) – it is easier for the state to construct these as a string of isolated instances<sup>13</sup> – as lots of 'little murders'<sup>14</sup> – ignoring or obscuring the similarities

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<sup>8</sup> Thornton (1995a), pp 2-3.

<sup>9</sup> For references to this critique see Section 1.2.

<sup>10</sup> Schneider (1994), p 38. See also Lacey (1993) and the collection of essays in Scott and Keates (2004).

<sup>11</sup> Smart (1995), pp 140-1.

<sup>12</sup> For example, the targets of the 9/11 attacks were chosen (i.e. the locations) due to their status as symbols of US financial, military and political power: Carr (2006), p 293. Past terrorist incidents have involved the targeting of national figureheads as emblematic of the target group: see for example the shootings of the Jordanian Prime Minister and former Defence Minister in 1971 by Palestinian group 'Black September' described in Carr (2006), p 201.

<sup>13</sup> Pranis (2002), pp 26-7.

<sup>14</sup> 'Just Another Little Murder' is the title of a book written by Phil Cleary about the murder of his sister Vicky and the subsequent conviction of her assailant for manslaughter based on provocation: Cleary (2002).

between them that point to the existence of the systemic use of violence in a way that is unmistakably gendered.<sup>15</sup>

In this chapter, I draw upon feminist critiques of the public and private already outlined in Chapter 1.2 in examining the legal constructions of terrorism and domestic violence. I then go on to consider how the legal element of intention to influence by intimidation the government or a section of the public is constructed in legal discourse, and how this reflects the differential constructions in social discourse. I examine the relationship between the identity of victims and perpetrators of crime and the definition of what is 'public' crime. Finally, I draw upon critiques of domestic violence and its systemic nature to argue that domestic violence can indeed be reconstructed as a crime against 'a section of the public', and the fact that it is not so constructed in legal discourse is reflective of the law's masculinist influences.

### *Critiques of the Public and Private and the Law's Construction of Public and Private Violence*

It is a feature of the ideological division between the public and the private that the former is privileged over the latter.<sup>16</sup> The public is also inextricably linked in feminist critique with the masculine.<sup>17</sup> Drawing upon feminist critiques of the public/private, I argue below that the law uses the 'potent and flexible rhetorical instrument'<sup>18</sup> of 'terrorist' in relation to those who constitute a threat to masculinist interests.

That terrorism is treated in a special way is aptly demonstrated by the enactment of new offences to deal with it.<sup>19</sup> Even conduct involving very early stage planning or preparation for a terrorist attack is subject to significant

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<sup>15</sup> This is similar to the way in which individualisation of sex discrimination claims masks the systemic nature of discrimination: Thornton (2010), p 324.

<sup>16</sup> Thornton (1995a), p 11.

<sup>17</sup> Thornton (1995a), pp 12-6.

<sup>18</sup> Hogg (2008), p 320.

<sup>19</sup> Rose and Nestorovska (2007), p 26.

penalties, with the maximum available sentences for providing training to, or supporting, a terrorist organisation equivalent to or more than the maximum penalties for manslaughter in four Australian jurisdictions.<sup>20</sup> This is consistent with one of the central purposes of the anti-terrorism legislation – to criminalise acts relating to terrorism at the preparatory stages as a preventative measure.<sup>21</sup>

The special place of terrorism in the criminal catalogue is also emphasised by judicial pronouncement. In *Roche*,<sup>22</sup> McKechnie J set out a number of principles that apply in sentencing terrorism offenders, which have subsequently been adopted by other courts. Justice McKechnie stated that offences that threaten the democratic government and security of the State, threaten the daily life and livelihood of millions of people, or threaten diplomats and others to whom Australia owes protection, have a seriousness all their own.<sup>23</sup> By implication, other 'ordinary' offences do not threaten the security of the state, or the daily lives and livelihoods of millions of people. Consistently with the critiques referred to above, this public/political aspect of terrorism is directly linked to its occupying a special place in the criminal catalogue.<sup>24</sup>

As noted above, acts of violence constructed as aimed at the government or the public are acts that violate masculinist interests. The targeting of public places and the people who occupy them constitutes an attack within a masculinist context, even though the victims of terrorism are both men and women.<sup>25</sup> The public realm of work and work-related life remains a masculine domain, despite the significant number of women who occupy it. While the polity and the market

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<sup>20</sup> These offences carry a maximum penalty of 25 years' imprisonment. Maximum penalties for manslaughter are 20 years in the ACT, Victoria and WA, 25 years in NSW, and life imprisonment in the Northern Territory, Queensland and South Australia: *Crimes Act 1900* (ACT) s 15; *Crimes Act 1900* (NSW) s 24; *Criminal Code Act 1983* (NT) s 161; *Criminal Code Act 1899* (Qld) s 310; *Criminal Law Consolidation Act 1935* (SA) s 13; *Crimes Act 1958* (Vic) s 5; *Criminal Code Act Compilation Act 1913* (WA) s 280.

<sup>21</sup> Senate Legal and Constitutional Legislation Committee (2002), arguments outlined at [3.12]-[3.18].

<sup>22</sup> *R v Roche* [2005] WASCA 4 (Unreported, Murray ACJ, Templeman and McKechnie JJ, 14 January 2005).

<sup>23</sup> *R v Roche* [2005] WASCA 4 (Unreported, Murray ACJ, Templeman and McKechnie JJ, 14 January 2005), [114]-[119].

<sup>24</sup> In a speech delivered at Manly Pacific Hotel on 21 January 2006, former Commonwealth Attorney-General Phillip Ruddock stated: 'Terrorism is arguably the greatest threat this nation has faced in many decades, and perhaps the most insidious and complex threat we have ever faced': Ruddock (2006), para 93.

<sup>25</sup> It has been noted that the symbolic players of September 11 for example were almost exclusively male – terrorists, commentators and heroes: Peters (2002); see also Charlesworth (1993), p 98.

both constitute different aspects of the public realm, both remain male-dominated.<sup>26</sup>

An examination of the terrorism sentences to date illustrates how the concept of the 'public' is constructed to refer to groups of people operating in the public sphere arena of work or life outside the home. It is not only the intimidation or coercing of those members of the public directly subject to attack, but the intimidation caused to members of the community more broadly that is seen as reflecting the gravamen of the offence.<sup>27</sup>

This was intended, in effect, to be a general attack on the community as a whole. It carried the obvious consequence that, if carried out, it would instil terror into members of the public so that they could, never again, feel free from the threat of bombing attacks within Australia.

Courts have accepted the likelihood of harm being caused to members of the public even in circumstances where there has been no agreement as to the nature or target of an attack.<sup>28</sup> The potential for harm to members of the public is directly linked to the perceived need for severe penalties as a deterrent in sentencing for terrorism offences.<sup>29</sup> A related aspect is the perceived need for greater sentences to allow for protection of the community against terrorism offences.<sup>30</sup>

By contrast, the domestic homicide cases studied in my research contained little reference to domestic violence as a social problem. Where there was a reference to the broader problem of domestic violence, it was usually to demarcate those cases as a category of killings separate from other homicides for the purposes of sentencing.<sup>31</sup> There was little if any reference to the

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<sup>26</sup> Thornton (1995a), pp 6-7.

<sup>27</sup> *R v Lodhi* (2006) 199 FLR 364, [52].

<sup>28</sup> *R v Elomar & Ors* (2010) 264 ALR 759, [59]-[60].

<sup>29</sup> *R v Khazal* [2009] NSWSC 1015 (Unreported, Latham J, 25 September 2009), [47].

<sup>30</sup> *Lodhi v R* (2007) 179 A Crim R 470, [89]-[109], [214]. These aspects are considered in more detail in Chapter 3.3.

<sup>31</sup> *R v Whiting* [1994] QCA 425 (Unreported, Davies and McPherson JJA, Derrington J, 24 October 1994); *R v Mehmet* [2004] NSWCCA 24 (Unreported, Levine, O'Keefe and Whealy JJ, 24 February 2004); *R v Gojanovic (No 2)* [2007] VSCA 153 (Unreported, Ashley and Kellam JJA and Kaye AJA, 14 August 2007), [140] (noting the need for general deterrence in killings in the domestic setting).

gendered nature of the violence, or to the gender of perpetrators.<sup>32</sup> Even after years of feminist campaigning, only New South Wales and Victoria give legislative recognition to domestic violence as a gendered phenomenon.<sup>33</sup> Recent proposed amendments to the *Family Law Act*<sup>34</sup> failed to give any recognition to the gendered nature of family violence, using the terminology of violence 'against families and children'.<sup>35</sup>

By contrast with terrorism, domestic violence has been commonly regarded by the law as a phenomenon that takes place within the 'private' space.<sup>36</sup> While the male-gendered subject takes his place within the public sphere as a 'universal', issues such as childcare and domestic violence, associated with women, have traditionally been relegated to the specifically-gendered private sphere.<sup>37</sup> The effect of this privatisation was, until domestic violence was made a public issue by women's groups, to deprive women of any effective remedy for violence inflicted upon them in the intimate arena.<sup>38</sup>

Feminist activism of the 1960s and 1970s achieved public recognition of a problem that had for many years been hidden from public view.<sup>39</sup> But despite the best attempts of feminists to drive home the message that 'the personal is the political', women who die inside their own homes do not, as MacKinnon has noted, have the 'dignity of politics'.<sup>40</sup> Domestic violence still remains in many senses a phenomenon associated with the private sphere.<sup>41</sup> It is private in the sense that it often occurs behind closed doors and within the sanctuary of the home, where historically the state has feared to tread.<sup>42</sup> It is also private in the sense that it occurs between two people who are in an intimate relationship,

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<sup>32</sup> For exceptions see *R v Keir* [2000] NSWSC 111 (Unreported, Adams J, 29 February 2000), [15]; *R v Hill* [2006] VSC 149 (Unreported, Hollingworth J, 2 May 2006).

<sup>33</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9; *Family Violence Protection Act 2008* (Vic), Preamble. Cf South Australian legislation, which specifically provides that 'abuse occurs in all areas of society, regardless of ... gender': *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 10(1)(a).

<sup>34</sup> *Family Law Act 1975* (Cth).

<sup>35</sup> See Explanatory Memorandum, Family Law Amendment (Family Violence and Other Measures) Bill 2011 (Cth).

<sup>36</sup> Douglas (2003-04), p 83.

<sup>37</sup> Carver (1996).

<sup>38</sup> See Genovese (1998) for a history of the women's movement's action in Australia to make domestic violence a public issue.

<sup>39</sup> Thornton (1995a), pp 8-9.

<sup>40</sup> MacKinnon (2002), p 430.

<sup>41</sup> Hanmer et al (1989), pp 46-51.

<sup>42</sup> O'Donovan (1985), Chapter 1.



often considered to be a personal matter for the individuals involved.<sup>43</sup> Within intimate relationships, the law continues to deny women full citizenship entitlements, for example through failure to recognise women's economic rights to a full-time wage or to payment for work done in the home.<sup>44</sup> This further relegates the issue of relationship violence to the private sphere.

However, the division between the public and the private is not as simple as questions of physical space or the relationship between parties. Nor can it any longer be said, as early liberal philosophers would have it,<sup>45</sup> that the public is and should be constituted by the area regulated by the state and the private conversely by the absence of state interference.<sup>46</sup> The state interferes in a range of areas that relate to the 'private' lives of individuals, including social security, taxation, marriage and custody arrangements following separation.<sup>47</sup> Thus it is not possible to map any pre-existing delineation between the public and private spheres. Rather, the meanings of the terms 'public' and 'private' are always changing, contested and subject to context.<sup>48</sup> As Thornton notes, the liberal conception of private is 'an elastic concept which can be stretched in order to oust intervention when it is politically desirable to do so'.<sup>49</sup>

Feminist legal theorists have pointed to the ability to delineate what is public and what is private as a form of power.<sup>50</sup> Therefore, given the malleability of the concepts of public and private, the state, and by extension the law, will construct these concepts in ways that serve dominant interests. As Smart notes, the law is riddled with inconsistencies, which serves to complicate the project of exposing its discriminatory impact on women, because it is always possible for others to point to ways in which the law acts for women's benefit.<sup>51</sup> Thus, the law in all Australian states and territories does recognise domestic

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<sup>43</sup> O'Donovan (1985), Chapter 1.

<sup>44</sup> Thornton (1995b), pp 208-10.

<sup>45</sup> Bottomley (1997), pp 41-2.

<sup>46</sup> Thornton (1995a), pp 3-4.

<sup>47</sup> Naffine (1990), pp 69-71; Thornton (1991), pp 449-50; Lacey (1993), pp 96-7.

<sup>48</sup> For example, Benn and Gaus discuss how publicness and privateness can each be understood in three-dimensional contexts of access, agency and interest, and a particular object may exhibit aspects of both: Benn and Gaus (1983), pp 31-66; Schneider (1994), p 38. See also Lacey (1993), p 93 and the collection of essays in Scott and Keates (2004).

<sup>49</sup> Thornton (1990), p 107.

<sup>50</sup> Landes (1998), p 3.

<sup>51</sup> Smart (1995), pp 156-61.

violence in one form or another as constituting a range of criminal offences, which obviously benefits women as a class as well as individual women, however it does so in ways that also reflect particular understandings about women and gendered crime that are not necessarily to women's advantage.<sup>52</sup>

One of the ways in which the law operates to women's detriment is through its failure to recognise the public aspect of systemic criminal conduct committed by men against women (e.g. domestic violence). Despite evidence of its systematically gendered nature, the law continues to construct domestic violence as a feature of individual relationships, ignoring recurring patterns in its commission that would suggest a reason to treat victims and perpetrators as members of groups defined by gender. The Australian legal system recognises other group identities for the purposes of hate crime and hate speech legislation, but has consistently failed to recognise male and female group identity as the basis for characterising acts of violence, in the context of hate crimes or otherwise. In the next section, I explore in more detail the law's construction of public and private violence, and the role of group identities in that characterisation.

### *The Role of Gender in the Construction of Public and Private Violence*

Because the concepts of public and private are malleable, they are susceptible to constant construction and reconstruction within legal and social discourse. It is important to remember in this regard that discourse is more than simply words; it is actions, symbols, silences, context, ways of speaking, and rules about who can speak and when.<sup>53</sup> These aspects of discourse operate to define violence perpetrated against women by their intimate partners as 'private'

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<sup>52</sup> See Smart (1989), Chapter 2 for a discussion of how rape laws operate in ways that disadvantage and oppress women.

<sup>53</sup> Howe (2008), pp 21-7.

violence. Legal discourse constructs the concept of the 'public' in such a way as to exclude women as a group from its parameters.<sup>54</sup>

The definition of terrorism in the Criminal Code includes acts of violence directed against the government and the public generally, as well as acts directed against a 'section of the public'.<sup>55</sup> There seems little doubt that a terrorist attack directed specifically at certain groups within Australian society would constitute an act of violence intended to intimidate a section of the public.<sup>56</sup> The offence of sedition contained in s 80.2 of the Commonwealth Criminal Code recognises that actions urging a group distinguished by race, religion, nationality or political opinion to use force or violence against another group so distinguished may threaten the peace, order and good government of the Commonwealth.<sup>57</sup> The fact that gender is not included as a basis for group identification in s 80.2 is an indication of the law's inability to recognise women as a group targeted for violence.<sup>58</sup> Moreover, s 80.2 is a relatively recent enactment, replacing the previous sections 24A to 24E of the *Crimes Act*, which were expressed in more general terms.<sup>59</sup> The wording of the sedition offence indicates that violence or incitement of violence towards a group identified by race, religion, or even political opinion, may constitute a crime that threatens the state, but this is not so in relation to violence directed towards a group identified by gender.

The law has traditionally not recognised women as a 'class' for the purposes of enabling them to take legal action in relation to systemic forms of harm committed against them as a group.<sup>60</sup> This absence of recognition is reflected in

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<sup>54</sup> Later feminist critiques of the public/private have focused upon its role in constructing women's subordinate position: see Davidoff (1998).

<sup>55</sup> *Criminal Code Act 1995* (Cth) s 100.1.

<sup>56</sup> The Explanatory Memorandum to the *Suppression of Financing of Terrorism Act 2002* which introduced the definition of terrorism does not provide any assistance as to the reason for including 'a section of the public'. The section largely replicates the definition of 'terrorist act' in the *Terrorism Act 2000* (UK) s 1(1).

<sup>57</sup> *Criminal Code Act 1995* (Cth) s 80.2.

<sup>58</sup> Scutt notes that the law is unable to recognise the risk of harm to women in the private sphere: Scutt (1997a), p 113. Developments in refugee law to recognise women as members of a 'particular social group' demonstrate the potential for change: Jayasinghe (2006).

<sup>59</sup> The Explanatory Memorandum notes that the new s 80.2(5) replacing ss 24A to 24E of the *Crimes Act* modernises the language in relation to groups or classes as recommended by the Gibbs report: Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth).

<sup>60</sup> For example in relation to sex discrimination law, Thornton notes that the federal *Sex Discrimination Act 1984* (Cth) recognises claims on an individual but not a systemic basis, and also does not recognise

hate crime and hate speech legislation, which exists in some form in all Australian states and territories.<sup>61</sup> I discuss this in more detail in Chapter 3.1.

Federally, the *Sex Discrimination Act*<sup>62</sup> does provide some recognition of the reality of gender-based discrimination. However, unlike the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>63</sup> the legislation is framed in a gender-neutral way,<sup>64</sup> which fails to recognise the background of female disadvantage behind its inception. Its enactment was also attended by strong opposition from a range of conservative groups,<sup>65</sup> reflecting a continuing antipathy toward the recognition of men's discrimination against women.

Domestic violence law reflects this same failure to recognise women as a group subject to systemic discrimination and violence.<sup>66</sup> Earlier strategies of the 1970s and 1980s women's movement focused on consciousness-raising to expose violence as the result of a system of oppression. However, Celina Romany points out that an increasing awareness of the gendered nature of domestic violence in the 1990s took place amidst an increasing general trend towards privatisation.<sup>67</sup> This heralded a return towards conceptualisation of violence as a result of individual choices and problems rather than systemic oppression.

The privatisation of domestic violence is reflected in various aspects of its treatment within the legal system. One is the 'reprivatisation' of abuse through the tendency of authorities to refer female survivors of abuse and violence for treatment that has the effect of making the abuse a facet of the women's own

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discrimination within the private sphere where much of the discrimination faced by women occurs: Thornton (2008), pp 36-8. See also Thornton (1990), pp 5-6.

<sup>61</sup> For hate speech provisions see *Racial Discrimination Act 1975* (Cth) ss 18B-18F; *Discrimination Act 1991* (ACT) ss 65-67; *Anti-Discrimination Act 1977* (NSW) ss 20B-20D, 38R-38T, 49ZS-49ZTA, 49ZXA-49ZXC; *Anti-Discrimination Act 1991* (Qld) ss 124A, 131A; *Racial Vilification Act 1996* (SA); *Anti-Discrimination Act 1998* (Tas) ss 17(1), 19; *Racial and Religious Tolerance Act 2001* (Vic); *Criminal Code* (WA) ss 76-80H. The provisions are civil only federally and in Tasmania, criminal only in WA and both civil and criminal in all other jurisdictions.

<sup>62</sup> *Sex Discrimination Act 1984* (Cth).

<sup>63</sup> *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981).

<sup>64</sup> Genovese (2010), pp 47-73.

<sup>65</sup> For an outline of the opposition see Thornton and Luker (2010).

<sup>66</sup> This mirrors the public perception of domestic violence as an individual problem referred to in Snyder (2009), p 111.

<sup>67</sup> By this, Romany was referring to the rise of the 'helping professions' where the individual and pathological became the focus at the expense of women's shared experiences: Romany (1994), pp 286-7.

pathology.<sup>68</sup> This trend towards privatisation through treatment is also reflected in the Australian family law mechanisms that provide for, and in some cases mandate, counselling or mediation between parties even where domestic violence has occurred.<sup>69</sup> This reinforces the conceptualisation of violence as a feature of a dysfunctional relationship, rather than part of a broader pattern of violence, and worse still, in some respects treats the victim as complicit in her own victimisation and as bearing some responsibility for addressing the violence.

Within the domestic homicide context, the privatisation of violence is reflected in findings that the homicidal act arises out of the tensions or frictions present in the particular relationship.<sup>70</sup> The relationship between findings of this nature and sentence is discussed in Chapter 3.3.

The state and the media also play important roles in constructing the public and the private. The federal government's 2003 'Let's look out for Australia' anti-terrorism campaign drew upon a discourse of fear and security.<sup>71</sup> The state encourages reporting of suspicious activity that may be related to planning for a terrorist attack, and has a 'hotline' set up specifically for this purpose.<sup>72</sup> In the United Kingdom, legislation expressly criminalises failing to disclose information that a person believes might be of material assistance in preventing an act of terrorism, or securing the apprehension or conviction of a person for a terrorist offence.<sup>73</sup> There is no corresponding indication in any of the federal, state or territory government documentation dealing with domestic violence to encourage reporting of it by members of the public.<sup>74</sup> The implication by

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<sup>68</sup> Caplan (2006), pp 115-25. Although therapeutic treatment may be helpful for some victims of domestic violence, it is problematic when used as a substitute for addressing the behaviour of the perpetrator.

<sup>69</sup> For a discussion of some of the disadvantages of this for women see Field and Crowe (2007).

<sup>70</sup> For examples see *R v Keir* [2000] NSWSC 111 (Unreported, Adams J, 29 February 2000), [8]; *R v Lem* [2005] SASC 405 (Unreported, Doyle CJ, Bleby and Gray JJ, 28 October 2005), [64]; *R v Mills* [2008] QCA 146 (Unreported, Keane, Holmes and Fraser JJA, 28 May 2008), [29]; *R v Stevens* [2008] NSWSC 1370 (Unreported, Hall J, 18 December 2008), [112].

<sup>71</sup> Poynting et al (2004), pp 239-40.

<sup>72</sup> 'The National Security Hotline',

<[http://www.ema.gov.au/agd/www/nationalsecurity.nsf/Page/The\\_National\\_Security\\_Hotline](http://www.ema.gov.au/agd/www/nationalsecurity.nsf/Page/The_National_Security_Hotline)> (viewed 1 Feb 2010).

<sup>73</sup> *Terrorism Act 2000* (UK) s 38B. A number of persons were prosecuted for this offence following the 2005 London bombings: *R v Sherif & Ors* [2008] EWCA Crim 2653.

<sup>74</sup> In Tasmania, *Family Violence Act 2004* (Tas) s 38 (not in force at December 2011) mandates reporting of suspected abuse by 'prescribed persons', including police, childcare workers and medical professionals.

omission is that domestic violence, unlike terrorism, is not a matter for public concern and vigilance.

Indeed, in 2003, funding set aside for the Partnerships Against Domestic Violence program was transferred to the 'National Security Public Information Campaign'. This reflected the government's conceptualisation of domestic violence as reflective of family dysfunction, and overlooking links between domestic violence and gendered power relationships more broadly.<sup>75</sup>

Government campaigns have also failed to address the fact that violence against women is perpetrated predominantly by men.<sup>76</sup> There has been some recent indication, via the release of the Australian Law Reform Commission report on family violence, that this may change, with a recommendation that domestic violence legislation set out the systematic features of such violence, including that it is perpetrated predominantly by men.<sup>77</sup>

Equally, the media often describes crimes of domestic violence in ways that minimise or downplay the sexed nature of the violence.<sup>78</sup> In news stories about domestic violence, the gendered nature of the violence is rarely mentioned.<sup>79</sup> Similarly, popular media ignores the social context of crimes of domestic violence focusing instead on the stories of particular individuals.<sup>80</sup> Power and Mackenzie found in their analysis of South Australian media reporting of domestic violence related deaths between 2005 and 2010 that reporting generally did not include gender analysis or discussion of domestic violence as part of a broader social problem.<sup>81</sup> In the American context, research shows that

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*Domestic and Family Violence Act 2007* (NT) s 124A creates an offence if a person reasonably believes domestic violence has been committed or is about to be committed and fails to report it.

<sup>75</sup> Phillips (2006), pp 206-7.

<sup>76</sup> In relation to this feature of the UK campaign combating Violence Against Women, see Howe (2008), pp 189-90.

<sup>77</sup> ALRC (2010a), [5.163].

<sup>78</sup> Howe (1998); Berns (2001).

<sup>79</sup> Howe (1998), pp 29-35; Evans (2001), p 170.

<sup>80</sup> Berns (2004), pp 57-63. In the Italian context see Romito (2008), p 5.

<sup>81</sup> Power and Mackenzie (2010).

mass murders in the public setting generate considerably more media coverage than mass murders in the domestic context.<sup>82</sup>

By failing to draw attention to the shared ideology of domestic homicide perpetrators, as identified in Chapter 2.2, the court constructs the perpetrators of these crimes very differently to the way it constructs terrorism offenders. Terrorism offenders are constructed as possessing a shared set of values – a shared ideological commitment – which not only satisfies the ‘ideological’ aspect of the definition of terrorism, but also establishes perpetrators as a class apart from the general public, against whom the individuals’ actions are then perceived as directed. By contrast, the similar beliefs and attitudes of domestic homicide perpetrators are ignored, establishing domestic homicides as instances of individual criminal conduct, not united by any broader pattern or context, and obscuring the highly-gendered pattern of the crime (male perpetrator/female victim). This further contributes to the privatisation of domestic violence and the absence of any classification of the female victims of domestic violence as a ‘section of the public’.

### *The Relationship Between the Identity of the Victim and the Construction of the ‘Public’*

The role of the victim is significant when it comes to comparing treatment of these phenomena of violence. Garland suggests that the symbolic victim has become a central figure in crime control: this is not necessarily an individual victim, but an image that is utilised by the media and by crime control agencies as the face that signifies the harm caused by crime.<sup>83</sup> In the media realm, the use of such images tends to unite public opinion in support of victims, with whom readers identify, and whose plight comes to symbolise the suffering of the community.

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<sup>82</sup> Clifford et al (2009), pp 130-1 (mass murder defined as the killing of three or more people at the one time in the one place).

<sup>83</sup> Garland (2001), pp 11-2, 158.

The symbolic victim is easily recognisable in the imagery surrounding high-profile terrorist attacks such as 9/11 in the United States and the 'Bali bombings' in 2002 and 2005. Many of the photographs from these terrorist attacks conjure the spirit of the anonymous victim, lost and bewildered, or hurt and suffering, following the infliction of violence against a group of people going about their everyday lives.<sup>84</sup> By creating a sense of community suffering, symbolic images reinforce the notion that the harm caused by terrorism is harm to all. It reinforces the fear of indiscriminate violence that is central to terrorism – the idea that anyone could be a victim at any time.<sup>85</sup>

By contrast, there is a striking absence of a symbolic victim of domestic violence in the Australian context. The kinds of shocking images that the public is used to seeing in relation to terrorist attacks – people covered in blood or soot, lifeless forms in the arms of others, bewildered and crying – are missing from media coverage of domestic violence.<sup>86</sup> Perhaps the best-known images of the domestic violence 'victim' in popular Australian culture are the women who appear in the advertisements for the 'Australia Says No' campaign:<sup>87</sup> these are ordinary-looking, well-dressed women talking about their experiences of domestic violence – they do not bear any physical signs of injury or damage.<sup>88</sup>

To draw attention to the absence of a symbolic victim is not to suggest that domestic violence victims should all be portrayed as bruised and bloodied. However it does mean that in public discussions about domestic violence, there is an absence of a figure with the capacity to unite public sympathies against domestic violence in the same way that the symbolic victim unites public opposition to terrorism. The absence of media coverage of the horrors associated with domestic violence also means that there is no trigger for the kind of emotive response to images of pain and suffering generated by the

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<sup>84</sup> See for example Magnum Photographers (2001). The image of a man falling from the north tower of the World Trade Centre on 9/11 'elicits an empathic identification with the man': Lurie (2006), p 45.

<sup>85</sup> Narveson (1991), p 119. It is this fear of random attack that is used by interest groups to generate social anxiety about terrorism: Filler (2003), pp 359-60.

<sup>86</sup> In a study of overseas and Australian domestic violence media campaigns, Donovan and Vlasis (2006), p 28 found that while a minority of advertisements demonstrated the graphic impact of violence against women, most opted for showing a worried or anxious face.

<sup>87</sup> Phillips (2006).

<sup>88</sup> Webster (2007).



images reflected in coverage of 9/11 and other terrorist attacks. This serves to reinforce the conceptualisation of domestic violence as a crime that happens to 'other people', reinforced by victim-blaming patterns of representation in the media that explain crime as a product of individual (victim) deficiencies.<sup>89</sup>

Mason argues that 'statements' and 'interpretive repertoires' in relation to particular events also construct particular types of violence in the public imagination.<sup>90</sup> When former US President George W Bush said in the wake of 9/11, 'You are either with us or against us',<sup>91</sup> this was part of a pattern of discourse which constructed terrorism as a crime against *all* people (or at least against all citizens of Western democratic nations), despite the fact that most members of that group were not personally affected by the terrorist attack.

Similarly, the use of the term 'war' in relation to terrorism is a response to a perceived public mood for a display of military might, rather than connoting a legal state of warfare.<sup>92</sup> The language of 'war' is never used in relation to domestic violence because it is not perceived as a crime that affects the populace, only select individuals in dysfunctional relationships. As MacKinnon notes, the declaration that the US was 'at war' following 9/11 was made notwithstanding that the attack was in reality one by private citizens *against* private citizens.<sup>93</sup>

As Mason notes, violence itself is a discourse that inscribes particular bodies with the markings of victimhood.<sup>94</sup> This is instructive in terms of the seriousness ascribed to terrorism as a crime. There is nothing unusual about the inscription of victimhood on women's bodies; that accords with the association that has always been made between women and physical weakness or vulnerability. However, terrorism serves to inscribe victimhood upon masculine, public bodies not in a manly way (such as one who comes off second-best in a fight or on the

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<sup>89</sup> Meloy and Miller (2009), p 31.

<sup>90</sup> Mason (2002), pp 31-2.

<sup>91</sup> 'You are either with us or against us', *CNN*, 6 November 2001, <<http://edition.cnn.com/2001/US/11/06/gen.attack.on.terror/>>.

<sup>92</sup> Burleigh (2008), p 449. The Australian government has enthusiastically adopted the rhetoric of 'war' in relation to terrorism: Gani and Urbas (2004), p 38.

<sup>93</sup> MacKinnon (2006), p 10. For the argument that the 'war' paradigm lacks a legal basis see International Commission of Jurists (2009), pp 49-56.

<sup>94</sup> Mason (2002), Chapter 8.

football field) but in a way that places that masculine body at the mercy of an ideological, foreign attacker.<sup>95</sup> That this challenges masculinist ideology directly also helps to explain the serious regard in which terrorism is held by the state.

More graphic portrayals of the violence meted out to women in the domestic context are usually reserved for the portrayal of violence against women as associated with particular minority racial or ethnic culture.<sup>96</sup> An example appears in the following extract by Martin Amis from his essay *The Age of Horrorism*.<sup>97</sup>

Two years ago I came across a striking photograph in a news magazine: it looked like a crudely cross-sectioned watermelon, but you could make out one or two humanoid features half-submerged in the crimson pulp. It was in fact the bravely circularised photograph of the face of a Saudi newscaster who had been beaten by her husband. In an attempted murder, it seems: at the time of his arrest he had her in the trunk of his car, and was evidently taking her into the desert for interment. What had she done to bring this on herself? In the marital home, that night, the telephone rang and the newscaster, a prosperous celebrity in her own right, answered it. She had answered the telephone. Male Westerners will be struck, here, by a dramatic cultural contrast. I know that I, for one, would be far more likely to beat my wife to death if she hadn't answered the telephone. But customs and mores vary from country to country, and you cannot reasonably claim that one ethos is 'better' than any other.

Amis's 'ironic' comment at the end of this quotation usefully illustrates a feature of Western journalism that Howe has described: that when the gendered nature of domestic violence is addressed, it is portrayed as something associated with minority culture, ignoring the fact that violence against women is associated with majority/mainstream culture also.<sup>98</sup> Except where the inferior nature or cruelty of 'other' cultures is the subject of emphasis, the true horror perpetrated

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<sup>95</sup> Robin Morgan makes a similar point in Morgan (1989), p 50.

<sup>96</sup> Howe notes the frequent association in the media between minority racial status and violence against women: Howe (1998), pp 42-53. In relation to racialisation of a spate of Sydney gang rapes see Warner (2004).

<sup>97</sup> Martin Amis, 'The Age of Horrorism', *The Observer (online)*, 10 Sept 2006,

<<http://www.guardian.co.uk/world/2006/sep/10/september11.politicsphilosophyandsociety>>.

<sup>98</sup> Howe (1998), pp 42-53. See also Webster (2007). There is also a view that women from minority racial/ethnic backgrounds are the target of discrimination but not women from majority culture: see reference to debates on the SDA in Thornton and Luker (2010), p 33.

in serious domestic violence cases is not portrayed in legal judgment, or in the media. This is illustrated by the increasing preoccupation in Australian media with the phenomenon of 'honour killings' and the association of violence and other oppression against women with Islam,<sup>99</sup> further obscuring the endemic nature of violence against women in mainstream Australian culture.<sup>100</sup>

The construction of the victim in judicial decisions also reflects the individualisation of the phenomenon of domestic violence. As discussed in Chapter 2.2, courts repeatedly accept perpetrators' assertions that victims provoked the violence against them by adultery, leaving the relationship, or failing to conform to proper expectations in terms of being a good partner and mother. This victim-blaming further isolates victims of domestic violence and portrays the violence as in some way associated with their deficiencies, removing any capacity for individual victims to symbolise a broader class of victims deserving of public sympathy.<sup>101</sup> As Schneider notes, the privatisation of domestic violence enables people to deny aspects of power and control present in their own relationships.<sup>102</sup>

### *The Relationship Between the Identity of the Perpetrator and the Construction of the 'Public'*

It is not only the construction of the victim but also of the perpetrator that is integral to the legal and social construction of the 'public'. For a crime to be aimed at coercing the government, or influencing or intimidating a section of the public, the perpetrator by implication stands *outside* of that government or that

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<sup>99</sup> As noted by a participant in HREOC (2003), p 60; Poynting et al (2004), pp 124-38; Imtaoul (2005).

<sup>100</sup> A recent example of this is the reaction to Ayaan Hirsi Ali's book *Infidel* (2007). Commentary suggesting that Ali's book caters to those with Islamophobic tendencies includes Lorraine Ali, 'Only one side of the story', *Newsweek (online)*, 26 Feb 2007, <<http://www.newsweek.com/2007/02/25/only-one-side-of-the-story.html>>.

<sup>101</sup> This is consistent with media portrayal of victims. In the US, Heeren and Messing note that partners and ex-partners who are victims in mass murder cases are only portrayed as 'innocent' in media coverage when the perpetrator is mentally ill: Heeren and Messing (2009), pp 217-20.

<sup>102</sup> Schneider (2000), pp 88-91.

targeted section of the public.<sup>103</sup> This is easy to do when the identity of the terrorism perpetrator fits the archetype of the 'Other' either in a racial/religious sense, or where the perpetrator can in some other way be characterised as abnormal.<sup>104</sup>

The sentencing judgment in relation to Shane Kent, the only member of the Benbrika terrorist organisation without a Middle Eastern background, provides a useful illustration of the way in which legal discourse constructs the terrorist as outside the 'norm'.<sup>105</sup> As is apparent from the judgment, Kent's counsel attempts to portray Kent's association with the group leader Benbrika as attributable to depression that he suffered at the time. There is then an attempt to normalise Kent by indicating his dissociation from the fundamentalist beliefs of his co-accused, suggesting that he began to frequent places that served alcohol and played Western music, and that he no longer practised Islam.<sup>106</sup> However, the sentencing judgment rejects evidence of Kent's remorse and emphasises his otherness, noting his support for *jihad*, his possession of *jihadi* material, and the fact that he had undertaken military training in Afghanistan.<sup>107</sup> In this way, despite his majority cultural identity, Kent is constructed as outside the model of the ordinary Australian, and therefore in opposition to the 'public' at whom planned terrorist activity was targeted.

In relation to domestic violence, although individual perpetrators may fall within a particular category of 'Otherness', the characteristic common to most perpetrators is the fact that they are male.<sup>108</sup> To recognise domestic violence as an act perpetrated against a 'section of the public' is therefore to place men as a group outside of the definition of the public, which is of course unthinkable within a masculinist worldview. As the public sphere is implicitly masculine, the

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<sup>103</sup> The morality or otherwise of the motive for opposing the government was not considered to be relevant in *R v F* [2007] EWCA Crim 243. Coleman (2010), p 96 notes that the isolation of terrorism as evil allows for state responses to terrorism to be normalised and even celebrated.

<sup>104</sup> Howie notes that Muslims are increasingly becoming the emblem of Australians' hatred toward terrorists: Howie (2005), p 22.

<sup>105</sup> *R v Kent* [2009] VSC 375 (Unreported, Bongiorno JA, 2 September 2009).

<sup>106</sup> *R v Kent* [2009] VSC 375 (Unreported, Bongiorno JA, 2 September 2009), [15], [34]-[40].

<sup>107</sup> *R v Kent* [2009] VSC 375 (Unreported, Bongiorno JA, 2 September 2009), [7]-[11].

<sup>108</sup> Scutt notes that cases involving violence against women have as their very essence 'male versus female': Scutt (1997b), p 107.

only men who can stand outside the public domain are those who in some way deviate from the 'norm'.<sup>109</sup>

As noted above, on the rare occasions when the perpetrator of domestic violence is demonised in the media, it is usually by virtue of an association with a minority culture portrayed as unusually oppressive of women.<sup>110</sup> For example, 'honour killings' have become increasingly associated with Islam and with a perception of 'backwardness'. This is despite the fact that the concept of honour still has currency in many Western countries, and is frequently associated with so-called provocation homicides in the intimate setting.<sup>111</sup>

This popular association of violence against women and minority culture is also reflected in legal discourse. Maher et al have discussed the ways in which courts construct men from minority backgrounds who act violently as 'uncivilised outsiders' by focusing on their cultural differences. Meanwhile, discussions of culture are absent from cases in which the perpetrators are from the white majority background, implying that Australian men are never violent or controlling towards women.<sup>112</sup>

These differential constructions of domestic violence perpetrators are relevant to the construction of crime targeted against the public. Where the perpetrator is from a minority ethnic, racial or religious group (as almost all terrorism perpetrators in Australia have been to date) it will be easy to construct him as a member of a small outsider group in opposition to Australian society more broadly, hence any act of violence he commits will be 'directed against the public'.<sup>113</sup>

By contrast, the domestic violence perpetrators who are expressed as having *no* cultural background by virtue of their affiliation with the mainstream are *themselves part* of the 'public'. Their implicit membership of the public makes it

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<sup>109</sup> Douglas notes that perpetrators are more likely to be accepted as members of the law-abiding community while the relationship remains intact, and therefore are more likely to be prosecuted once the relationship ends: Douglas (2003), p 83.

<sup>110</sup> Howe (1998), pp 42-53.

<sup>111</sup> Sen (2005).

<sup>112</sup> Maher et al (2005).

<sup>113</sup> In the US context, Filler notes the construction of moral panics around terrorism through associations drawn between terrorism, Islam and paedophilia: Filler (2003).

almost impossible to construct their acts of violence as directed against the public, because they do not stand outside of the public construct.<sup>114</sup>

The recognition of the gendered nature of domestic violence also threatens to undermine the 'familial ideology' that underpins Australian family law. Pursuant to this ideology, the unit of father, mother and child/ren is constructed as the 'natural and fundamental group unit of society'.<sup>115</sup> In family law, this ideology is constructed through both legislation and judicial decision-making.<sup>116</sup> To recognise the widespread nature of family violence would be to threaten the concept of the traditional family unit as the 'ideal' microcosm of social life. Thus, even in situations where there is strong evidence of family violence, a judicial tendency to order contact with the abusive father has been observed in family court proceedings.<sup>117</sup>

The popular and legal portrayals of domestic violence perpetrators, in combination with the absence of a symbolic victim in domestic violence cases, means that there are significant discursive impediments to reconceptualising domestic violence as perpetrated against a 'section of the public'. However, it is possible to envisage potential alternative reconstructions of domestic violence utilising the strategy that Howe refers to as 'resistant discourse'.<sup>118</sup>

### *Reconstructing Domestic violence as Public Violence*

As outlined in the previous section, the law, like the media, constructs domestic violence as a series of isolated and unrelated instances – violence in these settings is a feature of dysfunctional individuals or relationships, in which victims are often constructed as being partly responsible for their own victimisation.

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<sup>114</sup> For a discussion of the inability to construct moral panics when the perpetrator is part of the majority group see Howe (1998), pp 37-8.

<sup>115</sup> Fehlberg and Behrens (2008), p 145.

<sup>116</sup> Fehlberg and Behrens (2008), p 145.

<sup>117</sup> Fehlberg and Behrens (2008), pp 292-3.

<sup>118</sup> Howe (2008), Chapter 2.

However, a focus on the gendered nature of domestic violence<sup>119</sup> – a crime perpetrated overwhelmingly by men against women,<sup>120</sup> and perpetrated by men with the aim of achieving control over women – provides the groundwork for analysis of domestic violence that reconstructs its female victims as a ‘section of the public’.

The conceptualisation of domestic violence as a systemic form of harm that I argue for here is consistent with the framework established by Catharine MacKinnon, drawing on her earlier seminal work in *Towards a Feminist Theory of the State*.<sup>121</sup> MacKinnon argues that sexual violence (by which she means men’s violence against women) is political violence on the basis that sex is one way in which power is socially organised; sexual violence is a practice of sexual politics with misogyny as its ideology.<sup>122</sup> Reconceptualised in this way, domestic violence is indeed a political crime; it is committed by men as a politically-conceived group against women as a similarly-conceptualised group. Within this framework, women constitute a group defined by their victimisation on account of their gender – in other words, a section of the public.

Similarly, Susan Brownmiller, in her all-encompassing critique of the history of sexual assault, argues that rape is the means by which ‘all men keep all women in a state of fear’.<sup>123</sup> Brownmiller’s critique reflects a similar framework to MacKinnon’s for understanding men’s violence against women as a systemic problem rather than a series of isolated occurrences.<sup>124</sup> These critiques have been the subject of criticism for their obviously essentialist nature,<sup>125</sup> premised as they are upon the problematic assumption that all members of gendered ‘groups’ think and act alike. However, they effectively illustrate how gender-

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<sup>119</sup> Howe (2008).

<sup>120</sup> Johnson (1995) (unlike ‘common couple violence’, serious domestic violence is committed predominantly by men against women); Miller (2005), pp 14-37; Australian Government (2009), p 27.

<sup>121</sup> MacKinnon (1989).

<sup>122</sup> MacKinnon (2006), p 12.

<sup>123</sup> Brownmiller (1976).

<sup>124</sup> Young notes that despite the problems of using a collective concept of ‘women’ in terms of the exclusionary aspect, a possible solution is to consider gender as ‘seriality’ i.e. recognising commonality in relation to a particular object rather than membership of a group or sharing of common features in general: Young (2002).

<sup>125</sup> See Howe (2008), Chapter 5, for a discussion of the ‘monolithic adversary’ of male violence.

based crimes such as domestic violence and sexual assault are a means of reinforcing existing social inequalities.<sup>126</sup>

There is precedent under international instruments for this broader understanding of gendered violence. Violence against women is recognised under the *Convention on the Elimination of all Forms of Discrimination Against Women*<sup>127</sup> as a form of sex discrimination; this includes both violence directed against women *qua* women, and also violence that affects women disproportionately.<sup>128</sup> Within this framework, domestic violence is understood as a form of violence inflicted by men against women, rather than a series of commonly-occurring individual episodes of violence. However, recognition of the systemic nature of domestic violence does not translate to the Australian domestic context due to two inadequacies of anti-discrimination legislation: first, that it allows only for individual complaints and not class actions, and secondly, that it excludes discrimination that occurs in the private sphere.<sup>129</sup>

Reconceptualising domestic violence within the frameworks outlined above provides a basis for reconstructing such violence as directed against women as a politically-defined group. When one man targets one woman for violence in a social context in which he wishes to exert his control, and is *enabled* by social and legal structures to exert that control, and that happens thousands of times daily across the world, the effect is the same as though a number of men sharing a common belief system attacked a number of women simultaneously.<sup>130</sup> The result of domestic violence is not simply that intimidation or fear is produced in an individual woman; women *as a group* are kept in a state of perpetual fear by gendered violence,<sup>131</sup> and in that sense domestic

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<sup>126</sup> Coukos (1999-2000), p 36.

<sup>127</sup> *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981).

<sup>128</sup> *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981), Article 1.

<sup>129</sup> Thornton (2010). In relation to the limitations of such international instruments to achieve meaningful change for women see Charlesworth (1995).

<sup>130</sup> Terriff et al note that the scale and frequency of domestic violence globally serve to reinforce women's position of subordination: Terriff et al (2000), p 88.

<sup>131</sup> This is the central theme of Brownmiller (1976). Belknap writes 'the fact that *some* men victimize *some* women serves to control most females' lives through at least some degree of fear': Belknap (1996), p 130. Bograd (1988), p 14.



violence is directed against women as a section of the public. When viewed this way, domestic violence is fundamentally a problem of gender inequality.<sup>132</sup>

The obvious counter-argument to the suggestion that women constitute a section of the public is that men who attack their intimate partners do not do so *because they are women*.<sup>133</sup> They do so because they are angry or frustrated with their partners as individuals. This, an opponent to my argument might suggest, is a very different thing to the Bali bombers blowing up scores of foreigners in an Indonesian nightclub *because* they are foreigners and represent a perceived evil Western influence.<sup>134</sup> An intention to intimidate an individual woman does not constitute an intention to intimidate women in general.

If one accepts this argument, then only in situations where groups of women *qua women* are targeted for violence would a terrorist act be committed.<sup>135</sup> However, within the context of acts currently defined in law as terrorism, motivations are not as easily pigeon-holed as jurisprudence might suggest. The little research that has been done with terrorists and would-be terrorists to date demonstrates that they are often motivated by a complex range of factors, including the desire to make their families proud, and to achieve personal glory through martyrdom.<sup>136</sup> However, the existence of these 'private' motivations for committing terrorist acts does not prevent the conceptualisation of their actions within the law as ideological.

Certainly, the *modus operandi* of a domestic violence perpetrator is not identical to that of a terrorist. However, when victims of domestic violence are

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<sup>132</sup> Schneider (2000). Note also that those with low levels of support for gender equality are also more likely to hold attitudes supportive of violence against women: Flood and Pease (2006), p 21; Victorian Health Promotion Fund (2006).

<sup>133</sup> The argument that women are not 'interchangeable' in the sense that victims who are targeted based on race or ethnicity are has been used to exclude gender from hate crime statutes: Angelari (1997), pp 428-9.

<sup>134</sup> 'Leading the Bali bombings investigation', *Lateline*, 12 May 2003, <<http://www.abc.net.au/lateline/content/2003/s852953.htm>>.

<sup>135</sup> Perhaps the best-known contemporary example is the fatal shooting of 14 women and wounding of 10 others by Marc Lepine at the Ecole Polytechnique in Montreal, Quebec in 1989. Despite Lepine's deliberate targeting of women, there has still been a failure to recognise this as hate crime as critiqued in Caputi and Russell (1990). Examples also abound in warfare of women being targeted for rape *en masse*, described harrowingly in Brownmiller (1976).

<sup>136</sup> Post (2009).

constructed not as individual victims but as symbolic of a broader class of victim, violence perpetrated against them is aptly described as violence directed against a section of the public. The key to understanding this ‘discursive manoeuvre’ is to conceptualise the woman who is subjected to violence by her intimate partner as representative of *any woman* who might have, in different circumstances, taken her place.<sup>137</sup> Being female is an inescapable aspect of each victim’s identity as a partner of a perpetrator. In other words, for serious perpetrators of control-based violence, the individual identity of the woman is *not important* – any woman standing in that relationship would be subjected to the same control-based violence.<sup>138</sup> While this may not accord with popular notions of romantic love, it is consistent with the significant number of perpetrators who commit violence against multiple partners.<sup>139</sup>

Because of women’s association with the private sphere, and their complex relationship with the public sphere, it is unlikely that the state will of its own volition recognise the harm perpetrated by crimes of domestic violence as public crime. However, the more significant impediment to the recognition of this harm as public crime is the inconsistency that would produce with the principle of equality of persons that is fundamental to Australia’s liberal democratic

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<sup>137</sup> In this sense, women are ‘interchangeable’: Angelari (1997), pp 428-30.

<sup>138</sup> Graham et al note that, like hostage victims, domestic abuse victims are ‘symbolic’ of perpetrators’ frustrations with women generally and that one goal of such violence is to send a message to all women that they may be the target of attack at any time: Graham et al (1988), p 223.

<sup>139</sup> For cases evidencing serious violence against multiple partners see: *R v Bell* [2000] QCA 485 (Unreported, Williams JA, Pincus JA, Cullinane J, 23 November 2000) (seven previous convictions for assault against victim and prior conviction for assault against former partner); *R v Bond* [2001] NSWSC 1059 (Unreported, James J, 7 December 2000) (offender had previously been convicted of manslaughter of a woman he viciously assaulted after a date); *R v Wilson* [2001] QCA 215 (Unreported, McPherson and Williams JJA, Atkinson J, 1 June 2001) (convicted of wounding with intent to disfigure – previous history of violence against victim and other women); *Miles v R* [2002] NSWCCA 276 (Unreported, Stein JA, Bergin J, Carruthers JA, 18 July 2002) [51]-[57] (offender had a previous conviction for manslaughter of his girlfriend); *R v Lynch* [2002] NSWSC 1140 (Unreported, Whealy J, 20 November 2002) (offender not seen as a risk to the community despite two prior convictions for assault, one against the victim); *R v Sievers* [2004] NSWCCA 463 (Unreported, Levine, Simpson and Barr JJ, 17 December 2004) (murder conviction of partner preceded by a murder conviction for a previous partner 20 yrs prior); *R v Lyon* [2006] QCA 146 (Unreported, Jerrard JA, Fryberg and Douglas JJ, 21 March 2006) (breach of restraining order against ex-wife followed by domestic dispute with new partner and grievous bodily harm of ex-wife the following day); *Norris v Sanderson* [2007] NTSC 1 (Unreported, Riley J, 12 January 2007) (previous breach of restraining orders and threats against ex-partner); *R v Ferguson* [2007] NSWSC 949 (Unreported, Michael Grove J, 27 August 2007) (conviction for domestic assault 27 years ago but considered to be not relevant to sentence); *R v Robinson* [2010] VSC 10 (Unreported, Whelan J, 29 January 2010) (earlier conviction for manslaughter of previous conviction followed by murder of ex-partner).

traditions.<sup>140</sup> Within this tradition, all persons are equal before the law. To acknowledge that one group of persons defined by gender (women) is systematically targeted for violence by another group of persons (men) and to define that victimised group as a class, would undermine this fundamental notion of equality. As Thornton notes, '(T)he unqualified acceptance of systemic discrimination would ultimately threaten the state itself'.<sup>141</sup> The same problem does not arise when crimes of domestic violence are conceptualised as unrelated instances of violence perpetrated by disconnected individuals.

Recognition of the pervasive and systematic nature of violence against women threatens the legal fiction of equality before the law in a way that violence against other social groups (whether based on race, ethnicity, religion, disability or sexuality) does not.<sup>142</sup> This is due both to the scale of the problem, and also the fact that women constitute (slightly more than) 50 percent of the population.<sup>143</sup> It is possible to recognise Aboriginals (for example) as a group targeted for violence on the basis of race without undermining the equality of the law, because the numbers of people affected are still comparatively small (as against the population as a whole) and the violence therefore does not pose a threat to the fiction of equality. When one considers the number of women victimised by domestic violence (between one in six and one in three based on current estimates)<sup>144</sup> against the proportion of population who are women, this presents a fundamental challenge to the notion that all persons are equal before the law. It is difficult to see how equality can exist when members of a group constituted by one half of the population systematically target members of the other half of the population by violent acts.

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<sup>140</sup> Understood as formal, rather than substantive, equality: Thornton (2010), pp 331-2. See also Eastal (1998), p 2. See also Behrens and Bronitt (undated).

<sup>141</sup> Thornton (1990), pp 7-8.

<sup>142</sup> However, the law does have capacity to recognise some discrimination against women as legitimate while preserving the fiction of legal equality, as exemplified by the exemptions in the SDA for religious-based educational institutions, for an outline of which see Thornton and Luker (2010), pp 39-40.

<sup>143</sup> As at 30 June 2010, women constituted 50.22 percent of the Australian population: Australian Bureau of Statistics (2011) *Australian Demographic Statistics*, Catalogue no 3101.0, March 2011.

<sup>144</sup> The most recent ABS survey into experiences of violence found that 15 percent of women had experienced violence at the hands of a former partner since age 15 and 2.1 percent of women had experienced violence at the hands of a current partner: Australian Bureau of Statistics (2005). Mouzos and Makkai (2004), p 44 found that 34 percent of women who had a current or former partner experienced violence from a partner during their lifetime. Ferrante et al (1996), p 105 found much higher rates of victimisation amongst Indigenous women than non-Indigenous women.

By presenting domestic violence as a series of individualised acts (albeit on a large scale) the law is able to maintain one of the key bases for its legitimacy – that it ensures equality for all. Simultaneously, the individualisation of violence against women reflects the phallogentric nature of the law because it obscures the reality of male violence against women, and its gendered nature. This allows the state to downplay the problem of violence against women in the way referred to by Biden at the beginning of this chapter. Despite the fact that serious domestic violence is overwhelmingly perpetrated by men against women, domestic violence as framed within Australian law remains a phenomenon that can just as easily be inflicted by women against men. In this way, the law operates as Smart describes – while it does not *create* patriarchal relations, it reproduces the material and ideological conditions under which these relations continue to survive.<sup>145</sup>

### *Conclusion*

In this chapter and the two chapters preceding, I have examined the law's differential construction of crimes of terrorism and domestic violence. It is not possible to undertake a comparison of the law's different treatment of these phenomena without an understanding of the important role that the law plays in constructing them as legal concepts. The Australian legal system treats terrorism as a threat to the state, while simultaneously constructing terrorism and its key components in contradistinction to other 'ordinary' crimes, including domestic violence.

In Section 3, I consider how these differential constructions of terrorism and domestic violence provide the basis for their treatment within the legal system. I examine this legal treatment in four key areas: first, the criminalisation of preparatory forms of violence such as incitement and possession of ideological material; secondly, the steps the law takes to prevent violence through regimes for the imposition of civil control orders; thirdly, the punishment of violence

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<sup>145</sup> Smart (1995), p 144.

through sentencing; and finally, the way in which the legal system treats those who act in defence of themselves or others against different types of violence.

In relation to each of these practical manifestations of differential treatment, the dual themes of ideological and public violence are present, reinforcing the role of legal discourse in constructing violence in ways that privilege masculinist interests.



## SECTION THREE





## CHAPTER 3.1      INCITING TERROR

He would read from the pornography like a text book. In fact, when he asked me to be bound, when he finally convinced me to do it, he read in the magazine how to tie the knots, and how to bind me in a way that I couldn't get out. And most of the scenes that we - most of the scenes where I had to dress up or go through different fantasies - were the exact scenes he had read in the magazines.<sup>1</sup>

### *Introduction*

Having examined how the law differentially constructs terrorism and domestic violence, in this chapter I begin an examination of the consequences that this differential construction has for the legal treatment of violence. In Chapters 3.3 and 3.4 I consider the perpetration of lethal violence and how that is dealt with in sentencing and in responses to claims of self-defence. However, in this chapter and the next, I am concerned with the state's treatment of less serious forms of conduct. I commence by looking at the law's treatment of what I will call 'dangerous speech' – that is, spoken words, written material or some other form of speech that has the potential to cause harm. I argue that the law consistently treats hate speech as trivial in circumstances where the hatred is directed against women as a group.

Underlying the common law is the so-called 'harm principle', that is, the concept that only conduct that causes harm should be prohibited.<sup>2</sup> While seemingly straightforward, the elasticity of the harm principle results in uncertainty as to how it applies in any particular factual context. Questions such as whether conduct that causes non-physical harm (such as psychological or environmental

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<sup>1</sup> MacKinnon and Dworkin (1997), pp 113-4 (testimony of RMM, Minneapolis hearings).

<sup>2</sup> Originally expressed in Mill (1974), p 68. For discussion of the influence of the harm principle, see Bronitt and McSherry (2010), pp 57-9. The concept has been developed extensively in the work of Feinberg (1984).

harm), and whether or not conduct involving potential rather than actual harm, should be prohibited, are capable of different applications of the principle.<sup>3</sup>

One of the 'grey' areas of application of the harm principle is the regulation of speech. Attempts to censor speech in Australia have been met with suspicion, notwithstanding the absence of a Bill of Rights or express constitutional right to free speech.<sup>4</sup> Some, albeit limited, protection is provided by virtue of the implied freedom of communication that has been found to exist in relation to political matters.<sup>5</sup> Aside from this limited exception, the questions of when and how dangerous speech is prohibited fall to be determined in accordance with judgments about private morality.<sup>6</sup> These moral judgments, I will argue here, reflect masculinist ideology, particularly in what I identify as divergent discourses of 'harm' and 'morality' in this area of law.

In this chapter I consider three legal limitations to free speech, all of which demonstrate the lack of restraints imposed on speech that can be said to incite violence against women. First I examine obscenity and classification laws, and the divergent discourses in which different materials are regulated for possession and publication. Secondly, I consider the offence of sedition under the Commonwealth Criminal Code and associated state and territory offences prohibiting 'hate speech'. Finally, I consider so-called 'hate crimes' that operate to aggravate penalties for ordinary crimes in some states and territories.

The laws restricting 'dangerous speech' represent the first part of what I suggest is a pattern of the state's trivialisation of domestic violence and violence against women more generally. Pornography, and other forms of speech that potentially incite violence against women, are not prohibited in the same way as other forms of dangerous speech. Consistent with the law's characterisation of terrorism as a public crime of ideology, its treatment of dangerous speech in the

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<sup>3</sup> Bronitt and McSherry (2010), pp 57-9. Bronitt and McSherry note that the harm principle is capable of recognising harm to individuals more easily than harm to groups or communities.

<sup>4</sup> McNamara (2002), p 304.

<sup>5</sup> As recognised in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

<sup>6</sup> This is contrary to the liberalist notion that the criminal law should not be used to enforce a particular idea of private morality: Bronitt and McSherry (2010), p 695.

terrorism context is more restrictive than its treatment of speech that might be said to incite or encourage violence against women.

My argument is not premised on the assumption that particular speech forms do or do not in reality incite violence, either in a domestic violence or a terrorism context. I am not attempting to describe the 'real facts' in the types of violence I consider in this paper, but to conceptualise the violence in terms of 'linguistic facts' – that is, as violence that is produced within a context of cultural productions and references.<sup>7</sup> In other words, the language and conventions that frame the way a particular phenomenon is described act to construct that phenomenon as 'the truth' and deconstructing something to its linguistic facts allows us to examine that process.

### *Obscenity/Censorship Law*

Despite the fact that speech does merit some constitutional protection in Australia, there is not the kind of rigorous free speech debate that exists in the United Kingdom, Canada or the United States.<sup>8</sup> Particularly in the United States, from the middle of the twentieth century, a 'hyper-inflated rights consciousness'<sup>9</sup> has ensured that government attempts to regulate free speech are monitored very closely. Moreover, laws regarding the restriction for publication or sale of particular materials deemed to be unsuitable for public consumption, for the most part, do not seem to be the subject of significant controversy in Australia.<sup>10</sup> The law recognises, and the public for the most part accepts, the need to restrict free speech in the public interest in relation to particular material.<sup>11</sup>

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<sup>7</sup> Marcus (1992), discussed in Howe (2008), pp 171-5.

<sup>8</sup> Gelber (2007), Chapter 1.

<sup>9</sup> Mackey (2002), p 5.

<sup>10</sup> During the year 2009-2010, the Australian Classification Review Board, which reviews decisions of the Classification Board, received only nine applications for review, one of which was withdrawn: Australian Classification Review Board (2009-2010).

<sup>11</sup> Though the application of laws is not always non-controversial, as evidenced by the 2008 controversy over photographer Bill Henson's photographs of topless teenage girls, labelled by some as child pornography. See Ashleigh Wilson, 'Regional Gallery Removes Bill Henson's Art', *The Australian (online)*,

However, a closer investigation of the kinds of material that are restricted for publication and possession provides a useful indication of what limitations on free speech the state deems to be justified in the public interest. The current Australian statutory regimes for regulation of printed and other material represent an amalgam of two different discourses: first, material considered to offend against community standards of morality, and secondly, prohibition of speech that infringes the harm principle by creating the potential for violence.

In relation to material that depicts sexual activity, including sexual violence, Australian legal discourse reflects the historical regulation of material considered to be 'obscene' or 'indecent'. It adopts the language of morality in relation to whether such material should be prohibited.

On the other hand, in relation to material that incites terrorism, the law adopts the discourse of 'harm'. As noted above, the content of what is regulated pursuant to the harm principle reflects moral judgments about what is and is not harm, however, legal discourse in relation to the incitement of terrorist violence does not reflect the discourse of morality as does the regulation of pornography, for example. In the following sections, I examine these different discursive strands and how they create the basis for differential treatment of dangerous speech that has the potential to incite violence.

### *Statutory Regimes for Regulating Printed and other Material*

Australia has a national system of classification for materials to be publicly sold or distributed.<sup>12</sup> Under an agreement between the Commonwealth and the states and territories, the Commonwealth makes classification decisions, and

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27 May 2008, <<http://www.theaustralian.com.au/news/regional-gallery-removes-hensons-art/story-e6frg6o6-1111116452057>>.

<sup>12</sup> Note that in March 2011 the Attorney-General referred the National Classification Scheme to the Australian Law Reform Commission for review: 'National Classification Scheme Review', <<http://www.alrc.gov.au/inquiries/national-classification-review>> (viewed 18 July 2011).

the states and territories enforce them.<sup>13</sup> The website for the Australian Classification Board lists ways in which compliance can be achieved in relation to a range of public activities such as for cinemas and public exhibitors, and sale or hire of films, computer games and publications. The Board follows the *Classification (Publications, Films and Computer Games) Act 1995*<sup>14</sup> in reviewing material submitted for classification, and is also guided by the *Guidelines for the Classification of Films and Computer Games* and the *Guidelines for Publications* in categorising material according to the *National Classification Code* ('the Code').<sup>15</sup>

Under the Code, materials are 'Refused Classification' (RC) if they:<sup>16</sup>

- (a) depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, *violence* or revolting or abhorrent phenomena *in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults* to the extent that they should not be classified; or
- (b) describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not); or
- (c) promote, incite or instruct in matters of crime or violence [*emphasis added*].

Films that are not Refused Classification are classified on a scale ranging from categories restricted to adult viewing (X18+ and R18+) down to the rating G (for General viewing). In relation to publications other than films and computer

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<sup>13</sup> Office of Legislative Drafting and Publishing, Attorney-General's Department, *Guidelines for the Classification of Films and Computer Games* (at 19 March 2008).

<sup>14</sup> *Classification (Publications, Films and Computer Games) Act 1995* (Cth).

<sup>15</sup> Office of Legislative Drafting and Publishing, Attorney-General's Department, *Guidelines for the Classification of Films and Computer Games* (at 19 March 2008); Office of Legislative Drafting and Publishing, Attorney-General's Department, *Guidelines for the Classification of Publications 2005* (at 19 March 2008); *National Classification Code (May 2005)* (Cth).

<sup>16</sup> *National Classification Code (May 2005)* (Cth) ss 2 (publications), 3 (films) and 4 (computer games).

games, material is classified as Unrestricted, Refused Classification, Restricted Category 1 and Restricted Category 2.<sup>17</sup>

Classification decisions are to give effect, as far as possible, to the following guiding principles:<sup>18</sup>

- (a) adults should be able to read, hear and see what they want;
- (b) minors should be protected from material likely to harm or disturb them;
- (c) everyone should be protected from exposure to unsolicited material that they find offensive;
- (d) the need to take account of community concerns about:
  - (i) depictions that condone or incite violence, particularly sexual violence; and
  - (ii) the portrayal of persons in a demeaning manner.

The regulation of dangerous speech occurs in the context of this legislative framework in which judgments about certain materials are based on community standards of morality, decency and propriety. In the next section, I consider the application of this framework particularly to materials that might be said to incite violence, and how the incitement of violence against women is treated differently from incitement of terrorist violence.

### *The Differential Regulation of Material Inciting Violence against Women and Material Promoting Terrorist Violence*

#### Morality versus the Harm-based Approach

Although there is obviously scope for interpretation within the descriptions of 'RC' material, it seems likely that some pornography, and particularly violent

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<sup>17</sup> Restricted Category 1 and 2 material cannot be sold in Queensland.

<sup>18</sup> *National Classification Code (May 2005)* (Cth) s 1.

pornography, potentially falls within the description 'materials that depict, express or otherwise deal with matters of sex ... or violence ... in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults'. However, the imposition of such a standard makes the decision as to classification subject to interpretation according to masculinist standards that claim to be objective. Keeping in mind the definition of phallocentrism as a 'culture which is structured to meet the needs of the masculine imperative',<sup>19</sup> it is unlikely that the application of these standards of reasonableness will result in any substantial restrictions on the availability of pornography that is harmful to women.<sup>20</sup> This is especially the case when one notes that for material to be refused classification it must violate standards of morality 'to the extent it should be refused classification'.

Indeed, a vast array of movies depicting sexual violence against women, pornographic and otherwise, remains available for sale or distribution under the existing system of classification. Studies of pornographic videos have consistently found that a significant proportion contain scenes of violence, and even where sex is portrayed as consensual, violence is used to add a level of 'eroticism'.<sup>21</sup> Non-pornographic movies depicting violence against women, including sexual violence, are likely not to be refused classification due to the need to consider the literary, artistic or educational merit of the material.<sup>22</sup> Material that might otherwise offend against community standards of morality may not do so if it is considered to have some intrinsic literary or artistic worth.

As noted above, classification laws incorporate dual discourses: one based on prohibiting speech that creates a risk of harm through incitement or promotion of violence, and the other on regulating material that violates community standards of morality. In relation to real-life sexual practices, the law's approach

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<sup>19</sup> Smart (1989), p 27.

<sup>20</sup> MacKinnon notes that debates about obscenity are ultimately about one group of men not wanting to restrict what other men can watch, for fear of the tables being turned: MacKinnon (1997), pp 2-32. See also MacKinnon (1987), pp 146-7. In relation to United Kingdom legislation prohibiting the possession of 'extreme' pornography, McGlynn and Rackley (2009) note that it relies upon antiquated notions of obscenity and disgust that fails to regulate a range of material harmful to women.

<sup>21</sup> Flood and Hamilton (2003), Chapter 3.

<sup>22</sup> For a comprehensive list of movies containing rape scenes see *Escaping Hades: a Rape and Sexual Abuse Survivors' Site*, <<http://www.pandys.org/escapinghades/triggeringmedia.html>> (viewed 10 November 2010).

in Australia and the United Kingdom is reflective of the harm principle, at least insofar as sexual practices that are deemed beyond the capacity of adults to consent. Consent is no defence in relation to sadomasochistic sexual practices that result in serious harm, and this applies to heterosexual as well as homosexual practices.<sup>23</sup> What is defined as harm is defined by masculinist standards, however, and there is an inconsistency between the law's prohibition of consensual sado-masochistic sex and its willingness to imply consent to violence inflicted in traditional masculine settings such as sport.<sup>24</sup>

However, when it comes to speech or images that *depict* sexual violence, the harm-based approach is abandoned for one based on morality.<sup>25</sup> The law may set boundaries as to what sexual conduct consenting adults may engage in, however when it comes to the regulation of speech, a guiding principle is that 'adults should be able to read, hear and see what they want'.<sup>26</sup> Where physical violence or extreme sexual practices are depicted, but portrayed as 'consensual', they are less likely to offend against 'accepted' standards of morality, and therefore less likely to be refused classification. This is significant, given the vast amount of pornographic material that depicts women as 'consenting' to all manner of painful and degrading sexual activities.<sup>27</sup> As MacKinnon notes, what makes pornography 'sexy' is the sexual inequality that is achieved by the portrayal of women 'enjoying' their sexual subordination and humiliation.<sup>28</sup>

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<sup>23</sup> See *Boughey* (1986) 161 CLR 10; *R v Brown* [1993] 2 WLR 556; *R v Emmett* [1999] EWCA 1710; *R v McIntosh* [1999] VSC 358 (Unreported, Vincent J, 3 September 1999) and *Stein* (2007) 18 VR 376 and discussion of these cases in Bronitt and McSherry (2010), pp 595-600, 618-9.

<sup>24</sup> Bronitt (1995).

<sup>25</sup> For a discussion of the difference and advocacy for the harm-based approach to regulation of the Australian pornography industry see Evans (2006b).

<sup>26</sup> *National Classification Code (May 2005)* (Cth) s 1.

<sup>27</sup> In an analysis of pornographic videos, Jensen and Dines note that while sexual activity was portrayed as consensual, violence was used to 'increase the erotic charge', use of blindfolds and gagging was evident and there was routine depiction of sexual practices likely to cause soreness or pain: Jensen and Dines (1998), p 82. Russell catalogues a variety of images from popular men's magazines, which variously humourise and trivialise rape, eroticise violence against women and portray women as enjoying rape and penetration by objects: Russell (1998). The contemporary popularity of 'gonzo porn' i.e. porn that portrays women as consenting to a variety of violent and degrading acts, has been noted: Dines (2010); Gail Dines, 'How the hardcore porn industry is ruining young men's lives', *National Times (online)*, 18 May 2011, <<http://www.theage.com.au/opinion/society-and-culture/how-the-hardcore-porn-industry-is-ruining-young-mens-lives-20110517-1erac.html>>.

<sup>28</sup> MacKinnon (1991), p 802.



The regulation of pornography is an area of significant dispute among feminists.<sup>29</sup> 'Pro-pornography' feminists make a claim for pornography as a manifestation of women's sexual liberation,<sup>30</sup> and denounce attempts to cast moral judgments as to what women should and should not consent to. This perspective mirrors the law's approach, which is that the depiction of consensual sexual activity, regardless of its nature, will not violate ordinary standards of morality.

Anti-pornography feminists, on the other hand, have moved away from the idea of obscenity, and have conceptualised pornography as a harmful social practice responsible for causing injury to women.<sup>31</sup> This injury takes the form of direct harm to women used in the production of pornography,<sup>32</sup> harm to victims of men who have been incited to violence by viewing pornography,<sup>33</sup> and less directly, as a form of sex discrimination.<sup>34</sup> In particular, anti-pornography feminists have documented links between pornographic materials and instruction in violence; many women, such as the woman whose testimony is quoted at the beginning of this chapter, have outlined the role played by pornography as an 'instruction manual' used by partners and family members in their abuse. Moreover, harm to women does not simply flow from violent pornography but from the nature of

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<sup>29</sup> Smart broadly describes the differing approaches as 'pornography-as-violence' and 'pornography-as-representation': Smart (1989), pp 116-7. For a useful discussion of the debate in the UK context see Luff (2000).

<sup>30</sup> For example McElroy (1995) and Lumby (1997). For critique of so-called 'pro-sex feminism' see Levy (2005).

<sup>31</sup> The best-known example is the demonstration of harm caused through pornography outlined in MacKinnon and Dworkin (1998). See also Dworkin (1981) and MacKinnon (1987), especially Chapter 14; and Dines (2010). MacKinnon and Dworkin's conceptualisation of pornography as harm has support in the Australian context: Thornton (1989); Evans (2006b).

<sup>32</sup> As described in the civil hearings preliminary to MacKinnon and Dworkin's anti-pornography ordinance summarised in Evans (2006b). One of the best-known examples is the memoirs of Linda Marchiano (aka 'Linda Lovelace') in her book *Ordeal* (1980).

<sup>33</sup> See for example the quote cited at the beginning of this chapter. There is some empirical support for a link between the viewing of pornography (and particularly violent pornography) and attitudes supportive of violence against women: Flood and Pease (2006), pp 43-7; Hald et al (2010). See also sources cited in Evans (2006b), including reference to *State v Herberg* 324 NW 2d 346 (Minn, 1982), which documented the relationship between pornography and the horrific sexual and physical abuse of the offender's victim. Comprehensive analysis of the link between viewing of pornography and the risk of violence to women can be found in Russell (1998). This analysis was extended to gay male pornography in Kendall (2004), see especially Chapter 5. See also Caputi and Russell (1992), pp 19-20.

<sup>34</sup> MacKinnon (1987), Chapter 14. This approach has been opposed by other feminists on the basis that it is not possible to describe pornography and harm to women in a simple cause-and-effect model: see for example Cornell (1995), p 101. For a postmodern critique of the MacKinnon/Dworkin approach see Smart (1995), Chapter 6.

much 'mainstream' pornography itself, which sexualises and objectifies women, as well as silencing them.<sup>35</sup> Adrienne Rich writes:<sup>36</sup>

The most pernicious message relayed by pornography is that women are natural sexual prey to men and love it; that sexuality and violence are congruent; and that for women sex is essentially masochistic, humiliation pleasurable, physical abuse erotic.

This conceptualisation of pornography was utilised as a platform for legislative action by Andrea Dworkin and Catharine MacKinnon in their *Model Anti-Pornography Civil Rights Ordinance*:<sup>37</sup>

Pornography is a systematic practice of exploitation and subordination based on sex that differentially harms and disadvantages women. The harm of pornography includes dehumanization, psychic assault, sexual exploitation, forced sex, forced prostitution, physical injury, and social and sexual terrorism and inferiority presented as entertainment. The bigotry and contempt pornography promotes, with the acts of aggression it fosters, diminish opportunities for equality of rights in employment, education, property, public accommodations, and public services; create public and private harassment, persecution, and denigration; promote injury and degradation such as rape, battery, sexual abuse of children, and prostitution, and inhibit just enforcement of laws against these acts; expose individuals who appear in pornography against their will to contempt, ridicule, hatred, humiliation, and embarrassment and target such women in particular for abuse and physical aggression; demean the reputations and diminish the occupational opportunities of individuals and groups on the basis of sex; contribute significantly to restricting women in particular from full exercise of citizenship and participation in the life of the community; lower the human dignity, worth, and civil status of women and damage mutual respect between the sexes; and undermine women's equal exercise of rights to speech and action ...<sup>38</sup>

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<sup>35</sup> McLellan (2009).

<sup>36</sup> Rich (1980), p 641.

<sup>37</sup> A version of the ordinance was legislated into effect in Indianapolis but subsequently struck down as violating the First Amendment to the US Constitution in *American Bookseller Association Inc v Hudnut, Mayor, City of Indianapolis* 771 F 2d 323 (7<sup>th</sup> Cir, 1985).

<sup>38</sup> *Ordinance to amend Minneapolis Code of Ordinances* 7, chs. 139, 141 (1982) (passed 30 December 1983; vetoed 5 January 1984) s 1(2): Dworkin and MacKinnon (1988), 138.

The capacity of pornography to generate harm has been recognised in Canada, where the Supreme Court has upheld legislation criminalising the publication of obscene material, which extended to the portrayal of sexual violence as well as some explicit sex which is degrading or dehumanising.<sup>39</sup> Within this conceptualisation of pornography, the regular depiction of women as objects of sexual degradation can be interpreted as a discursive practice that normalises and legitimises violence against women and constructs even sexual violence as acceptable and consensual.<sup>40</sup>

The anti-pornography feminist interpretation of pornography is consistent with the argument proffered in Chapter 2.2, that much violence against women, particularly domestic violence, is ideologically-motivated. In that chapter I referred to pornography as part of the 'doctrine, myth and symbols' of masculinist ideology.<sup>41</sup> Pornographic material that objectifies and degrades women is reflective of a discourse in which men occupy positions of power and control over women, who rightly occupy a subordinate position, reinforced and perpetuated through sexual degradation.<sup>42</sup> When reconceptualised in this way, pornography is more readily identifiable as material that promotes, encourages or incites violence and therefore warrants prohibition under the classification scheme.

Postmodern feminists, too, have drawn attention to the way in which popular media portray violence against women in ways that reinforce common myths that women enjoy the use of force in a sexual context, and that create a link between violence and seduction or sensuality.<sup>43</sup> Cameron and Frazer note that from the eighteenth century onwards, there evolved a form of horror fiction that painted the serial killer as 'hero' rather than 'beast' and focused on the 'aesthetics' of killing as linked with sadistic or necrophiliac eroticism.<sup>44</sup> This type of media need not be overtly violent such that it would attract the prohibitions on

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<sup>39</sup> *R v Butler* [1992] 1 SCR 452, especially per Sopinka J at 479, 484-5.

<sup>40</sup> Though Cossman and Bell have argued that it is not possible to give one unequivocal meaning to pornographic images and they may have a variety of interpretations: Cossman and Bell (1997), p 25.

<sup>41</sup> The Macquarie Dictionary and Thesaurus (1991), p 200.

<sup>42</sup> Thornton (1989), pp 142-3. This public discourse of pornography as the ideology of sexual violence gained traction in the 1980s/1990s: Cossman and Bell (1997), p 3.

<sup>43</sup> A Young (1998); Caputi (1992).

<sup>44</sup> Cameron and Frazer (1987), pp 53-5.

sale or publication in the Classifications Act; rather it often passes for mainstream literature and film through such genres as the psychological thriller film and true crime fiction. Thus media indirectly supporting or encouraging violence against women is not only not prohibited by the state, but in some cases features on prime-time television and on best-selling booklists.

The benefit of the harm-based approach to the regulation of pornography is that it is consistent with the harm principle that underpins the common law; thus it does not bring into play the controversy that accompanies the regulation of private morality in the absence of harm.<sup>45</sup> However, the reliance upon notions of morality as the yardstick for prohibition is consistent with the historical regulation of pornography in Australia through obscenity laws which relied upon community standards of morality.<sup>46</sup> Interpretatively, the express inclusion of sexual violence in category (a) of 'RC' material means it is less likely to be considered for prohibition under category (c) – material that promotes, incites or instructs in matters of violence. Nor is material depicting non-sexualised violence against women likely to be considered for inclusion in category (c), particularly where the material in question is a work of fiction.

Although one of the guidelines for classifying material is the need to take into account community concerns about the incitement of violence, particularly sexual violence, Australia's legal system does not incorporate the radical feminist critique of pornography as material that potentially incites sexual violence.

The Classification Act specifically provides that material that advocates the doing of a terrorist act must be refused classification. This includes material that directly or indirectly counsels or urges the doing of a terrorist act, directly or indirectly instructs in doing a terrorist act, or directly praises the doing of a terrorist act in circumstances where there is a risk such praise might have the effect of leading a person to engage in a terrorist act.<sup>47</sup> Terrorist propaganda in the nature of celebration of violent acts against Western troops, or depiction of

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<sup>45</sup> Bronitt and McSherry (2010), p 695.

<sup>46</sup> *Crowe v Graham* (1968) 121 CLR 375 and for discussion see Bronitt and McSherry (2010), pp 689-99.

<sup>47</sup> *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 9A.

executions of hostages etc might well fall within the scope of 'Refused Classification'.<sup>48</sup> Material that does not urge or incite terrorist violence directly, but portrays acts of terrorist violence in a positive light may well be said to 'indirectly' counsel or urge the doing of a terrorist act. Notably, for material that matches these descriptions there is no additional requirement that it offend against community standards of morality. Material supporting terrorism is likely to be identified easily as ideological in the sense described in Chapter 2.2, that is as possessing a 'subjective value bias' and manifesting an 'illusory view of the world'.<sup>49</sup>

To reconceptualise pornography as material promoting, inciting or urging violence against women is not to unequivocally accept that there is an established link between pornography and the perpetration of violence itself, despite such a link being emphasised particularly by radical feminists such as Dworkin and MacKinnon.<sup>50</sup> It is, rather, to draw attention to the inconsistency in the state's treatment of material that may be said to incite terrorism and material that may be said to incite violence against women. The classification scheme prohibits the publication of material that incites, encourages or promotes violence: in that description it includes material that incites a terrorist act, even if indirectly. It does so on the unquestioned assumption that such material is likely to promote or provoke a terrorist act. On the other hand, despite a significant body of research demonstrating a link between consumption of pornography and violence to women, pornographic material will only be refused classification if it offends community standards of morality, ensuring that most purportedly 'consensual' pornography remains available. Within phallogocentric discourse, this kind of material is not labelled as ideological, but is normalised and becomes mainstream.

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<sup>48</sup> Two Islamic publications have been prohibited on the basis that they incite terrorism and violence against 'disbelievers': 'Classification Review Board determines 2 Islamic books are refused classification', Media Release, Classification Review Board, 10 July 2006, <[http://www.ag.gov.au/www/cob/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~879.pdf/\\$file/879.pdf](http://www.ag.gov.au/www/cob/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~879.pdf/$file/879.pdf)>.

<sup>49</sup> Vincent (2009), p 17.

<sup>50</sup> And see the research cited at note 33.

## The Prohibition of Possession of Material

The Classification Act is focused upon the sale and supply of material and does not generally prohibit the possession of proscribed material in and of itself. The exception is Part 10 of the Act, which was introduced in 2007 as part of the Howard government's Northern Territory Emergency Response. Part 10 prohibits possession as well as supply of prohibited material in prescribed areas,<sup>51</sup> and allows for seizure of prohibited material found within those areas.<sup>52</sup> Prohibited material includes material that has been refused classification, but also material that is or would be classified as Category 1 Restricted, Category 2 Restricted, or X18+.<sup>53</sup>

The 'prescribed area' in which these restrictions apply is that area subject to the Commonwealth government's emergency response.<sup>54</sup> The rationale for these offences that apply only in the Northern Territory is that the availability of pornography in Aboriginal communities has been linked to sexual abuse of children, through using the material to groom them and normalise sexualised behaviour.<sup>55</sup> Although the link between child sexual abuse and pornography was explicit in the Explanatory Memorandum, some participants in the Parliamentary debates drew a connection between the availability of pornography and domestic violence more generally.<sup>56</sup>

The federal government has also recently proposed the introduction of a system of internet filtering, which would potentially have the effect of restricting access to internet sites containing material instructing on criminal activity, and extreme

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<sup>51</sup> *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 101-105.

<sup>52</sup> *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 106.

<sup>53</sup> *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 99 (definition of 'Level 1 prohibited material' and 'Level 2 prohibited material').

<sup>54</sup> *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 99 (definition of 'prescribed area') and *Northern Territory National Emergency Response Act 2007* (Cth) s 4.

<sup>55</sup> Explanatory Memorandum, *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), pp 4-5. It is an open question whether the exposure of children to pornography is more common in Indigenous communities than in other similarly-placed socio-economic communities or whether this is simply a result of increased exposure to the scrutiny of welfare agencies associated with the NT Intervention.

<sup>56</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 110 (David Fawcett, Member for Wakefield), 13 August 2007, 118 (Senator Linda Kirk, SA), 14 August 2007, 43 (Senator Andrew Murray, WA).

or graphic material, including pornography.<sup>57</sup> The proposed program would require internet service providers to block all overseas-hosted internet content that is 'Refused Classification' material.<sup>58</sup> Past legislative attempts to block internet content have focused on protection of viewers from moral harm, rather than the role pornography plays in encouraging violence against women.<sup>59</sup>

With the exception of the emergency response provisions and proposed internet filtering, prohibitions relating to restricted materials are contained in state and territory legislation, which almost uniformly restrict sale and publication of unclassified materials but not possession.<sup>60</sup> These statutory provisions circumscribe the common law offence of 'obscene libel', which originally prohibited the publication of material having the tendency to deprave or corrupt those who were susceptible to immoral influences.<sup>61</sup> Although rare, it is also still possible to be prosecuted for the publication of indecent material, judged according to whether it offends the modesty of the average man or woman in sexual matters.<sup>62</sup> Notably, the United Kingdom prohibits the possession of 'extreme' pornographic images, defined as material that is produced solely or principally for the purposes of sexual arousal, that is grossly offensive, disgusting or of an obscene character, and falls within a number of proscribed

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<sup>57</sup> Quentin McDermott, 'Access Denied', *4 Corners*, ABC, 10 May 2010, <<http://www.abc.net.au/4corners/content/2010/s2893505.htm>>.

<sup>58</sup> Australian Government Department of Broadband, Communications and the Digital Economy, 'Internet Service Provider (ISP) Filtering', <[http://www.dbcde.gov.au/funding\\_and\\_programs/cybersafety\\_plan/internet\\_service\\_provider\\_isp\\_filtering](http://www.dbcde.gov.au/funding_and_programs/cybersafety_plan/internet_service_provider_isp_filtering)> (viewed 10 Nov 2010).

<sup>59</sup> Evans (2006a).

<sup>60</sup> State and territory legislation prohibits the possession of prohibited/restricted material for the purposes of sale or publication, but not possession *per se*: *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (ACT); *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW); *Classification of Films Act 1991* (Qld), *Classification of Publications Act 1991* (Qld) and *Classification of Computer Games and Images Act 1995* (Qld); *Classification (Publications, Films and Computer Games) Act 1995* (NT); *Classification (Publications, Films and Computer Games) Act 1995* (SA); *Classification (Publication, Films and Computer Games) Enforcement Act 1995* (Tas); *Classification (Publication, Films and Computer Games) Enforcement Act 1995* (Vic); cf *Classification (Publication, Films and Computer Games) Enforcement Act 1996* (WA) ss 59 and 62. NT legislation makes it an offence to use a computer to possess objectionable material.

<sup>61</sup> *R v Hicklin* (1868) LR Q 3B 360 and for discussion see Bronitt and McSherry (2010), pp 689-99.

<sup>62</sup> *Crowe v Graham* (1968) 121 CLR 375 (prosecution under the *Obscene and Indecent Publications Act 1901* (NSW)). The *Crimes Act 1900* (NSW) s 529 preserves the law relating to obscene libel. A person cannot be prosecuted for publishing an obscene libel if the allegedly libellous article is classified (other than RC or X18+): *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 63.

categories.<sup>63</sup> A number of prosecutions have been brought under this legislation, with varying degrees of success.<sup>64</sup>

As noted above, the Guidelines give effect to the principle that adults should be able to read, hear and see what they want. There is a longstanding tradition in Australia, as in other Western societies, of protecting privacy within the domestic domain. However, privacy is not absolute and the law curtails this freedom when considered necessary for the preservation of public morals, as in the case of the prohibition of sexual activity between consenting gay men.<sup>65</sup> The regulation of otherwise 'private' conduct changes over time and is subject to political considerations.<sup>66</sup> The standard of obscenity by reference to 'current community standards' leaves a broad scope for interpretation of what is and is not obscene, and does so in a way that creates the possibility for interpretations that pay little attention to the interests of women (and other groups).<sup>67</sup> As MacKinnon notes, the legal standard of obscenity is based on the 'male standpoint'.<sup>68</sup>

Further illustration of the state's selective practice in prohibiting dangerous speech is found in the regulation of private possession of materials said to be related to terrorism. As was noted in Chapter 2.2, the possession of 'extremist' material such as terrorism manuals, material encouraging violent jihad, celebration of violence against Western forces in Islamic countries, and videos

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<sup>63</sup> *Criminal Justice and Immigration Act 2008* (UK) ss 63-7. The proscribed categories are (a) an act which threatens a person's life, (b) an act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals, (c) an act which involves sexual interference with a human corpse, or (d) a person performing an act of intercourse or oral sex with an animal (whether dead or alive).

<sup>64</sup> See for example 'Man found not guilty in landmark "extreme porn" prosecution', 7 January 2011, <<http://www.thisisstaffordshire.co.uk/Jury-acquits-landmark-porn-prosecution/story-12524952-detail/story.html>>; 'Man had "grossly offensive and disgusting" porn images on computer', *St Helen's Star (online)*, 18 June 2009, <[http://www.sthelensstar.co.uk/news/4445020.Man\\_had\\_\\_grossly\\_offensive\\_and\\_disgusting\\_\\_porn\\_images\\_on\\_computer/](http://www.sthelensstar.co.uk/news/4445020.Man_had__grossly_offensive_and_disgusting__porn_images_on_computer/)>. It has been noted that this legislation is based on paternalistic standards of morality rather than a recognition of the harm extreme pornography causes to women: McGlynn and Rackley (2009).

<sup>65</sup> *R v Brown* [1993] 2 WLR 556.

<sup>66</sup> For example, sexual conduct involving consenting adults (whether gay or straight) acting in private cannot now be subject to arbitrary interference with privacy: *Sexual Conduct (Human Rights) Act 1994* (Cth) s 4. However, the EM to the Act notes that 'sexual conduct' does not extend to abortion or the production and distribution of pornographic material.

<sup>67</sup> Bronitt and McSherry (2010), pp 697-8.

<sup>68</sup> MacKinnon (1989), p 197.



depicting torture of hostages have been used as evidence establishing the ideological motivation of terrorism offenders in a range of cases.

Possession of such material can also constitute an offence in and of itself, when the possession is considered to be in connection with a terrorist act, even where the material is of a general nature and bears no relation to a specific act of terrorism.<sup>69</sup> In the United Kingdom, the Court of Appeal has held that a person can be convicted of an offence on the basis of possessing documents with the intention of inciting an act of terrorism.<sup>70</sup> The Victorian Court of Appeal has followed the English Court of Appeal in finding that the thing possessed must be being used, or must be intended to be used, in aid of an activity preparatory to a terrorist act, whether underway, or proposed or contemplated.<sup>71</sup>

The fact that possession of terrorist propaganda material is itself an offence indicates that the state regards possession of this material as preliminary to the perpetration of violence. That the state does not similarly criminalise the possession of material that could be said to incite violence against women is indicative of the lesser status of violence against women as a crime. There is a huge volume of material available, particularly via the internet, that depicts women being raped, tortured, mutilated, force-fed and even killed.<sup>72</sup> Possession of such material is generally not prohibited, notwithstanding a body of evidence suggesting that it undermines internal and social inhibitions to sexual violence, and is often used to undermine women's resistance or refusal to sexual acts.<sup>73</sup> It perhaps also demonstrates that the state benefits from allowing a legitimate market for pornography to flourish (e.g. through the collection of taxes and

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<sup>69</sup> In *Benbrika's* case it was possession of a CD containing jihadi material that was the subject of a charge of possession of a thing connected with a terrorist act: *R v Benbrika & Ors* (2009) 222 FLR 433.

<sup>70</sup> *Zafar, Butt, Iqbal, Raja, Matik v R* [2008] EWCA Crim 184 (interpreting s 57 of the *Terrorism Act 2000* (UK)), though in that case the evidence was found not to support the conviction on that basis. See also *Rowe v R* [2007] EWCA Crim 635, where there does not appear to have been an established plan for a particular terrorist act though the trial judge was satisfied that the terrorist purpose was 'imminent'.

<sup>71</sup> *Benbrika v R* (2010) 247 FLR 1, [315]. In *R v K* [2008] 3 All ER 526, the English Court of Appeal found that prosecution of K for possession of an al Qaeda training manual, a text about *jihadi* movements, and a text about working towards an Islamic state was not an abuse of process, but it was necessary to show that the documents were 'likely to be of practical assistance' to a person planning or preparing to commit a terrorist act.

<sup>72</sup> Descriptions of some of this material are provided in Evans (2006a). See also Flood and Hamilton (2003), Chapter 3.

<sup>73</sup> Russell (1998), Chapter 3.

minimisation of organised crime and corruption) that it would not obtain from allowing access to materials inciting terrorist violence.<sup>74</sup>

Through enacting prohibition on the possession of pornography in restricted zones in the Northern Territory, the government has itself accepted that a link does exist between sexual violence and pornography. Yet it fails to prohibit possession of pornographic material that incites or promotes violence against women in the same way that it prohibits possession of terrorist materials. It does not even do so where there is an established link between the possession or use of pornographic material and crimes of violence.<sup>75</sup> Again, my argument is not premised on an acceptance of a link between pornography and violence against women. The point is made to demonstrate that the state fails to regulate the possession of material that it *acknowledges* has a link to violence against women, while simultaneously regulating material assumed to promote terrorist violence.

Many feminists have drawn attention to the fact that the state's 'hands-off' policy in relation to the private sphere has often allowed abuse and oppression against women within that sphere to go unchecked.<sup>76</sup> This observation is apposite in relation to the lack of regulation of possession of material that may be said to incite violence against women. The state protects the making of pornography as an aspect of public freedom of expression, and the possession of it as an aspect of privacy.<sup>77</sup> Where the state does make prohibition in relation to material that portrays sexual or sexualised violence, it relates to the sale or publication of that material, not the possession of it within the home, notwithstanding evidence that possession in the intimate sphere is just as likely

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<sup>74</sup> Bronitt and McSherry (2010), p 698.

<sup>75</sup> In *Russell v R* [2010] NSWCCA 248 (Unreported, Campbell JA, Latham and Price JJ, 11 November 2010), the offender forced the complainant to download pornography in the course of a series of sexual assaults against her. See also *State v Herberg* 324 NW 2d 346 (Minn, 1982), referred to above at note 33. As noted above, the United Kingdom does prohibit possession of extreme pornographic material.

<sup>76</sup> Thornton (1995), pp 8-9.

<sup>77</sup> Lacey (1998), Chapter 3.

to promote or encourage violence against women as the publication or sale of the material.<sup>78</sup>

It is a matter of debate, not for resolution here, whether 'dangerous speech' does in fact promote or incite violence in any context. The state treats dangerous speech inconsistently by criminalising it in one form on the basis of an assumed link with terrorist acts, and on the other hand failing to regulate it, notwithstanding the existence of evidence drawing a link between pornography and violence against women. If the law criminalises possession of terrorist propaganda even where that is unrelated to any specific terrorism plan, then it is inconsistent for the law not to criminalise the possession of violent pornography and other material that may be said to incite or encourage violence against women. That it does not do so is indicative of the lesser status accorded to women as victims within the law.

### *Sedition*

In certain circumstances, the law prohibits speech that has the effect or the intention of inciting others to violence, or of fostering hatred. Despite the absence of a Bill of Rights or a constitutionally-entrenched right to free speech in Australia,<sup>79</sup> the government has traditionally taken a cautious approach to its regulation.<sup>80</sup> Legislation prohibiting public acts of vilification has been contentious because it is seen as interfering with free speech.<sup>81</sup>

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<sup>78</sup> See MacKinnon (1987), p 155 for this observation in relation to the protection afforded by the First Amendment of the US Constitution.

<sup>79</sup> Although the High Court has implied a freedom of communication in relation to political matters, subject to such restrictions as are reasonably appropriate and adapted to achieving a legitimate government end: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

<sup>80</sup> Bronitt (2007a), p 136.

<sup>81</sup> Thornton and Luker (2009), p 84. The authors note that Australia originally entered a reservation to article 4(a) of the *International Convention on the Elimination of All Forms of Racial Discrimination*, Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, ratified by Australia 30 September 1975. See also the essays in 'The Anti-Terrorism Bill (No 2) 2005' (special edition), *The Human Rights Defender* (2005) for opposition to the sedition legislation.

Notwithstanding this level of caution, Australian law does prohibit speech that incites violence or hatred.<sup>82</sup> However, not all such speech is prohibited; when incitement to violence is prohibited generally, it is incitement targeted at *particular groups*, defined primarily on the basis of race, ethnicity or religion. A noteworthy aspect of these laws is the almost total absence of reference to sex or gender in the prohibitions.

The offence of sedition, found in s 80.2 of the Commonwealth Criminal Code, was introduced by the *Anti-Terrorism Act (No 2) 2005* (Cth). Subsection (1) provides that a person commits an offence if the person urges another person to overthrow the Constitution, a government, or the lawful authority of the Commonwealth government, by force or violence.<sup>83</sup> The offence carries a maximum penalty of seven years' imprisonment. Subject to the same penalty is the offence created by subsection (5), which applies where a person urges a group or groups (whether distinguished by *race, religion, nationality or political opinion*) to use force or violence against another group or other groups (as so distinguished); and (b) the use of the force or violence would threaten the peace, order and good government of the Commonwealth.<sup>84</sup>

Section 80.2 replaced the previous sections 24A to 24E of the Crimes Act, and simultaneously amended the definition of 'seditious intention' in the Crimes Act to include 'an intention to promote feelings of ill-will or hostility between different groups' including groups of all types, races, religions, political interests and

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<sup>82</sup> Incitement to commit a particular crime is criminalised generally by statute e.g. *Criminal Code Act 1995* (Cth) s 11.4. In the United Kingdom, the *Terrorism Act 2006* (UK) ss 1 and 2 prohibit speech and publications likely to be understood as a direct or indirect encouragement or inducement to the commission or preparation of acts of terrorism. For discussion see Hunt (2007). The *Public Order Act 1986* (UK) s 18 prohibits the use of threatening, abusive or insulting words with intention to, or which are likely to, stir up racial hatred. Legislation similar to encouragement and glorification of terrorism in the *Terrorism Act 2006* (UK) was considered and rejected in Australia: Government response to recommendations, ALRC, *Fighting Words: a Review of Sedition Laws in Australia*, tabled 13 September 2006.

<sup>83</sup> State and territory provisions are *Criminal Code Act 1983* (NT) ss 45-46; *Criminal Code Act 1899* (Qld) ss 44-46, 52; *Criminal Code Act 1924* (Tas) ss 66-67, *Criminal Code Act Compilation Act 1913* (WA) ss 44-46, 52, and sedition is an offence at common law in NSW and WA.

<sup>84</sup> The incitement of a terrorist act could also be prosecuted under a combination of s 11.4 of the *Criminal Code Act 1995* (Cth) (incitement) and s 101.1. However this would require proof that the defendant intended the offence incited to be committed (which would presumably require evidence of intention that the act be motivated by a political, religious or ideological motivation). The offence of sedition, while carrying a lesser penalty, does not place such onerous obligations on the Prosecution.

nationalities.<sup>85</sup> The laws as reframed serve mixed objectives of protecting security and human rights; however the purpose of s 80.2(5) was not to strengthen the protection of racial minorities, but to expand the scope of prohibition of the incitement of terrorism.<sup>86</sup>

The new sedition provisions were clearly designed to catch speech inciting terrorist violence against the government or particular groups within society, although Saul notes that this wrongly conflates group-based violence and terrorism and 'can only reinforce the stereotyping of certain religions or ethnicities as terrorists'.<sup>87</sup> However, police have in the past determined that speech promoting suicide bombings and anti-Australian conspiracies did not violate the provisions.<sup>88</sup> The government considered enacting stronger sedition provisions but eventually referred the offending books to the Classification Review Board for review.<sup>89</sup>

Notably, the sedition offence does not prohibit urging a group to use force against another group distinguished by sex or gender.<sup>90</sup> It is unclear what the reason for this omission was. It may be that the incitement of violence between gendered groups was not envisaged as a possibility, an oversight that would be consistent with the historical oversight of crimes against women.<sup>91</sup> It might be that sex/gender is not included in Article 20 of the *International Covenant on Civil and Political Rights*,<sup>92</sup> suggested by the Gibbs Committee to be the basis for the new sedition provisions, although the absence of political opinion from Article 20 did not preclude its inclusion in subsection (5) of s 80.2.<sup>93</sup> It could also

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<sup>85</sup> *Crimes Act 1914* (Cth) s 30A(3)(d). The elaboration of the different 'types' of groups is not contained in the legislation but found in the Explanatory Memorandum, *Anti-Terrorism Act (No 2) (2005)* (Cth), p 89.

<sup>86</sup> Bronitt and Stellios (2006).

<sup>87</sup> Saul (2005).

<sup>88</sup> Kelvin Bissett and Angela Kamper, 'Muslim "books of hate" get OK', *Daily Telegraph (online)*, 15 May 2006, <<http://www.religionnewsblog.com/14645/australia-muslim-books-of-hate-get-ok>>.

<sup>89</sup> 'Sedition laws missing mark on hate books: Vaile', *The Age*, 17 May 2006, p 10.

<sup>90</sup> Explanatory Memorandum, *Anti-Terrorism Act (No 2) 2005* (Cth) notes that the new s 80.2(5) replacing ss 24A to 24E of the *Crimes Act* modernises the language in relation to groups or classes as recommended by Sir Harry Gibbs (June 1991), p 50.

<sup>91</sup> For example see Genovese (1998) in relation to the belated recognition of domestic violence in Australia and Chapter 2.2 in relation to the history of the marital rape exemption.

<sup>92</sup> *International Covenant on Civil and Political Rights*, Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966 (entered into force 23 March 1976).

<sup>93</sup> See for example Gibbs (1991), Chapter 32. The report refers only to the fact that s 24A was considered to require narrowing to particular groups in the community, whether distinguished by nationality, race,

be because such violence was not conceptualised as having the capacity to threaten the peace, order and good government of Australia, and therefore not meeting the constitutional requirement of a sufficient Commonwealth connection.<sup>94</sup> Given the absence of reference to sex or gender in the reports and debates relating to sedition,<sup>95</sup> it would appear that little consideration has been given to the issue at all.

One might argue that there is no need for the inclusion of gender in the sedition provision because gender-based incitement to violence is uncommon. As Saul notes however, it is beside the point that a particular type of vilification may not be commonplace; criminalisation is necessary not because of the prevalence of this type of crime but because of the serious social consequences when it does occur.<sup>96</sup> There are examples of conduct that might well fall within the category of sedition on the basis of gender. Recently a Facebook page was set up by some University of Sydney students entitled 'Define Statutory' and defined as 'pro-rape'. The page, subsequently removed from Facebook, was variously described as 'inciting people to sexual violence' and 'grooming perpetrators of sexual violence'.<sup>97</sup>

If gender were included as one of the categories within s 80.2, it is arguable that the development of such a site could be said to constitute the urging by one group (defined by gender) to use force against another group (defined by gender) in a way that would threaten the peace, order and good government of the Commonwealth. This limb of s 80.2(5) requires the Prosecution to demonstrate that in its scale and effect, the violence urged would impinge upon

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religion or other such groups and to the fact that the prohibition on grounds of race, religion or nationality was supported by the external affairs power and Article 20 of the International Covenant on Civil and Political Rights. However, sedition also includes a reference to groups defined by 'political interest', which is not referred to in Article 20. Political opinion is included in Article 26, which guarantees equal and effective protection against discrimination on any ground, including also sex.

<sup>94</sup> Bronitt and Stellios argue that it is doubtful whether hate crimes outside of racial and religious violence would be likely to prejudice the security of the Commonwealth: Bronitt and Stellios (2006), p 947.

<sup>95</sup> Sex and gender are also not addressed in the ALRC (2006).

<sup>96</sup> Saul (2005).

<sup>97</sup> Ruth Pollard, 'Elite College Students proud of 'pro-rape' Facebook page', *Sydney Morning Herald (online)*, 9 Nov 2009; 'Pro-rape Facebook Page Condemned' *ABC News Online*, 9 November 2009, <<http://www.abc.net.au/news/stories/2009/11/09/2736793.htm>>. Another pro-rape Facebook page was reported in May 2010: Lanai Vasek, 'Facebook fury over pro-rape page', *The Courier Mail (online)*, 25 May 2010, <<http://www.couriermail.com.au/news/technology-old/facebook-fury-over-pro-rape-page-sparking-calls-for-site-to-be-more-closely-monitored/story-e6frep1o-1225870805566>>.

the security of the Commonwealth.<sup>98</sup> To the extent that such a site could be said to promote sexual violence by men against women *en masse*, if that violence were carried out, the harm caused and the resulting drain upon government resources in terms of law enforcement, investigation and prosecution, would potentially threaten the order and good government of the state.<sup>99</sup> Arguably, the scale and extent of violence inflicted by men against women in Australia *already* represents a threat to the peace, order and good government of the Commonwealth, despite the fact that much of it goes unreported.<sup>100</sup> When one considers the cost of domestic violence to the Australian economy each year,<sup>101</sup> the scale of the impact of such violence on the resources of the state becomes clearer.

Pornography, as outlined in the first section of this chapter, has also been linked with the perpetration of violence against women.<sup>102</sup> Although there is disagreement as to whether this link is established on the empirical research,<sup>103</sup> the fact that such links have been drawn suggests that gender should have been included in the categories of groups within the sedition provision.

Further, the identification of dangerous speech as ideological propaganda is central to perceptions of its capacity to threaten peace, order and good government. Incitement to violence on the basis of race and religion are conceptualised as posing such a threat because they are seen to involve a deliberate and premeditated choice by one group of people to target another group, necessitating a state response and thus posing a threat to the state. On the other hand, male violence against women, as discussed in Section 2, is constructed within legal and social discourse as spontaneous and not

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<sup>98</sup> Bronitt and Stellios (2006), p 943.

<sup>99</sup> Bronitt and Stellios argue that it is unlikely that sedition outside of the recognised categories would be likely to endanger the security of the Commonwealth and its institutions: Bronitt and Stellios (2006), p 947.

<sup>100</sup> In 2005, there were an estimated 3,065,800 (almost 40 percent) of women who had experienced violence since the age of 15. Of those women, 46 percent were assaulted by a current and/or previous partner in the most recent incident. Of women who were physically assaulted by a male perpetrator in 2005, only 36 percent reported it to police: ABS (2006).

<sup>101</sup> Access Economics calculates that domestic violence will cost the Australian economy a projected \$9.8 billion in 2021-2: National Council to Reduce Violence against Women and their Children (March 2009), p 66.

<sup>102</sup> See sources cited at note 33.

<sup>103</sup> For criticism of the link drawn between viewing pornography and violence against women see particularly McElroy (1995).

ideologically-motivated, with the result that even given its widespread and systematic occurrence, it is conceived as readily containable within the parameters of an ordinary criminal justice response.

That gender was not included as a category or group that might be the target of incitement to violence illustrates the state's practice of overlooking the systemic, gender-based aspect of such violence. It is also inconsistent with the Australian government's responsibilities as a signatory to the *Convention on the Elimination of all Forms of Discrimination Against Women*,<sup>104</sup> and to its Optional Protocol.<sup>105</sup> To the extent that the sedition provision functions as protection of human rights, it does not afford the same protection to gender as it does to race and political views.

The state's role in obscuring the problem of violence against women is further perpetuated by state and territory legislation in relation to so-called 'hate speech', which consistently fails to recognise gender-based vilification.

### *Hate Speech*

Hate speech laws are not terrorism laws, however I have included them here as a continuation of the discussion of the federal sedition provision, as both types of provision target vilification on the basis of recognised group identity. As noted above, s80.2(5) of the *Crimes Act* serves conflicting purposes of protecting national security, and also operating as an anti-discrimination measure, and this same blurring of boundaries exists in relation to vilification laws. The incitement of terrorist violence against a particular group may well involve the use of language that denigrates and vilifies members of that group, and thus invoke

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<sup>104</sup> *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981). In Article 2, states parties 'condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women' including to adopt legislation and other measures to prohibit discrimination against women.

<sup>105</sup> The Optional Protocol was signed by Australia in December 2008. It provides for a Committee on the Elimination of Discrimination Against Women to hear individual complaints from people in member states who claim to be victims of violation of Convention Rights.



'hate speech' laws.<sup>106</sup> Conversely, some hate crimes may fit within the definition of terrorism.<sup>107</sup> It is therefore useful to consider the various state and territory anti-vilification provisions, and the differential protections afforded particularly to racial and ethnic groups and to groups defined on the basis of gender.

Federally, civil racial vilification prohibition is contained in the *Racial Discrimination Act*,<sup>108</sup> which enacts Australia's obligations under the *Convention on the Elimination of All Forms of Racial Discrimination*.<sup>109</sup> Notably, Australia reserved in relation to Article 4(a), which requires states to criminalise the dissemination of racist ideas, and incitement to racial discrimination and racial violence.<sup>110</sup> Most states and territories have enacted hate speech legislation, although the form varies across jurisdictions. Tasmania provides for civil remedies only, not criminal penalties; the Northern Territory only has general anti-discrimination laws, not specific hate speech provisions.<sup>111</sup> Western Australia has criminal provisions only, and all other jurisdictions provide for both criminal and civil remedies.<sup>112</sup> Legislation in all jurisdictions prohibits hate speech based on race. Religious hate speech is prohibited in Queensland, Tasmania and Victoria, and hate speech on the basis of sexuality and gender identity in the ACT, NSW, Queensland and Tasmania.<sup>113</sup>

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<sup>106</sup> For example, in *R v Javed* [2008] 2 Cr App R 12, protesters against the republication of anti-Muslim cartoons chanted 'Massacre those who insult Islam' and 'Bomb the UK'. They were variously convicted of soliciting murder and stirring up racial hatred.

<sup>107</sup> This is true, for example, of terrorist activity carried out by right-wing racist groups in the United States in the 1980s: Harris (1987), pp 10-3.

<sup>108</sup> *Racial Discrimination Act 1975* (Cth) ss 18B-18F. The *Sex Discrimination Act 1984* (Cth) does not contain comparable provisions.

<sup>109</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, ratified by Australia 30 September 1975.

<sup>110</sup> The text of the reservation includes the following: "It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4(a)": United Nations Treaty Collection, *International Convention on the Elimination of All Forms of Racial Discrimination*, Status as at 14.10.11,

<[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en#EndDec)> (viewed 15 Oct 2011).

<sup>111</sup> *Anti-Discrimination Act 1998* (Tas) ss 16-9; *Anti-Discrimination Act* (NT) s 19.

<sup>112</sup> *Discrimination Act 1991* (ACT) ss 66-68; *Anti-Discrimination Act 1977* (NSW) ss 20B-20D; *Anti-Discrimination Act 1991* (Qld) ss 124A, 131A; *Racial Vilification Act 1996* (SA) ss 4-6 and *Civil Liability Act 1936* (SA) s 73; *Racial and Religious Tolerance Act 2001* (Vic) ss 7-12, 24-25; *Criminal Code Act Compilation Act 1913* (WA) ss 77-80H. For an outline of provisions, see Annexure A.

<sup>113</sup> Other hate speech grounds include HIV/AIDS status (*Discrimination Act 1991* (ACT) s 66 and *Anti-Discrimination Act 1977* (NSW) s 49ZXA); disability (*Anti-Discrimination Act 1998* (Tas) s 19).

With the exception of Western Australia, criminal hate speech legislation generally prohibits a public act inciting hatred, serious contempt or ridicule of a person based on a specific ground, generally by means which threaten physical harm to person or property.<sup>114</sup> Civil hate speech laws tend to have the first two requirements, without the need to identify a threat to person or property.<sup>115</sup> Western Australia has enacted a broader set of provisions, including offences such as conduct likely to incite racial animosity or racist harassment, and conduct likely to racially harass.<sup>116</sup> Only Western Australia has successfully prosecuted someone under the anti-vilification laws: for possession of racist material following a graffiti attack in which swastikas and racist slogans were posted.<sup>117</sup>

Tasmania also prohibits engaging in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of a range of characteristics, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that it would have that effect on the other person.<sup>118</sup>

The only jurisdiction in which hate speech is prohibited on the basis of gender is Tasmania, however there is no criminal prohibition of gendered hate speech.<sup>119</sup> The vast majority of Australian states and territories, like the federal legislature, do not prohibit hate speech grounded in gender. This is a further manifestation of the state's failure to recognise women as a section of the public, discussed in Chapter 2.3. Hate speech legislation targets acts directed at individuals but on

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<sup>114</sup> *Discrimination Act 1991* (ACT) s 67; *Anti-Discrimination Act 1977* (NSW) ss 20D, 38T, 49ZTA, 49ZXC; *Anti-Discrimination Act 1991* (Qld) s 124A; *Civil Liability Act 1936* (SA) s 73; *Racial and Religious Tolerance Act 2001* (Vic) ss 24-25 (Victoria does not require a 'public act').

<sup>115</sup> *Discrimination Act 1991* (ACT) s 66; *Anti-Discrimination Act 1977* (NSW) ss 20C, 38R, 49ZS, 49ZXA; *Anti-Discrimination Act 1991* (Qld) s 131A; *Racial Vilification Act 1996* (SA) s 4; *Anti-Discrimination Act 1998* (Tas) s 19 (s 17 also creates a broader prohibition against conduct which offends, humiliates, intimidates, insults or ridicules where a reasonable person would anticipate the conduct would have that effect); *Racial and Religious Tolerance Act 2001* (Vic) ss 7-8.

<sup>116</sup> *Criminal Code Act Compilation Act 1913* (WA) ss 78, 80B.

<sup>117</sup> Gelber (2007), pp 8-9. The case involved graffiti of swastikas and slogans including 'Hitler was right' and 'Asians out'.

<sup>118</sup> *Anti-Discrimination Act 1998* (Tas) s 17 – the grounds include race; age; sexual orientation; lawful sexual activity; gender; marital status; relationship status; pregnancy; breastfeeding; parental status; family responsibilities; disability; industrial activity; political belief or affiliation; political activity; religious belief or affiliation; religious activity; irrelevant criminal record; irrelevant medical record; association with a person who has, or is believed to have, any of these attributes.

<sup>119</sup> *Anti-Discrimination Act 1998* (Tas) s 17.

the basis of their identity as members of a group. As the state fails to recognise the systematic nature of harm committed against women, it does not make provision for hate speech that targets women *as women*.

The failure to recognise gendered hate speech in legislation is not because it does not exist. As noted in the first section of this chapter, violent pornography and material that depicts women in ways that are humiliating or degrading are readily available, particularly via the internet.<sup>120</sup> Derogatory language used to describe women and the acts being done to them are a common feature of pornographic materials.<sup>121</sup> Since pornography produced for public consumption should satisfy the requirement of a 'public act', it would appear to meet the legal criteria for hate speech where it incites hatred, contempt or humiliation of women.<sup>122</sup> MacKinnon notes that pornography hurts not just individual women but women as a 'whole' and that gender inequality is central to what pornography is.<sup>123</sup> However, I was unable to find any instance in Australia of civil or criminal action taken against producers of pornography for hate speech.<sup>124</sup>

Pornography aside, speech inciting hatred against women is so commonplace as to be almost invisible. On the street, in film and on television, in public and in private, words associated with female hatred such as 'bitch', 'slut', 'tramp', 'slurry', 'skank' and 'cunt' and other words that associate women with animals or body parts, are used with such regularity that they are rarely the subject of comment.<sup>125</sup> Similarly, Spender has identified a range of words used to describe and discredit women's speech, such as 'nag', 'prattle' and 'whine'.<sup>126</sup> Domestic

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<sup>120</sup> Flood and Hamilton (2003), Chapter 3.

<sup>121</sup> MacKinnon (1987), p 199; Flood and Hamilton (2003), p 32.

<sup>122</sup> Smart suggests that to extend hate speech provisions in such a way would have 'wider symbolic value': Smart (1989), pp 132-3.

<sup>123</sup> MacKinnon (1997) and Dworkin (1997).

<sup>124</sup> Mason does not refer to any gender-based hatred sentences in her analysis of Australian legislation: Mason (2010). I did not locate any cases in which gender and hate speech were considered in a search of Lexis Nexis (Casebase) database. My search, conducted on 29 March 2011, utilised the following search combinations: 'gender and vilification'; 'sex and vilification'; 'gender and "hate speech"'; 'sex and "hate speech"'; 'gender and hate'.

<sup>125</sup> See Waterhouse-Watson (2007); Romito (2008), p 48. For gendered epithets in the political context see Gatens (1996), Chapter 2. For the use of derogatory language in pornography see Russell (1998), Chapter 2.

<sup>126</sup> Spender (1990), pp 106-7.

and sexual assaults are frequently accompanied by the use of words that denigrate women on the basis of their gender.<sup>127</sup>

Unlike words such as 'coon' or 'Paki' which automatically trigger an adverse response in the public domain and are often recognised as racial slurs, words used to and about women are not recognised as gendered epithets.<sup>128</sup> Yet, as Gelber notes, both types of hate speech have the effect of making a 'truth claim' about the inferiority of the recipient, which reinforces and recreates the victim's position of inequality.<sup>129</sup>

It is perhaps the very pervasiveness of gendered hate speech that contributes to its invisibility and its insidiousness. The use of derogatory terms based on gender is widespread, and their identification as gendered terms is made more problematic by their diversified use, for example the word 'cunt' is commonly used as a generally derogatory term *by men about* other men.<sup>130</sup> The term only becomes the subject of controversy when prefaced by a word that transforms it into a racial epithet, for example 'black cunt'.<sup>131</sup> The liberal underpinnings of the law also direct focus onto the subjective intention of the speaker rather than the *effect* of the speech; as gendered language is routinely used in a flippant or throwaway fashion, it is difficult to establish the requisite intention for a criminal prosecution.<sup>132</sup>

Gendered hate speech, like other forms of hate speech, is a phenomenon that affects not only the individuals targeted but all members of the group, through

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<sup>127</sup> Ptacek (1999), p 82; Coukos (1999-2000), pp 33 ff. I have also observed this phenomenon personally through my work as a criminal prosecutor.

<sup>128</sup> Cf Gelber (2002), p 71 (who does give recognition to gendered epithets).

<sup>129</sup> Gelber (2002), pp 71-2.

<sup>130</sup> Note that online dictionary tools almost without exception include 'female genitalia' and 'disparaging term for a woman' amongst the meanings of the term: see <<http://www.thefreedictionary.com/cunt>> , <<http://www.urbandictionary.com/define.php?term=cunt&page=2>> , <<http://onlineslangdictionary.com/definition+of/cunt>> , <<http://www.merriam-webster.com/dictionary/cunt>> , <<http://en.wikipedia.org/wiki/Cunt>> (all viewed 14 June 2010).

<sup>131</sup> Howe (2010), p 216.

<sup>132</sup> This applies in relation to offensive language laws: see Bronitt and McSherry (2010), pp 843-5.

increasing the sense of vulnerability and victimisation of members.<sup>133</sup> Talking about hate crime generally, the New York State legislature has noted that:<sup>134</sup>

Hate crimes do more than threaten the safety and welfare of all citizens. They inflict on victims incalculable physical and emotional damage and tear at the very fabric of free society. Crimes motivated by invidious hatred toward particular groups not only harm individual victims but send a powerful message of intolerance and discrimination to all members of the group to which the victim belongs. Hate crimes can and do intimidate and disrupt entire communities and vitiate the civility that is essential to healthy democratic processes.

This comment by the New York legislature illustrates the point that conduct that is generally perceived as a private or individual harm may in fact have a public dimension, as acts against particular individuals may have broader repercussions for the group or groups to which those individuals belong. Hate speech directed towards an individual woman, for example, impacts on women in general by degrading them and instilling fear in women as a group, and this is particularly so when the speech is used regularly and systematically.

It might be argued that gendered hate speech has not attracted the same legislative attention as other forms of hate speech because it is not as easily recognisable as hate speech, and legal prohibition would therefore be too difficult to enforce.<sup>135</sup>

However, race-based hate speech is often not easily recognisable. Indeed, it is sometimes framed in 'positive' terms such as an affirmation of love for one's own culture/race or a 'discourse of care' overtly expressing concern for the maligned group.<sup>136</sup>

Australian research suggests that 'everyday' forms of racism such as disrespectful treatment and name-calling encountered on the street, in shops and public places, are more common than institutional forms of racism

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<sup>133</sup> Gelber (2002), Chapter 4. For the argument that psychic injury is the most serious of harms perpetrated by hate speech see Sadurski (1994).

<sup>134</sup> *Hate Crimes Act of 2000*, NY [Penal] Law (Consol) § 485.00.

<sup>135</sup> Thornton notes that sex discrimination is more 'conceptually elusive' than race discrimination: Thornton (1990), p 62.

<sup>136</sup> Mason (2007).

experienced in schools and places of employment.<sup>137</sup> Subtle forms of vilification, it has been suggested, may be even more harmful than overt forms because they are more likely to be accepted as legitimate forms of expression.<sup>138</sup>

The subtle nature of much of the racism expressed in Australian society has not prevented the enactment of laws specifically prohibiting race-based hate speech. Perhaps, then, the absence of gender as a category of hate speech is due to the failure to recognise much of it as gender-based discrimination at all, subtle or not. Gendered hate speech, like other forms of sex discrimination, is largely perceived in Australia to be a problem associated with other countries, and this impression is reinforced by the ad hoc nature of sex discrimination complaints that is necessitated by the system of individualised complaints that is enshrined in Australian legislation.<sup>139</sup> Gender-based slurs are perceived as targeting only the individual women to whom they are directed rather than women *as a group* or *as a class*.

Thus, when a racial epithet is used, that is associated by the listener directly and exclusively with race. Many gender-based epithets, however, apparently relate to a *particular aspect* of gender, usually sexuality. Many derogatory terms used to and about women – ‘slut’, ‘whore’, ‘hoe’, ‘tart’, ‘skank’ and ‘slurry’ to name a few – appear to label the recipient not simply as a woman, but as a *sexually promiscuous* woman. It is therefore possible to dismiss them not as forms of gender-based discrimination but as insults based on perceived characteristics or traits of the particular women to whom they are targeted.

However, to understand gendered vilification in this way is to misunderstand the gendered basis for, and consequences of, such terms. To begin with, terms such as those described above are not used only in situations where the speaker actually has a perception that the recipient is sexually promiscuous. Terms such as ‘slut’ and ‘hoe’ are commonly used against women in all sorts of settings, including where there can be no possible perception of sexual promiscuity, and sexual history or experience bears no relevance in the context.

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<sup>137</sup> Dunn et al (2009).

<sup>138</sup> Gelber (2002), p 79.

<sup>139</sup> Thornton (2010), pp 321-4.

Secondly, if these terms denoted simply sexual promiscuity, they would be used also in relation to men, but they are not.

Thirdly and most importantly, to pretend that the kinds of words used regularly to and against women are about sex (the act) and not gender, is to ignore the relationship between the two that has been described by, in particular, Catharine MacKinnon.<sup>140</sup> In MacKinnon's view, sex can be used to oppress women,<sup>141</sup> and that goes for sex speech as it does for sex act. Sex is written on women's bodies, and that has nothing to do with what they wear or how they present themselves. In masculinist ideology, women *are* sex, and that is why they are called the names they are.

Gendered hate speech satisfies the legal criteria for hate speech, and yet in most Australian jurisdictions it is not recognised as such. This is further demonstration of the state's tendency to privatise harm committed against women, and to overlook the systematic nature of the harm caused to women by dangerous speech as well as domestic violence. In the next section, I consider Australian 'hate crime' provisions, which suffer from the same absence of reference to sex or gender as hate speech provisions.

### *Hate Crimes*

Like hate speech provisions, laws relating to hate crimes are not terrorism laws. However, as discussed above, terrorism will often involve violence directed by one self-identified group against another group identified in opposition to them. Violent crimes that bear the hallmark of principled opposition to a particular group of people therefore cross the boundary between terrorism and crime motivated by hatred. For that reason, I conclude this chapter with a discussion of so-called 'hate crimes' under state and territory law and the differential protection that is provided to women as a group as opposed to groups identified by racial, religious or political identity.

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<sup>140</sup> MacKinnon (1987), especially Chapter 3.

<sup>141</sup> MacKinnon (1987), pp 86-7.

'Hate crimes' are crimes 'wholly or partly motivated by, grounded in, or aggravated by, bias or prejudice towards particular groups of people'.<sup>142</sup> There are three major models. The first is the 'penalty enhancement model', which provides for an additional penalty where a crime is motivated by hatred, adopted only in WA (and the US) for hate-based crime.<sup>143</sup> The second, the sentence aggravation model, which provides that motivation by hatred is an aggravating factor on sentence, exists in New South Wales, Victoria, the Northern Territory and the United Kingdom.<sup>144</sup> This model, rather than stipulating an increase in penalty, simply provides for hate motivation to be taken into account as potentially one of a number of aggravating factors, and is therefore more flexible in terms of the impact it has on sentence.

The third model is the substantive offence model, creating specific crimes that apply where the perpetrator is motivated by prejudice. Although there are no substantive 'hate crime' laws in Australia, in some overseas jurisdictions there is provision for substantive crimes motivated by hatred or prejudice. For example, California, Massachusetts and Canada all criminalise certain types of conduct motivated by prejudice.<sup>145</sup> Although many states in the US have gender included in hate crime statutes, prosecutions for gender-based hate crimes are rare.<sup>146</sup> Federally in the US, gender was originally omitted from both hate crime offences and statistical reporting of hate crime, but was included in amendments made in 2009.<sup>147</sup> Feminist advocates in the US have also been successful in arguing for the inclusion of gender in various civil bias crime statutes, which allow victims of hate crime to bring civil suits against perpetrators.<sup>148</sup>

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<sup>142</sup> Mason (2009), pp 326-7.

<sup>143</sup> *Criminal Code Act Compilation Act 1913* (WA) s 80I; *Hate Crimes Sentencing Enhancement Act* 28 USC § 994 (1994); *Federal Sentencing Guidelines 2011* (US) § 3A1.1.

<sup>144</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h); *Sentencing Act 1995* (NT) s 6A(e); *Sentencing Act 1991* (Vic) s 5(2); *Criminal Justice Act 2003* (UK) ss 145 (racial and religious aggravation) and 146 (sexual orientation and disability); *Crime and Disorder Act 1998* (UK) ss 28 and 96.

<sup>145</sup> Cal [Penal] Code §§ 422.6, 190.03 (2011); 265 Mass Gen Laws §§ 37, 39 (2011); *Criminal Code*, RSC 1985, C-46 ss 318-320, cited in Mason (2010).

<sup>146</sup> Carney (2001), p 319.

<sup>147</sup> *Hate Crimes Prevention Act* 18 USC § 249 (2009); amendments introduced by the *Matthew Shepard and James Byrd Jr Act*, signed into law by President Obama on 28 October 2009.

<sup>148</sup> Coukos (1999-2000), p 22: although the article notes that only 20 states with hate crime statutes had included 'gender'. For example *Violence Against Women Act 1994*, Pub L No 103-322, 108 Stat 1902



Notably, in relation to Australian hate crime provisions, gender is not included as a relevant factor. Of the sentence aggravation models, Northern Territory and Victoria refer to group identity without specifying what kind of groups, while Western Australia refers only to race and New South Wales to a range of categories but gender is not specifically mentioned.<sup>149</sup> The omission of gender from the categories of motivation in hate crimes reinforces the construction of domestic violence as a crime committed in the private domain, rather than a species of offence directed against ‘a section of the public’, as outlined in Chapter 2.3.

In relation to the more general provisions that do not specify particular categories, the test used to identify an act as a hate crime may determine whether or not gender-based hatred is recognised. The first, the ‘motivation’ test, makes it a requirement of hate crime that the defendant be motivated by group hatred, prejudice or hostility. Prosecution on the basis of this test requires evidence not only that the offender *possessed* a particular prejudice, but also that her or his actions were *motivated* by that prejudice.

The second is the ‘group selection’ test, whereby a victim is chosen due to her or his membership of a particular group, notwithstanding that the offender may not be motivated by hatred or prejudice against that group. The third test is the ‘demonstration of hostility’ test, whereby an act will qualify as a hate crime if accompanied by words that demonstrate hostility for a particular group. While Victoria and Western Australia incorporate a combination of tests, the New South Wales and Northern Territory provisions adopt only the motivation test.<sup>150</sup>

Where the narrow motivation test applies, gender is unlikely to be recognised as a category of hate crime even where the list of categories is not exhaustive. For example in *Aslett v The Queen*,<sup>151</sup> a robbery targeting victims of Asian

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(US), which was invalidated by the US Supreme Court in *United States v Morrison* 529 US 598 (2000): for discussion see Graycar and Morgan (2002), pp 435-7.

<sup>149</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h); *Sentencing Act 1995* (NT) s 6A(e); *Sentencing Act 1991* (Vic) s 5(2); *Criminal Code Act Compilation Act 1913* (WA) s 80I.

<sup>150</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h); *Sentencing Act 1995* (NT) s 6A(e); *Sentencing Act 1991* (Vic) s 5(2); *Criminal Code Act Compilation Act 1913* (WA) s 80I. For discussion see Mason (2010).

<sup>151</sup> *Aslett v R* [2006] NSWCCA 49 (Unreported, Spigelman CJ, Barr and Howie JJ, 24 March 2006).

background was found not to constitute a hate crime on the basis that the victims were targeted because the offenders believed Asian people to be more wealthy, not because they were motivated by racial hatred or prejudice. While this act would have fallen within the category of the 'group selection' test-based hate crime, it failed the 'motivation' test.

If one takes the same approach to gendered hate crime, it seems likely that either of the 'group selection' or 'demonstration of hostility' test will encompass more gendered hate crime than the 'motivation test'. A sexual offender or domestic violence perpetrator may well be considered to have chosen his victim on the basis of her gender (or at least as one of the factors for that choice) or to have demonstrated hostility towards women through his choice of language. The motivation test focuses more on the subjective intention of the perpetrator and is therefore less likely to encompass the gendered nature of domestic violence because, as outlined in Chapter 2.2, perpetrators' actions are not constructed as ideological within the law.

In particular, the adoption of the demonstration of hostility test would support a construction of domestic violence, which is frequently accompanied by derogatory gendered language,<sup>152</sup> as a gendered crime, committed by members of one group (men) against another group (women) and motivated by prejudice towards that group. This would further support the construction of domestic violence as a 'public crime' as outlined in Chapter 2.3.

Indeed, there have been cases documented of violent crimes against individual women where the offender has expressly been motivated by a hatred of women.<sup>153</sup> However, rather than treating misogyny as an aggravating factor, the courts have expressed sympathy for the offenders, or treated their misogyny as a 'psychological condition', thereby pathologising the offender and denying what might otherwise be considered an ideological motivation.<sup>154</sup> As Caputi and

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<sup>152</sup> Ptacek (1999), p 82. I have also observed this phenomenon personally through my work as a criminal prosecutor.

<sup>153</sup> See the cases of *R v Hotene* (9 Oct 2000), HC Wn AP 23/00 and *R v Watson* (8 May 2000) CA 507/99 cited in Brown (2004).

<sup>154</sup> Brown (2004), pp 599-600. A rare exception is the recognition that sexual offences in company were reflective of gender-based prejudice in *R v ID & ON* [2007] NSWDC 51 (Unreported, Nicholson DCJ, 25

Russell write: 'Fixation on the pathology of perpetrators of violence against women only obscures the social control function of these acts.'<sup>155</sup> In this respect, the legal system reflects a social perception of men who commit harm in the domestic sphere as motivated by emotion rather than ideology.<sup>156</sup>

A number of writers, through their recognition of the gendered nature of harms committed systematically by men against women, have laid the theoretical foundation for recognition of violence against women as hate crime.<sup>157</sup> Carney argues that gender-based hate crime shares the same characteristics as other hate crimes, namely victims are selected (in part) because they are female; victims feel they cannot control their own safety because they cannot change the fact that they are female; all women realise that they are vulnerable to attack; perpetrators see each woman as a potential victim; gender-based crimes generate communal fear; there is increased psychological trauma for victims; crimes are under-reported; victims tend to be re-victimised and perpetrators tend to re-offend; and crimes involve heightened violence.<sup>158</sup> Although Carney applies this argument specifically to rape, a number of these features apply equally to domestic violence as a gender-based hate crime.

Angelari notes that women are not considered to be 'interchangeable' in the same way as victims of racially or ethnically motivated crime, that is, harm committed against an individual woman is not considered to impact on other women in the same way that crime committed against a member of an ethnic group might be seen as a harm to all members of that group.<sup>159</sup> In other words,

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January 2007). The judgement also makes reference to the use by one offender of pornography to learn about sex and fuel his sexual behaviours. I am indebted to one of the anonymous examiners for bringing this case to my attention.

<sup>155</sup> Caputi and Russell (1992), p 14.

<sup>156</sup> This is noted in the context of men who kill their children, in a commentary on the recent case of Arthur Freeman, who was convicted of the murder of his daughter Darcy by dropping her off a bridge as revenge against the child's mother, his former partner: Debbie Kirkwood, 'Men's Murderous Revenge', *Sydney Morning Herald (online)*, 31 March 2011, <<http://www.smh.com.au/opinion/society-and-culture/mens-murderous-revenge-20110330-1cg80.html>>.

<sup>157</sup> The best known being MacKinnon (1989); Millett (2000), p 44; Brownmiller (1976) discussed in Angelari (1997).

<sup>158</sup> Carney (2001).

<sup>159</sup> In relation to this, see for example the recent discussions relating to a number of violent crimes in which Indian nationals were the victims, which were perceived by members of the Indian community in Australia as specifically targeting them as a racial group: for discussion see Peter Spolc and Dr Murray Lee, 'Indian Students in Australia: Victims of Crime, Racism or the Media?' published online at <[http://proceedings.com.au/isana2009/PDF/paper\\_Spolc.pdf](http://proceedings.com.au/isana2009/PDF/paper_Spolc.pdf)> (viewed 31 Mar 2011).

crimes committed against women are a series of 'private' crimes, not evidence of a form of harm perpetrated systematically against women as a group.

However, the view that women are not 'interchangeable' overlooks the impact that violence against individual women has upon all women, and the ways in which women moderate and alter their behaviour in response to violence and its perceived threat.<sup>160</sup> Just as some victims of violence experience that violence as a member of a particular racial or ethnic group, women also experience violence *as women*.<sup>161</sup> Instances of sexual assault are an excellent example – reports of rape are often accompanied by media and police exhortations to women to alter their behaviour by not walking alone, avoiding certain areas at night, and locking their doors;<sup>162</sup> women who read or hear these messages understand that they could be the 'next victim' and that the last victim was targeted *because she was a woman*.

Moreover, the exclusion of gender/sex from grounds of hatred in hate crime laws reinforces the message that gendered crime such as sexual assault and domestic violence is 'just part of life' rather than being an aggravated form of violence.<sup>163</sup>

The laws in Australia relating to hate crimes are a further example of the state's failure to recognise the systematic nature of harms committed against women. Hate crimes stand as recognition that certain types of harm do not affect merely the individual targeted, but also the group to which that individual belongs (or is perceived by the offender as belonging). There is no reason why gendered hate crime should be treated any differently in this respect to other forms of hate crime, however it remains largely unrecognised in Australia either through express inclusion in legislation, or through prosecution. The omission of gender from these provisions reflects the same failure to recognise women as a section of the public that excludes gender-based violence from inclusion within the parameters of terrorism offences.

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<sup>160</sup> Stanko (1990), Chapter 2; Angelari (1997), pp 428-30.

<sup>161</sup> Stanko (1990), p 66.

<sup>162</sup> Easteal (1994), p 1.

<sup>163</sup> Brown (2004), pp 596-7.

## *Conclusion*

In this chapter, I have commenced my examination of the ways in which the differential understandings of domestic violence and terrorism that are constructed both within the law and society generally underpin their different legal treatment. Although providing a measure of protection to free speech, Australian law does prohibit speech and speech acts that violate the harm principle, by creating the potential for violence against others.

However, the regulation of dangerous speech reflects the existence of two divergent discourses: the discourse of harm or potential harm, and the discourse of morality. Material that can be said to encourage or promote terrorist violence, even indirectly, is prohibited on the basis of the potential for harm inherent in such material, which is not reliant on standards of morality; this extends to the mere possession of such material where it is interpreted as 'connected to' a terrorist act. On the other hand, material depicting violence against women is interpreted in the context of 'generally accepted standards of morality', resulting in the widespread depiction and acceptance of violence against women in various media, even where that might be said to indirectly incite or encourage violence against women. In this respect, the law is at odds with radical feminist discourse that focuses upon the harm and potential harm caused by pornographic material.

Further, federal sedition law and state-based hate speech laws prohibit race and religion-based violent speech but generally ignore gender-based hate speech. This can be attributed to the exclusion of women from the public realm, as discussed in Chapter 2.3, but also to the failure to recognise gendered hate speech as gendered hate speech, rather than derogatory comments applied to individual women. This is further evidence of the personalisation of violence against women that renders it non-ideological, as examined in Chapter 2.2.

In Chapter 3.2 I continue this discussion in the context of how violence is controlled pre-emptively, through the different systems of civil orders available for those with a propensity to commit violence, terrorist or domestic.

## CHAPTER 3.2      CONTROLLING TERROR: CIVIL MECHANISMS FOR THE PREVENTION OF VIOLENCE

Of all the tasks of government the most basic is to protect its citizens against violence.<sup>1</sup>

In Chapter 3.1, I examined the law's differential treatment of the incitement of violence through its regulation of 'dangerous speech'. In this chapter, I continue the exploration of how the state manages the risk of commission of violence, focusing upon the civil mechanisms available for the pre-emptive control of terror.

The statement by former United States Secretary of State John Foster Dulles, above, emphasises the state's role in recognising threats of harm to its citizens, and protecting against those threats. In relation to both terrorism and domestic violence, there are legislative schemes in place for the issuance of (respectively) control orders and protection orders, which both have the goal of preventing violence through restrictions imposed upon respondents.

However, the mechanisms by which the state pursues its objective of preventing harm differ according to the type of violence sought to be regulated. These differences are reflective of the distinction already identified in Chapter 2.3 between the public conceptualisation of harm in relation to terrorism, and the private in relation to domestic and family violence. They also, in certain respects, reflect and reinforce the notion of terrorism as a form of ideological violence compared to domestic violence as a problem related to individual persons or relationships discussed in Chapter 2.2.

In the first section of this chapter, I outline the legislative schemes for issuance of control orders in relation to terrorism,<sup>2</sup> and protection orders in relation to domestic violence. I argue that the concept of national security that underlies

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<sup>1</sup> Dulles (1957), p 715.

<sup>2</sup> I do not consider here 'preventative detention orders', which allow for periods of detention without charge of those suspected of involvement in terrorist activity for the purpose of preventing an imminent terrorist attack. For commentary on preventative detention see for example McInnis (2006); Lynch and Reilly (2007); Rose and Nestorovska (2007).

the control order legislation is a gendered one that constructs a certain type of harm as constituting a 'threat to the state'. Associated with this is the discourse of 'risk' that surrounds discussions of controlling terror, but not control of domestic violence.

In the second section, I compare the different schemes both in terms of the legislation itself, and how it is applied. In the course of this examination, I draw upon the analysis from Chapters 2.2 and 2.3 and further examine the different discursive mechanisms used in legislation and by courts to describe domestic violence and terrorism. The different civil order responses available both reflect and perpetuate these different constructions of violence.

Throughout this chapter, I further explore the ways in which the law's phallocentrism is reflected in the differential constructions of terrorism and domestic violence.<sup>3</sup> As in the previous chapter, I am concerned to examine the ways in which these constructions of violence reflect power relationships that are manifested within the law and within society more broadly.

### *Legislative Regimes for Terrorism Control Orders and Domestic Violence Protection Orders and the Gendered Concept of 'National Security'*

As set out above, Australian legislation applies two different regimes in relation to what might generally be described as 'control orders' – that is, orders that restrict people's movements, on the civil standard of proof, resulting in a criminal offence if violated. The purpose of the different regimes is essentially the same: to protect against the risk of harm occurring. In the case of domestic violence 'protection orders', the risk protected against is the risk of an act of domestic violence being perpetrated by the respondent against a partner or

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<sup>3</sup> Smart (1989), pp 27ff.



family member.<sup>4</sup> In the case of terrorism ‘control orders’ it is to protect against the risk of an act of terrorism.<sup>5</sup>

In *Thomas v Mowbray*,<sup>6</sup> the High Court by majority found that federal control order provisions were constitutionally valid and supported by the defence power. However, as a precautionary measure, all states and territories had agreed to delegate their legislative power to the Commonwealth.<sup>7</sup> This form of delegation is permissible pursuant to section 51(xxxvii) of the Constitution, but is exercised rarely, and only in situations where the problem is perceived as important enough to warrant joint cooperation across all states and territories.<sup>8</sup>

By contrast, despite the publication of Model Domestic Violence Laws in 1999,<sup>9</sup> intended as a template for state and territory laws, each jurisdiction continues to maintain a separate regime in relation to the granting of protection orders in domestic violence matters.<sup>10</sup> The Australian government has ratified the *Convention on the Elimination of All Forms of Discrimination against Women*,<sup>11</sup> and as a member of the United Nations, has obligations to ‘pursue by all appropriate means and without delay a policy of eliminating violence against women’ pursuant to the *Declaration on the Elimination of Violence Against Women*.<sup>12</sup> These international obligations arguably enliven the external affairs power, such that international obligations to suppress and eliminate violence against women could form the basis of federal legislation.<sup>13</sup>

The fact that Australia has not enacted federal legislation to suppress domestic violence suggests that violence against women is not conceptualised as a

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<sup>4</sup> For examples see *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9; *Domestic and Family Violence Act 2007* (NT) s 3; *Domestic and Family Violence Act 1989* (Qld) s 3A; *Family Violence Protection Act 2008* (Vic) preamble; *Family Violence Act 2004* (Tas).

<sup>5</sup> Explanatory Memorandum, *Anti-Terrorism Act (No 2) 2005* (Cth), pp 1, 15.

<sup>6</sup> *Thomas v Mowbray* (2007) 233 CLR 307. Kirby J dissented from the majority on this point.

<sup>7</sup> Justice Hayne also found that Subdivision B of Division 104 was supported by the reference power; cf Kirby J.

<sup>8</sup> See for example Explanatory Memorandum, *Terrorism (Commonwealth Powers) Act 2002* (NSW).

<sup>9</sup> PADV (1999).

<sup>10</sup> For an overview see National Council to Reduce Violence Against Women and Children (June 2009).

<sup>11</sup> *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981).

<sup>12</sup> *Declaration on the Elimination of Violence Against Women*, GA Res 48/104, UN GAOR, 48<sup>th</sup> sess, 85<sup>th</sup> plenary mtg, Agenda Item 111, UN Doc A/Res/48/104 (20 December 1993), Article 4.

<sup>13</sup> These instruments have supported the enactment of offences of sexual trafficking and child sex tourism: Bronitt and McShery (2010), p 149.

threat to national security in the way that terrorism is conceived.<sup>14</sup> National security is, I suggest, a gendered construct in the same way that the concept of 'public' in the context of terrorism legislation is a gendered construct.<sup>15</sup> What is defined as a threat to national security will, within the phallogentric context of the law, be what constitutes a threat to masculinist interests.<sup>16</sup> The concept of national security is based on the protection of the state from threats exterior to it.<sup>17</sup> Acts of violence that threaten public places and buildings, and potentially the government itself, will, within this paradigm, constitute a threat to national security.<sup>18</sup>

Threats to national security, associated with 'moral panics' about sudden epidemics of crime, have also been used to justify national laws in a range of other areas, including people smuggling, organised crime, sexual slavery and cybercrime.<sup>19</sup> In the case of people smuggling laws, the trend towards tougher immigration policy was accompanied (and facilitated) by a discursive transition from discussion of immigration policy towards 'national security'.<sup>20</sup> This rhetorical shift in government policy illustrates that the concept of 'national security' does not pre-exist the discourse in which it is constructed. The state determines and constructs threats to national security in the context of political expediency and the relations of power that operate both in the political and legal spheres.

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<sup>14</sup> 'National security' is defined as 'Australia's defence, security, international relations or law enforcement interests': *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 8, while 'security' is defined in the *Australian Security Intelligence Organisation Act 1979* (Cth) s 4 as:

- (a) 'The protection of, and of the people of, the Commonwealth and the several States and Territories from: (i) espionage; (ii) sabotage; (iii) politically motivated violence; (iv) promotion of communal violence; (v) attacks on Australia's defence system; or (vi) acts of foreign interference; whether directed from, or committed within Australia or not; and
- (aa) the protection of Australia's territorial and border integrity from serious threats; and
- (b) The carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).'

<sup>15</sup> The gendered nature of mainstream conceptions of security is discussed in Terriff et al (2000), Chapter 4.

<sup>16</sup> Smart (1989), pp 27ff.

<sup>17</sup> Hamber et al (2006), p 489; Zedner (2009), p 36.

<sup>18</sup> Threats of terrorism would clearly fall within the category of 'the protection of, and of the people of, the Commonwealth ... from politically motivated violence'.

<sup>19</sup> In relation to the seepage of terrorism laws into other areas of criminal activity see Bronitt (2011).

<sup>20</sup> Bronitt and McSherry (2010), pp 945, 990.

On the other hand, violence that impacts almost exclusively on women, within a domestic context, is not conceptualised as a threat to national security, even though the infliction of such violence is widespread and systematic. The different legislative regimes in relation to civil orders are outlined below.

### *Terrorism Control Orders*

The federal scheme for issuing control orders is contained in Division 104 of the *Criminal Code Act 1995* (Cth), which was introduced by the *Anti-Terrorism Act (No 2) 2005* (Cth). One of the principal features of the *Anti-Terrorism (No 2) Act* was said to be ‘... a new regime to allow for ‘control orders’ that will allow for the overt close monitoring of terrorist suspects who pose a risk to the community’.<sup>21</sup>

A senior AFP member may make an application to an issuing court for an interim control order.<sup>22</sup> The Attorney-General’s consent is required for such an application, unless it is urgent, in which case consent must be obtained after the event.<sup>23</sup> The applicant must subsequently elect whether to confirm the control order, and if such an election is made, must serve the respondent with the facts provided to the court as to why the order should be made and the explanation of the reasons for each of the conditions. There is an exception, however, where compliance would require the disclosure of information that would prejudice national security, or put at risk law enforcement operations or public safety.<sup>24</sup>

The respondent is entitled to be heard at the confirmation hearing, and the court may then declare the order void, revoke the order, or confirm the order with or without variation.<sup>25</sup> A person in respect of whom a confirmed order is made may apply at any time to revoke or vary it.<sup>26</sup> The Commissioner of the AFP must

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<sup>21</sup> Explanatory Memorandum, *Anti-Terrorism (No 2) Act 2005* (Cth).

<sup>22</sup> *Criminal Code Act 1995* (Cth) ss 104.2, 104.3.

<sup>23</sup> *Criminal Code Act 1995* (Cth) ss 104.8, 104.9.

<sup>24</sup> *Criminal Code Act 1995* (Cth) s 104.12A.

<sup>25</sup> *Criminal Code Act 1995* (Cth) s 104.14.

<sup>26</sup> *Criminal Code Act 1995* (Cth) s 104.18.

apply to the court to revoke the order, or vary conditions, if either the order itself or any condition is no longer necessary.<sup>27</sup> The Commissioner may also apply to have conditions added to an existing control order if he or she considers on reasonable grounds that it would substantially assist in preventing a terrorist act.<sup>28</sup>

The test for the granting of a control order is whether the order would substantially assist in preventing a terrorist attack, or whether the subject of the order provided training to, or received training from, a terrorist organisation. The court is required to be satisfied in relation to one of these on the balance of probabilities at the time of making an interim control order, at the time of determining whether the order should be confirmed, and at the time of any application for revocation or variation of the order.<sup>29</sup> Each of the obligations, prohibitions and restrictions to be placed on the subject must be reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.<sup>30</sup> The same applies to any additional conditions the Commissioner applies to have added to an existing control order.<sup>31</sup>

## *Domestic Violence Protection Orders*

Each state and territory has a legislative scheme in place for the granting of civil orders variously referred to as 'domestic violence orders', 'family violence orders', 'intervention orders' and 'family violence intervention orders'.<sup>32</sup> The legislative schemes vary across jurisdictions, and some of these variations are

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<sup>27</sup> *Criminal Code Act 1995* (Cth) s 104.19.

<sup>28</sup> *Criminal Code Act 1995* (Cth) s 104.23(1).

<sup>29</sup> *Criminal Code Act 1995* (Cth) ss 104.4(1)(c), 104.14, 104.20.

<sup>30</sup> *Criminal Code Act 1995* (Cth) s 104.4(1)(d) (interim control orders).

<sup>31</sup> *Criminal Code Act 1995* (Cth) s 104.24(1)(b).

<sup>32</sup> These legislative schemes are contained in *Domestic Violence and Protection Orders Act 2008* (ACT); *Crimes (Domestic and Personal Violence) Act 2007* (NSW); *Domestic and Family Violence Act 2007* (NT); *Domestic and Family Violence Act 1989* (Qld); *Domestic Violence Act 1994* (SA) replaced by *Intervention Orders (Prevention of Abuse) Act 2009* (SA); *Family Violence Act 2004* (Tas); *Family Violence Protection Act 2008* (Vic); *Restraining Orders Act 1997* (WA). For an overview of the various provisions see Annexure B.

outlined in more detail below. The various provisions are outlined in Annexure B. Orders can be obtained in most jurisdictions on the application of police, or of the person seeking an order.<sup>33</sup> Orders can be obtained in all jurisdictions for the protection of family members, including domestic partners and former partners, and in some jurisdictions extends to persons outside the family and domestic relationship.<sup>34</sup>

Before making an order, a court must usually be satisfied that there is a likelihood of an act of violence occurring absent the making of an order,<sup>35</sup> and some jurisdictions have an additional requirement that an act of violence has occurred in the past.<sup>36</sup> A protection order may include a number of conditions, including restrictions on contacting the applicant and other specified persons, 'ouster conditions' removing a person from her or his place of residence, and restrictions on attending certain places associated with the applicant.<sup>37</sup>

In late 2009, the Australian Government Solicitor prepared a report reviewing all Australian and New Zealand legislation relating to the making of protection orders. The report, prepared a decade after the publication of the Model Domestic Violence Laws report, found that there was general consistency across jurisdictions in terms of the types of conduct that may constitute domestic violence, and the grounds on which protection orders may be made; the types of orders and the kinds of prohibitions, restraints and conditions that

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<sup>33</sup> *Domestic Violence and Protection Orders Act 2008* (ACT) s 18; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 48; *Domestic and Family Violence Act 2007* (NT) s 28; *Domestic and Family Violence Act 1989* (Qld) s 14; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 20; *Family Violence Act 2004* (Tas) s 106B; *Family Violence Protection Act 2008* (Vic) s 45; *Restraining Orders Act 1997* (WA) s 25.

<sup>34</sup> *Domestic Violence and Protection Orders Act 2008* (ACT) s 15; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 3 and 5; *Domestic and Family Violence Act 2007* (NT) s 9; *Domestic and Family Violence Act 1989* (Qld) s 15; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 7 (not restricted to certain relationships); *Family Violence Act 2004* (Tas) (restricted to intimate relationships); *Family Violence Protection Act 2008* (Vic) s 8; *Restraining Orders Act 1997* (WA) s 7 (not restricted to certain relationships).

<sup>35</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 16(1); *Domestic and Family Violence Act 2007* (NT) s 18; *Domestic and Family Violence Act 1989* (Qld) s 20; *Domestic Violence Act 1994* (SA) s 4 (now see *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 6; *Family Violence Act 2004* (Tas) s 16; *Family Violence Protection Act 2008* (Vic) s 74; *Restraining Orders Act 1997* (WA) s 11A.

<sup>36</sup> This is a requirement in the ACT, Tasmania and Victoria.

<sup>37</sup> For available conditions see *Domestic Violence and Protection Orders Act 2008* (ACT) ss 35, 40, 48, 54, 76; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 35; *Domestic and Family Violence Act 2007* (NT) ss 21, 22, 24; *Domestic and Family Violence Act 1989* (Qld) ss 17 and 25; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) ss 5 and 10; *Family Violence Act 2004* (Tas) ss 16, 106B; *Family Violence Protection Act 2008* (Vic) ss 81, 93, 95; *Restraining Orders Act 1997* (WA) ss 13, 14, 36.

an order may impose on the person against whom it is made; the capacity for temporary orders to be made or obtained quickly by police in emergency situations; and the (criminal) effect of contravening a domestic violence protection order.<sup>38</sup>

The report also found differences across jurisdictions, specifically variations in the maximum penalties for breaching protection orders, in requirements on police to investigate if a reasonable suspicion exists of domestic violence, and in the approaches to counselling and rehabilitation, with some, but not all, jurisdictions allowing counselling as a condition of a protection order for the perpetrator.<sup>39</sup>

In the following section, I examine particular differences between the protection order and control order regimes. I argue that these differences broadly reflect the differential constructions of violence outlined in Chapters 2.2 and 2.3 – of terrorism as ideologically-motivated violence directed against the public, and of domestic violence as a form of private violence motivated by human emotion. I also explore the ways in which some of the differences between the civil order regimes further operate to differentially construct these types of violence and in particular terrorism as an especially serious form of crime. I am also concerned with the power relations underlying these discursive mechanisms, and the interests represented by the differential constructions.

### *Differences Between the Civil Order Regimes*

#### *Evaluating the Goals of Control Orders and Protection Orders*

A key point of distinction between state approaches to controlling terror in different contexts is the concept of risk. Risk management, and associated processes for identifying and managing suspect populations, represents a

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<sup>38</sup> Australian Government Solicitor (2010).

<sup>39</sup> Australian Government Solicitor (2010).

central plank in the management of terrorism.<sup>40</sup> This is driven by media-fed perceptions of the risk of terrorism, along with the need for the state to protect its own interests by being seen to manage the risks of harm to national security.<sup>41</sup> Consistently with the conceptualisation of terrorism as an ideological crime that threatens the general public, the enunciated purpose of terrorism control orders is to protect the community against the risk of terrorist violence.<sup>42</sup>

By contrast, domestic violence, as discussed in Chapter 2.3, is constructed as a crime that occurs within the context of individual relationships – a ‘private harm’. Consistently with that construction, the purpose of protection orders is expressed to be the protection and safety of individuals within ‘family relationships’ or ‘domestic relationships’, and the reduction of the incidence of violence within such relationships.<sup>43</sup> Protection order legislation in the ACT goes so far as to describe domestic violence as ‘... a particular form of interpersonal violence that needs a greater level of protective response’,<sup>44</sup> emphasising the perception that domestic violence has its origin not in the perpetrator but in the relationship.

The discourse of risk that surrounds the treatment of terrorism is largely absent from legal and policy documentation relating to domestic violence. This may be about to change, with the recent ALRC Family Violence Report recommending that risk assessment frameworks and tools be promoted in relation to family dispute resolution in federal family courts.<sup>45</sup> The report also made note of the risk assessment framework implemented by the Victorian government for use

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<sup>40</sup> Zedner (2009), p 78. See also National Counter-Terrorism Committee, ‘National Counter-Terrorism Plan’, 2<sup>nd</sup> ed, Sept 2005 (including amendments introduced 1 October 2008), <<http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/85A16ADB86A23AD1CA256FC600072E6B?OpenDocument>> (viewed 15 January 2010) [13].

<sup>41</sup> Zedner (2009), pp 80-1.

<sup>42</sup> Explanatory Memorandum, *Anti-Terrorism Act (No 2) 2005* (Cth), pp 1, 15.

<sup>43</sup> For examples see *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9; *Domestic and Family Violence Act 2007* (NT) s 3; *Domestic and Family Violence Act 1989* (Qld) s 3A; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 5 (objectives include prevention of domestic and non-domestic abuse); *Family Violence Act 2004* (Tas), long title; *Family Violence Protection Act 2008* (Vic) preamble.

<sup>44</sup> *Domestic Violence and Protection Orders Act 2008* (ACT) s 6.

<sup>45</sup> ALRC (2010a), Recommendation 21-2.

by all relevant stakeholders in family violence matters, and recommended that other jurisdictions adopt a similar framework.<sup>46</sup>

Despite the use of some risk assessment processes in other jurisdictions,<sup>47</sup> Victoria appears to be the only state or territory where a full risk assessment process has been adopted in relation to family violence.<sup>48</sup> The identification and management of risk of harm does not appear to be a feature of the treatment of domestic violence in Australia, although there has been a move towards a risk-based model in various parts of the United Kingdom.<sup>49</sup> A number of factors have been identified in domestic violence research as associated with risk of domestic homicide. These include women's predictions of future risk and its likely severity; evidence of stalking; recent termination of a relationship by the woman; access to or ownership of guns; threats to kill; serious injury in a prior abusive incident; threats of suicide by the male partner; drug and alcohol abuse by the male partner; forced sex; obsessiveness/extensive jealousy and extensive dominance.<sup>50</sup>

The absence of 'risk discourse' in relation to domestic violence effectively means that there is limited ability on the part of police, courts and other professionals to assess the risk of violence to a perpetrator's current or future partner/s. Although there is little research currently available into repeat offending/victimisation in domestic violence cases,<sup>51</sup> research demonstrating that the use of domestic violence is functional and a means of maintaining control within a relationship<sup>52</sup> suggests that perpetrators are likely to constitute a risk of violence in successive domestic relationships. Indeed, there have been

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<sup>46</sup> ALRC (2010a), p 843.

<sup>47</sup> ALRC (2010a), [29.30]-[29.34].

<sup>48</sup> Dept of Human Services (Vic) (2007). The Victorian Police have developed their own risk assessment processes based on this framework: Victoria Police (2005).

<sup>49</sup> Hoyle (2008).

<sup>50</sup> Hoyle (2008), pp 326-7.

<sup>51</sup> Rollings and Taylor (2008), p 3. One project that examined the effectiveness of different forms of intervention found that violence was more likely not to recur when a protection order was sought together with police intervention, rather than police intervention alone: M Young et al (2006).

<sup>52</sup> Fischer et al (1993), pp 2121-6; Dobash and Dobash (1996-7); Mouzos and Makkai (2004), p 44; Hunter (2006b), p 740.



many reported instances where perpetrators of lethal domestic violence have been noted as having previous histories of violence against other partners.<sup>53</sup>

One of the consequences of characterising domestic violence as a feature of individual relationships is that the law fails to acknowledge the risk of violence posed by the perpetrator and carried with him from one relationship to the next. A system of protection orders that focuses on protection of a particular individual, who at a point in time is in a specified relationship with a perpetrator, obscures the risk inherent in the perpetrator himself and his ideological predisposition to violence. A civil orders regime designed to protect other women from this kind of violence might, for example, require convicted domestic violence perpetrators to report to police upon entering into a new domestic partnership, or require notification of the new partner, features absent from any scheme of protection orders currently in existence. It might also include an obligation on police and other professionals to report suspected instances or risk of abuse.<sup>54</sup> It might also include the ability to issue an order restraining the defendant from committing violence against *any* woman, rather than just an individual.<sup>55</sup>

Despite the existence of criminal laws in all Australian jurisdictions that allow the prosecution of domestic violence, the law's response to feminist agitation about

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<sup>53</sup> *R v Bell* [2000] QCA 485 (Unreported, Williams JA, Pincus JA, Cullinane J, 23 November 2000) (seven previous convictions for assault against applicant for restraining order and prior conviction for assault against former partner); *R v Bond* [2001] NSWSC 1059 (Unreported, James J, 7 December 2000) (offender had previously been convicted of manslaughter of a woman he viciously assaulted after a date); *R v Wilson* [2001] QCA 215 (Unreported, McPherson and Williams JJA, Atkinson J, 1 June 2001) (convicted of wounding with intent to disfigure – previous history of violence against victim and other women); *Miles v R* [2002] NSWCCA 276 (Unreported, Stein JA, Bergin J, Carruthers JA, 18 July 2002) [51]-[57] where the offender had a previous conviction for manslaughter of his girlfriend; *R v Lynch* [2002] NSWSC 1140 (Unreported, Whealy J, 20 November 2002) (offender not seen as a risk to the community despite two prior convictions for assault, one against the victim); *R v Sievers* [2004] NSWCCA 463 (Unreported, Levine, Simpson and Barr JJ, 17 December 2004) (murder conviction of partner preceded by a murder conviction for a previous partner 20 yrs prior); *R v Lyon* [2006] QCA 146 (Unreported, Jerrard JA, Fryberg and Douglas JJ, 21 March 2006) (breach of restraining order against ex-wife followed by domestic dispute with new partner and grievous bodily harm of ex-wife the following day); *Norris v Sanderson* [2007] NTSC 1 (Unreported, Riley J, 12 January 2007) (previous breach of restraining orders and threats against ex-partner); *R v Ferguson* [2007] NSWSC 949 (Unreported, Michael Grove J, 27 August 2007) (conviction for domestic assault 27 years ago but considered to be not relevant to sentence); *R v Robinson* [2010] VSC 10 (Unreported, Whelan J, 29 January 2010) (earlier conviction for manslaughter of previous partner followed by murder of ex-partner).

<sup>54</sup> Tasmania and Northern Territory have enacted such a provision in relation to adult abuse: *Domestic and Family Violence Act 2007* (NT) s 124A; *Family Violence Act 2004* (Tas) s 38 (not in force as at December 2011).

<sup>55</sup> For the application of such orders in the US context see Coukos (1999-2000), p 33.

domestic violence from the 1970s onwards took the form of a focus on civil orders rather than criminalisation.<sup>56</sup> There is evidence to suggest that domestic violence protection orders are used as a substitute for, or alternative to, criminal justice intervention,<sup>57</sup> and that it is usually incidents involving the infliction of highly visible injuries that are prosecuted.<sup>58</sup> Some state and territory protection order legislation makes reference to holding the perpetrator responsible and accountable for his actions, suggesting that the civil scheme of protection orders potentially operates as an alternative to criminal prosecution.<sup>59</sup>

The decriminalisation of domestic violence is consistent with legal discourse's construction of domestic violence as a 'problem' both of the relationship and of individual pathology, which is best dealt with by separation of the parties, or 'treatment' of the individual.<sup>60</sup> Legislation in the ACT, Northern Territory, Victoria and Western Australia provides for counselling or treatment of the respondent as one of the possible conditions of a protection order, further suggestive of an avenue of 'reform' for perpetrators external to the criminal justice system.<sup>61</sup> This pathologisation of offenders in domestic violence is part of a trend towards therapeutic jurisprudence evidenced, for example, by the growth of specialist drug courts and family violence courts.<sup>62</sup> By contrast, this rehabilitative focus is absent from most official documentation in relation to terrorism; the focus is

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<sup>56</sup> Hunter (2006b), pp 737-8; Douglas (2007), pp 221-2; Bronitt and McSherry (2010), pp 809-11.

<sup>57</sup> Fehlberg and Behrens (2008), pp 200-3.

<sup>58</sup> In Queensland, Douglas found that of 694 applications for protection orders in 2001, there were only three prosecutions despite numerous allegations of criminal offences having occurred: Douglas (2003-04).

<sup>59</sup> Conditions of NT protection orders include such obligations as necessary or desirable to ensure that the defendant accepts responsibility for violence and encourage him to change behaviour: *Domestic and Family Violence Act 2007* (NT) s 21. See also preambles to *Domestic and Family Violence Act 2007* (NT) and *Family Violence Protection Act 2008* (Vic).

<sup>60</sup> Hunter (2006b), pp 743-9.

<sup>61</sup> *Domestic Violence and Protection Orders Act 2008* (ACT) s 90; *Domestic and Family Violence Act 2007* (NT) s 24 (the respondent must consent); *Family Violence Protection Act 2008* (Vic) Part 5; *Restraining Orders Act 1997* (WA) s 9(1)(i). In Victoria, an assessment must be made if a protection order is issued and the offender must be found eligible unless it is not appropriate for him to attend counselling. Note that this may also be a condition of a control order if the subject consents: *Criminal Code Act 1995* (Cth) s 104.5(3)(l), (6).

<sup>62</sup> Specialist family violence courts exist in some US states and in Australia have been established in NSW (Wagga Wagga and Campbelltown), Queensland (Rockhampton), SA, in Victoria (Ballarat and Heidelberg) and in WA. A new Family Violence court has recently been announced by the ACT government: 'New court to deal with family violence', *ABC News Online*, 25 Nov 2010,

<<http://www.abc.net.au/news/stories/2010/11/25/3075860.htm>>. See ALRC (2010a), Section 32.

clearly on improved intelligence and prosecution as a means of dealing with the problem, consistent with the characterisation of the terrorist as an ideologue.<sup>63</sup>

One possible explanation for the emphasis on the civil regime is that police and prosecutors may be reluctant to proceed with criminal charges where the victim of the violence is reluctant to do so.<sup>64</sup> However, this is at odds with legislatively-mandated police investigation where a reasonable suspicion of domestic violence exists.<sup>65</sup> Police reluctance to bring charges for domestic violence contrary to legislative mandate illustrates the way in which crime is constructed not only through law itself, but also the way it is implemented by police and prosecutors.<sup>66</sup>

The law's construction of domestic violence is paralleled in the language of government initiatives at both federal, and state and territory, levels. At the federal level, the Attorney-General's Department, within the previous Australian government in 2006, instituted a range of reforms to family law proceedings. These reforms included the development of Family Relationship Centres, Specialised Family Violence Services and a *Family Law Violence Strategy 2006*, focused upon the achievement and sustenance of 'positive family relationships'.<sup>67</sup> The reforms focused upon enhancing capacity within families for dealing with domestic violence as an alternative to criminal justice responses. Despite ostensibly addressing issues of family violence, the legislation sent 'mixed messages', with a continuing emphasis in family violence

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<sup>63</sup> For example, the National Counter Terrorism Committee (2005), includes in its section on 'Prevention and preparedness' the following headings (with no reference to education or rehabilitation of offenders/potential offenders): Intelligence and investigation; Threat assessment; National Counter-Terrorism Alert System; Jurisdictional responses; Public awareness; Information management; Border control; Transport security; Aviation; Maritime; Surface transport; Dignitary and foreign mission protection; Critical infrastructure protection; and Regulation of hazardous material. Governments in both Australia and the United Kingdom have, however, indicated a move towards prevention through ensuring that those at risk of developing extremist views are given access to health, education and community participation: Counter-Terrorism White Paper (2010), pp 63-8; Bergin (2009).

<sup>64</sup> Douglas (2007), pp 221-2. A fear of retaliation is a significant factor affecting victims' willingness to proceed with prosecution: Holder (2001), p 9.

<sup>65</sup> Qld, NSW and WA are the only jurisdictions where police have an obligation to investigate on reasonable suspicion: National Council to Reduce Violence against Women and Children (June 2009). NT has a system of mandatory reporting introduced in 2009: COAG (2011), p 8.

<sup>66</sup> Despite the mandatory investigation provisions, police and prosecutors still retain a discretion as to whether to investigate or prosecute, which in Australia is not generally subject to review: *R v Metropolitan Police Commissioner; ex parte Blackburn* [1968] 2 QB 118, affirmed in *Hinchliffe v Commissioner of Police of the AFP* (Unreported, Federal Court of Australia, 10 December 2001).

<sup>67</sup> Attorney-General's Department (2006), [21].

cases on the importance of any child maintaining a meaningful relationship with both parents.<sup>68</sup> The subsequent federal government took a different approach, focused on a broader definition of ‘family violence’ and strengthening the capacity of courts to vary the shared parenting approach where there is a history of family violence.<sup>69</sup>

The Attorney-General’s Department also incorporates Family Violence Prevention Legal Services for Aboriginal and Torres Strait Islander communities, with a focus on provision of assistance to victims-survivors of domestic violence, in particular in obtaining restraining orders and victim’s compensation, or in family law proceedings.<sup>70</sup> The principles underlying the program (not exclusive) are that all individuals have the right to be free from violence, that family violence is unacceptable, and that the community has a responsibility to work towards the prevention of family violence. While the Operational Framework does indicate that officers may assist with referrals to police, references to family violence as a crime and to criminal justice responses generally are notably absent.

By contrast, it appears, from their scarce use to date, that control orders in terrorism cases will be used primarily in situations where criminal justice options have been exhausted, or are not available because there is insufficient evidence to prosecute. In Australia, only two control orders have been applied for and made to date.<sup>71</sup> The first was an interim control order against Jack Thomas made on 27 August 2007, nine days after the Victorian Court of Appeal quashed criminal convictions against him.<sup>72</sup> In his dissenting judgment in the

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<sup>68</sup> Fehlberg and Behrens (2008), p 290.

<sup>69</sup> See the *Family Law Amendment (Family Violence) Bill 2010: Exposure Draft and Consultation Paper*, available for review at <<http://www.ag.gov.au/familyviolencebill>> (reviewed 6 Dec 2010), and see the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (introduced to House of Representatives 24 March 2011, not enacted as at 18 July 2011). As at September 2011, submissions were being sought in relation to the interplay between Commonwealth laws and family violence: ALRC, *Family Violence and Commonwealth Laws Inquiry*, details available at <<http://www.alrc.gov.au/inquiries/family-violence-and-commonwealth-laws>> (viewed 25 Sept 2011).

<sup>70</sup> AG’s Department Indigenous Law and Justice Branch (2006).

<sup>71</sup> AFP (2007); AG’s Department (2009). For a discussion of control orders made in the UK see Arden (2006), pp 831-3.

<sup>72</sup> *Thomas v R* [2006] 14 VR 475.

unsuccessful constitutional challenge Thomas made to Division 104 of the Criminal Code, Justice Kirby stated:<sup>73</sup>

This sequence of events inevitably gave rise to an appearance, in the plaintiff's case, of action by the Commonwealth designed to thwart the ordinary operation of the criminal law and to deprive the plaintiff of the benefit of the liberty he temporarily enjoyed pursuant to the Court of Appeal's orders.

The second was an order in relation to David Hicks, made as an interim control order on 21 December 2007 and confirmed on 19 February 2008.<sup>74</sup> The order was made in advance of Hicks' release from prison on 29 December 2007, after serving a nine-month sentence imposed by the US Military Commission in Guantanamo Bay and served in Adelaide's Yatala Prison.<sup>75</sup> No control orders have been applied for subsequently.<sup>76</sup>

The different concepts of risk and usages underlying these legislative regimes, I suggest, reflect the masculinist undercurrent of the law. How are masculinist interests served by the differences outlined above? Some might argue that a control order regime that places tight restrictions on potential terrorists benefits everybody in the community, and that no issues of gender are therefore involved. However, as MacKinnon notes, events such as September 11 are treated so seriously because men just as much as women are victims of such 'public' attacks.<sup>77</sup> As discussed in Chapter 2.3, an attack in the public domain constitutes an attack on masculinist interests.<sup>78</sup> By contrast, domestic violence affects women predominantly, and therefore is not constructed as a threat to the 'public interest' in the same way as terrorism.

However, the law's masculinist influence goes deeper than the gender identity of individual victims. Terrorism is a crime that directly, and sometimes

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<sup>73</sup> *Thomas v Mowbray* (2007) 233 CLR 307 per Kirby J at [182].

<sup>74</sup> 'Counter Terrorism and Related Cases', *Australian Government Attorney-General's Department website*, <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Nationalsecurity\\_Counter-terrorismandrelatedcases](http://www.ag.gov.au/www/agd/agd.nsf/Page/Nationalsecurity_Counter-terrorismandrelatedcases)> (viewed 8 November 2008).

<sup>75</sup> Penelope Debelle, 'David Hicks: Smile of Freedom' *The Age (online)*, 30 December 2007, <<http://www.theage.com.au/news/national/david-hicks-smile-of-freedom/2007/12/29/1198778767680.html>>.

<sup>76</sup> AG's Department (2009).

<sup>77</sup> MacKinnon (2006).

<sup>78</sup> Thornton (1995), pp 6-7.

expressly, challenges the authority of the state,<sup>79</sup> which has always been associated with the masculine.<sup>80</sup> By contrast, violence by an individual man against an individual woman within the home does not threaten the authority of the state; on the contrary, it reinforces the natural order within the marital relationship.<sup>81</sup> This is by way of contrast with a wife's violence against her husband, which in its lethal form was at common law deemed 'petit treason' and punishable by burning at the stake.<sup>82</sup> Although petit treason no longer exists, a woman's violence against her partner is still conceptualised as a threat to the established order and treated accordingly.<sup>83</sup>

That is not to say that all men are violent towards all women they are intimately involved with – far from it – however when such violence perpetuates power differentials between men and women, masculinist interests benefit. The focus on risk, and in particular the risk to national security, represented by terrorism legitimises restrictive measures for dealing with those risks, potentially at the expense of civil liberties.<sup>84</sup> It is noted that despite criticism from a civil liberties perspective,<sup>85</sup> the test for the granting of control orders remains as indicated above, absent a requirement to demonstrate an imminent act, threat or plan of violence. The absence of risk as a focus in domestic violence means that measures applied are likely to be less restrictive of perpetrator behaviour.

In the following section, I develop this theme through an examination of more specific aspects of the civil order schemes.

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<sup>79</sup> Hogg (2007), p 87. Saul (2006), at pp 4-6 notes that while the characterisation of terrorism as a crime against politics and the state is largely uncontroversial, the same cannot be said of terrorism as a crime against democracy.

<sup>80</sup> Thornton (1995), pp 12-6.

<sup>81</sup> Marcus (1994), pp 19-21; Siegel (1995), p 2122.

<sup>82</sup> Greene (1989). In the US context see Schneider (2000), pp 112-5. See Elizabeth Herring, 8 Sept 1773, The Proceedings of the Old Bailey Ref: t17730908-6.

<sup>83</sup> I expand upon this argument in Chapter 3.4.

<sup>84</sup> Zedner (2009), p 45.

<sup>85</sup> For example see McCulloch (2006), pp 359-60; Niarchos (2008), p 13.

## *General Rules Relating to Application and Making of Orders*

### The Grounds for Making an Order

One of the key differences between the requirements for issuing control orders and protection orders is the necessity of showing that an act of violence has been committed or is likely to be committed.<sup>86</sup> There is no such requirement in relation to an application for a terrorism control order: the court must be satisfied *either* that the respondent has trained with or provided training to, a terrorist organisation, or that the making of an order would substantially assist in preventing a terrorist act.<sup>87</sup> Thus a control order can be imposed upon someone who has never committed or threatened an act of violence. The 'substantially assist' test for control orders may imply some kind of assessment as to the likelihood of a terrorist attack occurring.<sup>88</sup> However even if the possibility of an attack is remote, control orders may still 'substantially assist' in averting that threat.

The test for making of control orders is to be contrasted with the tests applicable in relation to protection orders, which variously require some demonstration of likelihood or a reasonable apprehension that the defendant will commit an act of domestic violence.<sup>89</sup> In addition, provisions in the ACT, Tasmania and Victoria all require that an act of domestic violence (or a threat) has already occurred.<sup>90</sup> Even where not expressed in the legislation, a requirement of repetition of conduct has also been interpreted as a requirement.<sup>91</sup> The ALRC has recommended that it be a ground for obtaining an order if there is a reasonable fear of violence (not a subjective fear) without the requirement of a past act of

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<sup>86</sup> As noted by McCulloch (2006), p 360.

<sup>87</sup> *Criminal Code Act 1995* (Cth) s 104.4(1)(c).

<sup>88</sup> The Federal Magistrate found that there was a risk of Hicks engaging in a terrorist act and thus a control order would 'substantially assist' in preventing such an act: *Jabbour v Hicks* (2007) 183 A Crim R 297, 302.

<sup>89</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 16(1); *Domestic and Family Violence Act 2007* (NT) s 18; *Domestic and Family Violence Act 1989* (Qld) s 20; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 6; *Family Violence Act 2004* (Tas) s 16; *Family Violence Protection Act 2008* (Vic) s 74; *Restraining Orders Act 1997* (WA) s 11A.

<sup>90</sup> *Domestic Violence and Protection Orders Act 2008* (ACT) s 46; *Family Violence Act 2004* (Tas) s 16; *Family Violence Protection Act 2008* (Vic) s 74.

<sup>91</sup> *Barkovic v Serenellini* [2000] ACTSC 34 (Unreported, Higgins J, 4 May 2000).

violence.<sup>92</sup> While a purely objective test has the advantage of dispensing with the need for proof of actual fear, the imposition of an objective test has also been criticised for failing to recognise the psychological impact of violence, particularly where there has been a history of control.<sup>93</sup> A purely objective test also overlooks the fact that an accepted measure of the risk of future violence is the victim's perception of the threat and its severity.<sup>94</sup>

In recent years, legislative definitions of family violence have expanded to encompass broader aspects of controlling behaviour than simply physical abuse.<sup>95</sup> However, protection order legislation in two jurisdictions limits the definition of 'domestic violence' or 'family violence' to acts of physical abuse or property damage.<sup>96</sup> This effectively eliminates from the court's jurisdiction acts of social and economic abuse that are frequently associated with acts of violence,<sup>97</sup> as well as psychological abuse which under English law actually constitutes bodily harm.<sup>98</sup> If the philosophy of restricting behaviour perceived as leading to a risk of violence were applied, as it is in relation to terrorism control orders, one would expect to see a more expanded definition of family violence incorporated in the legislation.<sup>99</sup>

Why should the test for making a domestic violence protection order not be whether such an order would 'substantially assist in preventing an act of domestic violence', similar to the test for control orders? That would effectively remove the necessity for an applicant to establish either that an act of domestic

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<sup>92</sup> ALRC (2010a), [7.127-7.132].

<sup>93</sup> Fehlberg and Behrens (2008), p 215.

<sup>94</sup> Hoyle (2008), p 327.

<sup>95</sup> Fehlberg and Behrens (2008), p 203. Most recently see the Family Violence Amendment (Family Violence and Other Measures) Bill 2011 (Cth) s 4AB inserting a control-based definition of family violence with a broad set of indicators.

<sup>96</sup> *Domestic Violence and Protection Orders Act 2008* (ACT) s 13 (does not include emotional or economic abuse); *Domestic and Family Violence Act 1989* (Qld) s 11 (includes intimidation, harassment and threats but not specifically emotional or economic abuse); cf *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8 which now includes emotional and psychological harm and unreasonable and non-consensual denial of autonomy); *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 4 and 13 (includes intimidation with intention to cause the other person to fear physical or mental harm); *Domestic and Family Violence Act* (NT) s 5 (includes intimidation and economic abuse); *Family Violence Act 2004* (Tas) s 7 (includes economic and emotional abuse); *Family Violence Protection Act 2008* (Vic) s 5 (includes financial, emotional and psychological abuse); *Restraining Orders Act 1997* (WA) s 6(1)(d) (includes ongoing behaviour that is emotionally abusive).

<sup>97</sup> Pence and Paymar (1993), pp 2-3; Hunter (2006b), p 740.

<sup>98</sup> *R v Ireland* [1997] 4 All ER 225.

<sup>99</sup> The ALRC has recommended that a common definition of family violence would provide the groundwork for a common approach to risk assessment: ALRC (2010a), p 843.



violence had occurred previously, or the likelihood that it would occur again. It would mean that protection orders could be granted in circumstances where, for example, a new partner had a history of violence against a former partner; following a first act of violence against an applicant, where it was not possible to establish a likelihood of it happening again; or where non-physical forms of abuse were occurring. Alternatively, legislation could contain a presumption that where an act of domestic violence has occurred in the past, it is likely to happen again (with the onus on the respondent to demonstrate otherwise).

The different requirements for the granting of civil orders for domestic violence and terrorism reflect the phallogocentric culture underlying the law.<sup>100</sup> As outlined in Chapter 2.2, terrorism is constructed within legal discourse as the ideological violence of the 'other', therefore control orders are only ever likely to apply to those who are identified as being outside the 'mainstream'. By contrast, domestic violence is a form of violence inflicted by men across a range of cultural, religious and socioeconomic backgrounds. To cast the net for granting of protection orders too wide would have the potential of subjecting a wider range of persons to possible protection order applications, including those who simply 'lost their temper' and 'went too far' on one occasion. Within this 'non-feminist narrative' of domestic violence,<sup>101</sup> the imposition of control orders would represent an impermissible restriction on the liberties of those whose violence is characterised as an 'ordinary human response' to the tensions of a domestic relationship.

It might be counter-argued that if the law were reflective of masculinist interests, it would not provide for protection orders at all because male violence would be condoned. However, the law's apparent protection of the interests of women through the granting of control orders is part of the pattern of inconsistencies within the law that Smart identifies.<sup>102</sup> In providing for protection orders (and in other legal responses to domestic violence) the law reflects society's rhetorical commitment to cooperating with its international obligations to eliminate

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<sup>100</sup> Smart (1989), pp 27ff.

<sup>101</sup> Hunter (2006b), pp 743-55.

<sup>102</sup> Smart (1995), p 143.

violence against women. However, the limitations on criteria for granting of protection orders are simultaneously reflective of an underlying minimisation of harm in domestic violence, as outlined in Chapters 2.2 and 2.3. In this way, the legal system overtly condemns violence while ensuring that those whose violence resonates within the dominant paradigm are not unduly punished.

## Practice in Relation to Applying for Orders

As noted above, control orders can only be sought by AFP members, with the approval of the Attorney-General. By contrast, protection orders in domestic violence matters can generally be sought either by the police or by an 'aggrieved person', which is defined differently across states and territories, with some jurisdictions allowing a broad range of applicants and others restricting it to spouses and particular family members.<sup>103</sup>

There is a diversity of police practice across states and territories in relation to seeking protection orders. Some states and territories follow the model laws regime in requiring officers to seek a protection order unless the applicant is seeking one herself, or unless there is reason not to, which must be recorded.<sup>104</sup> In South Australia and New South Wales, police make the application for the vast majority of protection orders.<sup>105</sup> However, in other jurisdictions, police make the application in a much smaller percentage of cases, reflecting characterisation of domestic violence by some police as a

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<sup>103</sup> *Domestic Violence and Protection Orders Act 2008* (ACT) s 18 (aggrieved person and police); *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 48 (person seeking order or police); *Domestic and Family Violence Act* (NT) s 28 (police officer, person in domestic relationship or someone on their behalf); *Domestic and Family Violence Act 1989* (Qld) s 14 (police officer, aggrieved person or someone authorised by them); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 20 (police officer, person against whom act of abuse may be committed or child who may hear or witness an act of abuse); *Family Violence Act 2004* (Tas) s 15 (police officer or affected person); *Family Violence Protection Act 2008* (Vic) s 45 (police officer or affected family member); *Restraining Orders Act 1997* (WA) s 25 (police officer or person seeking protection).

<sup>104</sup> *Domestic Violence and Protection Orders Act 2008* (ACT) s 83 (if officer believes injury may be caused and no arrest is made); *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 49; *Domestic and Family Violence Act 1989* (Qld) s 71 (must make an application for a person taken into custody); *Family Violence Act 2004* (Tas) s 104DA(14); *Restraining Orders Act 1997* (WA) s 62C; PADV (1999), s 8.

<sup>105</sup> Alexander (2002), p 90; Alexander notes rates of police application are 75 percent in NSW, 49 percent in Victoria and almost none in WA: Alexander (2010), p 165.

private matter for the applicant to take action on. In those jurisdictions, applicants are often left to make application by themselves, with or without legal assistance.<sup>106</sup>

Although it is certainly understandable that some facility for individuals to make application for their own protection is included in legislation, the absence of a uniform requirement for police to apply for protection orders also reflects the characterisation of domestic violence as a 'private' harm rather than a public danger from which the police are responsible for protecting the community.<sup>107</sup> Similarly, the absence in most jurisdictions of any obligation on police to investigate where an act of domestic violence is suspected reinforces the conceptualisation of domestic violence as a private harm.<sup>108</sup>

As indicated previously, it is not my aim in this forum to make normative arguments about how the law should deal with domestic violence or terrorism. There has been feminist criticism of pro-arrest and pro-prosecution policies in relation to domestic violence on the basis that such policies disempower women, and remove from their hands decisions about how to deal with violence.<sup>109</sup> While the non-enforcement of protection order applications in some jurisdictions may therefore please some, it also reflects the construction of domestic violence as a private harm that is best left in the hands of the victim.

## Who the Order Protects

In some jurisdictions, the definition of 'aggrieved person' or 'protected person' is broad, and extends to a range of persons in family or carer relationships with the perpetrator. In Tasmania the definition is limited to people who are married

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<sup>106</sup> Alexander (2002), pp 87-91, 100, 118-9, 125-6, 140-1, 164, 173. This may also be a feature of the post-9/11 diversion of resources away from 'low policing' of community matters and towards 'high policing' of terrorism and organised crime: Bayley and Weisburd (2011).

<sup>107</sup> Conversely, when the police are involved, the State is seen to be acting to stop the violence: Alexander (2002), p 90.

<sup>108</sup> Qld, NSW and WA are the only jurisdictions where police have an obligation to investigate on reasonable suspicion: National Council to Reduce Violence against Women and Children (June 2009).

<sup>109</sup> Douglas (2007), pp 221-2. For an overview of the conflicting arguments see Schneider (2000), pp 74-86.

or in a significant relationship with the perpetrator.<sup>110</sup> In South Australia orders were previously limited to partners, former partners and children residing with the perpetrator.<sup>111</sup> However new legislation provides for orders for the protection of any person against whom it is suspected an act of abuse will be committed.<sup>112</sup>

The extension of the range of relationships covered by protection orders has been criticised for ignoring the particular nature of violence perpetrated by men against their partners, and also for diluting the seriousness with which such orders are perceived.<sup>113</sup> Consistent with the theoretical construct of this thesis, it is not the form of the orders themselves so much as the understandings behind them that I am concerned with. The extension of categories of 'aggrieved' or 'protected' persons to include relatives,<sup>114</sup> those in carer relationships,<sup>115</sup> and other residential arrangements,<sup>116</sup> while no doubt intended to extend the classes of vulnerable persons entitled to protection, does have the effect of obscuring any possible focus on the control dynamics particular to intimate relationships. The absence of specialised treatment of domestic or intimate relationships removes the possibility of characterising intimate partner violence as ideological or carried out for a particular purpose.

The minimisation of the harm involved in domestic violence is further reflected in the relationship between the protection order regimes of the various states and territories and the provisions of the *Family Law Act 1975*.<sup>117</sup> If a protection order is in place and the Family Court makes an order in the nature of a contact

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<sup>110</sup> *Family Violence Act 2004* (Tas) s 7. Protection orders for other people are contained in the *Justices Act 1959* (Tas).

<sup>111</sup> *Domestic Violence Act 1994* (SA) s 5.

<sup>112</sup> *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 7.

<sup>113</sup> Behrens and Bronitt (undated); Easteal (2001), pp 103-4.

<sup>114</sup> *Domestic Violence and Protection Orders Act 2008* (ACT) s 15; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 5; *Domestic and Family Violence Act 1989* (Qld) s 15; *Domestic and Family Violence Act 2007* (NT) s 9; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 7 (extends to any person against whom it is suspected an act of abuse may be committed); *Family Violence Act 2004* (Tas) s 7 (distinguishes orders for those in a domestic relationship and restraining orders, which apply to anyone); *Family Violence Protection Act 2008* (Vic) s 8; *Restraining Orders Act 1997* (WA) (extends to those in and outside a domestic relationship).

<sup>115</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 5; *Domestic and Family Violence Act 2007* (NT) s 9; *Domestic and Family Violence Act 1989* (Qld) s 15.

<sup>116</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 5; *Domestic and Family Violence Act* (NT) s 9.

<sup>117</sup> *Family Law Act 1975* (Cth).

order<sup>118</sup> that is inconsistent with the protection order, the protection order (referred to in the *Family Law Act* as a ‘family violence order’) is invalid to the extent of the inconsistency.<sup>119</sup> A court making a new protection order or varying an existing protection order is empowered to vary or suspend a contact order, however it must have before it material that was not before the court that made the contact order. It is also bound by the principles set out in the *Family Law Act*, which include the principle that a child’s best interests are met by having the benefit of both parents having a meaningful involvement in their lives.<sup>120</sup> Thus for women with children, the relationship between the *Family Law Act* and the state and territory protection orders regimes effectively means that the ‘paramount consideration’ of their personal safety under the state and territory legislation is made subordinate to the ‘best interests of the child’, which includes presumptions relating to access to both parents.<sup>121</sup>

Significantly, the *Family Law Act* itself also contains provisions for dealing with violence within family relationships. However, the regime contained within the *Family Law Act* is of limited utility, as police only have powers of arrest in very limited circumstances, and in other cases the applicant will be required to take action herself to enforce an injunction against violence.<sup>122</sup> It was largely this inadequacy within the family legislation that led to the enactment of protection

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<sup>118</sup> Under the amendments introduced by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth), the term ‘contact order’ has been replaced by parenting orders specifying details of who a child will spend time and communicate with. The term ‘contact order’ has been retained here to specify a parenting order that relates to contact with a parent who is a perpetrator of domestic violence, given that ‘parenting order’ is general enough to cover a range of orders, not all of them relating to contact.

<sup>119</sup> *Family Law Act 1975* (Cth) s 68Q(1).

<sup>120</sup> *Family Law Act 1975* (Cth) s 68S(5), 68N, 60B (although the amendments in the *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011* may change this).

<sup>121</sup> Section 61DA *Family Law Act 1975* (Cth) creates a presumption that the best interests of the child are served by both parents having equal shared parental responsibility, however this is displaced where there are reasonable grounds for belief that there has been family violence or child abuse. However, the other principles applicable in determining the best interests of the child remain: these include protection of children from abuse or violence, or exposure to it, but also the principle of children benefiting from both parents having a meaningful involvement in their lives. Particularly where there has been family violence but the child has been shielded from exposure to it, it may be possible for courts to reconcile the child’s access to an abusive father with the child’s best interests. Recent proposed amendment to the *Family Law Act* would prioritise the need to protect a child from physical or psychological harm, or exposure to family violence over the benefit of having a meaningful relationship with both parents: See the *Family Law Amendment (Family Violence) Bill 2010: Exposure Draft and Consultation Paper*, available for review at <<http://www.ag.gov.au/familyviolencebill>> (reviewed 6 Dec 2010), proposed amendment to s 60CC.

<sup>122</sup> Section 114AA (injunctions in relation to adults) and s 68C (injunctions in relation to children) both provide that police can arrest a respondent to an injunction without warrant if the injunction is for the ‘personal protection’ of a person and the respondent has caused or threatened to cause bodily harm to the applicant, or has harassed, molested or stalked the person.

order regimes by states and territories. However, the fact that the protection orders are, as indicated above, largely subordinated to family law contact orders creates a serious impediment to the implementation of effective measures for protection of women and their children.

### *Conditions of Orders that Can be Imposed*

There are some similarities in terms of the conditions that may be imposed in respect of the different types of orders. For example, there may be restrictions on a person's movement as to where they can go and when under both protection orders and control orders. However, protection orders in most states and territories focus on restricting contact with particular persons,<sup>123</sup> rather than general restrictions on liberty, consistent with their objective of protecting particular individuals rather than the community at large.<sup>124</sup>

It is worth noting that the restrictions that may be imposed under protection orders are usually expressed in legislation on an inclusive basis, leaving courts with discretion as to special orders that may be appropriate in an individual case. By contrast, the conditions that can be imposed under control orders are listed on an exclusive basis. However there are particular conditions that are expressly authorised as conditions of control orders that are not enumerated in the protection order legislation. These include requirements for persons to report at certain times and places, to wear a tracking device, and to subject themselves to the taking of photographs and fingerprints.<sup>125</sup> To the extent that these conditions are appropriate options for control orders, it is not apparent why they might not also be utilised where appropriate in protection orders. The wearing of tracking devices, for example, might well be useful in terms of

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<sup>123</sup> *Domestic Violence and Protection Orders Act 2008* (ACT) ss 38 and 45; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 35; *Domestic and Family Violence Act* (NT) s 21; *Domestic and Family Violence Act 1989* (Qld) ss 17 and 25; *Domestic Violence Act 1994* (SA) s 5; *Family Violence Act 2004* (Tas) s 106B; *Family Violence Protection Act 2008* (Vic) s 81; *Restraining Orders Act 1997* (WA) s 13. This is also a feature of the PADV's Model Domestic Violence Protection Laws: PADV (1999).

<sup>124</sup> The ability to tailor such orders is in fact perceived as one of their advantages: Bronitt and McSherry (2010), pp 806-7.

<sup>125</sup> *Criminal Code Act 1995* (Cth) s 104.5(3), (6).

monitoring the location of a defendant, especially where there had previously been repeated breaches of a condition not to approach the aggrieved person and police have in the past been unable to ascertain the respondent's whereabouts.<sup>126</sup>

Certainly, the requirement to wear a tracking device imposes a restriction on a person's liberty that should not be imposed without good cause, and the control order legislation gives effect to that by requiring that each individual condition be reasonably necessary and appropriate having regard to the person's circumstances.<sup>127</sup> However, where there is a real risk of harm to a person in a domestic violence context, a tracking device may well constitute an effective preventative measure.

In relation to the various protection order regimes, a near uniform stipulation is that the protection of persons from acts of domestic violence is paramount, along with the welfare of any children who may be affected by the behaviour of the defendant.<sup>128</sup> However, jurisdictions are also close to uniform in their specification of hardship to the defendant (especially in relation to accommodation needs) as a relevant factor.<sup>129</sup> This will often be important in the context of protection orders, as the protection of an aggrieved person may require an 'ouster order', which is likely to result in hardship where the defendant has no other accommodation available to him. There is evidence to suggest that despite the fact that legislation expressly authorises the making of ouster orders, courts are often reluctant to do so.<sup>130</sup>

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<sup>126</sup> Such a proposal has recently been the subject of a legislative bill in France: 'Violent French Husbands may be tagged' *BBC News Online*, 25 February 2010, <<http://news.bbc.co.uk/2/hi/europe/8537591.stm>>. A US Washington State Bill with a similar proposal was put forward in 2009 but later withdrawn: Erin Cunningham, 'Bill requiring monitoring of domestic abusers is withdrawn', *The Herald-Mail (online)*, 1 Apr 2009, <[http://articles.herald-mail.com/2009-04-01/news/25171435\\_1\\_protective-orders-domestic-abusers-gps-monitoring](http://articles.herald-mail.com/2009-04-01/news/25171435_1_protective-orders-domestic-abusers-gps-monitoring)>.

<sup>127</sup> *Criminal Code Act 1995* (Cth) s 104.4(1)(d).

<sup>128</sup> *PADV* (1999) s 16; *Domestic Violence and Protection Orders Act 2008* (ACT) s 7; *Domestic and Family Violence Act 2007* (NT) s 19; *Domestic and Family Violence Act 1989* (Qld) s 25(5); *Family Violence Act 2004* (Tas) s 106B(4AAB); *Family Violence Protection Act 2008* (Vic) s 80.

<sup>129</sup> *Domestic Violence and Protection Orders Act 2008* (ACT) s 47; *Domestic and Family Violence Act 1989* (Qld) s 25(6); *Domestic Violence Act 1994* (SA) s 6; *Family Violence Act 2004* (Tas) s 106B(5); *Family Violence Protection Act 2008* (Vic) s 36; *Restraining Orders Act 1997* (WA) s 12(d) and (e).

<sup>130</sup> Alexander (2002), p 132; Edwards (2004), p 8 (magistrates reluctant to grant exclusion orders if defendant did not have other accommodation options). Barnett notes that under English law the rights of

The requirement that a respondent attend counselling is available as a condition of a terrorism control order,<sup>131</sup> and also of most protection orders.<sup>132</sup> Counselling was not imposed as a condition of either of the two control orders that have been issued in Australia to date. The government's recent *Time for Action* report placed emphasis on the importance of counselling as a strategy for reducing domestic violence, noting that accountability of perpetrators through formal justice needs to be combined with changing social and perpetrator attitudes through programs.<sup>133</sup> However, a reference to the need to change attitudes or behaviour was absent from the Explanatory Memorandum to the legislation introducing the regime for control orders. It is also absent from the Australian government's *National Counter-Terrorism Plan*.<sup>134</sup>

An emphasis on counselling as a treatment for dealing with domestic violence offenders is consistent with the construction of domestic violence as 'non-ideological'. This is particularly significant in light of the fact that there is no clear evidence that domestic violence counselling is effective in preventing the recurrence of violence.<sup>135</sup> Indeed, the assumption that counselling will have an effect on the perpetration of violence implies that it is an aspect of the perpetrator's behaviour or psyche that can be 'unlearned', as opposed to an aspect of the perpetrator's ideology that is entrenched through common assumptions and trenchant phallocentrism within Australian society.

This is not to say that ideological belief may not be susceptible to change through participation in counselling, discussion and educational programs. The point I make here is that the construction of certain beliefs as ideological has the effect of channelling the persons who hold those beliefs away from

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the property owner have often been given priority over the right of a victim of violence to personal safety: Barnett (1998), pp 261-3.

<sup>131</sup> *Criminal Code Act 1995* (Cth) s 104.5(3)(l), (6).

<sup>132</sup> *Domestic Violence and Protection Orders Act 2008* (ACT) s 90; *Domestic and Family Violence Act 2007* (NT) s 24 (the respondent must consent); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 13; *Family Violence Act 2004* (Tas) s 13; *Family Violence Protection Act 2008* (Vic) Part 5; *Restraining Orders Act 1997* (WA) s 9(1)(i). In Victoria, an assessment must be made if a protection order is issued and the offender must be found eligible unless it is not appropriate for him to attend counselling.

<sup>133</sup> Australian Government (2009). The National Plan notes that perpetrators 'need assistance to end their violence': COAG (2011), p 33.

<sup>134</sup> National Counter-Terrorism Committee (2005).

<sup>135</sup> Laing (2002a), pp 9-17; Laing (2002b). The National Plan cites Andrews and Bonta (2010) to support the proposition that recidivism can be reduced by addressing the underlying causes of behaviour: COAG (2011), p 33.



'reformative' options within the law and towards more punitive ones. Equally, the construction of motivation as non-ideological (as in the case of domestic violence perpetrators) has the effect of making available rehabilitative options for the 'reform' of perpetrators. This not only benefits individual perpetrators of domestic violence, but also reinforces the phallogocentric myth that violence against women is not an ingrained aspect of Australian culture.

### *Penalties for Breach and Prosecution*

A further distinction is the seriousness with which the legislature treats breach of a protection order or a control order. An offence of breaching a terrorism control order is punishable by a maximum of five years' imprisonment.<sup>136</sup> In relation to domestic violence protection orders, only the ACT imposes a penalty of five years' imprisonment; all other jurisdictions provide for a maximum penalty of no more than two years' imprisonment for breach.<sup>137</sup> New South Wales alone provides that where a breach involves violence against a person, a sentence of imprisonment must be imposed unless the court so orders and gives reasons.<sup>138</sup>

The Model Domestic Violence Laws recommended an offence of breaching a protection order, punishable by \$24,000 or one year's imprisonment in the case of a first offence, and two years' imprisonment in the case of a second.<sup>139</sup> The Working Group reduced the penalties applicable for breach in line with the majority of submissions to their inquiry, though the \$24,000 penalty was noted as being higher than in Australian jurisdictions.<sup>140</sup> Taking into account that the maximum penalty imposed by a legislature in relation to an offence is indicative

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<sup>136</sup> *Criminal Code Act 1995* (Cth) s 104.27.

<sup>137</sup> *Domestic Violence and Protection Orders Act 2008* (ACT) s 90; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14(1); *Domestic and Family Violence Act 2007* (NT) s 120 and 121; *Domestic and Family Violence Act 1989* (Qld) s 80; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 15; *Family Violence Act 2004* (Tas) s 106I; *Family Violence Protection Act 2008* (Vic) ss 37 and 123; *Restraining Orders Act 1997* (WA) s 61.

<sup>138</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14.

<sup>139</sup> PADV (1999), p 212.

<sup>140</sup> PADV (1999), pp 213-5.

of the seriousness with which the legislature regards the offending,<sup>141</sup> the different penalties applicable to breaches would appear to reflect the construction of terrorism as a more serious offence than domestic violence.

In practice, it appears that police are reluctant to prosecute breaches of protection orders unless there has been a physical assault or property damage.<sup>142</sup> Where prosecution does occur, Victorian statistics show that breaches result in a non-custodial sentence in more than 80 percent of cases.<sup>143</sup> In a Queensland study, the majority of offenders were dealt with by means of a fine.<sup>144</sup> Western Australian and Victorian<sup>144</sup> reviews noted concerns that breaches of protection orders are dealt with leniently.<sup>145</sup>

There have been no prosecutions brought in Australia for breach in relation to either of the two control orders imposed. As indicated above, protection orders are frequently applied for in circumstances indicating that criminal charges could have been laid.<sup>146</sup> In my review of online sentences and appeals, more serious charges were generally laid where appropriate, however there were a few instances where it appears that more serious criminal offences would have been appropriate and were not charged.<sup>147</sup>

Some jurisdictions have taken steps to recognise the seriousness of domestic violence by the introduction of specialised offences. The ACT, New South Wales and Tasmania all make provision for 'domestic violence' offences, which are ordinary personal violence offences committed against a person in a

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<sup>141</sup> *Markarian v The Queen* (2005) 228 CLR 357.

<sup>142</sup> Easteal (2003), p 262.

<sup>143</sup> Department of Justice (2004); Sentencing Advisory Council (June 2009), p 44.

<sup>144</sup> Douglas (2007), pp 226-7.

<sup>145</sup> Western Australia Department of the Attorney General (2008), p 23; Sentencing Advisory Council (2009), p viii. By contrast, Crocker (2005) found that judges generally treated the intimate context of offending as an aggravating factor.

<sup>146</sup> Douglas (2003-04).

<sup>147</sup> For examples see *Pungatji v Woodcock* [2003] NTSC 31 (Unreported, Riley J, 2 April 2003) (breach of protection order only for dragging partner off bus, punching her, and attempted strangulation); *Jones v Hales* [2003] NTSC 73 (Unreported, Riley J, 27 June 2003) (breach of protection order only charged for punching partner five times in the mouth); *D v G* [2004] QDC 477 (Unreported, McGills DCJ, 3 December 2004) (assault not charged for grabbing of arm; judge noted that if it had been, defendant could have relied on provocation). Note that my searches excluded cases where significant, more serious offences had been charged. The ALRC recently sought submissions in relation to the issue of whether police in practice do not lay more serious criminal charges in breach of protection order cases where they are otherwise available: ALRC (2010a), Questions 6-16 to 6-18.

relevant relationship.<sup>148</sup> In New South Wales, characterising an offence in this way has the consequence that the offence can be recorded as a domestic violence offence on the offender's criminal history, and in all three jurisdictions, also has implications in terms of the granting of bail. Tasmanian legislation actually criminalises economic and emotional abuse, making reference to control or intimidation of a partner.<sup>149</sup>

Notwithstanding these developments in some jurisdictions, the pattern of decriminalisation of domestic violence, and the lower threshold penalties available for protection order breaches, reinforce the low status of domestic violence. By contrast, the majority of terrorism prosecutions in Australia to date have been for offences involving conduct at very preliminary stages of planning. Although research suggests that low-level violence in the domestic setting often leads to more serious abuse,<sup>150</sup> there is no discernible trend towards criminalisation of preliminary or low-level domestic violence offending. This reflects the law's conceptualisation of preliminary domestic violence offending as 'trivial' and not out of the ordinary.

### *Criminalisation of the Conduct of 'Aggrieved Persons'*

Although an individual can apply for a protection order in most states and territories, this does not mean that the same person also has the right to consent to a breach of the order.<sup>151</sup> The Working Group that drafted the Model Domestic Violence Laws considered a previous provision in Western Australia, which provided a defence to a respondent where the protected person had consented to the breach.<sup>152</sup> They decided against such a provision on the basis

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<sup>148</sup> *Domestic Violence and Protection Orders Act 2008* (ACT) ss 13(2) and Schedule 1; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 12; *Family Violence Act 2004* (Tas) ss 7 and 12.

<sup>149</sup> *Family Violence Act 2004* (Tas) ss 8 and 9.

<sup>150</sup> Johnson (1995).

<sup>151</sup> *McDonagh v Hales* [2003] NTSC 93 (Unreported, Riley J, 28 August 2003); *Tudor-Stack v Hill* [2003] NTCA 15 (Unreported, Martin CJ, Thomas and Riley JJ, 12 September 2003) (overruling *Palmer v Bryce* [2000] NTSC 7 (Unreported, Angel J, 9 March 2000)).

<sup>152</sup> *Restraining Orders Act 1997* (WA) s 62 (form of provision in force as at 1999). This provision was subsequently omitted on the recommendation of the Attorney-General's Department (WA) (2004), p 31.

that it failed to recognise that a protection order is an order of the court and not an agreement between two people.<sup>153</sup> In this respect, the Model Domestic Violence laws move towards recognising the perpetrator, rather than the relationship, as the cause of violence. This approach was also taken by the Australian Law Reform Commission in its recent Family Violence Report.<sup>154</sup>

In the ACT, legislation expressly provides for prosecution of a person who aids and abets a breach of a protection order, including by initiating contact that would make the respondent in breach of such an order.<sup>155</sup> In New Zealand, the standard non-contact condition of a protection order can be overridden by the express consent of the applicant.<sup>156</sup> In Victoria, it is reported that ‘mutual intervention orders’ are routinely made by consent, requiring both parties to refrain from violence, even where there is little evidence to support violence on the part of the aggrieved person.<sup>157</sup> However, Victorian legislation now provides that a protected person who encourages or allows a person to contravene a protection order does not aid, abet, counsel or procure the commission of an offence.<sup>158</sup> A provision with similar effect has been recommended in Western Australia.<sup>159</sup>

The Court of Appeal in South Australia previously held that the *Domestic Violence Act 1994 (SA)* permitted of accessory liability for protected persons who consented to a breach.<sup>160</sup> However, South Australian legislation passed subsequently expressly excludes accessory liability,<sup>161</sup> and accessory liability

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<sup>153</sup> PADV (1999), pp 213-5.

<sup>154</sup> ALRC (2010a), p 63. The ALRC has recommended against both prosecution of victims for aiding and abetting, and also for attempting to pervert the course of justice by conduct to reduce or mitigate the culpability of the offender: ALRC (2010b), Proposal 6.15.

<sup>155</sup> *Domestic Violence and Protection Orders Act 2008 (ACT)* s 85(2)(d); cf *Family Violence Protection Act 2008 (Vic)* s 125. Breach action against an applicant who permitted breach by the respondent was recommended by the magistrate in *Tudor-Stack v Hill* [2003] NTCA 15 (Unreported, Martin CJ, Thomas and Riley JJ, 12 September 2003).

<sup>156</sup> *Domestic Violence Act 1995 (NZ)* s 20(2).

<sup>157</sup> Alexander (2002), p 170. The same has been noted in the American context: Ptacek (1999), p 14.

<sup>158</sup> *Family Violence Protection Act 2008 (Vic)* s 125.

<sup>159</sup> Western Australia Department of the Attorney General (2008), p 33.

<sup>160</sup> *Domestic Violence Act 1994 (SA)*, now replaced by *Intervention Orders (Prevention of Abuse) Act 2009 (SA)*. Keane (1997) 95 A Crim R 593 and for discussion see Bronitt and McSherry (2010), pp 406-10.

<sup>161</sup> *Intervention Orders (Prevention of Abuse) Act 2009 (SA)* s 31(3).

is precluded in New South Wales.<sup>162</sup> Similarly, the UK and US do not criminalise victims for complicity in protection order breaches.<sup>163</sup>

Holding women criminally responsible for aiding and abetting breaches of protection orders reflects the law's assumption that violence is a feature of the relationship, and that violating a court order invokes the responsibility of both parties.

The difficulties faced by women in leaving abusive relationships are well-documented and include financial and social impediments to leaving.<sup>164</sup> There has also been increasing recognition of the fact that separation is a time of particular danger to women in abusive relationships and in that sense, remaining in the relationship is often a strategy of least resistance, given past experiences of the abuser 'hunting down' the complainant, and threats to kill or seriously injure the complainant if she leaves.<sup>165</sup> However, this pattern of violent behaviour that underlies much domestic violence is obscured by the law's approach to domestic violence. If it were recognised, the responsibility for complying with protection orders would rest squarely with the perpetrator of violence and no liability would accrue to an intimate partner for aiding and abetting breaches.

Laying blame at the door of the victim for the perpetrator's breaches of domestic violence is also consistent with the narrative of victim-blaming in domestic violence cases referred to in Chapter 2.2.<sup>166</sup> In my case reviews, a practice of victim-blaming was identified other than in 'aid and abet' situations. For example, the complainant is constructed as the person engaged in coercion or intimidation without any consideration of the background to the granting of the

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<sup>162</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14(7).

<sup>163</sup> Bronitt and McSherry (2010), p 405. Although Miller notes that pro-arrest policies in the US have resulted in an increase in the number of women charged with domestic violence offences: Miller (2005), pp 6-13.

<sup>164</sup> See for example Browne (1987); Mahoney (1991).

<sup>165</sup> Mahoney (1991).

<sup>166</sup> See for example *Tudor-Stack v Hill* [2003] NTCA 15 (Unreported, Martin CJ, Thomas and Riley JJ, 12 September 2003), where the magistrate had recommended the complainant be charged for consenting to the breach; *Palmer v Bryce* [2000] NTSC 7 (Unreported, Angel J, 9 March 2000) (complainant found to be an unreliable witness who 'enforced the order when it suited her').

protection order or previous violence in the relationship,<sup>167</sup> or both parties are blamed for the violence.<sup>168</sup> The responsibility of the state to protect its citizens against violence<sup>169</sup> is therefore diluted by victim-blaming discourse that sheets home responsibility to the victim for violence perpetrated against her.

## *Conclusion*

In this chapter, I have examined a number of different aspects of the civil order regimes in relation to domestic violence and terrorism. Despite a number of similarities, there are also numerous differences between the schemes that I argue are attributable to the different constructions of violence as outlined in Chapters 2.2 and 2.3.

The federal regime for terrorism control orders is aimed at protecting the public from the risk of terrorism, premised on the conceptualisation of terrorism as ideological violence directed against the public. Accordingly, such orders can be granted notwithstanding that no act of violence has taken place or is planned. Only police can apply for such an order (with the consent of the Attorney-General) and the restrictions that can be imposed on the respondent include reporting, the taking of identifying material, and the wearing of a tracking device. Breach of such an order attracts a maximum penalty of five years' imprisonment, higher than the penalties applicable for breaches of domestic violence protection orders in almost all Australian jurisdictions.

By contrast, the protection order regimes are geared towards the protection of individuals who stand in particular relations to the perpetrator. Although police in most jurisdictions are able to apply for such orders, practice varies across jurisdictions, and applications are frequently left to the responsibility of the

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<sup>167</sup> For examples see *Chandra v Chandra* [2001] NZFLR 222 (Unreported, District Court NZ, 3 November 2000); *D v G* [2004] QDC 477 (Unreported, McGills DCJ, 3 December 2004).

<sup>168</sup> *Bonnar v Fischbach* [2001] NZFLR 925 (Unreported, NZ Family Court, 13 August 2001). The ABC reported on the story of Deanne Bridgman, a victim of ongoing violence, who was prosecuted for conspiracy to pervert the course of justice after withdrawing a statement of complaint against her abusive partner Nicholas Pasinas; her partner gave evidence in the case against her and had his sentence reduced in return: Jill Singer, 'Changes to domestic violence laws "don't go far enough"', *7.30 Report*, ABC, 9 March 2010, <<http://www.abc.net.au/7.30/content/2010/s2841222.htm>> .

<sup>169</sup> Dulles (1957), p 715.

individuals seeking protection. Unlike terrorism control orders, an applicant will usually need to demonstrate the likelihood of an act of violence taking place, and in some cases also that an act of violence has already occurred. The conditions imposed in relation to protection orders are usually focused on prohibiting the respondent from associating with the protected person, or attending places associated with her, rather than preventing violence by the perpetrator more generally.

As well as reflecting the differential constructions of violence referred to in Chapters 2.2 and 2.3, the differences enumerated above also play their own part in constructing terrorism as a crime of utmost seriousness. In Chapter 3.3, I further explore the dimensions of these arguments in the context of sentencing of offenders for acts of terrorism and acts of domestic violence.





### CHAPTER 3.3 PUNISHING TERROR: SENTENCING IN TERRORISM AND DOMESTIC HOMICIDE CASES

Men (sic) are rewarded or punished not for what they do but rather for how their acts are defined. That is why men (sic) are more interested in better justifying themselves than in better behaving themselves.<sup>1</sup>

In this chapter, I consider how sentencing decisions in terrorism and domestic homicide cases reflect the differential construction of violence identified in Chapters 2.1 to 2.3. The dual discourses of ideology/non-ideology, and public/private violence, described in those chapters are further explored here in their relationship to the various considerations relevant to the sentencing exercise. This chapter follows on from Chapters 3.1 and 3.2, in which I examined how these discursive mechanisms operate in relation to other measures for the regulation of violence.

In Chapter 2.2, I argued that despite the ideological nature of much violence against women, these motivations are consistently constructed within the law as based on emotion or passion. In this chapter, I build on the deconstructive process described there, and argue that the focus upon motives personal to the accused in domestic homicides has the effect of reducing sentences, because of the relationship between offenders' motivations and the factors relevant to sentence. In the first section of this chapter, I examine general trends in sentencing, and identify a disparity in general terms between the sentences imposed for domestic homicide and those meted out to offenders convicted of terrorism-related offences.

In the second section of this chapter, I examine a range of factors relevant to the sentencing exercise – deterrence, punishment, denunciation, accountability of the offender, recognition of harm, rehabilitation and the need for protection of the community. The interplay between ideology and each of these factors, I will

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<sup>1</sup> Szasz (1973), p 686.

suggest, leads to a more severe approach to sentence in cases where the existence of ideological motivation is recognised.

In this chapter, I compare the reasons for sentence in the relatively small number of cases where people have been sentenced in Australia for terrorism-related offences, with sentencing of male offenders who have killed their intimate partners.<sup>2</sup> I focus upon sentencing for domestic homicides, rather than domestic violence more generally, because homicide constitutes the ‘ultimate’ in criminal activity – the taking of a human life – and could therefore be expected to merit penalties at the higher end of the sentencing spectrum.<sup>3</sup> These sentences provide a useful point of comparison with sentencing for terrorism offences, which have to date all involved conduct at relatively preliminary stages of planning or preparation.

I do not hypothesise that there is any consistent pattern in quantitative terms in sentencing offenders of either type of violence. The sentencing process is purported to be one of ‘instinctive synthesis’,<sup>4</sup> a philosophy that provides an incredibly broad scope for judges to place more weight on particular factors to justify the penalties they wish to impose in an individual case. Within the inherently inconsistent framework of the legal system,<sup>5</sup> there will always be the ‘exceptions that prove the rule’ – the severe sentence meted out to a man who kills his partner, or a terrorism offender who benefits from a favourable assessment of his character. However, it is possible to identify patterns in sentencing decisions that indicate that the ideological and public nature of terrorist offending is associated with harsher approaches to sentence.

Throughout this chapter, I also reflect, as in previous chapters, upon the ways in which the differential constructions of terrorism and domestic violence reflect

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<sup>2</sup> The means by which these cases were selected is outlined in Chapter 1.2.

<sup>3</sup> The fact that the taking of a human life is the starting point in sentences for murder and manslaughter is consistently emphasised in sentencing decisions – for example see *R v Blackledge* (Unreported, NSW Court of Criminal Appeal, 12 December 1995); *R v Foster* [2009] VSC 124 (Unreported, Osborn J, 2 April 2009), [39]-[40]; *R v Williams* [2004] NSWSC 189 (Unreported, O’Keefe J, 22 March 2004), [8].

<sup>4</sup> *Veen (No 2)* (1988) 164 CLR 465.

<sup>5</sup> Smart notes that the law is often conflicting, and can both benefit and disadvantage women at the same time: Smart (1995), pp 156-7.

the phallogocentric underpinnings of the law.<sup>6</sup> As discussed previously, the law's consistent oversight of the ideological nature of much lethal domestic violence obscures patterns of inequality and the pervasiveness of masculinist ideology in society more generally.

### *Disparity in Sentencing Between Terrorism and Intimate Homicide Offenders*

The criminal justice system in Australia reflects the country's identity as a federation. The Australian government has the power to legislate only with respect to matters falling within Constitutional heads of Commonwealth power, with residual legislative power falling to the states and territories.<sup>7</sup> Offences having a connection with a Commonwealth head of power are created by federal legislation,<sup>8</sup> while all other offences are created under state and territory law, whether at common law or more commonly, through legislation. Federal jurisdiction in relation to Commonwealth crimes is exercised by state and territory courts,<sup>9</sup> albeit applying sentencing principles set out in federal legislation.<sup>10</sup>

Terrorism offences are created by Commonwealth legislation, by virtue of a referral of legislative power to the Commonwealth by all states and territories.<sup>11</sup> By contrast, 'ordinary' offences through which domestic violence is prosecuted (e.g. assault, damage to property, manslaughter) are created through state and territory legislation. The most serious of personal violence offences are the

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<sup>6</sup> Smart (1989), pp 27ff; Smart (1995), pp 140-1.

<sup>7</sup> Heads of power in relation to which the Commonwealth can legislate are found in s 51, Constitution of the Commonwealth of Australia 1901 (Cth).

<sup>8</sup> Most importantly the *Criminal Code Act 1995* (Cth) and the *Crimes Act 1914* (Cth).

<sup>9</sup> *Judiciary Act 1903* (Cth) s 68.

<sup>10</sup> Commonwealth sentencing principles are found in Part 1B of the *Crimes Act 1914* (Cth).

<sup>11</sup> *Terrorism (Commonwealth Powers) Act 2002* (NSW); *Terrorism (Northern Territory Request) Act 2003* (NT); *Terrorism (Commonwealth Powers) Act 2002* (Qld); *Terrorism (Commonwealth Powers) Act 2002* (SA); *Terrorism (Commonwealth Powers) Act 2002* (Tas); *Terrorism (Commonwealth Powers) Act 2003* (Vic); and *Terrorism (Commonwealth Powers) Act 2002* (WA). Federal terrorism legislation is also supported by the defence power: *Thomas v Mowbray* (2007) 233 CLR 307.

crimes of murder and manslaughter. A table of these provisions is found at Annexure F.

As at the beginning of 2011, there have been only 29 individuals sentenced for terrorism-related offending in Australia. A list of terrorism sentencing decisions in Australia to date is located at Annexure D.<sup>12</sup>

The first successful prosecution under specialised terrorism laws was *Lodhi*,<sup>13</sup> convicted of intentionally doing an act in preparation for a terrorist act, and possessing items in connection with preparation for a terrorist act. Perhaps the most well-known of the terrorism offenders, Jack Thomas, was convicted of intentionally receiving funds from a terrorist organisation,<sup>14</sup> however that conviction was overturned on appeal;<sup>15</sup> the Victorian Court of Appeal rejected an application to stay a retrial on the basis of fresh evidence.<sup>16</sup> Thomas was subsequently retried and convicted of possessing a falsified passport.<sup>17</sup>

Joint prosecutions involving multiple accused acting in groups have taken place in Melbourne and Sydney. In September 2008, a Victorian jury convicted seven of an original twelve accused of terrorism offences in the 'Benbrika' trial; two others, Izzydeen Atik and Shane Kent, pleaded guilty to terrorism offences arising out of the same circumstances.<sup>18</sup> In 2009, five men were sentenced in Sydney for a range of terrorism offences, following their conviction by jury; four others – Mazen Touma, Mirsad Mulahalilovic, Khaled Sharrouf and one unnamed person, pleaded guilty to lesser charges and were separately

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<sup>12</sup> The figure includes those sentenced for terrorism-related activity prosecuted under the ordinary criminal law. Note that some judgments referenced at Annexure F contain sentencing remarks in relation to multiple defendants. As at July 2011, three persons had been convicted of terrorism offences arising out of the 'Holsworthy barracks' plot but had not yet been sentenced: Saney Aweys, Wissam Fattel and Nayef el Sayed.

<sup>13</sup> *R v Lodhi* (2006) 199 FLR 364 and the subsequent appeal *Lodhi v R* (2007) 179 A Crim R 470.

<sup>14</sup> *R v Thomas* [2006] VSC 120 (Unreported, Cummins J, 31 March 2006).

<sup>15</sup> *Thomas* (2006) 14 VR 475.

<sup>16</sup> *R v Thomas (no 4)* [2008] VSCA 107 (Unreported, Maxwell ACJ, Buchanan and Vincent JJA, 16 June 2008).

<sup>17</sup> *R v Thomas* [2008] VSC 620 (Unreported, Curtain J, 29 October 2008).

<sup>18</sup> The sentencing judgment is *R v Benbrika & Ors* (2009) 222 FLR 433. The seven convicted were Abdul Benbrika, Aman Joud, Fadl Sayadi, Abdullah Merhi, Ahmed Raad, Ezzit Raad, and Amer Haddara. Four of the original twelve were acquitted, and the jury could not reach a conclusion in respect of Shane Kent, who subsequently pleaded guilty to reduced charges: *Kent* [2009] VSC 375 (Unreported, Bongiorno J, 2 September 2009). A thirteenth man, Izzydeen Attik, pleaded guilty prior to trial: *Atik* [2007] VSC 299 (Unreported, Bongiorno J, 23 August 2007).

sentenced.<sup>19</sup> Belal Khazal was convicted by a jury and sentenced in September 2009 for making a document connected with assistance for a terrorist act.<sup>20</sup> Another eight terrorism-related prosecutions have proceeded under other criminal law provisions rather than the specific anti-terrorism provisions.<sup>21</sup> There have also been a small number of matters where terrorism charges were subsequently withdrawn, or where the accused were found not guilty after trial.<sup>22</sup>

Notwithstanding the small number of sentences to date, it is still possible to make comment about the severity of these sentences in comparison to domestic homicide sentencing. The arguably disproportionate penalties attaching to preparatory terrorism offences compared to penalties for murder were the subject of comment when the *Lodhi* sentence was handed down in 2006.<sup>23</sup> Despite the fact that no actual attack was carried out or planned by Lodhi, his sentence was higher than the average New South Wales sentence for murder, and approximately six times the average sentence for manslaughter and dangerous driving causing death.<sup>24</sup>

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<sup>19</sup> The primary sentencing judgment is *R v Elomar & Ors* (2010) 264 ALR 759. The other sentencing judgments are: *R v Touma* [2008] NSWSC 1475 (Unreported, Whealy J, 24 October 2008), *R v Mulahalilovic* [2009] NSWSC 1010 (Unreported, Whealy J, 30 January 2009), *R v Sharrouf* [2009] NSWSC 1002 (Unreported, Whealy J, 24 September 2009) and another man 'unnamed' who pleaded guilty on 3 November 2008 but whose name has been suppressed: Gilbert and Tobin Centre of Public Law, <<http://www.gtcentre.unsw.edu.au/content/mazen-touma-mirsad-mulahalilovic-khalid-sharrouf-and-one-other-man-cannot-be-named>> (viewed 1 November 2011).

<sup>20</sup> *R v Khazal* [2009] NSWSC 1015 (Unreported, Latham J, 25 September 2009).

<sup>21</sup> These eight cases are *Roche* (Unreported, Healy DCJ, 1 June 2004) and the subsequent appeal *R v Roche* [2005] WASC 4 (Unreported, Murray ACJ, Templeman and McKechnie JJ, 14 January 2005); Howells (pleaded guilty on 10 January 2006 to one count each of threatening to destroy by explosives and by fire the premises of an internationally protected person: Parliamentary Joint Committee on Intelligence and Security (2006), para 2.38); *R v Mallah* [2005] NSWSC 317 (Unreported, Wood CJ, 21 April 2005); *Della-Vedova v R* [2009] NSWCA 107 (Unreported, McClellan CJ at CL, Simpson J, Buddin J, 21 April 2009) and *R v Vinayagamoorthy* [2010] VSC 148 (Unreported, Coghlan J, 31 March 2010) (involving accused Vinayagamoorthy, Yathavan and Rajeevan). An older case involving a conspiracy to bomb the Turkish Embassy is *Demirian* (1988) 33 A Crim R 441; one of the co-conspirators was accidentally killed and the other was originally convicted of his murder, that conviction being overturned on appeal. The conviction for conspiracy to cause an explosion likely to endanger life or cause serious injury was upheld.

<sup>22</sup> Matters of Izhar Ul-Haque and John Howard Amundsen: see Australian Parliamentary Library, 'Law Internet Resources: Terrorism Law', <<http://www.aph.gov.au/library/intguide/law/terrorism.htm#court>> (viewed 23 October 2011). In 2007, Mohammed Haneef was charged with recklessly providing support to a terrorist organisation, however the charges were subsequently dropped: Rix (2009). Defendants acquitted after trial include Yacqub Khayre, Abdirahmen Ahmed (Holsworthy terrorism case); Hany Taha, Bassam Raad, Shoue Hammoud and Majed Raad (Benbrika terrorism case).

<sup>23</sup> Kenneth Nguyen and Lisa Allen, 'Bomb plot man gets 20 years', *The Age (online)*, 24 August 2006, <<http://www.theage.com.au/news/national/bomb-plot-man-gets-20-years/2006/08/23/1156012609641.html>>.

<sup>24</sup> NSW Bureau of Crime Statistics and Research,

Jack Roche, whose activities were also preparatory, received a sentence of nine years with a non-parole period of four and a half years, taking into account a reduction in head sentence of three years to allow for past and future cooperation, notwithstanding that he had voluntarily withdrawn from a conspiracy to attack Israeli targets in Australia and provided assistance to the police.<sup>25</sup> Although the appeals of both Roche and the Crown against sentence were dismissed, McKechnie J in dissent would have increased the sentence to 15 years with a non-parole period of nine years, slightly less than the average sentence for murder in NSW.<sup>26</sup>

One of the primary reasons why the terrorism sentences that have been passed to date provide such an interesting comparison with domestic homicide cases is that they deal with conduct that occurs at a very early stage of preparation.<sup>27</sup> To date, there has not been, since the 1978 Hilton Hotel bombing, any fatal terrorist attack on Australian soil.<sup>28</sup> This places the terrorism offences in stark relief to domestic homicides, in which the gravest type of harm – the death of a human being – has been brought about by the offender, and which collectively result in the deaths of around 60 Australian women each year.<sup>29</sup>

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<[http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/pages/bocsar\\_hc\\_mean0206](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_hc_mean0206)> (accessed 3 April 2008). It was reported in the media that the sentence was on par with the average Victorian sentence for murder, and roughly three times that of the average sentence for rape: Kenneth Nguyen and Lisa Allan, 'Bomb Plot Man gets 20 years' *The Age*, 24 August 2006. NSW Bureau of Crime Statistics and Research records that in 2006, the average period of imprisonment by principal offence for murder was around 16 years and nine months and for manslaughter and driving causing death around three years and three months. Statistics for manslaughter alone (rather than manslaughter combined with dangerous driving) were not available.

<sup>25</sup> *Roche* (Unreported, Healy DCJ, 1 June 2004).

<sup>26</sup> *R v Roche* [2005] WASCA 4 (Unreported, Murray ACJ, Templeman and McKechnie JJ, 14 January 2005).

<sup>27</sup> It has been suggested that anti-terrorism legislation reflects the application of the 'precautionary principle' i.e. the principle that action is justified where the risk of harm is uncertain but the harm would be irreversible: Bronitt (2008). Porter and Kebell (2010), p 10 found that none of the 21 convicted terrorists in their study was found to have been particularly advanced in planning for a terrorist attack.

<sup>28</sup> A bomb planted in a garbage bin outside the Hilton Hotel, the venue for CHOGM, killed two garbage collectors and a police officer. A member of the Ananda Marga sect was subsequently prosecuted, however his conviction was overturned on appeal: *R v Anderson* (1991) 53 A Crim R 421. For a discussion of the legal aspects of the Hilton Hotel bombing see Beddie and Moss (1982) and for an overview of the events and aftermath see Head (2008). In the course of the 1986 attack on the Turkish embassy in Melbourne, one of the co-conspirators was accidentally killed but no civilians: *Demirian* (1988) 33 A Crim R 441. The number of Australians killed in overseas attacks was 11 per year in the decade leading to 2003, and 55 per year in the two years prior to 2003: Leithner (2003), p 35.

<sup>29</sup> Mouzos and Rushforth (2003), p 2. The most recent available figures record 62 female victims of intimate partner homicide in 2007-08: Virueda and Payne (2010), p 20. See also Summers (2003), p 79. Summers notes that such figures provide at best a guesstimate and notes '... basically, no one has a clue how many women are having the shit beaten out of them night after night in their homes in this country'.

In terms of preparatory types of offending, there is a continuum of conduct, beginning at carrying out pre-planning or planning activity in relation to a crime, right through to the completed offence. Some offences criminalise conduct at such a preliminary stage that they fall into the category of what Jeremy Bentham describes as 'evidentiary offences' or 'presumed offences'.<sup>30</sup> These offences criminalise conduct that is not inherently wrongful, but is often associated with criminal behaviour. The question in relation to these preparatory types of conduct is how the culpability of the offender should be assessed, based on factors such as proximity to the completed offence and whether or not the plan, if put into place, was likely to have succeeded, and what harm it would have caused.<sup>31</sup>

In relation to attempts to commit a crime, for example, the law in some instances applies the same penalties as for a substantive offence.<sup>32</sup> However, there has also been historical recognition that although one who attempts a crime is liable in the same way as a person who commits the substantive offence, he or she is also deserving of lesser punishment.<sup>33</sup> In relation to conspiracy, it is accepted principle that a participant should be sentenced for her or his actions, rather than what he or she intended or planned but did not do.<sup>34</sup> Involvement in a conspiracy is generally less serious than involvement in an attempt, particularly where the attempt is by a viable method.<sup>35</sup> On that basis, one would anticipate that lower penalties would normally be applied in

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<sup>30</sup> Schauer and Zeckhauser (2007).

<sup>31</sup> The proper basis for sentencing in such cases has recently been the subject of discussion in sentencing the three offenders convicted of conspiring to plan to kill people at Holsworthy Barracks: Liz Hobday, 'Sentencing debate prompts fresh criticism of terror laws, *PM*, ABC, 24 May 2011, <<http://www.abc.net.au/pm/content/2011/s3225823.htm?site=melbourne>>.

<sup>32</sup> See for example the *Criminal Code Act 1995* (Cth) s 11.1(1).

<sup>33</sup> For example, see Jowett (1892) Vol 9, pp 876-7 citing Plato: 'Still having respect to the fortune which has in a manner favoured him, and to the providence which in pity to him and to the wounded man saved the one from a fatal blow, and the other from an accursed fate and calamity - as a thank-offering to this deity, and in order not to oppose his will - in such a case the law will remit the punishment of death, and only compel the offender to emigrate to a neighbouring city for the rest of his life, where he shall remain in the enjoyment of all his possessions.' See also Bentham (1871), p 426.

<sup>34</sup> *Savvas v The Queen* (1995) 183 CLR 1, cited in *R v Roche* [2005] WASCA 4 (Unreported, Murray ACJ, Templeman and McKechnie JJ, 14 January 2005), [32] per Templeman J and McKechnie J at [96].

<sup>35</sup> In *Barot* [2007] EWCA 1119 the English Court of Appeal held that a life sentence with a minimum term of 40 years should be reserved for a person who commits a serious attempt at mass murder by a viable method but is unsuccessful. Where the offence is of conspiracy and the act falls short of attempt the sentence should be lower: [60].

circumstances where the substantive offence was not close to being carried out.<sup>36</sup>

A proportionality between the proximity of preparatory activity to complete offence and sentence is not borne out, however, by the penalties applicable to terrorism offences that relate to conduct at quite preparatory stages even preceding the 'planning' stage.<sup>37</sup> Consistent with one of the central purposes of the anti-terrorism legislation – to criminalise acts relating to terrorism at the preparatory stages as a preventative measure<sup>38</sup> – even conduct that involves very early stage planning or preparation for a terrorist attack is subject to significant penalties.<sup>39</sup> The lowest maximum penalties for terrorism offences, with the exception of associating with a terrorist organisation, are for offences of possessing a document connected with a terrorist act, collecting or making documents likely to facilitate terrorist acts (being reckless as to the connection), and being a member of a terrorist organisation, all of which carry a maximum penalty of ten years' imprisonment.<sup>40</sup> A number of offences, such as receiving or providing training to a terrorist organisation, directing the activities of a terrorist organisation, recruiting for a terrorist organisation, and providing support to a terrorist organisation (with knowledge as to the terrorist organisation) carry a maximum penalty of 25 years imprisonment,<sup>41</sup> equivalent to or more than the maximum penalty for manslaughter in four Australian

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<sup>36</sup> There is also some indication of public support for lower penalties in cases of attempt than where an offence has been completed: Robinson and Darley (1995), p 23. Where a risk of physical harm was involved, the degree of liability attached by respondents increased in proportion to the severity of harm and the probability of the harm occurring: 32.

<sup>37</sup> An overview of the terrorism offences and maximum penalties is set out at Annexure G. McSherry (2004b), p 366 notes that the offence of doing an act in preparation for a terrorist act is very vague, and does not even require that the act be more than 'merely preparatory'.

<sup>38</sup> AG Dept's submission to Senate Legal and Constitutional Legislation Committee re Security Legislation Amendment (Terrorism) Bill 2002 (No 2) (Submission 383A, 1-3) cited in Gani (2008), p 272.

<sup>39</sup> In *Lodhi* (2006) 191 FLR 303 at 318 the court noted that, 'The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime. It was ... the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do. A policy judgment has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier stage than is usually the case for other kinds of criminal conduct'. These principles were found to apply to offences in Division 102 of the Code in *R v Ul Haque* [2006] NSWCCA 241 (Unreported, McClellan CJ at CL, Kirby and Hoeben JJ, 9 August 2006).

<sup>40</sup> *Criminal Code Act 1995* (Cth) ss 101.4(2), 101.5(2) and 102.3(1). A recommendation by the PJCS to replace the offence of being a member of a terrorist organisation with participation in a terrorist organisation was rejected: Government Response to Recommendations, Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, tabled 4 December 2006.

<sup>41</sup> *Criminal Code Act 1995* (Cth) ss 102.5, 102.2(1), 102.4(1), 102.7(1).



jurisdictions.<sup>42</sup> In the United Kingdom, legislation provides for a ‘whole life’ tariff in certain categories of murder considered particularly serious, including terrorist murders.<sup>43</sup> In the United States, federal sentencing guidelines provide for increased penalties for those convicted of offences involving, or intended to promote, terrorism.<sup>44</sup>

While there is no doubt a link between at least some of these types of activity and the carrying out of a terrorist attack, most of the activities fall far short of an attempt or conspiracy to commit a terrorist offence. The high maximum penalties applicable for these very preliminary types of conduct both reflect and reinforce the perception that terrorism is the most serious in the catalogue of criminal offences. By contrast, non-physical forms of violence that are often associated with the perpetration of domestic violence, such as emotional or financial abuse,<sup>45</sup> are not criminalised in most jurisdictions, with the exception of Tasmania.<sup>46</sup> Even offences involving the threat or infliction of physical force, such as assault, do not carry penalties as severe as the maximum applicable penalties for preparatory terrorism offences.<sup>47</sup> In relation to ideologically-motivated domestic violence, there is therefore no equivalent to the serious preparatory terrorism offences that offenders can be prosecuted for.

It is not only in the applicable maximum penalties but in the actual penalties imposed that the effects of the differential constructions of violence are manifest. In her doctoral study of spousal homicides between 1980 and 2000, Rebecca Bradfield found that the median sentence for male spousal homicide

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<sup>42</sup> Maximum penalties for manslaughter are 20 years in the ACT, Victoria and WA, 25 years in NSW, and life imprisonment in the Northern Territory, Queensland and South Australia: *Crimes Act 1900* (ACT) s 15; *Crimes Act 1900* (NSW) s 24; *Criminal Code Act 1983* (NT) s 161; *Criminal Code Act 1899* (Qld) s 310; *Criminal Law Consolidation Act 1935* (SA) s 13; *Crimes Act 1958* (Vic) s 5; *Criminal Code Act Compilation Act 1913* (WA) s 280.

<sup>43</sup> *Criminal Justice Act 2003* (UK); for discussion see Lacey et al (2003), pp 729-31.

<sup>44</sup> *Federal Sentencing Guidelines 2011* (US) § 3A1.4.

<sup>45</sup> Pence and Paymar (1993), pp 2-3; Hunter (2006b), p 740.

<sup>46</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 8 and 9. Legislative definitions of ‘domestic violence’ have expanded to incorporate non-physical violence: Fehlberg and Behrens (2008), p 203. However, these definitions relate to the making of protection orders, not the criminalisation of conduct. Thus a type of non-physical abuse may constitute a crime if it is prohibited under a protection order, but not in and of itself.

<sup>47</sup> For assault penalties applicable in states and territories see *Crimes Act 1900* (ACT) s 26 (2 yrs); *Crimes Act 1900* (NSW) s 61 (2 yrs); *Criminal Code Act 1983* (NT) s 188 (1 yr); *Criminal Code Act 1899* (Qld) s 335 (3 yrs); *Criminal Law Consolidation Act 1935* (SA) s 20 (2 yrs); *Criminal Code Act 1924* (Tas) s 182; *Criminal Code Compilation Act 1913* (WA) s 313 (18 months).

offenders was 18 years and 10 months for murder, and seven years and three months for manslaughter.<sup>48</sup> The New South Wales Court of Criminal Appeal has noted that in relation to intimate homicides, sentences of twenty years or more have generally been reserved for those matters where the killing was premeditated or particularly brutal.<sup>49</sup>

By comparison, the head sentences of between 23 and 28 years handed out to the offenders in *Elomar* for conspiracy to commit terrorist acts appear quite severe, taking into consideration that no decision had been made by the conspirators in relation to the nature of any attack, its target, or who would carry it out.<sup>50</sup> Of the terrorism offenders who have been sentenced to less than Bradfield's median sentence for male spousal manslaughter offenders, all involved fairly minor conduct far removed from the commission of an actual terrorist attack.<sup>51</sup>

It is because of their application at a very early stage of criminal conduct that the terrorism cases provide an interesting comparison with murder and manslaughter cases where there is undeniably harm caused in the form of the killing of another person (for whatever reason), resulting in not only the loss of human life, but also the associated loss and suffering of friends and family members. The human, social and financial costs of a completed terrorist attack would likely be enormous, depending of course on its scale and success. However, in this analysis, that potential harm is measured against *actual* harm –

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<sup>48</sup> Bradfield (2002), pp 334-6.

<sup>49</sup> *R v Toki* [2003] NSWCCA 125 (Unreported, Levine J, Hidden J, Smart AJ, 13 May 2003), [31]. Warner (2002), pp 270-1 found that angry or jealous domestic confrontations attracted median sentences in comparison to the higher sentences imposed for premeditated murder in a domestic setting.

<sup>50</sup> *R v Elomar & Ors* (2010) 264 ALR 759. A pattern of severe sentencing for terrorism offenders has been noted in the US: Zabel and Benjamin (2009), pp 41-5.

<sup>51</sup> *R v Atik* [2007] VSC 299 (Bongiorno J, 23 Aug 2007) (five-and-a-half years for membership of a terrorist organisation and intentionally providing resources to a terrorist organisation); *Benbrika v R* (2010) 247 FLR 1 (Abdullah Merhi and Amer Haddara) (six years with a non-parole period of four and a half for membership of a terrorist organisation; resentenced on appeal to four and a half years with a non-parole period of three years); *R v Kent* [2009] VSC 375 (Unreported, Bongiorno JA, 2 September 2009) (four and a half years and two and a half years concurrently for membership of a terrorist organisation and assisting to prepare a propaganda video for use on a terrorism website); *R v Mallah* [2005] NSWSC 317 (Unreported, Wood CJ, 21 April 2005) (two and a half years for making a threat to cause harm to a Commonwealth public official); *R v Mulahalilovic* [2009] NSWSC 1010 (Unreported, Whealy J, 30 January 2009) (four years eight months for possession of ammunition connected with preparation for a terrorist act); *R v Sharrouf* [2009] NSWSC 1002 (Unreported, Whealy J, 24 September 2009) (five years three months for possession of a thing connected with a terrorist act); *R v Thomas* [2008] VSC 620 (Unreported, Curtain J, 29 October 2008) (nine months for possession of a falsified passport).

the death of an individual – which would appear to ‘even up the balance’ somewhat; the potential for huge loss of life (but none in actuality) versus the actual loss of life, albeit on a small scale.<sup>52</sup>

The relatively severe penalties imposed upon terrorism offenders are no doubt reflective of a number of considerations, not least of which is the potential for harm on a massive scale inherent in such conduct. However, taking into account the very preparatory nature of much of the conduct being considered in the cases, I suggest that the penalties also reflect the court’s construction of the offending via the dual discourses of ideology and public violence. These discourses interplay with a variety of factors that courts take into consideration as part of the sentencing process, that relate to both the objective seriousness of the offence and the subjective characteristics of the offender. In particular, the construction of domestic violence as non-ideological contributes to more favourable treatment of offenders than might otherwise be expected.<sup>53</sup>

From a comparison of the terrorism and domestic homicide sentencing cases, I have identified five aspects that illustrate the link between the dual discourses and factors relevant to sentencing:

1. The presence of ideological motive in terrorism offending is perceived by courts as an aggravating feature, marking the violence as the product of a deliberate choice, and calling for strong deterrence, both specific and general.
2. The possession of ideological motivation is linked with a construction of terrorist violence as planned and therefore intentional, while the association of lethal domestic violence with a spontaneous outburst of emotion means that it is frequently constructed as reckless or unintended. The culpability of the offender is directly related to the perceived need for punishment and denunciation in sentencing.

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<sup>52</sup> See *Turner* (1975) 61 Cr App R 67, cited in *R v Roche* [2005] WASCA 4 (Unreported, Murray ACJ, Templeman and McKechnie JJ, 14 January 2005) at [103] per McKechnie J: ‘It seems to us that it is not in the public interest that even for grave crimes, sentences should be passed which do not correlate sensibly and fairly with the time in prison which is likely to be served by somebody who has committed murder in circumstances in which there were no mitigating circumstances.’

<sup>53</sup> Spatz (1991) draws upon research from a number of countries in arguing that there is widespread leniency afforded to men who kill their wives, both in terms of legal defences and sentencing.

3. Where offending is not perceived as ideological, and the victim is characterised as in some way responsible for her or his victimisation, the need to hold the offender accountable, and to recognise harm done to the victim and the community, is reduced. This is particularly relevant in cases where the partial defence of provocation is accepted.
4. The presence of ideological motive is associated with strong commitment to violence and therefore poor prospects of rehabilitation, while the absence of ideological motive in domestic homicides is often associated with reasonable prospects of rehabilitation.
5. Unlike the terrorism offender, whose violence is indiscriminate, the domestic homicide perpetrator, whose violence is targeted at a particular victim, is not perceived as a threat to the broader public, but only to the individual victim, meaning that protection of the community is a factor to be given less weight.

In the following section, I consider each of these aspects in turn.

### *The Relationship Between Offence Construction and Sentencing*

Analysing reasons for sentence in both types of case involves looking at one stage of the process of case construction,<sup>54</sup> in which facts are variously chosen, ignored, obscured or emphasised in ways that result in differential constructions of terrorism and domestic violence. What common features may exist between the two are, through the construction process, obscured or obliterated so that the two offence types are made to seem completely different. As described by McConville, Sanders and Leng:<sup>55</sup>

It must be emphasized that at each point of the criminal justice process ‘what happened’ is the subject of interpretation, addition, subtraction, selection and reformulation. This process is a *continuous* process, so that the meaning and

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<sup>54</sup> McConville et al (1991).

<sup>55</sup> McConville et al (1991), p 12.

status of 'a case' are to be understood in terms of the particular time and context in which it is viewed, a meaning and status that it may not have possessed earlier or continue to possess thereafter. The construction of a case is not confined to one aspect of the process, such as the creation of an internal record or the compilation of evidence, but infuses every action and activity of official actors from the initial selection of the suspect to final case disposition. Case construction implicates the actors in a discourse with legal rules and guidelines and involves them in using rules, manipulating rules and interpreting rules. It involves not simply the selection and interpretation of evidence but its *creation*.

Thus depiction of the players in terrorism and domestic violence sentencing, as in all cases, is a process of construction. Although the 'official actors' I am concerned with here are members of the judiciary,<sup>56</sup> it is important to remember that the process of case construction engaged in by judges occurs at a point in the process when a case has passed through the hands of other official actors, and been subject to those actors' own 'interpretation, addition, subtraction, selection and reformulation'. Decisions by police about which matters to investigate, and by prosecutors about when to proceed with prosecution, and what charge is appropriate, while not the subject of examination here,<sup>57</sup> also play a critical role in the construction of cases.<sup>58</sup> In the case of a sentence following a plea of guilty, the Statement of Facts agreed between prosecution and defence serves to construct the 'facts' of the case. For example, the presence of ideological motivation as relevant to a terrorism offence will be accepted on the basis of the Statement of Facts and any other additional material before the court, rather than the prosecution needing to call evidence to prove that element of the offence.

In the *Roche* appeal, McKechnie J set out a number of principles applicable in sentencing for terrorism cases, which include the principle that terrorism is an

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<sup>56</sup> In judicial decision-making, stories are told based on questions such as 'Did it happen that way?' and 'Could it have happened that way?' that reflect unspoken understandings of how people act in certain ways: Lacey et al (2003), p 21.

<sup>57</sup> Although the acceptance by the Crown of a plea to manslaughter on the basis of provocation or the acceptance of provocation by a jury are discussed below. Decisions by police to prosecute for breach of protection order rather than substantive offences are also discussed in Chapter 3.2.

<sup>58</sup> Lacey et al (2003), pp 80-97.

'abnormal crime', requiring consideration of a range of penalties that do not necessarily correlate with ordinary, though grave, offences.<sup>59</sup> The theme of terrorism, and the offenders responsible for planning it, as abnormal and 'Other', pervades the discourse of construction in the reasons courts give for sentence. Through the possession of ideological motivation, the terrorism offender stands apart as part of an unusual class of offender who merits condign punishment.

In the section that follows, I continue to deconstruct concepts in legal discourse such as 'ideology', 'public', 'jealousy', 'anger' and 'danger'. I examine how these concepts are constructed in domestic homicide and terrorism sentences, and how they in turn provide part of the foundation for the exercise of the court's sentencing discretion.<sup>60</sup> Through 'discursive manoeuvres'<sup>61</sup> involving these and other terms, serious male violence against women is minimised in the sentencing process.

These differential constructions interact with the purposes of sentencing, which are set out in legislation in some Australian states and territories, but generally reflect well-established principles of common law. They are deterrence, punishment, denunciation, accountability of the offender, recognition of harm, rehabilitation and protection of the community.<sup>62</sup>

### *Ideological Motive and Deterrence*

One of the key purposes of sentencing is deterrence: both specific (meaning deterrence of the offender) and general (deterrence of the public at large).<sup>63</sup> In

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<sup>59</sup> *R v Roche* [2005] WASCA 4 (Unreported, Murray ACJ, Templeman and McKechnie JJ, 14 January 2005), [115].

<sup>60</sup> The way a defendant is treated is 'closely linked to the stories he (tells) and the stories that (are) made of him, his victim, and the crime': Strange (2003), p 313.

<sup>61</sup> Howe (2008), pp 54-6 referencing Allen (1987b).

<sup>62</sup> See for example *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act* (NT) s 5; *Penalties and Sentences Act 1992* (Qld) s 9; *Criminal Law (Sentencing) Act 1988* (SA) s 10; *Sentencing Act 1991* (Vic) s 5.

<sup>63</sup> *Sentencing Act* (NT) s 5(1)(c); *Penalties and Sentences Act 1992* (Qld) s 9(1)(c); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(j); *Sentencing Act 1991* (Vic) s 5(1)(b).

legal discourse, the existence of ideological motivation points to a greater need for deterrence of both types: both those individuals who have indicated a willingness to act on their ideological motivations, and those who might be tempted to follow them, need to be deterred in order to protect the community.

Within the law, ideological motivation is, as noted in Chapter 2.2, reflective of a 'subjective value bias ... an illusory view of the world';<sup>64</sup> it is thus not only an element of terrorism offences, but also an aggravating feature.<sup>65</sup> The possession of ideological motivation places the offender outside the scope of normal offending and renders her or him 'Other'.<sup>66</sup> This is reflected by the use of words such as 'fanatical' (*Lodhi*), 'extreme' (*Lodhi*), 'extremist' (Raad in *Benbrika*) and 'abnormal' (*Roche*).<sup>67</sup> An illustration is provided by the sentencing remarks of Whealy J in the New South Wales Supreme Court decision in *Elomar*.<sup>68</sup>

The mindset evinced by all this material may be summarised as follows: First, a *hatred* of the "KUFR", that is those Muslims and non-Muslims who did not share their *extremist views*. Secondly, an *intolerance* towards the democratic Australian Government and its policies. Thirdly, a conviction that Muslims are obligated by their religion to pursue violent jihad for the purposes of overthrowing liberal democratic societies and to replace them with Islamic rule and Shariah law. This criminal enterprise was not in any sense motivated, as criminal activities so often are, by a need for financial gain or simply private revenge. Rather, an *intolerant and inflexible fundamentalist religious conviction* was the principal motivation for the commission of the offence. This is the most startling and intransigent feature of the crime. It sets it apart from other criminal enterprises motivated by financial gain, by passion, anger or revenge [emphasis added].

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<sup>64</sup> Vincent (2009), p 17.

<sup>65</sup> I do not use the word 'aggravating' here in a technical legal sense, as for the court to treat ideology as an aggravating factor in that sense in a terrorism case would infringe the legal principle that an element of an offence cannot be considered an aggravating feature. I use it in the dictionary sense of 'to make worse or more severe' than other (ordinary) crimes. In *R v Mulahalilovic* [2009] NSWSC 1010 (Unreported, Whealy J, 30 January 2009), [27] Whealy J noted that the offender was not being punished for having extremist beliefs, but the existence of such beliefs was relevant to the objective seriousness of the offence.

<sup>66</sup> The Victorian Court of Appeal has noted that moral culpability and objective seriousness may both differ according to the history and type of organisation joined: *Benbrika v R* (2010) 247 FLR 1, [555].

<sup>67</sup> *R v Roche* (Unreported, Healy DCJ, 1 June 2004); *R v Lodhi* (2006) 199 FLR 364; *R v Benbrika & Ors* (2009) 222 FLR 433.

<sup>68</sup> *R v Elomar & Ors* (2010) 264 ALR 759, [63].

In a number of terrorism cases, courts have emphasised the particular importance of specific deterrence in protecting the community from this type of offender.<sup>69</sup> Courts have also underlined the significance of general deterrence in sentencing terrorism offenders.<sup>70</sup> The assumption is that offending of this type is a deliberate choice and therefore capable of suppression through the mechanism of general deterrence. For example, in *Demirian*, the court stated that, 'Unless courts in this country are vigilant in imposing condign sentences for such conduct evil-minded persons might seek to emulate this conduct.'<sup>71</sup>

Moreover, the extremism, fanaticism, and evil intention in terrorism offending are portrayed as part of the offender's make-up rather than an aspect of her or his behaviour. This is reflected in phrases such as 'deeply fanatical, but sincerely held, religious and worldview based on his faith',<sup>72</sup> 'extremist views',<sup>73</sup> and 'intolerant and radical views'.<sup>74</sup> Although both terrorism and domestic homicide offenders are frequently described as being of 'good character', the use to be made of this character is different. In domestic homicides, the offending is constructed as an isolated deviation from the usual path, rather than something associated with the offender's nature.<sup>75</sup> On the other hand, courts have emphasised that good character is to be given less weight in

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<sup>69</sup> *R v Mallah* [2005] NSWSC 317 (Unreported, Wood CJ, 21 April 2005), [78]-[82]; *R v Lodhi* (2006) 199 FLR 364; *R v Benbrika & Ors* (2009) 222 FLR 433, [69]-[85]; *R v Mulahalilovic* [2009] NSWSC 1010 (Unreported, Whealy J, 30 January 2009), [45]; *R v Sharrouf* [2009] NSWSC 1002 (Unreported, Whealy J, 24 September 2009), [60]; *R v Elomar & Ors* (2010) 264 ALR 759, [78].

<sup>70</sup> *R v Mallah* [2005] NSWSC 317 (Unreported, Wood CJ, 21 April 2005), [78]-[82]; *R v Lodhi* (2006) 199 FLR 364, [89], [91]-[92]; *R v Thomas* [2006] VSC 120 (Unreported, Cummins J, 31 March 2006), [14]; *Lodhi v R* (2007) 179 A Crim R 470, [274]; *R v Touma* [2008] NSWSC 1475 (Unreported, Whealy J, 24 October 2008), [131]; *R v Mulahalilovic* [2009] NSWSC 1010 (Unreported, Whealy J, 30 January 2009), [45]; *R v Sharrouf* [2009] NSWSC 1002 (Unreported, Whealy J, 24 September 2009), [60].

<sup>71</sup> *Demirian* (1988) 33 A Crim R 441, [474]. The court relied upon the political nature of the crime and its seriousness in deciding that the offender should not receive the benefit of a minimum term of imprisonment in relation to his ten-year sentence for conspiracy to detonate an explosive at the Turkish Consulate in Melbourne. Similarly, Whealy J in *R v Lodhi* (2006) 199 FLR 364, [91] referred to the 'increasing evil' of terrorism and the 'horror of terrorist activities'.

<sup>72</sup> *R v Lodhi* (2006) 199 FLR 364, [49].

<sup>73</sup> *R v Lodhi* (2006) 199 FLR 364; *R v Sharrouf* [2009] NSWSC 1002 (Unreported, Whealy J, 24 September 2009); *R v Elomar & Ors* (2010) 264 ALR 759.

<sup>74</sup> *R v Elomar & Ors* (2010) 264 ALR 759, [139].

<sup>75</sup> *R v Margach* [2006] VSC 77 (Unreported, King J, 8 March 2006); *R v Hill* [2006] VSC 149 (Unreported, Hollingworth J, 2 May 2006); *R v Shepherd* [2006] NSWSC 799 (Unreported, Hoeben J, 11 August 2006); *R v Ferguson* [2007] NSWSC 949 (Unreported, Michael Grove J, 27 August 2007). For historical treatment of 'good breadwinners' who killed their wives see Strange (2003). In the Israeli context, it has been noted that reference to the defendant as 'normative' and a 'law-abiding citizen' is common in domestic violence sentencing: First and Agmon-Gonnen (2009), p 162. See also Crocker (2005), p 210.



terrorism cases,<sup>76</sup> although why that should be the case in terrorism as opposed to domestic homicide is not clear.

The ingrained aspect of ideological motivation might suggest that deterrence is *less likely* to be effective in terrorism cases.<sup>77</sup> However, deterrence is still given weight by the courts notwithstanding the possibility that it will not actually work, as illustrated by the following passage in *Lodhi*:<sup>78</sup>

... [The] obligation of the Court is to denounce terrorism and voice its stern disapproval of activities such as those contemplated by the offender here. It may be argued that the imposition of stern penalties, in the context of firm denunciatory statements, will not in fact deter those whose religious and political ideologies are extreme and fanatical. But a stand must be taken. The community is owed this protection even if the obstinacy and madness of extreme views may mean that the protection is a fragile or uncertain one. In my view, the Courts must speak firmly and with conviction in matters of this kind. This does not of course mean that general sentencing principles are undervalued or that matters favourable to an offender are to be overlooked. It does mean, however, that in offences of this kind, as I have said, the principles of denunciation and deterrence are to play a substantial role. There is also a need to recognise that the imposition of a substantial sentence may have a personal impact as a deterrent on this offender so that upon his release he will, it is cautiously hoped, be unlikely or less likely to re-offend. In addition to general deterrence, the need to deter this man from future offences is a potent factor in the sentencing process.

By contrast, the conduct of offenders in some domestic murder and manslaughter cases is minimised by constructing it as the product of tensions within the domestic relationship, rather than considering whether it is in fact a strategic use of violence rooted in a particular belief system possessed by the perpetrator. Not uncommonly, the seriousness of the violence is minimised by

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<sup>76</sup> *R v Lodhi* (2006) 199 FLR 364, [91]; *R v Khazal* [2009] NSWSC 1015 (Unreported, Latham J, 25 September 2009), [41]. Porter and Kebell (2010), p 9 found that only six of 21 convicted terrorists in their study had criminal histories.

<sup>77</sup> For a critique of the deterrence approach in the context of terrorism, see Ilardi (1999).

<sup>78</sup> *R v Lodhi* (2006) 199 FLR 364 [91]-[92]. On appeal, Spigelman CJ noted that both types of deterrence may be less relevant where religious or ideological motivation means that they are less likely to work, however in that case protection of the community takes on extra weight: *Lodhi v R* (2007) 179 A Crim R 470, [87]-[88].

'euphemising'<sup>79</sup> it as 'domestic discord' or 'marital tension'.<sup>80</sup> For example, the following description was given in *Mills* of how the offender's conduct occurred: 'Their mutual resentments appeared to have festered over the years to reach their tragic culmination on 10 July 2005.'<sup>81</sup> Alternatively, suggestions of previous violence are brushed over or ignored altogether.<sup>82</sup>

The general failure to recognise the conduct of some domestic homicide perpetrators as ideologically motivated reflects the masculinist nature of the legal system. To characterise domestic homicide as an extreme manifestation of ordinary relationship tensions, to which anyone might be subject, normalises such violence, and obscures its deliberate use as a means of control that characterises much intimate violence. Minimising the violence inflicted on women also protects the state from facing the consequences of failing to deal with the violence.<sup>83</sup> On the other hand, to recognise that many perpetrators of domestic violence make a deliberate choice to use violence because they believe they are entitled to would expose the existence of masculinist ideology.

Even in cases of domestic homicide where there is strong evidence of a desire for control over a partner or former partner culminating in homicide, legal discourse frames this as emotion<sup>84</sup> – usually jealousy<sup>85</sup> or anger.<sup>86</sup> In the

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<sup>79</sup> Romito (2008), pp 43-6. Romito uses the term 'euphemising' to describe the process of labelling a concept in such a way as to obscure the seriousness of it or who has responsibility for it.

<sup>80</sup> *R v Barry* [2000] NSWCCA 138 (Unreported, Stein JA, Dunford and Sperling JJ, 13 April 2000) (association of the couple had been 'attended by violence'); *R v Bell* [2000] QCA 485 (Unreported, Williams JA, Pincus JA, Cullinane J, 23 November 2000) (previous history of violence referred to as 'marital disharmony'); *R v Gojanovic (No 2)* [2007] VSCA 153 (Unreported, Ashley and Kellam JJA and Kaye AJA, 14 August 2007); Parkinson and Behrens (2004), pp 370-5. Cf *R v Conway* [2005] VSC 205 (Unreported, Bell J, 10 June 2005) where the violence was characterised as carried out in a 'state of possessive male rage'.

<sup>81</sup> *R v Mills* [2008] QCA 146 (Unreported, Keane, Holmes and Fraser JJA, 28 May 2008), [14]. For similar minimisation see *R v Hill* [2006] VSC 149 (Unreported, Hollingworth J, 2 May 2006), [41].

<sup>82</sup> *R v Zammit* [2008] NSWSC 317 (Unreported, Howie J, 9 April 2008), where Howie J found that, 'Although this was a case of domestic violence there is nothing to suggest that this was an incident occurring in an abusive relationship'. The offender had pushed the deceased hard into items of furniture twice in a 24-hour period resulting in her death. The catalyst for the violence was that the offender became angry when his former girlfriend had asked the victim if the offender was ever violent towards her, and the victim said that he was. See also *R v Shepherd* [2006] NSWSC 799 (Unreported, Hoeben J, 11 August 2006), [39].

<sup>83</sup> Coukos (1999-2000), p 36.

<sup>84</sup> *R v Culleton* [2000] VSC 559 (Unreported, Vincent J, 27 November 2000), [17] ('outburst of explosive violence'); *R v Leonboyer* [2001] VSCA 149 (Unreported, Phillips CJ, Charles and Callaway JJA, 7 September 2001), [125].

<sup>85</sup> *R v Gardner* (1989) 42 A Crim R 279; *Stingel v R* (1990) 171 CLR 312, 329; *R v Tjami* (2000) LSJS 309, [6]; *R v Copland* [2006] VSC 224 (Unreported, Eames J, 23 June 2006); *R v Butler* [2007] VSC 185

process, what might otherwise be conceptualised as ideological motivation is reconstructed as human emotion, which is less susceptible to the influence of deterrence.<sup>87</sup> While the need for general deterrence in domestic homicides is commonly referred to,<sup>88</sup> the need for specific deterrence is commonly afforded less (or no) weight on the basis that the act is isolated, and the offender is unlikely to offend again.<sup>89</sup> As noted by Keane JA in *Mills*, ‘There is room for considerable doubt as to the practical efficacy of heavy sentences in deterring the kind of crime of passion with which we are presently concerned.’<sup>90</sup>

In a rare exception to this trend, in *Keir*,<sup>91</sup> Adams J acknowledged that ‘there are some men in the community who consider that marriage gives them the right to control the lives and welfare of their wives and to punish them when they do not comply with those demands’ and that ‘the assertion of such a right should be treated as rendering culpability all the greater’. Justice Adams made these observations in the context of imposing a 24 year sentence for murder,

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(Unreported, Curtain J, 1 June 2007); *R v Andrew* [2008] VSC 138 (Unreported, Forrest J, 1 May 2008) (previous history of violence – punches and kicks inflicted following accusations of infidelity).

<sup>86</sup> *R v Tjami* (2000) LSJS 309; *R v Lynch* [2002] NSWSC 1140 (Unreported, Whealy J, 20 November 2002), [23]; *R v Joseph* [2003] NSWSC 1080 (Unreported, Greg James J, 21 November 2003); *R v Brown* [2004] NSWSC 194 (Unreported, Hulme J, 6 February 2004); *R v Margach* [2006] VSC 77 (Unreported, King J, 8 March 2006), [26]; *R v Ferguson* [2007] NSWSC 949 (Unreported, Michael Grove J, 27 August 2007), [23]. By contrast, in *R v Conway* [2005] VSC 205 (Unreported, Bell J, 10 June 2005), Bell J referred to a state of ‘possessive male rage’ [8].

<sup>87</sup> Sherman hypothesises that police inaction in domestic violence may be due to the perception that deterrence will not work against ‘emotional’ crime: Sherman (1992), pp 43-4.

<sup>88</sup> *R v Baggott* [2000] QCA 153 (Unreported, McMurdo P, McPherson JA, Mackenzie J, 3 May 2000), p 8; *R v Hurley* [2001] NSWSC 1007 (Unreported, David Levine J, 2 November 2001); *R v Badanjak* [2004] NSWCCA 395 (Unreported, Wood CJ, McClellan AJA and Smart AJ, 25 October 2004), [31]; *Schubring; ex parte Attorney-General* [2005] 1 Qd R 515, 524; *R v Lem* [2005] SASC 405 (Unreported, Doyle CJ, Bleby and Gray JJ, 28 October 2005); *R v Hill* [2006] VSC 149 (Unreported, Hollingworth J, 2 May 2006), [39]; *R v Verdins*; *R v Buckley*; *R v Vo* (2007) 16 VR 269, [93]; *R v Gojanovic (No 2)* [2007] VSCA 153 (Unreported, Ashley and Kellam JJA and Kaye AJA, 14 August 2007), [40]; *R v Boyle* [2008] VSC 71 (Unreported, Forrest J, 18 March 2008); *R v Robinson* [2010] VSC 10 (Unreported, Whelan J, 29 January 2010), [45]-[46].

<sup>89</sup> *R v Olig* [2000] NSWSC 1246 (Unreported, Adams J, 21 December 2000); *R v Goodwin* [2001] VSC 519 (Unreported, Coldrey J, 21 December 2001); *R v Nicol* [2005] NSWSC 547 (Unreported, Hulme J, 27 May 2005); *R v Hill* [2006] VSC 149 (Unreported, Hollingworth J, 2 May 2006), [41]; *R v Zammit* [2008] NSWSC 317 (Unreported, Howie J, 9 April 2008); Cf *R v Verdins*; *R v Buckley*; *R v Vo* (2007) 16 VR 269, [93]; *R v Butler* [2007] VSC 185 (Unreported, Curtain J, 1 June 2007); *R v Galante* [2008] NSWSC 319 (Unreported, Adams J, 11 April 2008).

<sup>90</sup> *R v Mills* [2008] QCA 146 (Unreported, Keane, Holmes and Fraser JJA, 28 May 2008), [29].

<sup>91</sup> *R v Keir* [2000] NSWSC 111 (Unreported, Adams J, 29 February 2000), [15]. Following two successful appeals against conviction, Keir was resentenced to 22 yrs with a non-parole period of 16 yrs: *R v Keir* [2004] NSWSC 1164 (Unreported, MW Campbell AJ, 13 December 2004).

notably higher than most of the sentences for domestic murder imposed in my sample.<sup>92</sup>

The danger of exposing masculinist behaviour in the way Adams J did in *Keir*<sup>93</sup> is that the group of men who ‘consider that marriage gives the right to control the lives and welfare of their wives’ is not a small fringe-group, but a significant proportion of men in the Australian community.<sup>94</sup> Recognising the pervasive nature of masculinist ideology would undermine the myth of gender equality that permeates Australian law and society, as well as the traditional liberal premise that the family is a safe haven.

### *Ideological Motivation and the Need for Punishment and Denunciation*

The need to ensure that the offender is adequately punished, and the need for denunciation of her or his conduct, are both recognised purposes of sentencing.<sup>95</sup> The weight to be given to denunciation and punishment will be directly proportionate to the offender’s culpability for the crime he or she has committed. In this regard, the court’s construction of the fault element – the mental element required to establish criminal responsibility – takes on particular significance. For example, a person who inflicts violence with the intention to kill will be more culpable, and therefore more deserving of punishment and denunciation, than one who kills with the intention to cause some lesser form of harm. Premeditation of an offence also increases the offender’s culpability.<sup>96</sup>

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<sup>92</sup> Warner (2002), p 299 also notes that more recent Tasmanian decisions for domestic violence non-fatal offences against the person have been in line with non-domestic offence sentencing, finding that the marriage context may be treated as an aggravating factor.

<sup>93</sup> *R v Keir* [2000] NSWSC 111 (Unreported, Adams J, 29 February 2000).

<sup>94</sup> As Schneider notes with respect to American society: ‘It is far easier to distance ourselves when the issue is physical abuse rather than personal domination, which may feel uncomfortably close to home’: Schneider (2000), p 66. For the prevalence of domestic violence in Australian society see Chapter 2.3, particularly sources quoted at note 144.

<sup>95</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(a) and (f); *Sentencing Act 1995* (NT) s 5(1)(a) and (d); *Penalties and Sentences Act 1992* (Qld) s 9(1)(a) and (d); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(k); *Sentencing Act 1991* (Vic) s 5(1)(a) and (d).

<sup>96</sup> For example *R v Chalmers* [2009] VSC 251 (Unreported, Osborne J, 22 June 2009), [13].

As noted in Chapter 2.2, although motive is not usually required to establish criminal responsibility, it may help to prove the fault element by providing a reason for the conduct.<sup>97</sup> In this way, the obscuring of ideological motivation in domestic homicides is directly related to the construction of the requisite legal intention for the crime, and particularly whether the intention exists to cause death or grievous bodily harm. An offender constructed as ideologically-motivated is more likely to be perceived to have deliberately acted with the intention to kill than an offender constructed as acting spontaneously in the heat of the moment.<sup>98</sup>

When a person is convicted of murder, the jury must have been satisfied in each case that the accused acted with any of the intention to kill, the intention to inflict serious harm, or reckless indifference to the probability of causing death, in descending order of seriousness.<sup>99</sup> In the Northern Territory, reckless indifference to life means a conviction for manslaughter rather than murder.<sup>100</sup> Sometimes the jury verdict will indicate a finding as to intention, but where it is left open on the verdict, it is the judge on sentence who determines which of these intentions the jury must have concluded was held by the accused. For example, a verdict of guilty of murder might indicate that the offender acted with either of the intention to kill *or* the intention to cause grievous bodily harm. The intention to kill, indicative of greater culpability, will be associated with a more severe sentence.

In some domestic homicide cases, the deconstructive process reveals the judge's construction of a less serious intention in circumstances where other 'facts' of the case are indicative of an intention to kill. This 'downgrading' of

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<sup>97</sup> Bronitt and McSherry (2010), p 200.

<sup>98</sup> Copelon notes that domestic violence offenders are often perceived as acting impulsively rather than deliberately: Copelon (1993-4), pp 325-7.

<sup>99</sup> *Crimes Act 1900* (ACT) s 12; *Crimes Act 1900* (NSW) s 18; *Criminal Code Act 1983* (NT) s 156; *Criminal Code Act 1899* (Qld) s 302 (no reckless indifference but includes death caused by an act committed for an unlawful purpose, where the act is likely to endanger human life); *Criminal Code Act 1924* (Tas) s 157 (no reckless indifference but also includes commission of an unlawful act which the defendant knew or ought to have known was likely to cause death); *Criminal Code Act Compilation Act 1913* (WA) s 279 (no reckless indifference but includes act done in the prosecution of an unlawful purpose where likely to endanger human life). NSW, Queensland, Tasmania and Victoria also provide for murder where the killing is done in the context of commission of a serious offence: see references cited above and *Crimes Act 1958* (Vic) s 3A.

<sup>100</sup> *Criminal Code Act 1983* (NT) s 160.

intention is consistent with characterisation of the conduct of domestic homicide offenders as personally rather than ideologically motivated. It is also likely to reduce the perceived need for punishment and denunciation in the imposition of sentence.

This argument is illustrated by two case examples.<sup>101</sup> In 2002, the NSW Supreme Court sentenced Kevin Lynch for the malicious wounding with intent to cause grievous bodily harm of his former partner Elizabeth Lynch, and the manslaughter of her new boyfriend Jason Phelps. As the basis for the plea to manslaughter was provocation, there could legally have been a finding of intention to kill or to cause grievous bodily harm, however Whealy J found that the accused only had the latter intention.<sup>102</sup> That finding was in spite of the fact that he had simmered angrily over the victims' relationship for some weeks prior to the event, broken into the house where they were staying carrying two knives, stabbed them both, and only desisted when hit over the head several times by Phelps' sister. The judge noted that once Phelps' sister had struck him over the head with the hatstand:<sup>103</sup>

[He] must have come to his senses and realised what he had done. He did not display any further aggression towards either Christine Henry [Phelps' sister] or her mother but left the premises quickly and in fact rang the emergency services ambulance to report the stabbing.

Although this could easily be interpreted as a situation in which the accused was committed to killing the victims and was only stopped by an act of self-defence, Lynch was in effect given credit for 'coming to his senses' and ceasing the violence as though he had done so voluntarily.

In *Vu*,<sup>104</sup> the offender was convicted of the murder of his former de facto partner, whom he had assaulted and raped on a number of occasions. She had left him, taken out an apprehended violence order (which he had breached on a

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<sup>101</sup> See also *R v Joseph* [2003] NSWSC 1080 (Unreported, Greg James J, 21 November 2003) (intention to cause grievous bodily harm rather than to kill where offender attacked his sleeping wife with a blunt object in a 'frenzy' of rage).

<sup>102</sup> *R v Lynch* [2002] NSWSC 1140 (Unreported, Whealy J, 20 November 2002), [30].

<sup>103</sup> *R v Lynch* [2002] NSWSC 1140 (Unreported, Whealy J, 20 November 2002), [39].

<sup>104</sup> *R v Vu* [2005] NSWSC 271 (Unreported, Barr J, 1 April 2005).

number of occasions) and taken steps to hide her address from him; she was in fact in the process of moving again when he broke into her house and beat her to death. The sentencing judge stated:<sup>105</sup>

I do not think that the offender went to the deceased's home with the express intention of injuring her, but he must have known that if he went there violence would probably follow. He was well aware from his recent confrontations that he was likely to lose his temper. He knew that if he did so he would not stop short of beating up the deceased. The way in which he entered the deceased's premises shows that he did not expect her to let him in. He must have known that there would be some kind of difficulty.

In this case, despite the obvious indicators of premeditation and previous episodes of violence, the offender's conduct was constructed essentially as the product of negligence, in failing to recognise his propensity for violence when in the presence of the victim.

In terrorism cases, the need for punishment and denunciation is seen as particularly important.<sup>106</sup> Some of the domestic homicide cases also make reference to the relevance of these factors,<sup>107</sup> however, drawing upon the 'emotional' context of the crime, there is a common theme of the offender having expressed remorse for his actions,<sup>108</sup> which has the effect of reducing the need for punishment and denunciation to be factored into sentence.

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<sup>105</sup> *R v Vu* [2005] NSWSC 271 (Unreported, Barr J, 1 April 2005), [19].

<sup>106</sup> *R v Roche* [2005] WASCA 4 (Unreported, Murray ACJ, Templeman and McKechnie JJ, 14 January 2005); *Lodhi v R* (2007) 179 A Crim R 470, [79], [86]; *R v Touma* [2008] NSWSC 1475 (Unreported, Whealy J, 24 October 2008), [80]; *R v Mulahalilovic* [2009] NSWSC 1010 (Unreported, Whealy J, 30 January 2009), [45]; *R v Sharrouf* [2009] NSWSC 1002 (Unreported, Whealy J, 24 September 2009, [60]; *R v Elomar & Ors* (2010) 264 ALR 759, [78]-[79].

<sup>107</sup> *R v Bond* [2001] NSWSC 1059 (Unreported, James J, 7 December 2000); *R v Joseph* [2003] NSWSC 1080 (Unreported, Greg James J, 21 November 2003); *R v Badanjak* [2004] NSWCCA 395 (Unreported, Wood CJ, McClellan AJA and Smart AJ, 25 October 2004), [31]; *R v Yasso* [2005] VSC 75 (Unreported, Hollingworth J, 21 March 2005); *R v Lem* [2005] SASC 405 (Unreported, Doyle CJ, Bleby and Gray JJ, 28 October 2005), [64]; *DPP v Rhodes* [2007] VSC 55 (Unreported, Curtain J, 8 March 2007); *R v Butler* [2007] VSC 185 (Unreported, Curtain J, 1 June 2007); *R v Boyle* [2008] VSC 71 (Unreported, Forrest J, 18 March 2008); *R v Robinson* [2010] VSC 10 (Unreported, Whelan J, 29 January 2010), [45]-[46].

<sup>108</sup> *R v Hawkins* [2001] NSWSC 420 (Unreported, O'Keefe J, 24 May 2001); *R v Hurley* [2001] NSWSC 1007 (Unreported, David Levine J, 2 November 2001); *R v Hunt* [2002] NSWSC 66 (Unreported, Dowd J, 19 February 2002); *R v Lynch* [2002] NSWSC 1140 (Unreported, Whealy J, 20 November 2002); *R v Newling* [2005] VSC 54 (Unreported, Teague J, 8 March 2005); *R v Margach* [2006] VSC 77 (Unreported, King J, 8 March 2006); *R v Shepherd* [2006] NSWSC 799 (Unreported, Hoeben J, 11 August 2006); *R v Andrew* [2008] VSC 138 (Unreported, Forrest J, 1 May 2008); *R v Mills* [2008] QCA 146 (Unreported, Keane, Holmes and Fraser JJA, 28 May 2008); *R v Foster* [2009] VSC 124 (Unreported, Osborn J, 2 April 2009).

Because the existence of ideological motivation is obscured, whether or not an offender has taken steps to disavow himself of ideological beliefs is not a relevant factor on sentence, as it is in terrorism sentencing.<sup>109</sup>

### *Ideological Motivation and the Need to Hold the Offender Accountable and Recognise Harm to the Victim and the Community*

Two further principles of sentencing are the need to hold the offender accountable for her or his actions, and the need to recognise harm caused to the victim and the community as a result of the offending.<sup>110</sup> Where the victim is perceived as in some way responsible for the harm committed against her or him, the significance of these considerations is reduced. In domestic homicide cases, this is pertinent in relation to the operation of the partial defence of provocation.

As discussed in Chapter 2.2, the motivation of terrorism offenders, as constructed in contemporary sentencing decisions, is antithetical to the 'ordinary way of thinking'.<sup>111</sup> The notion of *jihad*, and the goal of punishing the 'infidels' or reacting against the liberal excesses of the West, are completely foreign to common understandings that underpin judicial decision-making.<sup>112</sup> By contrast, motivations of rage, despair or jealousy as constructed in the domestic homicide cases, resonate strongly within the legal system. In its most overt form, this allows perpetrators of domestic homicide to rely on a defence of

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<sup>109</sup> Cases where the strength of ideological belief, and failure to renounce these views, has been noted include *R v Khazal* [2009] NSWSC 1015 (Unreported, Latham J, 25 September 2009), [43]-[45]; *R v Benbrika & Ors* (2009) 222 FLR 433, [69]-[85] (Benbrika), [103]-[119] (Joud), [120]-[139] (Sayadi), [174]-[211] (Ahmed Raad), [229]-[246] (Hadara); *R v Elomar & Ors* (2010) 264 ALR 759, [93] (Elomar), [106] (Khaled Cheikho), [130] (Hasan), [178] (Jamal).

<sup>110</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(e) and (g).

<sup>111</sup> This is reflected by the use of words such as 'fanatical' and 'extreme' (*R v Lodhi* (2006) 199 FLR 364), 'extremist' (Raad in *R v Benbrika & Ors* (2009) 222 FLR 433 in relation to Raad) and 'abnormal' (*R v Roche* (Unreported, Healy DCJ, 1 June 2004)).

<sup>112</sup> In a study assessing attitudes towards ideological motivation, respondents were asked to assess the blameworthiness of perpetrators of acts based on motivation, constituted either by *jihadi* or corporate motive. Participants were more likely to find a perpetrator blameworthy when motivated by *jihadi* motive than anti-corporate motive: Nolan (2008).



provocation, in circumstances where they have allegedly been ‘provoked’ to kill by the behaviour of their intimate partners.<sup>113</sup>

The test for provocation is whether the killing took place following provocative conduct, as a result of which the defendant suffered a ‘sudden loss of self-control’ in circumstances where an ordinary person might have lost control and reacted in the same way.<sup>114</sup> The ordinary person, so the law stipulates, does not share any of the characteristics of the accused except age, for the purposes of determining whether the response was that of an ordinary person.<sup>115</sup> Characteristics such as gender can only be taken into account in determining the gravity of the provocation. However, a moment’s reflection on the response of the ordinary man versus the ordinary woman brings into stark relief the gendered nature of the ‘ordinary person’.<sup>116</sup> In fact, the High Court in *Stingel* acknowledged that the sexes may well have different thresholds of self-control.<sup>117</sup> However, as a matter of ‘equality before the law’, the lower threshold standard – that is, the male standard – is applied to all persons, although this operates to the detriment of women and the benefit of men because it is most commonly availed of by men who have killed their female partners.

The defence of provocation traditionally allowed a man to escape responsibility for murder where he found his wife in bed with another man and killed her lover, and thus focused on male conceptions of sexual jealousy, anger, revenge and proprietary interest in his spouse.<sup>118</sup> A violent response was considered a legitimate means of protecting the wronged husband’s honour, a clear example of ideology in operation. It was only in the eighteenth and nineteenth centuries that provocation came to be perceived as a concession to the ‘understandable’

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<sup>113</sup> Bronitt and McSherry (2010), p 296. The test now relates to the behaviour of the ‘ordinary’ rather than the reasonable person. Provocation has been abolished in Tasmania (*Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas)), Victoria (*Crimes (Homicide) Act 2005* (Vic)) and Western Australia (*Criminal Law Amendment (Homicide) Act 2008* (WA) s 12) and in New Zealand (2009).

<sup>114</sup> *Stingel v R* (1990) 171 CLR 312. See Horder (1992), pp 101-6; Bronitt and McSherry (2010), pp 294ff. The test is found in the common law in South Australia and in legislation in other jurisdictions: *Crimes Act 1900* (ACT) s 13; *Crimes Act 1900* (NSW) s 23; *Criminal Code Act 1983* (NT) s 34; *Criminal Code Act 1899* (Qld) s 304. It has been abolished in Tasmania, Victoria and Western Australia.

<sup>115</sup> *Stingel v R* (1990) 171 CLR 312. Yeo has argued that although standards of self-control should not differ between groups there should be a recognition of different ‘response patterns’: Yeo (1996).

<sup>116</sup> Hillary Allen notes that the law in reality cannot conceive of a reasonable person free from gender: Allen (1987a), pp 30-1. See also Allen (1988), pp 16-9; and Smart (2002), pp 31-4.

<sup>117</sup> *Stingel v R* (1990) 171 CLR 312, 329.

<sup>118</sup> Bronitt and McSherry (2010), p 295.

rage provoked by adultery rather than a deliberate (and justified) decision to avenge one's honour. The focus turned more to the state of mind of the offender and whether the killing was a result of a 'loss of self-control' than whether the circumstances meant that the killing was justified.<sup>119</sup> However, the idea that a lethal response is understandable in response to certain types of conduct by the victim continues to underpin the provocation defence.

The law of provocation continued to evolve so that it came to apply to the killing of the man's spouse as well as her lover, and further to situations where the accused did not physically witness the act of adultery, but was told about it either by his wife or a third party.<sup>120</sup> Despite judicial proclamation that 'mere words' could never amount to provocation,<sup>121</sup> caveats have been applied to make the limitation less than absolute, and recent cases suggest that it no longer applies.<sup>122</sup> Of the 60 or so men who kill their intimate partners in Australia each year, it is estimated that about 50 of them kill as a result of jealousy, their partner leaving, adultery, or taunts.<sup>123</sup>

The availability of the partial defence of provocation provides an incentive for offenders to construct their conduct as based on jealousy or anger; ideological motivation is reframed as ordinary human emotion, to make it fit within the defence. However, the gendered nature of this 'ordinary' human emotion is significant in terms of identifying the law's masculinist influence. A successful provocation defence in effect amounts to a statement by the legal system that the 'ordinary person' could be provoked to kill a partner who left the relationship or threatened to leave,<sup>124</sup> failed to look after the house or children,<sup>125</sup> or insulted

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<sup>119</sup> Horder (1992), Chapter 5.

<sup>120</sup> Leader-Elliott (1997), pp 154-7.

<sup>121</sup> *R v Buttigieg* (1993) 69 A Crim R 21.

<sup>122</sup> McSherry (2004a). *R v Tuncay* [1998] 2 VR 19; *R v Thorpe (No 2)* [1999] 2 VR 719, 720; *R v Parsons* [2000] 1 VR 161; *R v Leonboyer* [2001] VSCA 149 (Unreported, Phillips CJ, Charles and Callaway JJA, 7 September 2001); *R v Kumar* [2002] 5 VR 193. For a discussion of the cases see Bronitt and McSherry (2010), p 299.

<sup>123</sup> Coss (2006), p 142.

<sup>124</sup> *Gardner* (1989) 42 A Crim R 279; *Schubring; ex parte Attorney-General* [2005] 1 Qd R 515; cf *Jacovic v R* [2002] WASCA 149 (Unreported, Murray, Parker and Miller JJ, 7 June 2002) (jury rejected provocation by victim threatening to leave offender for a younger man).

<sup>125</sup> *R v Stevens* [2008] NSWSC 1370 (Unreported, Hall J, 18 December 2008).

his sexual prowess.<sup>126</sup> Even where provocation is not available as a defence, it can be relied upon as a mitigating factor in sentencing.<sup>127</sup> However, it is overwhelmingly men, not women, who kill in such circumstances;<sup>128</sup> women typically have relied on provocation in circumstances more consistent with having acted in self-defence.<sup>129</sup> It is therefore male interests that are served by the continuing operation of the defence of provocation in most jurisdictions, and its application in the circumstances described above.

Through their convictions for manslaughter rather than murder, juries may demonstrate a willingness to accept that offenders have been motivated by emotion; in other cases, this may reflect the prosecution's acceptance of a plea on this basis.<sup>130</sup> Where provocation is raised and the jury convicts of manslaughter rather than murder, it means that they must have accepted either that the offender was provoked, or that he did not possess the intention to kill or cause serious bodily harm. In *Baggott*,<sup>131</sup> for example, the accused was involved in a dispute over custody and property with his estranged wife. He was tried for murder and convicted by a jury of manslaughter. This was despite the fact that he had initially lied to police about the victim coming to his house, and the trial judge found that he had invited the victim over as a 'ruse' for killing her, suggesting premeditation of the killing consistent with both an intention to kill and an absence of provocation.<sup>132</sup>

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<sup>126</sup> *R v Farfalla* [2001] VSC 99 (Unreported, Vincent J, 7 May 2001); *R v Butay* [2001] VSC 417 (Unreported, Flatman J, 2 November 2001). Morgan notes that those judges who refuse to allow provocation to be left to the jury tend to focus more on the 'separation' aspect of the victim's behaviour than comments in relation to the accused's sexual prowess or related conduct: Morgan (1997), pp 248-9.

<sup>127</sup> Warner (1996), pp 112-3. However, the decision in *Tyne v Tasmania* [2005] 15 Tas R 221 suggests that simply taking provocation into account on sentence may not result in such a significant sentencing discount. Where provocation is available, it has been noted that sentencing has tended to be higher than for manslaughter on average, however the lower maximum penalty applicable to manslaughter does lead to reduced sentencing: Stewart and Frieberg (2008), paras [8.10.75]-[8.10.76].

<sup>128</sup> VLRC (2004), p 29. For a critique of the gendered nature of provocation in the UK see Howe (2002).

<sup>129</sup> Bradfield (2002), pp 145-6; VLRC (2004), pp 27-30.

<sup>130</sup> For other cases not cited here see *R v Miguel* [1994] QCA 512 (Unreported, Fitzgerald P, McPherson JA, Derrington J, 25 October 1994); *R v Stevens* [2008] NSWSC 1370 (Unreported, Hall J, 18 December 2008) (plea to manslaughter on the basis of provocation accepted, although there was evidence of previous violence in the days leading up to the victim's death and the offender was found to have lied about the nature and extent of injuries inflicted on the victim. The more significant provocation was found to be the victim's failure to fulfil her obligations as a mother due to her substance abuse).

<sup>131</sup> *R v Baggott* [2000] QCA 153 (Unreported, McMurdo P, McPherson JA, Mackenzie J, 3 May 2000).

<sup>132</sup> Lees noted in a UK study that provocation was commonly accepted where there was evidence of premeditation: Lees (1992).

In *Butay*,<sup>133</sup> the lethal attack upon the victim followed a separation instigated by the victim and opposed by the accused. On the day of the attack, the offender had gone to the victim's house in an attempt to persuade her to resume the relationship. Although the trial judge was satisfied that there was intention to kill, the jury verdict was guilty of manslaughter, indicating an acceptance that the attack took place in the context of a loss of self-control, irrespective of indications that the killing was the final stage in a series of failed attempts by the offender at reconciliation.<sup>134</sup> Similarly, in *Williams*,<sup>135</sup> the jury found the offender guilty of manslaughter by provocation on the basis that his partner had apparently threatened to smash his car windows. However, the offender had a history of violence, and subsequently boasted to people of killing the victim and dumping her body with legs splayed 'so that the maggots and ferals would decompose her quicker'.

A successful defence of provocation means that the jury must have accepted both that the victim offered provocation by her conduct, and that she did so in circumstances where an ordinary person may have reacted in the same way the accused did (that is, by killing her). In this way, the law expressly criminalises violence by men against their partners, but simultaneously through the construction of the offending behaviour and the role of the victim, lawyers, judges and juries reinforce subtle messages about acceptable and unacceptable male and female behaviour.

A momentary consideration of how provocation might operate in the terrorism context throws the phallogocentric operation of the defence into stark relief. In the mind of a potential terrorist (taking the Islamist as an example), Western nations' treatment of Muslims (e.g. through involvement in the wars in Afghanistan and Iraq, racial profiling in criminal investigations and community opposition to mosques and Muslim schools) might well be considered provocation 'excusing' political action, even to the extent of violence. Such an idea would be anathema to most Australians, and would no doubt generate an

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<sup>133</sup> *R v Butay* [2001] VSC 417 (Unreported, Flatman J, 2 November 2001).

<sup>134</sup> Sue Lees in her research using Old Bailey cases between 1987 and 1990 found a similar tendency to characterise male violence as 'uncontrollable': Lees (1997), pp 143-4.

<sup>135</sup> *R v Williams* [2004] NSWSC 189 (Unreported, O'Keefe J, 22 March 2004).

outcry if argued before a court of law. The idea that a partner's adultery, nagging or exit from a relationship could provoke lethal violence is equally, I suggest, anathema to most women. Yet the gendered defence of provocation has to date been abolished in only three Australian states, Tasmania, Victoria and Western Australia.<sup>136</sup> That provocation can successfully be relied upon in these circumstances reflects the masculinist ideology underpinning the law.

### *Ideological Motivation and Prospects of Rehabilitation*

An offender's prospects of rehabilitation are relevant to the sentencing exercise.<sup>137</sup> A sentence may be structured in a particular way to maximise the prospects of the offender's rehabilitation, or there may be less need for specific deterrence if an offender has already been significantly rehabilitated.

A common feature of the sentencing decisions in terrorism cases to date is the finding that the offender has 'poor prospects of rehabilitation', usually based on the strength of his ideological commitments and his failure to renounce them before the court.<sup>138</sup> By contrast, courts commonly find that domestic homicide perpetrators have reasonable prospects of rehabilitation, notwithstanding the presence of other indicators that violence has been used as a strategy to exercise control over a partner.<sup>139</sup> The different treatment is significant, given

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<sup>136</sup> The gendered nature of provocation has formed part of the basis for its abolition: WALRC (2007), pp 276-8. Cf in the United Kingdom where the provocation defence was maintained with a recommendation for reform: Law Commission of the United Kingdom (2004).

<sup>137</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(d); *Sentencing Act* (NT) s 5(1)(b); *Penalties and Sentences Act 1992* (Qld) s 9(1)(b); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(m); *Sentencing Act 1991* (Vic) s 5(1)(c).

<sup>138</sup> *R v Khazal* [2009] NSWSC 1015 (Unreported, Latham J, 25 September 2009), [43]-[45]; *R v Benbrika & Ors* (2009) 222 FLR 433, [69]-[85] (Benbrika), [103]-[119] (Joud), [120]-[139] (Sayadi), [174]-[211] (Ahmed Raad), [229]-[246] (Hadara); *R v Elomar & Ors* (2010) 264 ALR 759, [93] (Elomar), [106] (Khaled Cheikho), [130] (Hasan), [178] (Jamal); cf *R v Roche* (Unreported, Healy DCJ, 1 June 2004) (good prospects of rehabilitation: p 39); *R v Lodhi* (2006) 199 FLR 364, [75] (court expressed some 'cautious hope'); *R v Thomas* [2006] VSC 120 (Unreported, Cummins J, 31 March 2006) (excellent prospects of rehabilitation).

<sup>139</sup> For other examples not cited here in detail see *R v Auberson* [1996] QCA 321 (Unreported, Fitzgerald P, Pincus JA, de Jersey J, 3 September 1996); *DPP v Sypott* [2003] VSC 537 (Unreported, Redlich J, 5 September 2003) (sentence affirmed on appeal in *DPP v Sypott* [2004] VSCA 9 (Unreported, Vincent JA, Smith and O'Brien AJJA, 13 February 2004)); *R v Yasso* [2005] VSC 75 (Unreported, Hollingworth J, 21 March 2005); *R v Conway* [2005] VSC 205 (Unreported, Bell J, 10 June 2005); *R v Lem* [2005] SASC 405 (Unreported, Doyle CJ, Bleby and Gray JJ, 28 October 2005); *R v Margach* [2006] VSC 77 (Unreported,

that an offender with good prospects of rehabilitation is likely to merit a lesser sentence as there will be less need for deterrence, and less need for protection of the community.

For example, in *Prasoeur*,<sup>140</sup> the offender was sentenced for the murder of his estranged girlfriend, whom he shot after she ended their relationship. The sentencing judge found that there were good prospects of rehabilitation notwithstanding that the offender had continued to deny responsibility for the killing up until the trial, and had gone so far as to accuse a co-worker of having admitted to the murder.

The case of *Miles*<sup>141</sup> demonstrates how the same behaviour can be characterised as part of a spontaneous emotional reaction, and alternately as part of an ongoing pattern of violence against female partners. This differential characterisation in turn influences how prospects of rehabilitation will be viewed by the court. Miles pleaded guilty to murder and escape from lawful custody. He had been in prison serving a sentence for the murder of his former girlfriend Donna Newland, whom he had killed in 1992 after she left him and commenced a new relationship. While in prison, he commenced a new relationship with Yolande (Nadine) Michaels. Michaels started to withdraw from the relationship, and Miles escaped from custody and went to her house, killing her when he found that she was with another man.

The murder of the first victim, Ms Newland, had been preceded by a barrage of letters written to the victim after she left. While in prison, Miles had written a number of letters to the second victim Michaels, which are suggestive of a

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King J, 8 March 2006); *R v Hill* [2006] VSC 149 (Unreported, Hollingworth J, 2 May 2006); *R v Shepherd* [2006] NSWSC 799 (Unreported, Hoeben J, 11 August 2006); *R v Butler* [2007] VSC 185 (Unreported, Curtain J, 1 June 2007) (prospects not 'without hope' notwithstanding nine court appearances for domestic violence over a nine-year period). Cf *R v Robinson* [2007] NSWSC 460 (Unreported, Hall J, 11 May 2007) and *R v Chalmers* [2009] VSC 251 (Unreported, Osborne J, 22 June 2009) where Osborne J noted that the absence of a history of violence made for a 'more favourable prognosis' than otherwise: [41].

<sup>140</sup> *R v Prasoeur* [2006] VSC 41 (Unreported, Bell J, 17 February 2006).

<sup>141</sup> *Miles v R* [2002] NSWCCA 276 (Unreported, Stein JA, Bergin J, Carruthers JA, 18 July 2002).

sense of entitlement to her, and a commitment to use violence to achieve his objectives.<sup>142</sup>

I know you have a lot of confusion, but for fuck sake would you just turn to me, tell me everything and trust me. I do things babe, I am not a talker. Just ask Donna when I told her to stop playing games with my heart or I would put a hole in her heart. If I say I'll do something, then believe I'll do it. ...

I will be interested to hear your response as this feeling of badness is quite strong. The horrible thing is I've only had this feeling once before and it turned out to be true, my worst nightmare. Just like what you'd see on a video. ...

If you... leave me... I'm staying alone for the rest of my life I will never trust another girl. It happened to me once, I get a girl, we are getting married and shit a guy with half my looks and style but a heap of money comes and steals her away from me. Anyway you know the story but I was 18 then and didn't really know how to handle them situations. Today I would simply go over take his money flog him senseless and take my girl back. But I can't fucking take it again, I really thought you would be my wife, you already said yes fuck ya. You can't go Indian giving on marriage, well I hope you won't baby, this is my last shot to get Nadine back in my arms where she bloody well belongs.

The sentencing judge found that the threat implicit in the first letter was 'rhetorical' and rejected the suggestion that Miles had killed Michaels on the basis that 'if he couldn't have her nobody would'. This was directly related to his finding that the offender had good prospects of rehabilitation in sentencing him to 25 years' imprisonment for murder. On a Crown appeal against sentence, Stein JA agreed with that view. The majority of the Court of Criminal Appeal (Carruthers JA, Bergin J), however, found that there was no convincing prospect of rehabilitation in upholding the Crown appeal and imposing a life sentence.<sup>143</sup> The threat was not merely rhetorical, and there was a harmony between what was threatened and what the offender actually did to the victim.<sup>144</sup> Justice Bergin noted the similarities between the killing of Michaels

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<sup>142</sup> *Miles v R* [2002] NSWCCA 276 (Unreported, Stein JA, Bergin J, Carruthers JA, 18 July 2002), [74], [79].

<sup>143</sup> *Miles v R* [2002] NSWCCA 276 (Unreported, Stein JA, Bergin J, Carruthers JA, 18 July 2002), [205].

<sup>144</sup> *Miles v R* [2002] NSWCCA 276 (Unreported, Stein JA, Bergin J, Carruthers JA, 18 July 2002), [194].

and the previous homicide of Newlands, including that each occurred after the victim had decided to distance herself, involved a barrage of letters and phone calls, use of a knife, and the claim that jealousy and anger led to the killing.<sup>145</sup>

In Chapter 2.2, I discussed the tendency of courts to downplay or minimise a history of abuse against the victim, or a former partner, as a feature of personalising the motivation of domestic violence offenders.<sup>146</sup> The process of divorcing a killing from the context of a history of abuse is consistent with ‘playing down’ the ideological aspect of the attack. By constructing the violence as a one-off attack, or as unplanned or unpremeditated, it is easier to attribute it to emotional impulses such as anger or jealousy, rather than as indicative of a strategy of violence in furtherance of a cause. It also makes it easier for the court to find that good prospects of rehabilitation exist, and therefore that there is less need for specific deterrence.<sup>147</sup>

Again, I suggest that these are aspects of the law that reflect masculinist interests. Certainly, it serves the interests of individual male offenders in terms of generating less severe penalties than might otherwise be imposed. However, constructing masculinist behaviour as an individualised expression of emotion also reflects the myth that there is no such thing as masculinist ideology. This myth allows that very ideology to flourish, while simultaneously maintaining its invisibility.<sup>148</sup>

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<sup>145</sup> *Miles v R* [2002] NSWCCA 276 (Unreported, Stein JA, Bergin J, Carruthers JA, 18 July 2002), [65].

<sup>146</sup> See for example *R v Zammit* [2008] NSWSC 317 (Unreported, Howie J, 9 April 2008) (the act causing death was ‘not an incident in an abusive relationship’ despite two acts of violence in two days, precipitated by an argument where the deceased discussed the offender’s violence with his previous partner). Cf *R v Keir* [2000] NSWSC 111 (Unreported, Adams J, 29 February 2000), where the judge found that the offender considered the victim to be ‘his property to be dealt with as he thought it right’ and ‘believed he had the right to violently punish his wife for not only defying but also for trying to leave him’ (but still found that the offender did not have the intention to kill, only the intention to cause grievous bodily harm).

<sup>147</sup> In *R v Vu* [2005] NSWSC 271 (Unreported, Barr J, 1 April 2005), the court did not find that a pattern of attending the victim’s home and assaulting her amounted to a deliberate strategy, but the accused must have known that if he went there violence would probably follow. The court found that it was unable to say whether he was at risk of reoffending.

<sup>148</sup> Millett (2000), p 25 (see the opening quote to Chapter 2.2).



## *Ideological Motivation and the Need to Protect the Community*

Protection of the community is a relevant consideration on sentence.<sup>149</sup> In terrorism sentences, the principle is accorded paramount importance.<sup>150</sup> There is an apparent link between this principle and the presence of ideological commitment; since one can never be sure that an ideologically-motivated offender will not strike, the protection of the community becomes an especially significant consideration.<sup>151</sup> By contrast, because domestic homicide, like domestic violence generally, is constructed as a feature of a particular relationship, where that relationship has ended (for example, due to the victim's death) there is no perceived danger to the general community.

Unlike in the terrorism cases, in domestic homicide cases there is rarely a discussion of risk to the public, or the need for protection of the community from the offender.<sup>152</sup> On the contrary, where the subject is raised, it is to note that the risk posed by the offender is limited to the particular relationship, or to intimate partners rather than to the public.<sup>153</sup> This overlooks the risk of harm that flows to other persons within the life of domestic violence victims, as well as the danger to other women with whom the perpetrator may form a relationship.<sup>154</sup>

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<sup>149</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(e); *Sentencing Act 1995* (NT) s 5(1)(e); *Penalties and Sentences Act 1992* (Qld) s 9(1)(e); *Sentencing Act 1991* (Vic) s 5(1)(e).

<sup>150</sup> *R v Benbrika & Ors* (2009) 222 FLR 433, [69]-[85].

<sup>151</sup> In *Barot v R* [2007] EWCA Crim 1119, [37], the court stated in dismissing an appeal against a life sentence for conspiracy to murder: 'A terrorist who is in the grip of idealistic extremism to the extent that, over a prolonged period, he has been plotting to commit murder of innocent citizens is likely to pose a serious risk for an indefinite period if he is not confined'.

<sup>152</sup> Cf *R v Robinson* [2010] VSC 10 (Unreported, Whelan J, 29 January 2010): there was a need to protect the community from this 'serious violent offender' who had murdered two ex-girlfriends, 40 years apart; *Spencer v R* [2005] NTCA 3 (Unreported, Martin CJ, Thomas and Riley JJ, 29 April 2005).

<sup>153</sup> *Coker* (1992), p 76. *R v Lever* [2001] NSWSC 1131 (Unreported, Bell J, 13 December 2001); *R v Toki* [2003] NSWCCA 125 (Unreported, Levine J, Hidden J, Smart AJ, 13 May 2003), [25]. It has been noted that in Israeli cases, divorce of the offender from the victim was identified as a factor decreasing the risk of future harm: First and Agmon-Gonnen (2009), p 162.

<sup>154</sup> For cases evidencing serious violence against multiple partners see: *R v Bell* [2000] QCA 485 (Unreported, Williams JA, Pincus JA, Cullinane J, 23 November 2000) (seven previous convictions for assault against applicant for restraining order and prior conviction for assault against former partner); *R v Bond* [2001] NSWSC 1059 (Unreported, James J, 7 December 2000) (offender had previously been convicted of manslaughter of a woman he viciously assaulted after a date); *R v Wilson* [2001] QCA 215 (Unreported, McPherson and Williams JJA, Atkinson J, 1 June 2001) (convicted of wounding with intent to disfigure – previous history of violence against victim and other women); *Miles v R* [2002] NSWCCA 276 (Unreported, Stein JA, Bergin J, Carruthers JA, 18 July 2002), [51]-[57] (offender had a previous conviction for manslaughter of his girlfriend); *R v Lynch* [2002] NSWSC 1140 (Unreported, Whealy J, 20 November 2002) (offender not seen as a risk to the community despite two prior convictions for assault, one against

Courts in some instances have afforded leniency to perpetrators on the basis that otherwise hardship would flow to the family, indicating a privileging of sanctity of the family over the protection of women and children.<sup>155</sup> Clearly, future female partners do not constitute a 'section of the public'.<sup>156</sup> In *Keir*, the risk to future partners was recognised, however this was distinguished from danger to the community more broadly, reinforcing the concept of domestic violence as an individualised crime:<sup>157</sup>

... [It] is probably reasonable to assume that he does not represent a risk to the general population when future dangerousness is being considered. His risks within intimate relationships must be considered to be reasonably high. The history indicates that he became quite obsessed in this particular relationship, he may have even developed a degree of morbid jealousy although I cannot confirm that. The history however does indicate (sic) that his concerns about certain aspects of his wife's behaviour were unhealthy and probably at an extreme. ...

With his current position of denying the offending behaviour these issues cannot sensibly be addressed with him and this obviously has implications for resolving problems of the type I have described and this in turn impacts on the issue of his future dangerousness. I would not, as noted above, consider him to represent a risk to the general community but one would need to say that in the context of an intense emotional relationship of an intimate type he potentially

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the victim); *R v Sievers* [2002] NSWSC 1257 (Unreported, Sully J, 18 December 2002) and *R v Sievers* [2004] NSWCCA 463 (Unreported, Levine, Simpson and Barr JJ, 17 December 2004) (murder conviction of partner preceded by a murder conviction for a previous partner 20 years prior); *R v Lyon* [2006] QCA 146 (Unreported, Jerrard JA, Fryberg and Douglas JJ, 21 March 2006) (breach of restraining order against ex-wife followed by domestic dispute with new partner and grievous bodily harm of ex-wife the following day); *Norris v Sanderson* [2007] NTSC 1 (Unreported, Riley J, 12 January 2007) (previous breach of restraining orders and threats against ex-partner); *R v Ferguson* [2007] NSWSC 949 (Unreported, Michael Grove J, 27 August 2007) (conviction for domestic assault 27 years ago but considered to be not relevant to sentence); *R v Robinson* [2010] VSC 10 (Unreported, Whelan J, 29 January 2010) (earlier conviction for manslaughter of previous conviction followed by murder of ex-partner).

<sup>155</sup> Warner (1996), pp 111-2.

<sup>156</sup> *R v Lynch* [2002] NSWSC 1140 (Unreported, Whealy J, 20 November 2002), [49]; *R v Yasso* [2005] VSC 75 (Unreported, Hollingworth J, 21 March 2005) (reference to extreme violence in context of controlling behaviour had a 'very personalised nature'); *R v Galante* [2008] NSWSC 319 (Unreported, Adams J, 11 April 2008) (low risk of reoffending as premeditated murder occurred in the context of particular domestic situation); *R v Mills* [2008] QCA 146 (Unreported, Keane, Holmes and Fraser JJA, 28 May 2008).

<sup>157</sup> *R v Keir* [2000] NSWSC 111 (Unreported, Adams J, 29 February 2000), [8].

does represent risk to the other person, particularly if that person chooses to leave him at some stage during the course of that relationship.<sup>158</sup>

The absence of reference to ‘protection of the community’ in sentencing domestic homicide offenders is reflective of the construction of the ‘public’ referred to in Chapter 2.3. Where an offender acts violently due to a sense of entitlement to ‘his woman’ following separation, or to disobedience by his partner, the law generally finds no reason to believe that this same sense of entitlement will be carried on by the offender into subsequent relationships.<sup>159</sup> If women constituted a ‘section of the public’ then protection of the community would warrant serious consideration on sentence, and would likely be reflected in longer sentences as is the case in sentencing for terrorism offences.

The absence of community protection as a factor of relevance in domestic homicide sentencing is further evidence of the masculinist nature of the law. Where public interests are threatened by violence – as in the case of threats of terrorism – the law intervenes with heavy sentences for the protection of the community. Thus the law imposes condign punishment on those who pose a risk to public installations, to buildings, public monuments and transport facilities, where men (as well as women) would be potential targets. However, where the threat is specifically directed towards women, ‘protection of the community’ does not factor into the equation. Violence is constructed as a feature of individual (dysfunctional) relationships in which the victim plays a role, and is sometimes (as in the provocation cases) accorded responsibility for the harm inflicted upon her. There is no recognition of the fact that in many cases, the identity and behaviour of the victim is immaterial – any victim with whom the offender happened to have a relationship would be treated exactly the same due to the offender’s ideological leanings. To that extent, many domestic violence victims are in fact *interchangeable* in the same way as victims of terrorism offences.

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<sup>158</sup> Note the degendering of violence implicit in this quote by reference to ‘risk to the other person’ rather than risk to other women, which is in fact the reality.

<sup>159</sup> See comments by Adams J in *R v Keir* [2000] NSWSC 111 (Unreported, Adams J, 29 February 2000), [14]. Cf *Vella v WA* (2007) 33 WAR 411, [92] per Wheeler JA.

It might of course be suggested that the treatment of ideological motivation as an aggravating feature in terrorism cases serves not only patriarchal interests but the interests of all persons who may be affected by a terrorist attack, given the indiscriminate nature of such violence. However, the difference between domestic violence and terrorism is that while men are as likely to be the victims of terrorist attacks as women,<sup>160</sup> the overwhelming majority of victims in domestic homicides are female. In terms of real risk to women, domestic homicide poses much more of a threat than terrorism. As Catharine MacKinnon notes in relation to the international response to September 11, 'It is hard to avoid the impression that what is called war is what men make against each other, and what they do to women is called everyday life'.<sup>161</sup>

### *Conclusion*

The differential construction of terrorism and domestic violence in law has real consequences for the way that violence is dealt with on sentence. The construction of terrorist violence as ideological violence directed against governments and the public results in higher penalties than might otherwise be warranted by criminal behaviour of a preparatory nature. Conversely, the construction of domestic homicide as emotionally-generated, non-ideological violence is, I have argued here, reflected in the penalties imposed on offenders of this type. This not only reflects the differential construction of violence, but also creates an incentive for offenders to frame their conduct in an emotional context,<sup>162</sup> as this is likely to lead to benefits in terms of reduced sentences.

In this chapter, I have explored a number of the ways in which this differential construction is linked to the treatment of offenders. In relation to terrorism offending, the existence of ideological motivation is perceived as an aggravating factor, and linked to limited prospects of rehabilitation and a strong need for

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<sup>160</sup> Though note that there were approximately three times the number of male victims as female in the September 11 attacks (2303: 739): MacKinnon (2006), p 3.

<sup>161</sup> MacKinnon (2006), p 27.

<sup>162</sup> As Szasz (1973), p 686 notes, people are punished not for what they do but for how their acts are defined.

protection of the community. By contrast, domestic homicide offenders are constructed as having good prospects of rehabilitation and presenting little risk to members of the public, as their targets – individual women – do not constitute a section of the public in legal parlance.

In the next chapter, I conclude my examination of the application of differential constructions of violence by considering the application of the rules of self-defence. In particular, I examine the legal treatment accorded to women who kill abusive partners, and the difficulties they have traditionally encountered in relying upon self-defence. This treatment is a further and final example of the ways in which the state fails to recognise the ideological commitment to violence of many domestic abusers, and accordingly fails to recognise the legitimacy of women's self-defence responses to domestic violence.



## CHAPTER 3.4 DEFENDING AGAINST TERROR

That was my life. Getting hit, waiting to get hit, recovering; forgetting. Starting all over again. There was no time, a beginning or an end. I can't say how many times he beat me. It was one beating; it went on forever. I know for how long: seventeen years. One stinking, miserable, goosed lump of days. Daylight and darkness. Pain and the fear of it. Darkness and daylight, over and over; world without end.<sup>1</sup>

### *Introduction*

In this chapter, I continue the analysis of previous chapters by examining the differential construction of violence in the context of the law's treatment of self-defence responses. In Chapter 3.3, I examined how the law trivialises domestic violence in the sentencing process by constructing it as an outburst of human emotion, rather than as part of a strategy rooted in an offender's masculinist ideology. Here I follow that analysis with an examination of how the law responds to women who kill their abusers in self-defence, and compare that to the way the state treats its agents who use violence in enforcing its laws.

Unlike the preceding chapters, in this chapter it is not possible to draw a direct comparison between the treatment of terrorism and domestic violence. To date, there have been no fatal shootings of suspected terrorists in Australia,<sup>2</sup> although there have been high-profile fatal shootings of suspected terrorists in both the United Kingdom and the United States. While I discuss these incidents, I also draw upon other instances of defensive responses by police in Australia to illustrate how the law differentially constructs violence perpetrated in self-defence. Police action in the context of a threatened or actual terrorist attack may involve particular aspects not involved in an 'ordinary' police response.

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<sup>1</sup> Doyle (1997), p 206.

<sup>2</sup> Suspected terrorist Omar Baladjam was shot in Sydney in November 2005 after disobeying an order by police to stop, however he was not killed: Les Kennedy and Andrew Clark, 'Shot man appeared on Home and Away', *Sydney Morning Herald* (online), 9 November 2005, <<http://www.smh.com.au/articles/2005/11/08/1131407637642.html>>.

However, in the sense that terrorism and violence aimed at police are both forms of violence directed at the state, the latter provides an interesting measure of how police responses to the former would be treated. It is also possible to identify similar 'discursive patterns' between the responses to counter-terrorism shootings in the United Kingdom and United States, and responses to police shootings in Australia.

I suggest that this differential construction of defensive responses is further illustrative of the distinction drawn in law between ideological and non-ideological and public/private violence. Although it is possible to construct women who kill in self-defence as *de facto* agents of the state, defending themselves and their families when the state has failed to do so, this is not what occurs in the criminal justice process. Such a construction would be at odds with the law's conceptualisation of domestic violence as a feature of individual relationship tensions, and also with the victim-blaming tendency of masculinist ideology.

Previous chapters have focused on how the law actively constructs violence in different ways, through legislation and judicial pronouncement. However, as Foucault notes, silence is also an important aspect of discourse.<sup>3</sup> Silence is created by the law's non-intervention in certain areas. A number of commentators have in the last couple of decades drawn attention to the importance of the process that occurs outside the court-room – decisions made about whether to investigate and the process of evidence gathering, and the exercise of prosecutorial discretion in deciding to proceed with prosecution, or whether to accept a plea-bargain.<sup>4</sup> These external processes of legal decision-making, in determining what cases will be brought before courts, and how they will be presented, play a significant role in constructions of violence. When decision-makers consistently decline to discuss or interpret an activity as criminal, then it is constructed within legal discourse as 'not a crime'.

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<sup>3</sup> 'There is not one but many silences, and they are an integral part of the strategies that underlie and permeate discourses': Foucault (1990), p 27.

<sup>4</sup> McBarnet (1983); McConville et al (1991); Dixon (1997); Mack and Roach Anleu (2000); Bronitt and Stenning (undated).



Many feminist legal scholars have drawn attention to inequalities within the law in relation to self-defence and provocation, and their unavailability to women who kill their partners following a history of violence.<sup>5</sup> These analyses have tended to focus on inequality as it manifests itself once a matter goes to trial – whether defences are available as a question of law, and how a history of domestic violence is treated in sentencing women for murder or manslaughter. Less attention has been paid to the process of decision-making that occurs prior to a matter coming to court – namely, the decisions to charge and to proceed with prosecution.

In the first part of this chapter, I examine the differential treatment of women who kill in self-defence in the context of a history of domestic violence, and police officers who take lethal action when confronted with a dangerous attack. In the case of the former, the usual course of events is that a prosecution is commenced, and the accused may raise self-defence or the partial defence of provocation (or where relevant, diminished responsibility) at trial. On the other hand, where police have used lethal force in defence of themselves or others, or to effect arrest, it is uncommon for any prosecution to take place. Thus two different categories of lethal action taken in self-defence follow two different paths through the criminal justice process.

In the second part, I examine the processes by which legal discourse constructs the key players in these self-defence scenarios in ways that reflect common assumptions about law enforcement, and perpetrators and victims of domestic violence. Reliance on these common assumptions both provides legitimacy for, and perpetuates, the criminal justice system's differential treatment of violence. Delving into these processes reveals the way in which the domestic violence victim who kills in self-defence is constructed as a criminal, while the police officer who shoots in self-defence is portrayed as having acted with justification.

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<sup>5</sup> For example Tolmie (1991); Sheehy et al (1992); Eastaugh (1993), Chapters 7 and 8.

## *The Differential Treatment of Self-Defence Responses*

Australian law, and the English common law in which it has its roots, have long recognised a defence for those who kill while defending themselves or others.<sup>6</sup> At common law, self-defence incorporates both subjective and objective components: the person acting in self-defence must have believed their conduct to be necessary in defence of themselves or another (subjective), and there must have been a reasonable basis for that belief (objective).<sup>7</sup> The laws of all Australian states and territories, while not homogenous, incorporate some combination of these elements.<sup>8</sup>

Prior to arriving at the stage where a matter comes before a court and the law of self-defence potentially comes into play, various formal and informal decisions are made that determine whether or not the matter will ever proceed through the legal system. These decisions are part of a process whereby cases are 'constructed' through the collection of evidence and determinations about whether and what to charge.<sup>9</sup> Patterns of decision-making that emerge from this process effectively exclude particular categories of case from criminal prosecution.

Criminal charges are usually laid by police officers, and then an independent determination is made by the relevant Director of Public Prosecutions (DPP) to carry on or discontinue prosecution.<sup>10</sup>

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<sup>6</sup> For an examination of the law of self-defence in the Australian context see Bronitt and McSherry (2010), Chapter 6.

<sup>7</sup> *Zecevic v DPP (Vic)* (1987) 162 CLR 645.

<sup>8</sup> Bronitt and McSherry (2010), pp 334-7. Victoria adopts the common law test set out in *Zecevic* for offences other than homicide. In the ACT, NSW and NT and at Commonwealth level, the accused must have *believed* that the force was necessary, while in Queensland force must be reasonably necessary, or necessary in addition to the requirement of a belief in the necessity of force. In South Australia, the accused must genuinely believe the force to be necessary and reasonable, and the conduct must be reasonably proportionate to the threat in the circumstances as the accused believed them to be. For self-defence provisions see *Criminal Code Act 1995* (Cth) s 10.4; *Criminal Code Act 2002* (ACT) s 42; *Crimes Act 1900* (NSW) s 418; *Criminal Code Act 1983* (NT) ss 29, 43BD; *Criminal Code Act 1899* (Qld) s 271; *Criminal Law Consolidation Act 1935* (SA) s 15; *Criminal Code Act 1924* (Tas) s 46; *Crimes Act 1958* (Vic) ss 9AC, 9AD, 9AE (for homicide offences); *Criminal Code Act Compilation Act 1913* (WA) s 248.

<sup>9</sup> McConville et al (1991).

<sup>10</sup> See the various state and territory Prosecution policies, available at:

<<http://www.dpp.act.gov.au/policy.htm>> (ACT);

<<http://www.odpp.nsw.gov.au/Guidelines/Guidelines.html>> (NSW);

## *Shootings by Law Enforcement Agents*

In Australia, there has to date been no fatal shooting of a terrorist suspect. However, high-profile shootings of suspected terrorists have occurred in the United Kingdom and the United States. The circumstances of the shootings of Jean Charles de Menezes and Rigoberto Alpizar are outlined in Annexure H.

Australia has, however, introduced broad-ranging powers for members of the defence force, acting under 'lawful authority', to destroy aircraft or vessels when deemed necessary to protect life, or designated critical infrastructure.<sup>11</sup> These laws extend the capacity of the military to lawfully respond well beyond ordinary powers of self-defence, necessity or duress.<sup>12</sup> In particular, the laws authorise the use of lethal force to protect critical infrastructure, not just to prevent death or injury. While I do not consider them in detail here, the enactment of these laws is consistent with the construction of terrorism as a special crime warranting a special response.

Australia has a significant history of police shootings executed in the line of duty.<sup>13</sup> McCulloch argues that the state's power to define terrorism allows it to justify certain actions that would otherwise be illegal as legitimate 'counter-terrorism' operations.<sup>14</sup> She ascribes the occurrence of police shootings to the blurring between police and military personnel functions in specialist terrorism response units that are also used in response to situations outside of counter-terrorism. Unlike police, the military are not bound by a principle of minimum use of force, and the concept of an 'enemy' is integral to military operations.

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<<http://www.nt.gov.au/justice/dpp/html/guidelines.html>> (Northern Territory);  
<[http://www.justice.qld.gov.au/files/CourtsAndTribunals/Directors\\_Prosecution\\_Guidelines.pdf](http://www.justice.qld.gov.au/files/CourtsAndTribunals/Directors_Prosecution_Guidelines.pdf)>  
(Queensland); <<http://www.dpp.sa.gov.au/03/ppg.php?s=03>> (South Australia);  
<[http://www.crownlaw.tas.gov.au/dpp/prosecution\\_guidelines](http://www.crownlaw.tas.gov.au/dpp/prosecution_guidelines)> (Tasmania); <<http://www.opp.vic.gov.au/>>  
(Victoria);  
<[http://www.dpp.wa.gov.au/content/statement\\_prosecution\\_policy2005.pdf](http://www.dpp.wa.gov.au/content/statement_prosecution_policy2005.pdf)> (Western Australia).

<sup>11</sup> *Defence Act 1903* (Cth) Part IIIAAA. For a discussion of these and contrast to other police powers, see Bronitt (2007b).

<sup>12</sup> Bronitt and Stephens (2008); Bronitt (2011), pp 14-5.

<sup>13</sup> See for example Silvester et al (1995).

<sup>14</sup> McCulloch (2001), pp 1-22.

Prosecutions of police for any crime (even fatal shootings) are rare,<sup>15</sup> and those that have proceeded have been largely unsuccessful.<sup>16</sup> A similar pattern has been observed in the United Kingdom.<sup>17</sup> This is consistent with the historical common law principle that an officer of the state who killed an escaping thief, or an outlaw resisting arrest, could rely on a legal justification for doing so and would not be prosecuted.<sup>18</sup>

Certain types of killing, including deaths occurring in police custody, are subject to coronial inquest.<sup>19</sup> If the coroner forms the view that there is a prima facie case of an indictable offence causing death, he or she must usually refer the matter to the relevant DPP.<sup>20</sup> A number of coronial cases I examined made reference to the need to properly investigate, and where necessary prosecute, police for wrongful killings in the same way that would occur with a civilian killing.<sup>21</sup> In some states and territories, the coroner is also entitled to make a finding that a shooting was justified.<sup>22</sup> Police shootings, therefore, will be kept out of the criminal justice system unless a coroner rules the shooting unjustified, or finds that there is evidence that an indictable offence has been committed.

Since 1990, the Australian Institute of Criminology has collected data relating to deaths in 'police custody', which include shootings during incidents in which

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<sup>15</sup> Freckelton (2000), pp 148-9. Cases of police prosecutions I discovered in my research included *Bedek v Brown* [2000] FCA 880 (Unreported, Gallop, Whitlam and Madgwick JJ, 26 July 2000) (defendant acquitted on direction of judge of attempted murder and attempted infliction of grievous bodily harm); *Hill v Richman* [2001] TASSC 148 (Unreported, Evans J, 20 December 2001) (appeal by officer allowed against convictions on assault); *Lukatela v Birch* [2008] ACTSC 99 (Unreported, Rares J, 30 September 2008) (officer pleaded guilty to unlawfully administering injurious substance).

<sup>16</sup> Bongiorno (1994); O'Loughlin and Billing (2000), pp 75-6.

<sup>17</sup> McCulloch and Sentas (2006), p 95.

<sup>18</sup> Green (1975-76), pp 419-20; Horder (1992), pp 6-7.

<sup>19</sup> *Coroners Act 1997* (ACT) s 13(1)(k); *Coroners Act 1980* (NSW) ss 13A and 14B; *Coroners Act 1993* (NT) s 15(1)(a); *Coroners Act 2003* (Qld), ss 8, 10, 11(2); *Coroners Act 2003* (SA) s 21; *Coroners Act 1995* (Tas) ss 3 and 21; *Coroners Act 1985* (Vic) ss 3 and 15(2); *Coroners Act 1996* (WA) ss 3 and 19.

<sup>20</sup> *Coroners Act 1997* (ACT) s 58; *Coroners Act 1980* (NSW) s 19; *Coroners Act 1993* (NT) s 35; *Coroners Act 2003* (Qld) s 48(2)(a); *Coroners Act 1995* (Tas) s 30; *Coroners Act 1985* (Vic) s 21; *Coroners Act 1996* (WA) s 27.

<sup>21</sup> See for example *Malcolm Bell* (Qld Coroners' Court, 26 May 2006); *Thomas Waite, Mieng Huynh, James Jacobs, James Gear* (Qld Coroners' Court, 17 March 2008); *Clay Hatch* (Qld Coroners' Court, 19 June 2009). See also the criticisms made by counsel assisting the coroner of the police investigation into the shooting of Jedd Malcolm Houghton: Silvester et al (1995), Chapter 11, and the comments in *Taskforce Victor* (1994), p 152.

<sup>22</sup> State Coroner's Office (NSW Attorney General's Department) (2006), p 88. Cf the coroner's role in Victoria: *Khan v Keown & West* [2001] VSCA 137 (Unreported, Ormiston, Phillips and Batt JJA, 6 September 2001) per Phillips JA at [15] suggesting that it is beyond the scope of the coroner's role to determine whether killing is 'justified'. This is also the position in SA: *Geoffrey Nicholls* (Unreported, SA Coroner's Office, 29 October 2003).

police are involved. In particular, they include shootings by police 'in self-defence' when they are attacked following a call-out to an incident.<sup>23</sup> Between 1990 and 2006, 82 people were shot and killed by police in Australia, varying between two and six each year after a peak in 1994.<sup>24</sup> Ninety percent of fatal police shootings for this period were classified as 'justifiable homicide', with one shooting in 2000 categorised as unlawful homicide, and one in 2002 as accidental homicide. 'Justifiable homicide' is defined as a homicide occurring under circumstances authorised by law, for example a prison officer acting in self-defence.<sup>25</sup> Since a referral to the relevant prosecuting agency does not follow a finding that a shooting by police was justified, it appears that nobody was prosecuted in relation to these 'justifiable homicides'.

### *Responding to Battered Women who use Lethal Force*

In contrast to its treatment of police who kill in the execution of duty, traditionally, the law has not readily extended the benefit of its defences to women who kill their abusers.<sup>26</sup> Until the late nineteenth century, the law provided that a woman was the property of her husband,<sup>27</sup> and her legal identity upon marriage became subsumed within his.<sup>28</sup> Women who killed their husbands were not considered responsible simply for murder, but for petit treason; killing the master was a crime secondary only to killing the king, and was punishable by burning at the stake.<sup>29</sup> Neither self-defence nor provocation was available to those charged with petit treason.<sup>30</sup>

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<sup>23</sup> Dalton (1998), p 2.

<sup>24</sup> Joudo and Curnow (2008), pp 77-81. Six shootings were classified as 'other'. Although p 103 of the Report indicates that the unlawful homicide by police shooting occurred in NSW, it does not appear in the NSW State Coroner's Report for any of the years for which reports are publicly available.

<sup>25</sup> Joudo and Curnow (2008), p 25.

<sup>26</sup> See Sheehy et al (1992), p 3.

<sup>27</sup> So that in fact in the United Kingdom a practice of 'wife-sale' operated as an informal alternative to separation or divorce, as detailed in Menefee (1981).

<sup>28</sup> Siegel (1995), p 2122; Graycar and Morgan (2002), pp 91-2.

<sup>29</sup> Greene (1989); Dolan (1992), p 4 suggests that for female offenders, petit treason was in terms of penalty indistinguishable from high treason. In the US context see Schneider (2000), pp 112-5. See the case of *Elizabeth Herring*, 8 Sept 1773, The Proceedings of the Old Bailey Ref: t17730908-6. By contrast,

After 1828, when petit treason was abolished in the United Kingdom and the applicable charge changed to murder,<sup>31</sup> provocation continued to be inaccessible. The circumstances of women's actions frequently did not fit within the paradigm conduct for 'sudden loss of self-control', the requirement of a 'sudden response' or proportionality between the perceived threat and the force used in response.<sup>32</sup> Women's experiences did not fit within a defence that evolved as a means of partially excusing a man's fiery response to finding his wife in *flagrante delicto*, or to another affront to his honour.<sup>33</sup> Research has consistently shown that the majority of women who kill their partners do so following a history of violence perpetrated against them.<sup>34</sup>

Feminist agitation eventually produced some recognition of the gendered nature of provocation.<sup>35</sup> However, a more significant problem is that many women who kill violent abusers should be able to rely on self-defence, rather than the partial defence of provocation.<sup>36</sup> Despite some positive developments,<sup>37</sup> the requirements of self-defence, like the requirements of provocation, are plagued by patriarchal meanings and a lack of understanding of women's experiences.<sup>38</sup>

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a husband who murdered his wife was guilty only of murder, due to the absence of subjection due from the wife to the husband: Hale (1971), p 381.

<sup>30</sup> Alldridge (2000), p 91.

<sup>31</sup> Alldridge (2000), p 91.

<sup>32</sup> Greene (1989); de Pasquale (2002), pp 122-3; Cheyne and Dennison (2005); Bronitt and McSherry (2010), pp 314-5.

<sup>33</sup> Horder (1992), Chapter 2; Howe (1997).

<sup>34</sup> Wallace (1986), p 103; Jenny Morgan (2002), pp 25-6.

<sup>35</sup> *R v Chhay* (1994) 72 A Crim R 1 per Gleeson CJ at 11. In the Northern Territory the suddenness requirement was removed by the Criminal Law Reform Amendment Bill (No 2) 2006 with a view to making the defence more available to women who killed abusive partners: Northern Territory, *Parliamentary Debates*, 22 August 2006, Parliamentary Record No 9 (Dr P Toyne). For a description of changes to provocation law see Sheehy et al (1992), pp 376-7.

<sup>36</sup> See for example Tolmie (1991); Sheehy et al (1992); Coss (2006), p 134.

<sup>37</sup> For example, in *Secretary* (1996) 107 NTR 1, the Northern Territory Court of Appeal found (by majority) that a man who inflicted violence before going to sleep and threatened to inflict further violence when he woke up had an 'actual and apparent present ability to carry out the threat'; his violence constituted a 'continuing assault' on the accused.

<sup>38</sup> See Sheehy et al (1992); Schneider (2000), p 116. For examples of cases not otherwise discussed in this chapter where the accused was convicted of manslaughter on the basis of provocation in circumstances suggestive of self-defence see *R v Hill* (1981) 3 A Crim R 397; *Bogunovich* (1985) 16 A Crim R 456; *R v Collingburn* (1985) 18 A Crim R 294; *Bradley* (Unreported, VSC, Coldrey J, 14 December 1994); *R v Kennedy* [2000] NSWSC 109 (Unreported, Barr J, 1 March 2000).

One of the traditional requirements of self-defence (as for provocation) was the immediacy of the threat to which the accused was responding.<sup>39</sup> This had the effect of making it difficult for women to rely on self-defence where there was a lapse of time, even short, between the making of the threat or the assault, and the response.<sup>40</sup> Other requirements that female murder accused have had difficulty in meeting include the exhaustion of all avenues of peaceful resolution (including a duty to retreat); the requirements that the response be 'necessary' and 'proportionate' to the threat, and the stipulation that an accused's perception of danger of death or grievous bodily harm be reasonable.<sup>41</sup>

Although there are isolated examples of decisions not to prosecute,<sup>42</sup> it is impossible to analyse what proportion of women who kill in the context of a history of abuse are ultimately prosecuted. There is little publicly available data recording crimes that are not investigated, or that are investigated but do not proceed to prosecution.<sup>43</sup> Killings by civilians, whether in self-defence or not, are rarely the subject of coronial inquiry (unless the person responsible for the homicide goes on to kill themselves).<sup>44</sup>

It is possible, however, to identify cases that have proceeded to prosecution despite circumstances strongly indicative that the woman was acting in self-defence.<sup>45</sup> In a comprehensive study of spousal homicide cases between 1980

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<sup>39</sup> See *R v Collingburn* (1985) 18 A Crim R 294, where a direction that an 'immediate threat' was required rather than 'imminent danger' was held not to be a misdirection. Imminence is no longer a technical requirement of self-defence following *Zecevic v DPP (Vic)* (1987) 162 CLR 645.

<sup>40</sup> Stubbs and Tolmie (1994), pp 195-6. Stubbs and Tolmie outline cases in which self-defence was accepted in respect of pre-emptive defensive actions: see Stubbs and Tolmie (1999), pp 733-6.

<sup>41</sup> Sheehy et al (1992); WALRC (2007), pp 272-5.

<sup>42</sup> Polk (1994), p 161 identifies two such cases from his sample. See also the case of Sherrie Lee Seakins reported in Gay Alcorn, 'No Trial after Woman Kills Violent Husband', *The Sydney Morning Herald* (Sydney), 14 September 1993, 1, cited in Stubbs and Tolmie (1999), p 720. One barrister has suggested that prosecutors have traditionally felt that they must prosecute such matters: Ross (1998).

<sup>43</sup> In *R v Metropolitan Police Commissioner; ex parte Blackburn* [1968] 2 QB 118, it was accepted that police officers possess a wide discretion in exercising their duties, which will not ordinarily be reviewable. The discretion was affirmed in *Hinchliffe v Commissioner of Police of the AFP* (Unreported, Federal Court of Australia, 10 December 2001). In the UK, decisions not to prosecute are subject to administrative appeal. For example, the decision not to prosecute the police responsible for the shooting of Jean Charles de Menezes was reviewed in *R (Da Silva) v DPP* [2006] EWHC 3204 Admin.

<sup>44</sup> *Sonya Mercer and Darren Batchelor* (2004) TASC 57 (Unreported, 12 February 2004); *Michelle Morcom and Jamie Venn* (2004) TASC 55 (Unreported, 12 February 2004); *Andrea Wrathall and Stephen Pugh* (2007) TASC 360 (Unreported, 2 November 2007); cf *Anne Chantel Millar* [2005] NTMC 056 (Unreported, 2 September 2005) and *Jodie Palipuminni* [2006] NTMC 083 (Unreported, 23 October 2006).

<sup>45</sup> A further example discussed at length in the media is the case of Catherine Smith, who was prosecuted for, and acquitted of, the attempted murder of her husband following 30 years of horrific abuse at his

and 2000, Rebecca Bradfield noted that women who killed abusive husbands were often convicted of manslaughter in circumstances suggesting that they were acting in self-defence (and therefore should arguably have been entitled to a full acquittal).<sup>46</sup> In 65 out of 76 cases where women killed their male partners, there was a history of abuse by the 'victim' against the accused.<sup>47</sup> Women relied on self-defence in only one-third of these cases, and more than 70 percent of women who had suffered a history of abuse were convicted of manslaughter.<sup>48</sup>

Although these women were often given lenient sentences, Bradfield's analysis suggests that leniency was generally a result of compassion or sympathy exercised as an aspect of 'mercy' meted out by the sentencing judge. There was no recognition of the real danger faced by the accused and the legitimacy of their responses.<sup>49</sup> In those manslaughter cases where a non-custodial sentence was imposed, extreme violence by the deceased was generally deemphasised in sentencing reasons in preference for a focus on the pathology of the accused.<sup>50</sup>

I examined cases reported between 2000 and 2008 in which women were sentenced for manslaughter or murder for the killing of their partners which involved a history of violence committed by the deceased against the accused.<sup>51</sup> In four of 17 cases,<sup>52</sup> it was apparent on the face of the sentencing judgment that the accused had a strong self-defence argument available to her.<sup>53</sup> These four cases were *Denney*,<sup>54</sup> *Gazdovic*,<sup>55</sup> *Melrose*<sup>56</sup> and *Russell*.<sup>57</sup> In

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hands. It was only after her acquittal, and campaigning by her family, that Kevin Smith was eventually prosecuted and convicted of domestic violence offences: Belinda Kontominas, 'She took a gun to kill, but jury set her free', *Sydney Morning Herald* (online), 31 May 2008, <<http://www.smh.com.au/news/national/she-took-a-gun-to-kill-but-jury-set-her-free/2008/05/30/1211654312825.html>>.

<sup>46</sup> Bradfield (2002), pp 124-9.

<sup>47</sup> Bradfield (2002), p 22.

<sup>48</sup> Bradfield (2002), pp 195-6. Other studies that have found that only a small proportion of women who kill intimate partners rely on self-defence include Eastaerl (1993), p 115 and WALRC (2007), p 271.

<sup>49</sup> Bradfield (2002), pp 337-44.

<sup>50</sup> Bradfield (2002), pp 365-70.

<sup>51</sup> For an explanation of how cases were selected, see Chapter 1.2.

<sup>52</sup> See Annexure I.

<sup>53</sup> Although there was violence by the deceased in the other cases, I have limited my discussion to these cases as they involved a precipitating act of violence by the deceased shortly prior to the act of self-defence, in accordance with the traditional operation of self-defence. However, note that in *R v Ferguson* [2008] NSWSC 761 (Unreported, Barr J, 25 July 2008) a threat that 'You will always be looking over your shoulder' immediately preceded the stabbing of the deceased.

<sup>54</sup> *R v Denney* [2000] VSC 323 (Unreported, Coldrey J, 4 August 2000).



*Denney*, the offender was convicted of manslaughter at trial after the Crown rejected an earlier plea of guilty to manslaughter. In the other three cases, the accused pleaded guilty to manslaughter.

In *Denney*,<sup>58</sup> the offender killed her husband following a lengthy history of physical, financial and emotional abuse. She had been raped by the deceased just prior to the killing, and was in fear for her life. She hid the body and evaded detection for 10 years. She was sentenced to three years' imprisonment fully suspended.

In *Gazdovic*,<sup>59</sup> after a lengthy history of physical and emotional abuse, the offender killed her husband immediately after he had threatened to kill her and had picked up an axe that he kept in the house. Justice Teague noted that the offender had only 'marginally failed to judge to a nicety' when to cease her actions in self-defence and noted, 'I cannot think of a homicide case where the level of moral culpability could be rated as low as here.'<sup>60</sup> The Crown did not ask for a custodial sentence, and Gazdovic was sentenced to a two-year good behaviour bond.

In *Melrose*,<sup>61</sup> the Crown accepted a plea of guilty to manslaughter on the basis of unlawful and dangerous act. There was a long history of physical abuse, and of the deceased following the offender when she attempted to leave the relationship. On the evening in question, the deceased had physically attacked the offender, who went home and armed herself with a knife. When the deceased returned home and physically and verbally abused her, she stabbed him once, fatally, in the shoulder. Melrose was sentenced to a good behaviour order for four years with conditions in relation to psychiatric treatment.

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<sup>55</sup> *R v Gazdovic* [2002] VSC 588 (Unreported, Teague J, 20 December 2002).

<sup>56</sup> *R v Melrose* [2001] NSWSC 847 (Unreported, McClellan J, 31 August 2001).

<sup>57</sup> *R v Russell* [2006] NSWSC 722 (Unreported, Newman AJ, 21 July 2006).

<sup>58</sup> *R v Denney* [2000] VSC 323 (Unreported, Coldrey J, 4 August 2000).

<sup>59</sup> *R v Gazdovic* [2002] VSC 588 (Unreported, Teague J, 20 December 2002).

<sup>60</sup> *R v Gazdovic* [2002] VSC 588 (Unreported, Teague J, 20 December 2002), [9].

<sup>61</sup> *R v Melrose* [2001] NSWSC 847 (Unreported, McClellan J, 31 August 2001).

In *Russell*,<sup>62</sup> Cherie Russell was sentenced to a head sentence of six years with a non-parole period of three years for the manslaughter of her partner Jeffrey Cook. She was originally charged with murder. Russell and Cook had been in a de facto relationship characterised by violence, especially when Cook was drunk. On 18 May 2005, an argument broke out while the two were drinking. The evidence was that Cook hit Russell once and then threatened to 'kill her stone dead'. She picked up a knife and he challenged her to stab him, which she did. He died of blood loss.

Russell had had a car accident in 2001 which had left her with brain damage. She had a very low IQ and poor memory skills. There was a history of violence against her, with the police attending on a number of occasions in 2004, as well as violence against her by previous partners. There was also a history of serious violence by Cook against former partners and he was noted by the police as a 'high risk' domestic violence offender.

My aim in examining these cases is not to question whether or not the facts as presented in coronial or court decisions reflect the 'truth'. Foucault's work exposes the fallacy of relying on any concept of truth independent of the discursive context in which knowledge is constructed.<sup>63</sup> Rather I examine the different ways in which truth is constructed as the 'facts' in these two categories of case.

In doing so, I argue that whether or not a person is prosecuted is based on the differential construction of 'the facts', which draws upon common understandings and assumptions about particular types of violence and the people who use violence. These discursive mechanisms both reflect and perpetuate structural and procedural differences in the way that different types of killings are treated.

In the following section, I interrogate the recorded facts of those matters that *have* proceeded to prosecution, and compare the facts in those matters with those outlined in the terrorism shootings and other defensive responses by

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<sup>62</sup> *R v Russell* [2006] NSWSC 722 (Unreported, Newman AJ, 21 July 2006).

<sup>63</sup> Howe (2008), pp 99-103.

police. By identifying similar features between the two types of cases, I am then able to explore the way in which the violence perpetrated by the 'victim' and the responses to the violence are differentially constructed to justify the different outcomes.

### *How Self-Defence Responses are Constructed within Legal Processes*

A key strategy utilised by Howe, following on from Foucault, is attempting to separate the processes of knowledge construction from the hegemonic forces that control their operation. This is done not by seeking '*the truth*' (which is impossible to find) but by problematising commonly-accepted truths.<sup>64</sup> As in previous chapters, I am not seeking the 'real facts' of these cases, but to conceptualise the violence in terms of 'linguistic facts' – that is, as violence that is produced within a context of cultural productions and references.<sup>65</sup>

Within the sources outlined above, I identified general trends or patterns in the treatment of different self-defence responses within the Australian legal system. These differences in part reflect the different structural processes through which particular homicides are constructed as justified or not justified. When police kill, their actions are constructed within the system as 'justified', while victims of domestic violence who kill are generally prosecuted, constructing their actions as (at least potentially) criminal. In this respect, the coronial and criminal justice processes themselves are part of the discursive process that constructs violence.

As noted in previous chapters, discourse both reflects and creates relationships of power.<sup>66</sup> In a coronial inquest, the purpose of the coroner's findings is to explain why the actions of the police officer who killed were justifiable, so that

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<sup>64</sup> Howe (2008), pp 27-32.

<sup>65</sup> Marcus (1992), discussed in Howe (2008), pp 171-5.

<sup>66</sup> Howe (2008), pp 27-32.

there is an explanation for why the 'usual' process of criminal prosecution is not followed. By contrast, when a judge provides reasons for sentence in relation to a woman who kills her abuser, the criminal justice process has already been engaged and is drawing to its logical conclusion – that of measuring the seriousness of the offence that has already been proved either by way of a jury verdict or a guilty plea. Thus the differential truth constructions *reflect* these different procedural avenues for dealing with certain types of killing.

However, at the same time, they support and reinforce the process by providing a justification for the differential treatment. If police officers are usually justified in killing suspects, then it is right that they not be exposed to criminal prosecution. Conversely, if abused women are constructed as being criminally liable, rather than having acted in self-defence, it is only fair that they be subjected to criminal justice.

Reg Graycar, Rosemary Hunter, Kathy Mack and Sharon Roach Anleu have written about the common understandings and assumptions that operate concerning women and violence in the legal system.<sup>67</sup> Just as judicial decision-making reflects judges' 'knowledge' about people's (and in particular women's) lives, decisions made outside the judicial system (e.g. the decision to prosecute) also reflect knowledge of 'ordinary human experience' that does not necessarily represent the experiences of women.<sup>68</sup> Common understandings about domestic violence include that it is a product of 'relationship conflict'; that violence can be stopped by separation; that women are (at least partly) responsible for violence against them; and that men and women both perpetrate domestic violence.<sup>69</sup> These common understandings bear upon decisions that are made about whether or not a woman who kills her abusive partner should be prosecuted.

By contrast, police officers benefit from a perception that any lethal force they use must have been justified, due to the danger they face in their ordinary

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<sup>67</sup> Graycar (1995); Hunter (2006b); Mack and Roach Anleu (2000).

<sup>68</sup> Mack and Roach Anleu (2000).

<sup>69</sup> Hunter (2006b).

duties.<sup>70</sup> The state has a monopoly on the use of legitimate force,<sup>71</sup> and as agents of the state, police carry the mark of state legitimacy in respect of their actions, regardless of the motivations of the individual officers involved.<sup>72</sup> This common conception of the police officer as protector of the community is reflected in the construction of the police officer in the coronial process as 'simply doing her or his job'.

To understand how these common assumptions operate in practice, I examine three aspects of the two categories of cases. The coronial and sentencing decisions examined illustrate how these factors are treated in different ways depending on the category of case, and operate to construct the killing as justified or not, depending on the category it falls within. Broadly, these factors are as follows:

- Legal discourse differentially constructs the 'danger' that those who kill in self-defence are responding to: while police who shoot in self-defence are described as facing a 'real threat', the threat posed by abusers to the women who kill them is minimised or ignored;
- Police are generally constructed as 'witnesses of truth' while a woman's credibility as a witness is influenced by stereotypes of women as untruthful, and by the degree to which the accused conforms to the image of the 'ideal victim'; and
- The perceived availability of other options for women who kill provides an outlet for explaining why their conduct was not justified, while for police who kill, the availability of alternatives to lethal shooting does not preclude their conduct being presented as justified.

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<sup>70</sup> Goldsmith (2000), especially pp 109-114, 125-7.

<sup>71</sup> Fletcher (1978), pp 867-8. For monopolisation of the use of legitimate force as a criterion for statehood see Weber (1947), p 156; cf Ptacek (1999), p 12.

<sup>72</sup> Fletcher notes that historically within the common law, justifications were linked with governmental conduct: see Fletcher (1978), pp 773-5.

## *The Existence of a 'Real Threat'*

The way in which the danger faced by the person who acts with lethal violence is constructed is integral to whether or not her or his actions will ultimately be characterised as justified. In this regard, the construction of terrorism as ideological and directed at intimidation or coercion of the government or the public, as outlined in Chapters 2.1 to 2.3, is significant. If the violence that police are responding to is motivated by a commitment to a fundamentalist cause, that will be relevant to consideration of whether violence carried out by the police in response is justified. A person committed to carrying out a violent act in pursuit of a cause is likely to pose a 'real danger' requiring a swift and serious response. Similar themes are evident in the police shooting cases. Coroners in their decisions paint a picture of police acting under pressure and in difficult circumstances, attempting to manage threats to public safety posed by dangerous, and sometimes irrational, persons. On the other hand, the 'battered women' cases further illustrate the characterisation of domestic violence as a 'personal' and 'private' problem as illustrated in Chapters 2.2 and 2.3.

The construction of a 'real threat' is evident in the discourse used in relation to the de Menezes and Alpizar shootings, despite the fact that both these 'suspected terrorists' were ultimately proven to be innocent bystanders with no terrorist affiliations or aspirations.<sup>73</sup> Prior terrorist attacks and a general state of alarm are woven into the discussion about the shootings in a way that sets the scene for justifying the killings. Both the Alpizar and de Menezes reports make reference to previous terrorist attacks having occurred, and use that to construct a context for the killings, not only in terms of the additional pressures that the threat of an attack placed on officers, but also on their responsibility to act in defence of themselves and members of the public. For example, the authors of the Independent Police Complaints Commission report into the shooting at

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<sup>73</sup> For another example of challenge to the dominant discourse surrounding the de Menezes shooting (the discourse of 'tragic mistake'), see Vaughan-Williams (2007).

Stockwell Tube Station emphasised the need to take into account the dangerous situation faced by police:<sup>74</sup>

Any assessment of the strategy adopted, how it was applied that morning and how individuals performed and reacted must be measured against the background. There is always a danger of assessing judgements with the benefit of hindsight and with the precious luxury of time for a measured consideration of possible options. That the Metropolitan Police force was facing operational problems never before encountered is plain and the constant pressures placed on individuals, over a period of more than two weeks, has been recognised.

Similarly, it was considered to be factually and legally irrelevant that Alpizar actually had no bomb when he was shot, or that he was suffering from bipolar disorder. It was also considered irrelevant that Alpizar's wife, Anne Buechner, had called out and said that her husband was sick; there was no evidence the marshals had heard her, and even if they did, it would not alleviate their responsibility to deal quickly and decisively with the issue.<sup>75</sup>

In a post-September 11<sup>th</sup> and Madrid bombing world, the air marshals were faced with a man on an American Airlines flight clutching a backpack on his chest, claiming to have a bomb and threatening to detonate it while heading back toward the aircraft. Under these circumstances, there simply is no room for delay for the purposes of conducting the type of investigation that hindsight offers.<sup>76</sup>

In allowing the social context of the terrorism responses to be taken into account, the threat of terrorist attack becomes palpable, making a lethal response justifiable.

Similarly, in all but one of the police-shooting coronial cases examined, the coroner made reference either to the nature of the threat faced by police, or to the fact that the shooting was justified in the circumstances.<sup>77</sup> In three cases,

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<sup>74</sup> IPCC (2007), [20.2].

<sup>75</sup> Office of the State Attorney (Miami-Dade State Attorney's office) (2006), pp 45-46.

<sup>76</sup> Office of the State Attorney (Miami-Dade State Attorney's office) (2006), p 46.

<sup>77</sup> For example a 'difficult and terrifying situation' and 'difficult and dangerous situation' (*Thomas Waite, Mieng Huynh, James Jacobs, James Gear* (Qld Coroners' Court, 17 March 2008)). The exception was the Northern Territory case *Robert Jongman* [2007] NTMC 080 (Unreported, 3 December 2007), discussed in

coroners made reference to it being 'unfair' to judge the police officer's actions without consideration of the threat faced, or stated that 'no fair-minded person' could deny that the officer was acting in self-defence.<sup>78</sup> The recourse to concepts of fairness is a discursive manoeuvre that has the effect of placing the issue of self-defence beyond challenge.

Legal discourse regarding women who kill in response to violence against them does not provide women with the same advantage of reference to social context. The construction of domestic violence as a private crime, rather than a crime directed against a section of the public, means that women who respond to such violence are seen as acting in a personal capacity only, and not reacting against a broader threat to women as a 'section of the public'. Legislation introduced in Victoria allows evidence of a history of violence in the relationship, and the dynamics of the violent relationship generally, to be led in determining whether an accused who raises the issue of past domestic violence believed it necessary to act in self-defence and whether there were reasonable grounds for that belief.<sup>79</sup> For the most part, however, evidentiary rules make it difficult for women to adduce evidence of past acts of violence against them, and particularly to introduce evidence of the dynamics of violent relationships generally.<sup>80</sup>

Social discourse about self-defence for women focuses on the threat of 'stranger assault' and the need for things such as personal alarms and improved lighting.<sup>81</sup> This ignores the reality that the most common form of violence against women is that perpetrated by men who are known to them, usually family members or intimate partners.<sup>82</sup> Because domestic violence is

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more detail below. For an interesting example of two very different judicial constructions of police conduct as 'justified' or 'not justified' see *Khan v West* (2002) 131 A Crim R 111 and *Khan v West* (Unreported, VSC, Hampel J, 11 September 1997).

<sup>78</sup> State Coroner's Office (NSW Attorney General's Department) (2005) (shooting by CS); *Daniel Cory Rhodes* (Qld Coroners' Court, 24 March 2006); *Malcolm Bell* (Qld Coroners' Court, 26 May 2006).

<sup>79</sup> *Crimes Act 1958* (Vic) s 9AH. For discussion see Hale et al (2006).

<sup>80</sup> Admissibility of evidence is governed by rules as to what evidence is deemed 'relevant'. In relation to self-defence, courts have generally focused on the immediate danger to the accused who kills in self-defence rather than past instances of violence: Tolmie (1991), pp 72-3. Evidence in relation to the threat posed to women by domestic violence more broadly would generally be excluded as being 'irrelevant'.

<sup>81</sup> Stanko (1990), p 149.

<sup>82</sup> In 46 percent of cases of women who have experienced violence since the age of 15, it has been at the hands of a partner or former partner: Australian Bureau of Statistics, *Personal Safety Survey*, 4906.0, 2005



constructed as private abuse, the devastating effects of domestic violence on women generally are minimised in the law's official version of events,<sup>83</sup> making it more difficult for women to demonstrate that they were responding to a real and present danger.<sup>84</sup>

Not only does legal discourse exclude the broader social context of domestic violence, the process by which cases are constructed in court often makes it difficult for women to present the 'tensions' involved in an abusive relationship in a meaningful way. Although a history of abuse is relevant and admissible to an argument of self-defence,<sup>85</sup> the way that the Crown constructs its case and the rules of evidence mean that abusive relationships are often broken down into a series of discrete incidents, depriving them of their meaning.<sup>86</sup> Situations of ongoing abuse, as reflected in the opening excerpt to this chapter,<sup>87</sup> can be especially difficult to present in terms of discrete events.

A victim of domestic violence is uniquely placed to be able to judge the level of threat posed to her by the most recent instance of violence. Women who are victims of ongoing abuse develop an ability to predict possible triggers for a violent situation. On the basis of past abuse, a victim may well know how severe an impending attack is likely to be.<sup>88</sup> Yet the rules that determine what evidence is admissible mean that it will be difficult for a victim to explain this enhanced form of understanding to the court.<sup>89</sup>

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(Reissue),

<[http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/056A404DAA576AE6CA2571D00080E985/\\$File/49060\\_2005%20\(reissue\).pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/056A404DAA576AE6CA2571D00080E985/$File/49060_2005%20(reissue).pdf)> at 30 May 2007.

<sup>83</sup> Hunter (2006a), pp 41-2.

<sup>84</sup> Note that between 1990 and 1997, one-fifth of victims of police shootings had been involved in a domestic incident immediately prior to the shooting, indicating the existence of a threat to police as well as the immediate victim: Dalton (1998).

<sup>85</sup> *Zecevic v DPP (Vic)* (1987) 162 CLR 645, 662, 663, 672, 673. See also *R v Besim (no 1)* [2004] VSC 168 (Unreported, Redlich J, 17 February 2004) where evidence of abuse by victim against his previous partner was admitted in relation to self-defence argument by female accused.

<sup>86</sup> Bradfield (2002), pp 253-63.

<sup>87</sup> Doyle (1997), p 206.

<sup>88</sup> Browne (1987), p 172.

<sup>89</sup> To begin with, such evidence may be construed as 'tendency evidence' and therefore subject to the requirements of admissibility set out in ss 97 and 101 of the *Evidence Act 1995* (Cth) (equivalent or similar provisions exist in other jurisdictions and at common law).

In each of the four domestic homicide cases outlined above, the facts were constructed in such a way as to minimise the danger to the accused,<sup>90</sup> cast doubt upon her version of events, or downplay the threat posed by the 'victim' by mention of his 'redeeming qualities'. For example, in *Denney*, where the accused shot her husband who had assaulted and raped her, threatened to kill her and prevented her from seeing friends and family, Coldrey J stated:<sup>91</sup>

... It should not be concluded from what I say that John Denney lacked any redeeming features. The evidence before the court is of a hard worker, a man who generally got on well with his work mates and a father who related well to his children. Indeed, somewhat paradoxically, you told the investigating police that you loved John, but you did not like the things that he did.

In other words, John Denney's actions may not always have been meritorious, but that did not make him a person who deserved to die.<sup>92</sup>

Another discursive tool that is sometimes used to minimise the threat of harm faced by women in situations of domestic violence is to describe the situation as one of 'matrimonial discord' or 'domestic discord'.<sup>93</sup> In this way, what might otherwise be described as real and tangible harm justifying a self-defence response is repackaged as the significantly less harmful 'domestic discord'. The result of this discursive manoeuvre is that a lethal response is interpreted as excessive or disproportionate.

The use of 'battered woman syndrome' evolved as a means of attempting to address some of the difficulties in presenting evidence of the realities of domestic abuse to courts. In Australia, evidence of 'battered woman syndrome' is admissible to prove both that the accused believed her actions were necessary in self-defence, and that the belief was held on reasonable

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<sup>90</sup> This feature of judgments of this nature was noted in Stubbs and Tolmie (1994), p 193; in relation to minimisation of domestic violence generally see Edwards (1996), pp 183-5.

<sup>91</sup> *R v Denney* [2000] VSC 323 (Unreported, Coldrey J, 4 August 2000), [16].

<sup>92</sup> For a discussion of the law's resistance to discourse of 'love' for abusers see Seuffert (1999). Similarly, the fictional victim's expression of love for her abuser 'Charlo' in Doyle's *The Woman who Walked into Doors* does not detract from the severity of the abuse inflicted on her.

<sup>93</sup> *R v Bogunovich* (1985) 16 A Crim R 456; *Whalen* (Unreported, NSWCCA, Lee J, 5 April 1991); *R v Vandersee* [2000] NSWSC 916 (Unreported, James J, 18 September 2000); *R v Melrose* [2001] NSWSC 847 (Unreported, McClellan J, 31 August 2001); *R v Russell* [2006] NSWSC 722 (Unreported, Newman AJ, 21 July 2006); *R v Gojanovic (No 2)* [2007] VSCA 153 (Unreported, Ashley and Kellam JJA and Kaye AJA, 14 August 2007). See also Easteal (1993), p 140.

grounds.<sup>94</sup> Even in cases where women are successfully able to utilise 'battered woman syndrome' in their defence, the facts are constructed in such a way as to downplay the existence of a threat and to blame the response instead on the woman's pathological misinterpretation of the signs of danger. Thus self-defence is not successful because the woman 'reasonably believed' she was in danger based on her past experiences. It succeeds because previous instances of abuse have created in her a state of 'learned helplessness', in which she mistakenly believes that she has no other option but to kill her abuser.<sup>95</sup>

'Battered woman syndrome' has been roundly criticised for its pathologising effect, and for failing to recognise the reality of the danger faced by women, despite the fact that it has resulted in some individual positive outcomes.<sup>96</sup> Presentation of BWS evidence has also led to concerns about the construction of the 'reasonable battered woman', whose example must be met by abused women in order to allow them successfully to rely on self-defence.<sup>97</sup>

'Battered woman syndrome' has also been described as a manifestation of so-called 'victim feminism', which focuses on women's victimisation but ignores their agency as demonstrated through separating from a violent partner (or attempting to), other steps to manage violence on a daily basis, and ultimately, defensive violence.<sup>98</sup>

Given the state's continuing failure to address the problem of domestic violence,<sup>99</sup> a construction of women who kill their abusers as 'agents' who take necessary action to defend themselves and their families from continuing violence is available to courts and those who make decisions within the criminal justice process. However, the construction of women's agency as pathology –

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<sup>94</sup> *Osland v The Queen* (1998) 197 CLR 316 per Gaudron and Gummow JJ at 335-9.

<sup>95</sup> Sheehy et al (1992); Leader-Elliott (1993), p 430. For critique of the focus on the 'syndrome' rather than the history of violence see Schopp et al (1994).

<sup>96</sup> For example Naffine (1995), pp 31-7; McDonald (1997).

<sup>97</sup> Sheehy et al (1992), pp 384-6.

<sup>98</sup> Schneider (2000), pp 74-86.

<sup>99</sup> The coroner noted a number of such failures by police in *Jodie Palipuaminni* [2006] NTMC 083 (Unreported, 23 October 2006) including failure to record reasons for not seeking a protection order and to arrest the offender, who ultimately went on to kill Palipuaminni, for breach of bail. Other deficiencies in police response were noted in *Sonya Mercer and Darren Batchelor* (2004) TASC 57 (Unreported, 12 February 2004); *Anne Chantel Millar* [2005] NTMC 056 (Unreported, 2 Sept 2005); *Andrea Wrathall and Stephen Pugh* (2007) TASC 360 (Unreported, 2 November 2007).

through labelling it ‘battered woman syndrome’ – minimises the threat that such agency poses to masculinist interests. Through this ‘strategy of recuperation’, legal discourse provides a measure of mercy to victims of domestic violence, while simultaneously failing to recognise the legitimacy of their actions.

The way that ‘battered woman syndrome’ operates is further illustrative of the law’s construction of domestic violence as a less serious form of violence, and one that does not justify a violent response (although an accused may be excused if she is able to rely on her defective state of mind).

### *The Construction of the ‘Victim’*

Integral to the construction of cases in coronial and criminal courts is the identity of the ‘narrator’ – the person who claims to have been the ‘victim’ of an attack and to have responded in self-defence. While it appears that police witnesses are generally accepted as witnesses of truth, the same cannot be said for women who kill their abusers. Despite research demonstrating that many police are prepared to lie to protect their colleagues,<sup>100</sup> police were generally accepted as witnesses of truth in the coronial cases examined, even in circumstances where their version of events was inconsistent with other evidence.<sup>101</sup>

The law has traditionally been reluctant to rely on the uncorroborated testimony of a single woman,<sup>102</sup> based on the cherished male assumption that women

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<sup>100</sup> Goldsmith (2000), pp 121-3; McCulloch (2001), pp 21-2. The Stockwell One report found that, although none of the 17 civilian witnesses heard police shout ‘Police’ prior to the shooting of de Menezes, all eight police reported either shouting it or hearing it shouted: IPCC (2007), [13.2].

<sup>101</sup> The de Menezes case is an example: *Death of Jean-Charles de Menezes: Ruling by Coroner as to what verdicts available to the jury*, 24 November 2008 and supplementary ruling 8 December 2008, Transcript of jury verdict, 12 December 2008,

<[http://stockwellinquest.org.uk/hearing\\_transcripts/index.htm](http://stockwellinquest.org.uk/hearing_transcripts/index.htm)> (viewed 13 December 2008) (Note: site no longer available as at 12 Nov 2011). A jury handed down an ‘open verdict’ (the only verdict available to them apart from lawful killing) and found (unanimously) that the operative had not shouted ‘Armed police’ and de Menezes had not advanced on the operative as per police evidence. Coronial cases where police evidence was accepted despite inconsistency with other evidence are the Victorian case of *Whyte* (Gary Whyte, Record of Investigation into Death (Unreported, Victorian Coroner’s Court, 21 January 2005)), and the Queensland cases of *Waite and Gear* (*Thomas Waite, Mieng Huynh, James Jacobs, James Gear* (Queensland Coroners’ Court, 17 March 2008)).

<sup>102</sup> Until 1981, there was a common law rule requiring the judge to direct the jury about the dangers of acting on the uncorroborated evidence of a sexual assault victim: Department for Women (NSW) (1996), p 183.

have a tendency to lie.<sup>103</sup> More than twenty years ago, a NSW Parliamentarian made the following remark:<sup>104</sup>

Judges have commonly warned juries against the dangers of conviction of rape on the uncorroborated evidence of a woman. That there might be a rule of law or practice to this effect is unacceptable. No doubt members of the police force would be justifiably upset if Parliament were to legislate a warning against the dangers of convicting on the uncorroborated evidence of a police officer.

Perhaps that historical reluctance factors into the decision-making process in determining whether or not the accused has faced a real threat of danger. In situations where women kill their abusers, it usually takes place behind closed doors and out of public sight, meaning that the only witness to the killing and the preceding violence will often be the 'accused' herself. A history of violence may have been actively concealed from other parties, meaning that there is no corroboration of the woman's version of events.<sup>105</sup> In two of the 'domestic homicide' cases studied, the courts made reference to the fact that the deceased was not available to give his version of events,<sup>106</sup> however there was no similar reference made in any of the coronial cases involving shootings by police officers, and the absence of corroboration of police evidence did not prevent police actions being declared justified.<sup>107</sup>

The difficulties women face in having their stories of previous violence believed are exacerbated by the way in which such cases are divorced from their social context, as described above. As noted above, the context of actual and impending terrorist attack is factored into the consideration of police responses.

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<sup>103</sup> Brownmiller (1976), p 369. In a NSW study, 84 percent of sexual assault complainants were asked questions about whether they were lying or making up the story: Van de Zandt (1998), p 130. See for example the well-known comment of Salmond LJ in *R v Manning; R v Henry* (1968) 53 Cr App Rep 150 at 153 that, 'human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate ... for all sorts of reasons ... and sometimes for no reason at all.' In a Victorian Study, almost half the participants agreed that women involved in custody disputes often make up claims of domestic violence: Taylor and Mouzos (2006), pp 66, 70.

<sup>104</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 March 1981, 4773 (FJ Walker) (Second Reading of the Crimes (Sexual Assault) Bill)).

<sup>105</sup> Sheehy et al (1992), p 374. Douglas (2003), p 92 notes that matters are more likely to be prosecuted where independent evidence exists; the victim's testimony is not sufficient because of her relationship to the perpetrator.

<sup>106</sup> *Osland v The Queen* (1998) 197 CLR 316, [209], [239]; *R v Denney* [2000] VSC 323 (Unreported, Coldrey J, 4 August 2000), [3].

<sup>107</sup> For example, there were no independent witnesses referred to by the coroner in relation to the shooting of AC: State Coroner's Office (NSW Attorney-General's Department) (2001).

Similarly, the fact of widespread domestic violence committed by men against women should add strength and credibility to a woman's claim that she has been the victim of domestic violence.<sup>108</sup> However, the context of a 'real threat' that is present in cases where law enforcement agents act against suspected terrorists is absent from cases involving self-defence responses by victims of domestic violence. Each individual accused is required to prove that she has been a victim of abuse, in the absence of an understanding of the widespread nature of such violence, and working against assumptions that women frequently lie about the perpetration of abuse.

Even where courts have been prepared to allow women to rely on self-defence in abuse cases, they have typically been reluctant to rely on the testimony of the woman herself, preferring instead to rely on expert testimony in relation to 'battered woman syndrome' or other mental impairment that the woman suffered from at the time.<sup>109</sup> In such circumstances, the woman in question may be exonerated, but it will be on the basis that she was suffering from the mental defect of 'learned helplessness' rather than because she was responding in a rational and comprehensible way to a real threat.

The victim who is killed is also constructed differently within the two types of cases. In cases involving women who kill their abusers, courts still commonly focus on the harm caused by the killing and the consequences of the accused's actions in taking a human life.<sup>110</sup> The quote from *Denney's* case above indicates the court's emphasis on the 'redeeming qualities' of the victim, despite his violent past. Although the doctrine of coverture, in which the legal identity of a woman was subsumed within that of her husband upon marriage, was abolished in the United Kingdom and United States in the late nineteenth

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<sup>108</sup> As at 2006, an estimated 780,500 women had experienced violence at the hands of a partner or former partner since the age of 15: Australian Bureau of Statistics, *Personal Safety Survey*, 4906.0, 2005 (Reissue),

<[http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/056A404DAA576AE6CA2571D00080E985/\\$File/49060\\_2005%20\(reissue\).pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/056A404DAA576AE6CA2571D00080E985/$File/49060_2005%20(reissue).pdf)> , at 30 May 2007.

<sup>109</sup> Scully (2000).

<sup>110</sup> For reference to the seriousness of the taking of human life in self-defence cases see *Osland v The Queen* (1998) 197 CLR 316, [210]; *R v Vandersee* [2000] NSWSC 916 (Unreported, James J, 18 September 2000); *R v Melrose* [2001] NSWSC 847 (Unreported, McClellan J, 31 August 2001); *R v Trevenna* [2003] NSWSC 463 (Unreported, Buddin J, 29 May 2003); *R v Russell* [2006] NSWSC 722 (Unreported, Newman AJ, 21 July 2006).

century, the law and legal philosophy have continued well into the twentieth century to reinforce the concept that a woman's position within the marriage relationship is secondary to her husband's.<sup>111</sup> Within this legal construct, a woman who kills her partner commits the crime of killing her superior in the marriage relationship.

In relation to police shootings, Goldsmith notes that the public is more likely to be sympathetic to police in circumstances where the victim of lethal action is identified as 'other' within the community:<sup>112</sup>

The 'stranger' or 'outsider' in our communities often eludes the kind of common sympathy between fellow citizens that helps keep police use of force within limits. Fear of the 'otherness' of the indigenous, the homeless, the mentally ill and other visible 'threats', fuelled by concerns for personal security and community orderliness, makes violence by police towards those groups more acceptable as well as predictable.

In the United Kingdom, a trend towards more militaristic styles of policing has resulted in an increased focus on identifying risk types and the 'other', incorporating racial profiling.<sup>113</sup>

The media also plays a role in the public construction of victims of police shootings. The construction of the victim is as a 'criminal' within the paradigm of 'good guys versus bad guys', de-emphasising or obscuring alternative constructions of the victim.<sup>114</sup>

The construction of the players in homicide cases is a key factor in whether the homicide is ultimately considered to be justified. The construction of the police officer who shoots and the victim respectively as 'good' and 'bad' supports the construction of such shootings as justifiable homicide. On the other hand,

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<sup>111</sup> Rawls (1972), p 128 (for an example in legal theory of assuming the secondary position of the wife); Smart (1984), Chapter 2; Thornton (1990), p 71 (evidenced by the continued practice of women taking their husbands' surnames); Marcus (1994), pp 19-21; Siegel (1995), p 2122. Pateman (1988), pp 39-55 notes that most social contract theorists believed in the natural subjection of women to men; see also Chapter 5. For a subtle demonstration of the secondary nature of the wife's position, see the helpful etiquette tips contained in Bolton (1955), pp 52, 65, 99.

<sup>112</sup> Goldsmith (2000), especially pp 109-114.

<sup>113</sup> McCulloch and Sentas (2006), pp 97-102.

<sup>114</sup> McCulloch (1997).

constructions of ‘victim’ and ‘accused’ in domestic homicides where women kill their abusers are much more complex, and reflect common assumptions about such violence, in particular that women are partly responsible for violence against them, and that they could have taken other steps to leave. The second of these aspects is addressed in more detail in the final section of this chapter.

### *The Availability of Other Options*

The final aspect for consideration that illustrates the differential factual construction in these cases relates to the availability of options other than lethal force. In relation to terrorism responses, it is arguable that key requirements of self-defence, such as imminence and lack of other available options, have been replaced by an ‘anticipatory security paradigm’ with prevention as the key focus, reflected most clearly in shoot-to-kill policies such as Operation Kratos in the United Kingdom.<sup>115</sup>

In the police shooting cases, the requirement that self-defence be reasonably necessary is apparently not interpreted to require that the perpetrator have no other option before using lethal force. In most of the Victorian cases referred to in this chapter, coronial findings indicated that police had, by the operational choices they made, effectively placed themselves in a position where they had little option but to use lethal force.<sup>116</sup> The coroner who presided over these hearings indicated that it seems if police believed they were acting in self-defence, it didn’t matter from their perspective if the lethal action could have been avoided.<sup>117</sup> However, charges were laid in relation to only two of these incidents, and ultimately charges against seven of the 11 officers involved were

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<sup>115</sup> O’Driscoll (2008), p 154.

<sup>116</sup> See letter from David Neal (Commissioner, LRC Victoria) to John Thwaites, 24 October 1988, cited in McCulloch (2001), p 111. In an inquest into seven police shootings occurring between 1990 and 1994, the coroner found that in six of seven cases police had been exposed at least partly by their own actions to a person with a gun requiring them to make split-second decisions: Freckelton (2000), p 164.

<sup>117</sup> Silvester et al (1995), p 220.



dropped; the three that went to trial resulted in acquittals.<sup>118</sup> These were the first prosecutions for police shootings in Australia.<sup>119</sup>

In my analysis of available coronial reports relating to police shootings,<sup>120</sup> of 25 reported inquiries into police shootings, there were 12 cases in which police had made errors of judgment,<sup>121</sup> the coroner found that the operation should have been conducted differently,<sup>122</sup> or there was evidence inconsistent with police versions of events.<sup>123</sup> Yet in only two cases was the police officer referred for prosecution; in one case the indictment was quashed due to a procedural defect and disciplinary charges were also subsequently dropped against him,<sup>124</sup> and in the other, the magistrate discharged the officer at committal.<sup>125</sup>

In the cases involving women who kill their abusive partners, however, the reasonableness element will often require them to demonstrate that no other option (including retreat from the home) was available to them.<sup>126</sup> Judges and juries may make decisions based on common assumptions about women's behaviour – particularly the idea that they could and should have left a violent

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<sup>118</sup> The eleventh police officer committed suicide before the matter came to trial. These were the prosecutions of police for the shootings of Graeme Jensen and Gary Abdallah, detailed in McCulloch (2001).

<sup>119</sup> Jude McCulloch, Personal Communication (on file with author), 10 August 2009.

<sup>120</sup> For an explanation of how cases were chosen see Chapter 1.2.

<sup>121</sup> State Coroner's Office (NSW Attorney-General's Department) (2001) (shooting of 'AC'); State Coroner's Office (NSW Attorney-General's Department) (2006) (shooting of Thuong Lam); *Robert Jongman* [2007] NTMC 080 (3 December 2007). See also the discussion of the police shooting of Joshua Yap and Chee Ming Tsen, Gerhard Alfred Sader and Arthur James Nelson in Silvester et al (1995), Chapter 2, Chapter 8, Chapter 10. In relation to the shooting of Roni Levi, both officers involved had used drugs in the months leading up to the shooting, and there were hearsay reports of them having used drugs in the hours prior to the shooting: Police Integrity Commission (June 2001), pp 52, 57, 61, 65. In a study of police shootings in the US, officers in a significant number of cases admitted that the victim did not constitute an imminent threat at the time of the shooting: Geller (1985), p 205.

<sup>122</sup> *Luke Donaghey* (Unreported, SA Coroners' Court, 15 September 2000); State Coroner's Office (NSW Attorney-General's Department) (2001) (shooting of 'AC'); State Coroner's Office (NSW Attorney-General's Department) (2002) case no 382/2001 (shooting of JH) (indicates if finding not made by a jury it is likely coroner would have been critical of police conduct); *Gary Whyte*, Record of Investigation into Death (Unreported, Victorian Coroner's Court, 21 January 2005). See the discussion of the shooting of Jedd Malcolm Houghton in Silvester et al (1995), Chapter 11.

<sup>123</sup> *Warren l'Anson* (Unreported, ACT Coroner's Court, 26 February 1999); State Coroner's Office (NSW Attorney-General's Department) (2002), case no 258/2000 (shooting of RS); *Grant Wanganeen* (Unreported, SA Coroner's Court, 9 October 2002); *Daniel Cory Rhodes* (Queensland Coroners' Court, 24 March 2006); *Thomas Waite, Mieng Huynh, James Jacobs, James Gear* (Queensland Coroners' Court, 17 March 2008) (Waite and Gear).

<sup>124</sup> *Robert Jongman* [2007] NTMC 080 (Unreported, 3 December 2007).

<sup>125</sup> *Gary Whyte*, Record of Investigation into Death (Unreported, Victorian Coroner's Court, 21 January 2005).

<sup>126</sup> See Stubbs and Tolmie (1998), pp 79-80.

relationship<sup>127</sup> - but this fails to recognise the practical realities that mean these 'alternative options' are effectively unavailable to many women.<sup>128</sup>

The reality of the situation for many battered women may well be that it is a case of 'kill or be killed'. In the United States, it has been determined that the state bears no responsibility to women for abuse inflicted in private.<sup>129</sup> In such circumstances, abused women effectively take on the role of their own law enforcer, and potentially also the law enforcer for children and other family members who may be at risk.

In one NSW coronial case, the coroner took into account in ruling the shooting justified that police had been hindered by the failure of commanding officers to provide back-up and support, which they had a right to expect.<sup>130</sup> To take this into account is in keeping with the theme of allowing the reasonableness of response to be considered against the broader context in which a defendant's actions occur.<sup>131</sup> However, the willingness to consider context in relation to reasonableness does not always translate to the situation of women who kill their abusive partners.<sup>132</sup> The fact that police could or should have been called to respond to the violent behaviour of the victim rather than the perpetrator 'taking the law into her own hands' may be held against her<sup>133</sup> notwithstanding evidence that police have systematically failed to respond effectively to domestic violence.<sup>134</sup> It is certainly no bar to prosecution that in a particular

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<sup>127</sup> Sheehy et al (1992), p 375. Historically, in Europe and the US a person could rely on self-defence if the attack was made in the home on the basis that the law had failed to afford the person protection, and to retreat would bring dishonour: Beale (1903), pp 573-80.

<sup>128</sup> Mahoney (1991).

<sup>129</sup> *DeShaney v Winnebago County Department of Social Services* 489 US 189 (1989).

<sup>130</sup> State Coroner's Office (NSW Attorney-General's Department) (2001) (shooting of 'AC').

<sup>131</sup> This was the approach endorsed in *Zecevic v DPP (Vic)* (1987) 162 CLR 645 at 662, 663, 672, 673.

<sup>132</sup> See *Sheppard* (Unreported, Supreme Court of SA, 26 August 1992) where on a plea of guilty to manslaughter Bollen J applauded the accused for not seeking to rely on a violent attack just prior to her stabbing the victim 'to make up a story to support an idea of self-defence': cited in Bradfield (2002), p 208. Bradfield found no cases where self-defence was successfully relied upon absent a context of immediate confrontational situation or uttering of a threat: p 211.

<sup>133</sup> See Miller (2000), p 205 for the idea that in contemporary society the police should be the first port of call. Cf *R v Kontinnen* (Unreported, Supreme Court of SA, Legoe J, 30 March 1992) at 53.

<sup>134</sup> See Stubbs and Tolmie (1998), pp 79-80 responding to Hubble's claim that the time taken to call for police assistance should be used to delimit self-help from self-defence.

case police have been called previously but have been unsuccessful in stopping the 'victim's' violent behaviour.<sup>135</sup>

Although imminence of threat is no longer an express requirement of self-defence, it is still relevant to an assessment of the reasonableness of the accused's response. Kaufman argues that there is a political rather than a moral rationale to the imminence requirement, based on the state's monopoly on the legitimate use of force – in other words, a person can only defend themselves with violence when there is no time to call the authorities for protection.<sup>136</sup>

Although Kaufman is wary of allowing a relaxation of the imminence requirement in relation to battered women, she does note that there is some capacity to take into account the 'effectiveness' of state response in determining whether the imminence requirement should operate. Similarly, it is arguable that the state's failure to respond to a particular domestic violence problem is relevant to an assessment of whether the actions of a woman who kills in self-defence were reasonable. A reworking of self-defence law might also factor in the different responses that might be expected from different categories of people. For example, more allowance might be made for a victim of long-term violence than for a trained law enforcement agent in terms of the reasonableness of a defensive response.<sup>137</sup>

## *Conclusion*

It is not my objective to argue that all instances of women who kill their abusers are straight-forward cases of self-defence and that all police shootings are unjustified. Instances where people shoot to kill are many and varied, and will range from killings that are justified in self-defence to those that are the product

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<sup>135</sup> *R v Bogunovich* (1985) 16 A Crim R 456 (defendant convicted of manslaughter had previously sought help in vain from police, a magistrate and solicitor); *R v Kennedy* [2000] NSWSC 109 (Unreported, Barr J, 1 March 2000) (Aboriginal accused had been unable to rely on police for practical and emotional reasons). In *R v Gazdovic* [2002] VSC 588 (Unreported, Teague J, 20 December 2002), police had attended previously and confiscated the deceased's firearms; he later bought an axe which the prisoner used to kill him.

<sup>136</sup> Kaufman (2007). Kremnitzer and Ganiyyam (2003-04), pp 897-9 argue that the individual who acts in self-defence acts as a 'substitute policeman' (sic).

<sup>137</sup> Lacey (2000), p 125.

of negligence, recklessness or malice. What the theory of case construction teaches us is that whether or not killings are justified is not simply a case of sifting through the objective facts; rather, cases are constructed as justified or not through a complex process of decision-making, and the application of common assumptions about different types of violence.

As is the case with legislation, the administration of the civil orders regime, and sentencing of terrorism and domestic violence offenders discussed in previous chapters, discursive mechanisms are at play in the construction of 'the facts' in cases involving self-defence responses to different types of violence. These discursive mechanisms play an important role in constructing certain types of killings as justified and others as unjustified. Discourse both reflects and reinforces the power relations that determine that certain types of killing will be prosecuted in the criminal justice system but not others. By constructing police killings as 'justified' and killings by abused women as 'unjustified' the structural processes that routinely direct lethal killings through different avenues are reinforced. This occurs in a way that works directly to the disadvantage of abused women, who are routinely prosecuted in situations where they kill following a history of abuse.

This is not to suggest that these processes take place without exception. There have been four instances in Australia where police have been prosecuted (at least initially) for fatal shootings, and at least one instance of a woman who killed her abusive husband not being prosecuted.<sup>138</sup> However, these 'aberrant' cases do not defeat the argument that systemic forces are at play. On the contrary, the existence of inconsistencies in the system serves to strengthen it and reinforce the appearance that the system is in fact neutral and unbiased simply *because* it is able to generate these 'exceptions that prove the rule'.

The treatment afforded to women who use lethal violence to defend themselves and their families is a further illustration of the legal construction of domestic violence as a 'private' crime reflecting tensions within dysfunctional relationships. Conceptualising the violence in this way makes it more difficult for

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<sup>138</sup> See references at notes 42, 117, 123, 124.

a domestic violence victim to demonstrate that her use of violence was 'necessary' in order to protect herself. If the social context of domestic violence as a systematically-perpetrated gendered crime were taken into account, the outcomes for individual women may be significantly different. This chapter constitutes a final illustration that the way in which legal and other discourses construct crime has very real consequences for individual victims of violence.



## SECTION FOUR





## CHAPTER 4 THE WAY FORWARD

If you want to see the true face of war, go to the amateur porn Web site NowThatsFuckedUp.com. For almost a year, American soldiers stationed in Iraq and Afghanistan have been taking photographs of dead bodies, many of them horribly mutilated or blown to pieces, and sending them to Web site administrator Chris Wilson. In return for letting him post these images, Wilson gives the soldiers free access to his site. American soldiers have been using the pictures of disfigured Iraqi corpses as currency to buy pornography. ...

Wilson, a 27-year-old Web entrepreneur living in Florida, created the Web site a year ago, asked fans to contribute pictures of their wives and girlfriends, and posted footage and photographs bearing titles such as “wife working cock” and “ass fucking my wife on the stairs.” The site was a big hit with soldiers stationed overseas; about a third of his customers, or more than fifty thousand people, work in the military. Wilson says soldiers began e-mailing him, thanking him for keeping up their morale and “bringing a little piece of the States to them.” ...

One of the pictures on Wilson's site depicts a woman whose right leg has been torn off by a land mine, and a medical worker is holding the mangled stump up to the camera. The woman's vagina is visible under the hem of her skirt. The caption for this picture reads: “Nice pussy - bad foot.”<sup>1</sup>

In this thesis, I have developed the idea that terrorism and domestic violence, contrary to common understandings, share important elements in common. I have sought to problematise the idea that domestic violence is motivated by emotion or passion generated by the tension of individual relationships. First, I have argued in Chapter 2.2 that some perpetrators of domestic violence share a masculinist ideology that places domestic violence squarely within the definition of a crime committed with the intention to advance a political, religious or ideological cause. Secondly, I have argued in Chapter 2.3 that a reworking of the concept ‘public’ from a feminist perspective means that domestic violence

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<sup>1</sup> ‘US soldiers sell porn photos of mutilated Iraqi women with joke captions’, *The Insider* (online), 27 Sept 2005, <<http://www.theinsider.org/news/article.asp?id=1569>>.

can be reconstructed as a crime committed against 'a section of the public' due to its gendered nature.

I have chosen to begin this concluding chapter with an extract from a news item about 'gore-for-porn' trade involving members of the United States military, because it illustrates the complex interplay between terrorism, violence against women and masculinist ideology. Although it is easy (and consistent with contemporary social and legal discourse) to see domestic violence and terrorism as two separate and entirely unrelated things, both are underpinned by the masculinist ideology that underlies most forms of discourse. Although it is impossible to 'know' anything outside of its discursive construction, considering domestic violence and terrorism in the context of each other paves the way for a fuller appreciation of both.

In this concluding chapter, I draw together key themes explored in previous chapters, and outline possible avenues of further investigation in relation to dealing with terrorism and domestic violence. I use the news item quoted above as a unifying thread in relation to each key point. I include here also a fictionalised reconstruction of the reasons for sentence passed on James Ramage for the manslaughter of Julie Ramage.<sup>2</sup> The sentence imposed was 11 years' imprisonment with a non-parole period of eight years. As a result of *Getting Away with Murder*, written by domestic violence campaigner Phil Cleary,<sup>3</sup> we have access to a range of 'alternative facts' that are not available in most homicide cases, which is why I have chosen to use this case as the subject of a feminist rewriting. It is possible to utilise these facts to reconstruct Ramage's actions not as those of an 'ordinary man' driven by frustrated passion to kill the woman he loved, but as the actions of a man whose commitment to masculinist ideology was carried to its brutal conclusion in the homicide of his former wife.

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<sup>2</sup> The reasons for sentence delivered by Osborn J are reported at *R v Ramage* [2004] VSC 508 (Unreported, Osborn J, 9 December 2004). While Ramage was convicted of and sentenced for manslaughter, I have reconstructed the decision in terms of a rejection of the defence of provocation and a conviction for murder, utilising both facts given in evidence at trial and facts extracted from Cleary's book.

<sup>3</sup> Cleary (2005).

In drawing together themes from the various chapters with a view to possible ways forward, I keep in mind the observation made of Foucault's work that scepticism should not be read as pessimism; recognition of the need to constantly monitor and critique normalising institutions is itself an expression of hope, and the possibility for change.<sup>4</sup>

### *The Problematisation of Woman-Hating Speech*

As discussed in Chapter 3.1, the use of 'us and them' language is common in terrorism discourse, and often features in popular and legal discussions of terrorism. References to 'infidel', 'unbelievers', 'kuffar' and 'Westerners' by terrorists clearly set them apart from their targets, and reinforce the idea that a terrorist crime is a strike against all of Western society. Since terrorism is defined as a crime committed with the intention to intimidate or coerce the government, or the public, this use of language serves to construct the terrorist in opposition to her or his victims, who stand *within* the construct of the public, while the terrorist stands outside it.

Social discourse is replete with the same sorts of 'us and them' language in a gendered context. Gendered epithets such as 'slut', 'whore', 'bitch' and 'cunt', jokes about and references to women's bodies and sexuality, and pervasive associations of women with weakness and inferiority, all serve to create women as the 'them' to the 'us' of the user. However, the use of gendered hate speech is so commonplace as to be rendered invisible as gendered hate speech.

The 'gore-for-porn' scandal referred to at the beginning of this chapter generated controversy due to the graphic portrayal of victims of the conflicts in Afghanistan and Iraq, coupled with the use of dehumanising and derogatory language to describe the victims.<sup>5</sup> The language used evidenced contempt, hatred and racism toward the victims of those conflicts. However, what went

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<sup>4</sup> McLaren (2002), pp 41-5.

<sup>5</sup> Some reactions to the material are described in the article: 'US soldiers sell porn photos of mutilated Iraqi women with joke captions', *The Insider* (online), 27 Sept 2005, <<http://www.theinsider.org/news/article.asp?id=1569>>.

unremarked was the language used to describe the women in the 'porn' pictures, which could be accessed for free as 'reward' for posting the 'gore' images. The description of an image as 'wife working cock' or 'ass fucking my wife' bespeaks a complete disrespect for, and objectification of, the woman the subject of the photo, and of women generally. These descriptions are, of course, mild in comparison to the terminology often used to describe women in pornography.<sup>6</sup> Yet in the media, these terms are simply invisible as woman-hating speech.

Hate speech against women needs to be made visible. Notwithstanding postmodern scepticism in relation to the power of law to effect change, at the most basic level one way to achieve this would be to ensure that all Australian states and territories amend existing hate speech and hate crime laws to include gender as a prohibited ground.<sup>7</sup> Currently, only Tasmania does so, and only in a civil law context.<sup>8</sup> This would at least allow a platform for the legal recognition of gendered hate speech.

Beyond legal reform, however, there needs to be social discussion and awareness about the use of woman-hating language. Recently, in several countries around the world, including Canada, the United States and Australia, there has been an attempt to 'reclaim' the word 'slut' through the organisation of 'slut walks' protesting the admonition of Canadian students by a police officer to avoid sexual assault by not dressing as sluts.<sup>9</sup> Although drawing attention to obvious victim-blaming by authority figures is important, it is questionable whether words that have at their core such misogynist understandings of women and their sexuality are really capable of being reclaimed.<sup>10</sup> In the same way that racist and homophobic language now generates public outrage (at

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<sup>6</sup> Flood and Hamilton (2003), p 32.

<sup>7</sup> As Barnett notes, the law does have the potential to shape public opinion: Barnett (1998), pp 36-8.

<sup>8</sup> *Anti-Discrimination Act 1998* (Tas) s 16 and see overview of hate speech provisions in Annexure A.

<sup>9</sup> 'London gets its Slut Walk', *The Australian* (online), 12 June 2011,

<<http://www.theaustralian.com.au/news/world/london-gets-its-slut-walk/story-fn3dxix6-1226073711588>>;

'Sydney "SlutWalk" small but powerful', *Sydney Morning Herald* (online), 13 June 2011,

<<http://news.smh.com.au/breaking-news-national/sydney-slutwalk-small-but-powerful-20110613-1g05w.html>>.

<sup>10</sup> Gail Dines and Wendy J Murphy, 'Slutwalk is not sexual liberation', *The Guardian (UK)* (online), 8 May 2011, <<http://www.guardian.co.uk/commentisfree/2011/may/08/slutwalk-not-sexual-liberation>>.

least on the surface),<sup>11</sup> we need to draw attention to gendered hate-speech as and when it occurs.

Pornography has always been a key area for disagreement among feminists. Without delving into the merits of the arguments on either side, I suggest that a discourse that focuses on incitement to, and instruction in, violence has advantages over the current discourse of morality that surrounds the regulation of pornography. Conceptions of morality are replete with phallogocentric influences, and can only serve to protect the production of images that suit masculinist sexual interests. While these same influences will be present in any discourse, taking the MacKinnon/Dworkin approach of focusing on the harm caused by pornography<sup>12</sup> has the benefit of placing the violence and objectification involved in some pornography squarely in focus.

An incitement to violence approach also focuses attention on the effects of pornography. The consequences of pornography viewing are a matter for debate, however there is a body of evidence, discussed in Chapter 3.1, to suggest that pornography has harmful consequences for women involved in the making of pornography, and for women who are subjected to 'acting out' of pornographic fantasies by their male partners. Beyond this however, the role of pornography as 'instruction' in sexual relationships between men and women needs to be examined. The work that pornography does in this sense is illustrated by the testimonies of women such as RMM, cited at the beginning of Chapter 3.1, that pornography is used 'like a textbook' in the perpetration of sexual abuse against intimate partners.<sup>13</sup>

If the things that were done by men to women in pornography were done systematically by members of one racial group against another racial group, and photographed, would that be acceptable? Or would that be decried as

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<sup>11</sup> See for example 'Stephanie Rice in trouble over homophobic tweet', *Sydney Morning Herald* (online), 6 Sept 2010, <<http://www.smh.com.au/sport/swimming/stephanie-rice-in-trouble-over-homophobic-tweet-20100906-14wb9.html>> (homophobia); Chris Barrett, 'Inglis wants league to cast out Johns', *Sydney Morning Herald* (online), 24 June 2010, <<http://www.smh.com.au/rugby-league/league-news/inglis-wants-league-to-cast-out-johns-20100623-yz4v.html>> (racism).

<sup>12</sup> *Ordinance to amend Minneapolis Code of Ordinances* 7, chs. 139, 141 (1982) (passed 30 December 1983; vetoed 5 January 1984) s 1(2); Dworkin and MacKinnon (1988), p 138.

<sup>13</sup> MacKinnon and Dworkin (1997), pp 113-4.

racist, and advocating racially-based violence? If the answer to the last question is 'yes', and I suggest that it is, then hate speech laws have potential in terms of at least allowing for the recognition of the harm caused by pornography and other forms of gendered hate speech. The emerging recognition given to racist and homophobic hate speech is a positive development, however steps need to be taken to ensure that gendered hate speech is stripped of its cloak of invisibility.

### *Preventative Measures*

In Chapter 3.2, I compared the legislative provisions relating to the making of control orders for those suspected of terrorist activity, and protection orders available in situations where domestic violence has occurred or is at risk of occurring. I outlined a number of aspects of these orders that demonstrate the 'privatisation' and trivialisation of domestic violence.

One of the main problems with the privatisation of domestic violence is that it ignores the threat that domestic abusers pose to women generally, particularly women with whom they are in an intimate relationship. The perception that violence is a feature of individual dysfunctional relationships, evidenced for example in findings that those who kill their partners are not at risk of reoffending, significantly downplays the threat that such men pose to subsequent partners. In this regard, the state persistently fails in fulfilling its '... most basic (task) ... to protect its citizens against violence'.<sup>14</sup>

The popularity of the 'gore-for-porn' website described above is illuminating in demonstrating how masculinist ideology constitutes a shared belief system. Notwithstanding the ready availability of pornography on the internet, a site specialising in photographs sent by men of them having sex with their intimate partners proved particularly popular amongst members of the US military. What is it about the viewing of another man engaged in sexual activity with his wife or girlfriend (presumably without her knowledge) that is especially erotic or

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<sup>14</sup> Dulles (1957), p 715.

stimulating? The site's popularity would seem to suggest a shared camaraderie over the objectification of a woman, similar to that exhibited in male bonding rituals that involve the shared degradation of an individual woman.<sup>15</sup> Importantly, masculinist ideology is not about the objectification or denigration of *one woman*, but of *women as a group*. To conceptualise domestic violence as a problem associated with an individual victim or relationship overlooks the role of masculinist ideology altogether.

One change that would be consistent with the recognition of the public aspect of domestic violence would be to mandate notification of entry into a subsequent relationship by serious perpetrators of domestic violence. In a number of states and territories, legislation requires convicted child sex offenders to be placed on a register, and to notify authorities of changes of name, appearance, address, employment, vehicle and of any travel plans, with failure to do so constituting an offence.<sup>16</sup> Similarly, men convicted of serious domestic violence offences could be placed on a register requiring them to notify authorities of personal details, and also of entry into any new intimate relationship.<sup>17</sup> Legislation could include a requirement that a new partner then be advised by authorities of the fact of the offender's prior convictions. While this would not of course have the result that all such relationships would be terminated, it would ensure that women in danger from domestic violence perpetrators were warned of the threat at the earliest possible stage.<sup>18</sup>

Recognising the similarities between terrorism and domestic violence as forms of violence based in ideological belief would allow a reconceptualisation of how protection orders may indeed operate to fulfil their objective of 'preventing harm'. By treating domestic violence as an ideological crime, perpetrators come to constitute a threat to women as a group defined by gender, rather than

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<sup>15</sup> Philadelphoff-Puren (2004).

<sup>16</sup> *Crimes (Sex Offenders) Act 2005* (ACT); *Child Protection (Offenders Registration) Act 2000* (NSW); *Child Protection (Offender Reporting and Registration) Act 2004* (NT); *Child Protection (Offender Reporting) Act 2004* (Qld); *Child Sex Offenders Registration Act 2006* (SA); *Sex Offenders Registration Act 2004* (Vic); *Community Protection (Offender Reporting) Act 2004* (WA).

<sup>17</sup> Such a register has already been mooted in New South Wales: 'Shame list for repeat offenders', *Nine News* (online), 17 October 2010, <<http://news.ninemsn.com.au/national/8107324/shame-list-for-repeat-abusers>> .

<sup>18</sup> Phil Cleary noted in his book that had his sister been aware of the extent of Peter Keogh's previous convictions at the outset, the relationship would not have developed: Cleary (2002).

simply to individual women. Such a reconceptualisation would potentially increase the willingness of police to apply for protection orders, have consequences for the conditions imposed on such orders, and improve police and judicial responses to breaches.

### *The Use of Ideology in Sentencing*

Not all domestic homicides are the result of ideological motivation. In my analysis of cases where men killed their intimate partners between 2000 and 2008, there were cases where, at least on the basis of the facts contained in the judgments, the killing did appear to be the product of 'relationship tensions' or a spontaneous outburst of emotion. However, a significant number of cases, as outlined in Chapter 3.3, did indicate a masculinist ideological disposition on the part of the offender, as evidenced by factors such as the previous use of violence in the relationship, and the use of force for strategic purposes.

Ideological motivation could also be evidenced by the possession of material that glorifies and celebrates the use of violence against women. In many of the terrorism cases referred to in Chapters 2.2 and 3.3, the existence of motivation to advance the cause of *jihad* was supported by evidence of offenders' possession of ideological propaganda. This included material extolling the virtues of martyrdom and violent *jihad*, and celebrating victories against foreign forces in the wars in Iraq and Afghanistan. The same kind of dehumanising effect is present in the image referred to above of a dead Iraqi woman, with a simultaneous mocking of her death and denigrating reference to her sexuality. The possession of material that is violent and dehumanising towards women in a domestic violence case would be one piece of evidence among others that could be used to demonstrate the existence of masculinist ideology.

As noted by Szasz, people are punished based not on what they do, but how their actions are defined.<sup>19</sup> Where a domestic homicide, or any act of domestic violence, is motivated by ideology, that needs to be recognised and reflected in

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<sup>19</sup> Szasz (1973), p 686.



both the sentence itself and the reasons for sentence. The present ongoing failure to recognise the existence of masculinist ideology, as I have argued in this thesis, is reflective of the law's masculinist nature. Although such influences operate at a different level to the role played by individual decision-makers, individuals can and do exercise their own discretion in particular cases. Indeed, the potential for the use of 'resistant discourses'<sup>20</sup> to disrupt accepted ways of speaking about things lies in the use of such discourses *by* individuals.

For prosecutors and judges to recognise the existence of masculinist ideology in their submissions and reasons for sentence therefore opens up the possibility for a broader recognition of the role played by ideological belief in serious domestic violence. Examples of this already exist.<sup>21</sup> Moreover, this can assist in recognising perpetrators of domestic violence as 'other' and distinguishing them from men as a broader social group by declaring explicitly that most men, notwithstanding the existence of ordinary frustrations and tensions within their intimate relationships, do not commit violence. Those who believe in the legitimacy of such violence against women, and utilise it as a means of control, are therefore 'other' and stand outside the paradigm of the 'ordinary person'.

As discussed in Chapter 3.3, a number of feminist commentators have drawn attention to the way in which the partial defence of provocation operates to excuse men's violence against women, and to disadvantage women. The abolition of provocation in Tasmania, Victoria and Western Australia is in part the product of an ongoing struggle by feminists to engage with law, and draw attention to its gendered application in particular contexts. Although it is as yet too early to determine whether the abolition of provocation will be to women's advantage, it is arguable that removing an excuse commonly allowed to men for the killing of their intimate partners can only be regarded as a positive step.<sup>22</sup>

In the following section, I reconstruct the reasons for sentence in the Julie Ramage manslaughter case from a feminist perspective, drawing upon

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<sup>20</sup> McNay (1992), Chapter 4.

<sup>21</sup> *R v Keir* [2000] NSWSC 111 (Unreported, Adams J, 29 February 2000) at [15] per Adams J, cited in Chapter 3.3.

<sup>22</sup> Howe (2002) has argued for this approach in the UK.

alternative facts available in the book written about her death by Phil Cleary.<sup>23</sup> In doing so, I attempt to illustrate the way that alternative facts can be utilised to construct a picture of offending behaviour very different to that presented by the sentencing judge. This 'alternative picture' is one consistent with control-based and feminist understandings of domestic violence perpetration. Rewriting judicial decisions from a feminist perspective has potential as a means of utilising 'resistant discourse' to expose and undermine the power of masculinist ideology.<sup>24</sup>

Although the feminist rewriting in this case includes the imposition of a harsher penalty than was imposed by the sentencing judge, it is important to note that a reconceptualisation of domestic violence in line with the analysis presented here is not suggested with a view to increasing penalties automatically for domestic violence perpetrators, though that may well be a consequence in individual cases. Rather, this analysis seeks to open up new ways of conceptualising the actions of perpetrators that may have implications for sentencing both those engaged in terrorism and perpetrators of domestic violence.

## R v RAMAGE

James Ramage, you have been convicted by a jury of the murder of Julie Ramage at Balwyn on 21 July 2003.

Your counsel attempted to argue a provocation defence on your behalf, however I refused to allow that defence to go to the jury. I will say more about that in due course.

You and the deceased married in 1980 when she was 19 years old and you were 20. You had two children together, a son Matthew, now aged 19, and a daughter Samantha, aged 15.

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<sup>23</sup> Cleary (2005).

<sup>24</sup> For examples of feminist judgment-writing see Hunter et al (2010).

It is clear that the deceased was unhappy in the relationship in the two years prior to her death. The evidence indicates that she found your behaviour controlling and oppressive. You had also previously been violent towards her.<sup>25</sup> There was an incident in 1991 when you headbutted her and broke her nose. You broke glasses and had an explosive temper.<sup>26</sup> There were also other instances of physical violence towards the deceased,<sup>27</sup> your daughter Samantha, and also your previous business partner.<sup>28</sup> It is apparent from these instances that you were a person who used violence as a punishment when you were angry or felt that you had not gotten your way about something.

The deceased had, during the course of the relationship, also confided in friends about your tendency towards sado-masochistic sex, constant demands for sex and that sexual intercourse with you felt like 'rape'.<sup>29</sup>

There was evidence before the court of the extent of your controlling behaviour in the relationship. The evidence of your cleaning lady was that the deceased would keep money hidden in the house to pay her extra, but made her promise not to tell you because you would 'go mad' if you find out she was paying her more.<sup>30</sup> You also sought to isolate the deceased from her family and friends, preventing her from attending important family celebrations.<sup>31</sup> You controlled aspects of her behaviour such as what she ate and what she wore.<sup>32</sup> It is apparent that you used physical, economic and social abuse as a mechanism to control the behaviour of the deceased in the relationship.

In 2003, the deceased moved out of the house you shared together while you were away on a business trip and told you that the relationship was over. It is clear that you were unable to accept the deceased's decision to separate from you. Despite her decision, you continued to make attempts to reconcile with the deceased, including contacting her, obtaining counselling and asking her to

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<sup>25</sup> *R v Ramage* [2004] VSC 508 (Unreported, Osborn J, 9 December 2004), [3].

<sup>26</sup> Cleary (2005), p 17.

<sup>27</sup> Cleary (2005), p 100. Evidence of previous violence was withheld from the jury on the basis that it was too long ago to be of relevance: Cleary (2005), p 119.

<sup>28</sup> Cleary (2005), p 155. This evidence was not given at trial.

<sup>29</sup> Cleary (2005), p 28.

<sup>30</sup> Cleary (2005), p 14.

<sup>31</sup> Cleary (2005), p 100.

<sup>32</sup> Cleary (2005), pp 158-9.

attend with you, and seeking advice from friends, especially the deceased's friends, as to how you could win her back.<sup>33</sup>

It is equally clear that the deceased benefited from the separation and indeed at the time of her death had established a new relationship that had brought her some happiness.<sup>34</sup>

It is apparent the deceased was afraid of you and in fact had told a number of people that you would kill her if you found out about her new relationship.<sup>35</sup> She had previously fled from you in 1987 when she was pregnant, fearing that you were going to kill her.<sup>36</sup>

Unfortunately, you were unable to accept that your wife had moved on and established a new relationship, and spoke to family and friends with some obsession, seeking to find out about the new relationship and how serious it was.

On 21 June 2003, you had invited the deceased over to the house to see new renovations you had done. You stated in your interview that you still entertained your hope that the relationship could be re-established, notwithstanding the deceased's indications to you that the relationship was over and your knowledge that she had embarked upon a new relationship.

In your Record of Interview, you gave a version of events of what took place after the deceased visited the home. You said that the deceased dismissed the renovations as being of no significance; that you pleaded with her to return; and that she said, 'You don't get it do you? I'm over you. I should have left you 10 years ago'.

You said that she questioned whether your daughter wanted to visit you as much as she had. You said that you then raised the issue of her new partner and she said that it was none of your business. You asked how serious the

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<sup>33</sup> *R v Ramage* [2004] VSC 508 (Unreported, Osborn J, 9 December 2004), [6].

<sup>34</sup> *R v Ramage* [2004] VSC 508 (Unreported, Osborn J, 9 December 2004), [8].

<sup>35</sup> Cleary (2005), pp 21, 23. In fact, this evidence was withheld from the jury on the basis that it was unfairly prejudicial: Cleary (2005), pp 118-9.

<sup>36</sup> Cleary (2005), p 27.

relationship was and she said that she had had sleepovers and screwed up her face and said that sex with you repulsed her and said or implied that sex with her new partner was much better.<sup>37</sup>

It was at this point that you say you 'lost control' and after striking two heavy blows to the deceased's head, she fell to the floor at which point you strangled her until she was no longer breathing.

I rejected your counsel's argument that provocation should be left to the jury. If I accepted that events had indeed unfolded as you said they did, I still would not accept that such conduct on the part of the deceased is capable of characterisation as 'provocative conduct' of the kind that might cause the ordinary person to lose self-control. Every day all over Australia, relationships disintegrate and couples separate. There is no way that being informed of an intention to leave a relationship, particularly in circumstances where you already knew that was the deceased's wish, could be viewed in any way as provocative. Nor could comments about the deceased's new lover's sexual prowess, if in fact such comments had been made, amount to provocation. The ordinary person is expected to act with a minimum level of self-control to comments that might be regarded as insulting or hurtful.

In any case, I reject the version of events described by you in your Record of Interview. Friends of the deceased gave evidence that she rarely swore, and that it would not have been in her nature to abuse you.<sup>38</sup> A counsellor who saw you both six days before this incident gave evidence that the deceased did not do or say anything provocative during the counselling session, but instead was open and civilised.<sup>39</sup> Indeed, the evidence points to the conclusion that the deceased had in fact taken pains to ensure that she dealt with you in relation to the separation in a thoughtful and compassionate way. The idea that the deceased, who was familiar with your violent tendencies and had expressed fear to her friends about the possibility of you killing her, would speak to you

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<sup>37</sup> *R v Ramage* [2004] VSC 508 (Unreported, Osborn J, 9 December 2004), [17]-[22].

<sup>38</sup> Cleary (2005), p 157. This evidence was not given at trial.

<sup>39</sup> Cleary (2005), p 30.

scornfully in the manner you have said, when she was alone with you in the house, is simply fanciful.

I note that you were significantly larger and stronger than the deceased.<sup>40</sup> I note also that it is not possible to tell how many blows were delivered to Julie. In your interview, you said that she did not resist for long, however the bruises on her neck and left wrist and third knuckle of her right hand indicate that she struggled to dislodge your grip on her neck.<sup>41</sup>

Evidence was called from a range of psychologists and counsellors who saw you immediately prior to or subsequent to the killing. Their view was that you were at the time of the killing in a state of extreme obsessive anxiety and that you were desperately seeking to reassert control over the relationship with your wife.<sup>42</sup> I consider this evidence consistent with the view expressed above that you were in fact a controlling person who used violence and other mechanisms strategically to control the behaviour of your partner, and that you believed you were entitled to do so as she was your wife.

Despite your attempts to portray the killing of the deceased as unpremeditated, there were a number of features of the killing that bespeak premeditation. On the morning of the killing, the builder conducting your renovations, Graeme McIntosh, arrived and found a note asking him to call you. You said that Julie was coming around and you would rather he not be there when she arrived. You later called and asked him to leave before 12, rejecting your offer to wait around the corner until she had left.<sup>43</sup> I note the evidence that prior to the killing, you had cut a two-foot length of rope from a roll in the garage.<sup>44</sup> The rope was found alongside items of your clothing and tea towels used to clean up the deceased's blood, buried near her body.<sup>45</sup> Although it is not clear how the rope was used in the offence, I accept the Crown's submission that its presence at

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<sup>40</sup> *R v Ramage* [2004] VSC 508 (Unreported, Osborn J, 9 December 2004), [33].

<sup>41</sup> Cleary (2005), p 3.

<sup>42</sup> *R v Ramage* [2004] VSC 508 (Unreported, Osborn J, 9 December 2004), [35].

<sup>43</sup> Cleary (2005), pp 12-3.

<sup>44</sup> Cleary (2005), p 7.

<sup>45</sup> Cleary (2005), p 40.

the burial site indicates that it was used in the commission of the crime, and that it was cut prior to the deceased visiting the house.

I note also that on the answers in your Record of Interview, it took less than an hour and a half for you to dig the two holes in which the deceased and other items were buried, for you to place the deceased and those items in the holes and cover them up. The unlikelihood of a person unaccustomed to physical labour being able to complete this in such a short period of time is strongly suggestive of the holes having been dug at an earlier point in time.<sup>46</sup>

After killing the deceased, you engaged in a series of detailed actions by way of covering up what you had done. You cleaned the scene of the crime with detergent. You moved the cars around – your car had previously been outside so you moved it into the garage to allow you to place the deceased's body and belongings inside it.<sup>47</sup> You made a series of phone calls (including to the deceased's phone) to give the impression you did not know of her whereabouts; you moved her car to a nearby carpark; you drove to a remote location and roughly buried the deceased's body and her belongings separately. You then returned to Melbourne, attended an appointment to order some granite benchtops where you were calm and collected; showered and dressed, and took your son out to dinner and answered a call from your daughter, all the while giving the impression you had no idea where the deceased was.<sup>48</sup>

I find these actions to be inconsistent with a person who had suddenly lost self-control and reacted on the spur of the moment. The calm and calculated nature of your actions in attempting to cover up what you had done is consistent with the actions of a person who was in control of what he was doing and took steps to attempt to ensure the killing could not be attributed to him. It is also consistent with the characterisation of your conduct in killing the deceased as planned and premeditated.

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<sup>46</sup> Cleary (2005), pp 40-1.

<sup>47</sup> Cleary (2005), p 33.

<sup>48</sup> *R v Ramage* [2004] VSC 508 (Unreported, Osborn J, 9 December 2004), [34].

I find beyond reasonable doubt that you invited the deceased to the house that day with the intention of giving her one last opportunity to reconcile with you, but with the intention that if she refused, you would punish her by taking her life.

Some evidence has been put before me attempting to demonstrate that you are remorseful for your actions. Although it is clear that you have regret for the consequences of your actions, it is not clear to me that you have any genuine remorse for killing the deceased, in circumstances when she had begun a new life and had much to look forward to.<sup>49</sup>

Dr Walton's evidence on sentence was that you were unlikely in general terms to reoffend.<sup>50</sup> However, I do not accept that this is the case. Through your prior behaviour towards the deceased, and particularly your actions on 21 June 2003, you exhibited a capacity to take actions of an extreme and violent nature in order to regain control over a situation you felt was rapidly spiralling out of control. There is no basis upon which I could be satisfied that, given the same circumstances again, you would not act in the same way. Therefore, the protection of the community, and in particular of women with whom you might subsequently form an intimate relationship, remains an important consideration upon sentence.

James Ramage, for the murder of Julie Ramage I sentence you to 20 years' imprisonment with a non-parole period of 15 years.

### *Reconceptualising the Actions of Women who Kill in Self-Defence*

In Chapter 3.4, I examined the treatment of women who kill their abusive partners in self-defence in the legal system, in the context of how police who kill in defence of themselves or the public are dealt with. In particular, I considered the critiques of feminist scholars of self-defence and how women have traditionally had difficulty fitting their experiences within its legal parameters without relying on the problematic notion of 'battered woman syndrome' that

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<sup>49</sup> *R v Ramage* [2004] VSC 508 (Unreported, Osborn J, 9 December 2004), [48].

<sup>50</sup> *R v Ramage* [2004] VSC 508 (Unreported, Osborn J, 9 December 2004), [42].



constructs their response as one based on a pathological reaction to the violence inflicted upon them.

In 2005, Victoria introduced provisions specifically to deal with defensive responses to ongoing domestic violence, with the intention of making it easier for women who kill in self-defence to introduce evidence of a history of violence.<sup>51</sup> Such developments are positive, and should be implemented in all jurisdictions.

However, police and prosecutorial discretion also has a role to play in developing a response to defensive homicides that properly reflects the domestic violence background to many such killings. It is important to keep in mind Foucault's notion of 'resistant discourse', which always carries the potential to undermine and ultimately fracture the dominant discourses that produce power.<sup>52</sup> The Victorian DPP's decision to 'buck the trend' in non-prosecution of police in the 1980s is a powerful example of resistant discourse at play. Likewise, brave decisions to *not* prosecute battered women who have clearly responded in self-defence may provide the catalyst for more systemic changes in the way those who kill in self-defence are treated.

As discussed in Chapter 3.4, the current process of subjecting police shootings to coronial inquiry, and other defensive responses to the criminal justice system, has the effect of creating two parallel systems of justice. Police must and do operate in difficult situations, making split-second decisions with serious consequences about the best way to protect themselves and members of the public from danger.

However, women who live in abusive relationships are also faced with the same kinds of decisions, albeit without the imprimatur of state authority, and usually

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<sup>51</sup> *Crimes Act 1958* (Vic) s 9AH, introduced by the *Crimes (Homicide) Act 2005*. The *Crimes (Homicide) Act 2005* (Vic) also introduced s 9AD, which provides a partial defence of 'defensive homicide'. For discussion of the legislation see Hale et al (2006). In Queensland, a partial defence of killing in an abusive relationship, reducing a conviction from murder to manslaughter, was introduced in 2010: *Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010* (Qld) s 3 (introducing s 304B to the Criminal Code).

<sup>52</sup> McNay (1992), Chapter 4.

without access to the same kinds of weapons and violence response training as police.

That was my life. Getting hit, waiting to get hit, recovering; forgetting. Starting all over again. There was no time, a beginning or an end. I can't say how many times he beat me. It was one beating; it went on forever. I know for how long: seventeen years.<sup>53</sup>

Moreover, given their past experiences with the abuser, victims of domestic violence may be uniquely placed to appreciate the significance of a particular turn of phrase or action by the perpetrator, and the threat it represents. The justice response to defensive violence needs to give more import to this kind of 'insider' knowledge and the role it plays in making decisions about what actions to take in self-defence.

As reflected in the gore-for-porn story above, terrorists and those associated with them are dehumanised and made 'other' in social, legal and political discourse. This makes it easier to portray lethal action against suspected terrorists (and as explored in Chapter 3.4, against others perceived as constituting a threat to the state) as trivial, or even humorous. By contrast, domestic violence perpetrators are not perceived as constituting a 'real threat' to the women they are violent towards, let alone to the community in general, and therefore women who kill in self-defence, while sometimes treated sympathetically, are condemned within our legal system with little understanding of the power inequalities and dynamics of control that precipitate such killings.

Removal of the provocation defence in those jurisdictions where it is still available would, it is hoped, have advantages for women. Although there is always the possibility that removing the intermediate option of provocation would result in more murder convictions, the alternative is that more women who kill in circumstances suggestive of self-defence would in fact rely upon self-defence rather than the partial defence of provocation. This would also be

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<sup>53</sup> Doyle (1997), p 206.

facilitated by the introduction of provisions similar to those in Victoria making it easier for women to adduce evidence of a history of domestic violence.

### *Concluding Thoughts*

At the beginning of my thesis, I posed the following question asked by Catharine MacKinnon:

... (When) will opposition to terrorism include the daily terrorism against women as women that goes on day after day, worldwide? ... Why does the whole world turn on a dime into a concerted force to face down the one, while to address the other squarely and urgently is unthinkable?<sup>54</sup>

The answer to the first question, at the conclusion of the analysis undertaken here, can only be: who knows? In relation to the second question, hopefully my analysis has offered some possible answers, which are associated with *how* social and legal discourse differentially constructs the two types of violence MacKinnon is comparing.

Drawing upon the arguments advanced in this thesis, I would answer MacKinnon's second question as follows. We take such drastic steps to address terrorism because we see terrorism as a threat to the state. We see terrorism as a threat to society – to *us*. We see terrorists as committed ideologues who believe that violence is legitimate in the pursuit of their cause and will stop at nothing to achieve their ends.

We do not perceive domestic violence in the same way. We perceive domestic violence as a threat to individual women, or perhaps also to men, but not to society, and certainly not to the state. We see domestic violence as inevitable, because it is based in human emotion and a spontaneous outburst of passion. We conceive of domestic violence perpetrators as individual, frustrated men, not as members of a group with a common set of beliefs and understandings.

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<sup>54</sup> MacKinnon (2002), p 429.

We do not perceive masculinist ideology at all, because it is invisible within our society.

We see these things not solely, but largely, because that is how they are constructed in social and legal discourse, and those discourses represent the way in which we hear about violence and the way we speak about it and understand it. But this is not to say that these constructions are the *only* way in which to speak about violence. The concept of 'resistant discourse' always exists as a means of offering new and disruptive ways of speaking about violence against women.

It is in disrupting these taken-for-granted discursive patterns and offering up new ways of speaking about and understanding violence, that we create the potential for a new understanding of domestic violence – as 'terrorism against women *as women*'. The events of 9/11 were horrifying, and have had an impact on modern society which is likely to reverberate for many years to come. The challenge for those engaged in addressing the problem of violence against women is to generate the same profound outrage and impetus for action in the context of 'Women's September 11'.<sup>55</sup>

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<sup>55</sup> MacKinnon (2006).

## ANNEXURES

**ANNEXURE A: SUMMARY TABLE OF HATE SPEECH/HATE CRIME LEGISLATION**

<b>Jurisdiction</b>	<b>Civil provisions</b>	<b>Criminal provisions</b>	<b>Hate crimes</b>	<b>Explanatory Memorandum – Reference to Gender/Sex?</b>
<p>Australian Capital Territory <i>Discrimination Act 1991</i></p>	<p>s 66: It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of people on the ground of any of the following characteristics of the person or members of the group:                      (a) race;                      (b) sexuality;                      (c) gender identity;                      (d) HIV/AIDS status</p> <p>Exception for: a public act, done reasonably and honestly, for academic, artistic, scientific or research purposes or for other purposes in the public interest,</p>	<p>S 67: Intentionally carries out an act - reckless about whether the act is a public act - the act is a threatening act - reckless about whether the act incites hatred towards, serious contempt for, or severe ridicule of, a person or group of people on the ground of race/sexuality/gender identity/HIV/AIDS status. (50 pu)</p> <p>Dictionary: 'sexuality' means heterosexuality, homosexuality or bisexuality</p>	<p>No relevant provisions</p>	<p>EM to the Sexuality Discrimination Act 2004 Amt 2.7 (amending ss 66 and 67): notes that the existing provisions in relation to racial vilification and serious racial vilification (ss 66 and 67) are expanded to include vilification on the basis of sexuality, transsexuality, or HIV/AIDS status.</p>

Jurisdiction	Civil provisions	Criminal provisions	Hate crimes	Explanatory Memorandum – Reference to Gender/Sex?
	<p>including discussion or debate about and presentations of any matter.</p> <p>S 65: ‘Public act’ includes any communication to the public; any conduct observable by the public; and distribution/dissemination of any matter to the public</p>			
<p>New South Wales <i>Anti Discrimination Act 1977</i></p>	<p>S 20C: It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the: race of the person or members of the group.</p> <p>Same conduct prohibited on the grounds of:</p>	<p>S 20D: public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group by means which include: (a) threatening physical harm towards, or towards any property of, the person or group of persons, or</p>	<p>NSW <i>Crimes (Sentencing Procedure) Act 1999</i> s 21A(2)(h): The aggravating factors to be taken into account in determining the appropriate sentence for an offence are as follows: ... (h) the offence was motivated by hatred for or prejudice against a group of people to which the offender believed</p>	<p>EM to Transgender (Anti-Discrimination and Other Acts Amendment) Bill: purpose as noted in Overview section is to make discrimination and vilification on transgender grounds unlawful (introduction of s 38S)</p> <p>EM to the <i>Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing)</i></p>

Jurisdiction	Civil provisions	Criminal provisions	Hate crimes	Explanatory Memorandum – Reference to Gender/Sex?
	<p>Transgender identity (s 38S)</p> <p>Homosexuality (s 49ZT)</p> <p>HIV/AIDS status (s 49ZXB)</p> <p>Exceptions for a public act, done reasonably and in good faith, for academic, artistic, scientific, research or other purposes in the public interest, or for religious discussion (except in the case of racial vilification)</p>	<p>(b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.</p> <p>Maximum penalty: 50 pu/6m (individual); 100pu (corporation). Requires consent of AG.</p> <p>Same conduct prohibited on the grounds of:</p> <p>Transgender identity (s 38T) Max penalty: 10 pu/6m (individual)/100pu (corporation). Requires consent of AG.</p> <p>Homosexuality (s 49ZTA) Max penalty: 10 pu/6m (individual)/100pu (corporation). Requires consent of AG.</p>	<p>the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability) ...</p>	<p><i>Act 2002: “a new section that sets out specific aggravating and mitigating circumstances that are to be taken into account by sentencing courts in determining the appropriate sentence for an offence, if those circumstances are relevant and known to the court.”</i> No references to gender/sex included.</p>



Jurisdiction	Civil provisions	Criminal provisions	Hate crimes	Explanatory Memorandum – Reference to Gender/Sex?
		<p>HIV/AIDS status (s 49ZXC)  Max penalty: 10 pu/6m (individual)/100pu (corporation). Requires consent of AG.</p>		
<p>Northern Territory  <i>Anti Discrimination Act 1992</i></p>	<p>No specific hate speech provisions – general anti-discrimination provisions.</p> <p>S 19: prohibition on discrimination on the basis of (a) race; (b) sex; (c) sexuality; (d) age; (e) marital status; (f) pregnancy; (g) parenthood; (h) breastfeeding; (j) impairment; (k) trade union or employer association activity; (m) religious belief or activity; (n) political opinion, affiliation or activity; (p) irrelevant medical record; (q) irrelevant criminal</p>	<p>No criminal provisions</p>	<p><i>Sentencing Act 1995</i> (NT) s 6A(e): it is an aggravating factor for sentencing where the offence was motivated by hate against a 'group of people'</p>	<p>EM to the <i>Justice Legislation Amendment (Group Criminal Activities) Act 2006</i>: Allows courts in imposing sentence to have further guidance as to the various matters that are commonly part of group crime that may be considered as aggravating factors and to add a new guideline of harm done to the broader community. No references to sex or gender.</p>

Jurisdiction	Civil provisions	Criminal provisions	Hate crimes	Explanatory Memorandum – Reference to Gender/Sex?
	record; (r) association with a person who has, or is believed to have, an attribute referred to in this section.			
Queensland <i>Anti Discrimination Act 1991</i>	<p>S 124A: by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group.</p> <p>Exception for: a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including public discussion or debate about, and expositions of, any act</p>	<p>S 131A: by a public act, knowingly or recklessly incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group in a way that includes—</p> <p>(a) threatening physical harm towards, or towards any property of, the person or group of persons; or</p> <p>(b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.</p> <p>Max penalty: 70pu/6m</p>	No relevant provisions	EM to the Discrimination Law Amendment Bill (original s 124A referred only to racial and religious vilification): Makes clear that “sexuality” is a reference to the gay and lesbian community, while “gender identity” is for the protection of transgender and intersex people

Jurisdiction	Civil provisions	Criminal provisions	Hate crimes	Explanatory Memorandum – Reference to Gender/Sex?
	or matter	(individual)/350 pu (corporation). Requires consent of Crown law/AG.		
South Australia <i>Racial Vilification Act 1996</i>	<p>S 6: Court may award damages against person convicted of an offence against s 4 (up to \$40,000) to an individual the offence was directed at or an organisation formed to further the interests of the group.</p> <p>S 73 Civil Liability Act 1936: An ‘act of racial victimisation’ that results in detriment is actionable as a tort – “act of racial victimisation” means a public act inciting hatred, serious contempt or severe ridicule of a person or group of persons on the ground of their race but does not include—</p>	<p>S 4: A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of their race by—</p> <p>(a) threatening physical harm to the person, or members of the group, or to property of the person or members of the group; or</p> <p>inciting others to threaten physical harm to the person, or members of the group, or to property of the person or members of the group.</p> <p>Max penalty: \$5,000/3 y (individual)/\$25,000 (body corporate).</p>	No relevant provisions	Act contains no references to gender or sex

Jurisdiction	Civil provisions	Criminal provisions	Hate crimes	Explanatory Memorandum – Reference to Gender/Sex?
	(a) publication of a fair report of the act of another person; or (b) publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation; or (c) a reasonable act, done in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest (including reasonable public discussion, debate or expositions)	Requires consent of DPP.		
Tasmania <i>Anti Discrimination Act 1998</i>	S 17: (1) A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute referred to in	No criminal provisions	No relevant provisions	

Jurisdiction	Civil provisions	Criminal provisions	Hate crimes	Explanatory Memorandum – Reference to Gender/Sex?
	<p>section 16(e), (f), (fa), (g), (h), (i) or (j) in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.</p> <p>S 16 (grounds of discrimination): race; age; sexual orientation; lawful sexual activity; gender; marital status; relationship status; pregnancy; breastfeeding; parental status; family responsibilities; disability; industrial activity; political belief or affiliation; political activity; religious belief or affiliation; religious activity; irrelevant</p>			

Jurisdiction	Civil provisions	Criminal provisions	Hate crimes	Explanatory Memorandum – Reference to Gender/Sex?
	<p>criminal record; irrelevant medical record; association with a person who has, or is believed to have, any of these attributes</p> <p>S 19: A person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of (a) the race of the person or any member of the group; or (b) any disability of the person or any member of the group; or (c) the sexual orientation or lawful sexual activity of the person or any member of the group; or (d) the religious belief or affiliation or religious activity of the person or any member of the group.</p>			

Jurisdiction	Civil provisions	Criminal provisions	Hate crimes	Explanatory Memorandum – Reference to Gender/Sex?
<p>Victoria <i>Racial and Religious Tolerance Act 2001</i></p>	<p>S 7: conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons (on ground of race)</p> <p>s 8: same conduct unlawful on basis of religious belief or activity</p> <p>s 9: (1) In determining whether a person has contravened section 7 or 8, the person's motive in engaging in any conduct is irrelevant.</p> <p>(2) In determining whether a person has contravened section 7 or 8, it is irrelevant whether or not the race or religious belief or activity of another person or class of persons is the only or dominant ground for the</p>	<p>S 24: must not on the ground of race intentionally engage in conduct that the offender knows is likely—</p> <p>(a) to incite hatred against that other person or class of persons; and</p> <p>(b) to threaten, or incite others to threaten, physical harm towards that other person or class of persons or the property of that other person or class of persons.</p> <p>S 24(2): A person (the offender) must not, on the ground of the race of another person or class of persons, intentionally engage in conduct that the offender knows is likely to incite serious contempt for, or revulsion or severe</p>	<p><i>Sentencing Act 1991</i> s 5(2): In sentencing an offender the court must have regard to - (daaa) whether the offence was motivated (wholly or partly) by hatred for or prejudice against a group of people with common characteristics with which the victim was associated or with which the offender believed the victim was associated ...</p>	<p>Sentencing Advisory Council recommended it be left to courts to identify and develop the groups to which aggravating factors should apply: Sentencing Advisory Council (2009), para E.4.</p>

Jurisdiction	Civil provisions	Criminal provisions	Hate crimes	Explanatory Memorandum – Reference to Gender/Sex?
	<p>conduct, so long as it is a substantial ground.</p> <p>S 11: person does not contravene section 7 or 8 if the person establishes that the person's conduct was engaged in reasonably and in good faith—</p> <p>(a) in the performance, exhibition or distribution of an artistic work; or</p> <p>(b) in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for—</p> <p>(i) any genuine academic, artistic, religious or scientific purpose; or</p> <p>(ii) any purpose that is in the public interest.</p> <p>S 12: (1) A person does not contravene section 7 or 8 if the person establishes that the person engaged in the</p>	<p>ridicule of, that other person or class of persons.</p> <p>Max penalty: 6m/60pu for individual; 300 pu for body corporate.</p> <p>Prosecution requires consent of DPP.</p> <p>S 25: same offence for religious vilification</p>		



Jurisdiction	Civil provisions	Criminal provisions	Hate crimes	Explanatory Memorandum – Reference to Gender/Sex?
	<p>conduct in circumstances that may reasonably be taken to indicate that the parties to the conduct desire it to be heard or seen only by themselves.            (2) Subsection (1) does not apply in relation to conduct in any circumstances in which the parties to the conduct ought reasonably to expect that it may be heard or seen by someone else.</p>			
<p>Western Australia  <i>Criminal Code Act            Compilation 1913</i></p>	<p>No civil provisions</p>	<p>S 77: Conduct intended to incite racial animosity or racist harassment – 14 yrs.            S 78: Conduct likely to incite racial animosity or racist harassment- 5 yrs            S 79: Possession of material for dissemination with intent to incite racial animosity or racist harassment – 14 yrs</p>	<p>S 80I (circumstances of racial aggravation means): immediately before or during or immediately after the commission of the offence, the offender demonstrates hostility towards the victim based, in whole or part, on the victim being a member of a racial</p>	<p>No references to sex or gender in legislation</p>

Jurisdiction	Civil provisions	Criminal provisions	Hate crimes	Explanatory Memorandum – Reference to Gender/Sex?
		<p>s 80: Possession of material for dissemination if material likely to incite racial animosity or racist harassment – 5 yrs</p> <p>s 80A: Conduct intended to racially harass – 5 yrs</p> <p>s 80B: Conduct likely to racially harass – 3 yrs</p> <p>s 80C: Possession of material for display with intent to racially harass – 5 yrs</p> <p>s 80D: Possession of material for display if material likely to racially harass – 3 yrs</p> <p>Defences for s 78, 80 and 80B and 80D for conduct engaged in reasonably and in good faith in performance of an artistic work, academic purposes etc.</p> <p>S 80H: Prosecution ss 77-80 requires consent of DPP.</p>	<p>group; or</p> <p>(b) the offence is motivated, in whole or part, by hostility towards persons as members of a racial group. [Circumstances of aggravation for assaults, AOABH – relates to increased penalties]</p>	
Federal	Ss 18B-18F: prohibits	No criminal provisions.	No relevant provisions	No provisions relating to



**ANNEXURE B: LEGISLATION RELATING TO DOMESTIC VIOLENCE PROTECTION ORDERS**

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>SA</b>	<b>WA</b>	<b>TAS</b>	<b>NT</b>	<b>ACT</b>
Relevant legislation	<i>Crimes (Domestic and Personal Violence) Act 2007</i>	<i>Family Violence Protection Act 2008</i>	<i>Domestic and Family Violence Protection Act 1989</i>	<i>Intervention Orders (Prevention of Abuse) Act 2009</i>	<i>Restraining Orders Act 1997</i>	<i>Family Violence Act 2004</i>  <i>Justices Act 1959</i> (second reference in each box)	<i>Domestic and Family Violence Act 2007</i>	<i>Domestic Violence and Protection Orders Act 2008</i>
Commencement	10 March 2008	Sections 1, 2 and 224 on 24 September 2008: section 3(1); sections 3–223, 233–272 on 8 December 2008: Special Gazette (No. 339) 4 December 2008 page 1; ss 225–232	Sections 1-2: 5 May 1989 Remaining provisions: 21 August 1989	Most provisions in force at 9 December 2011	ss 1 and 2: 28 Aug 1997; Other provisions: 15 Sep 1997 (s 2 and Gazette 12 Sep 1997 p 5149)	30 March 2005  24 July 1958	1 July 2008	30 March 2009

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>SA</b>	<b>WA</b>	<b>TAS</b>	<b>NT</b>	<b>ACT</b>
		not yet commenced.						
Purpose/preamble	S 9: a. to ensure the safety and protection of all persons, including children, who experience or witness domestic violence, and b. to reduce and prevent violence by a person against another person where a domestic relationship exists between those persons, and	Preamble: family violence is a fundamental violation of human rights – recognises that family violence is committed predominantly by men against women, children and other vulnerable persons. Section 1: purpose is to maximise safety of children and adults who have	S 3A: To provide for the safety or protection of a person in the case of DV committed in one of a number of specified relationships – spousal, intimate personal, family or informal carer	S 5: To assist in preventing domestic and non-domestic abuse, and the exposure of children to the effects of domestic and non-domestic abuse by providing for: intervention orders; associated orders re problem gambling and tenancy agreements and the registration of foreign	None specified	Long title: 'to provide for an integrated criminal justice response to family violence which promotes the safety of people affected by family violence'	Preamble: The Legislative Assembly enacts this Act because it recognises: (a) domestic violence is unacceptable behaviour that society does not condone; and (b) domestic violence has: (i) negative and long-lasting consequences for victims and others	S 6: The objects of this Act include— (a) to prevent violence between family members and others who are in a domestic relationship recognising that domestic violence is a particular form of interpersonal violence that needs a greater level of protective response;

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>SA</b>	<b>WA</b>	<b>TAS</b>	<b>NT</b>	<b>ACT</b>
	<p>c. to enact provisions that are consistent with certain principles underlying the Declaration on the Elimination of Violence against Women, and</p> <p>d. to enact provisions that are consistent with the United Nations Convention on the Rights of the Child. Parliament recognises that domestic violence is predomin-</p>	<p>experienced FV; reduce incidence of FV; make perpetrators accountable</p>		<p>intervention orders; to provide special police powers of arrest, detention and search re intervention orders and to further protect persons suffering or witnessing domestic or non-domestic abuse by providing special arrangements for witnesses and imposing limitations on publishing reports</p>			<p>exposed to it; and (ii) negative consequences for the community, the workplace and the economy. S 3: Objects of Act: (a) to ensure the safety and protection of all persons, including children, who experience or are exposed to domestic violence; and (b) to ensure people who commit domestic</p>	<p>and (b) to facilitate the safety and protection of people who fear or experience violence by — (i) providing a legally enforceable mechanism to prevent violent conduct; and (ii) allowing for the resolution of conflict without the need to resort to adjudication.</p>

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>SA</b>	<b>WA</b>	<b>TAS</b>	<b>NT</b>	<b>ACT</b>
	antly perpetrated by men against women and children.			about proceedings for orders. S 10 (principles): the following must be recognised (inter alia): abuse occurs in all areas of society, regardless of socio-economic status, health, age, culture, gender, sexuality, ability, ethnicity and religion.			violence accept Responsibility for their conduct; and (c) to reduce and prevent domestic violence.	
Type of order	S 16: Apprehended domestic violence	Family violence intervention order/family violence	S 13: 'Domestic violence order' – can be a	S6: Intervention order	Part 2: Violence restraining order – can be interim	Ss 14-16: family violence order 'Police	Court of Summary Jurisdiction Domestic Violence	Ss 10 and 11: Domestic violence order

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>SA</b>	<b>WA</b>	<b>TAS</b>	<b>NT</b>	<b>ACT</b>
	order (ADVO)	safety notice (interim order where FVIO is not in place). Interim FVIO also available pending final determination (Pt 4, Div 2). Family Violence Safety Notice (FVSN) can be made by police.	protection order/temporary protection order – for protection of ‘aggrieved person’ against respondent		or final – interim orders become final if respondent consents or does not object. Part 3: misconduct restraining orders (not for persons in a domestic and family relationship	family violence order’ can be made by police officer if satisfied family violence offence has occurred/likely to occur  <i>Justices Act:</i> Restraining orders	Order (CSJ DVO). S 35: interim order can be made at any time during proceedings for a DVO. S 41: police DVO if urgent circumstances so not practicable to apply for CSJ DVO; necessary to ensure safety; and CSJ DVO might reasonably have been made had it been practicable to apply.	(restrains respondent from engaging in DV – can be final, interim or emergency) and personal protection order (restrains respondent from engaging in personal violence - can be final or interim). Personal protection order can be a workplace order restraining personal violence in the workplace. S 36:



	NSW	VIC	QLD	SA	WA	TAS	NT	ACT
								interim orders become final orders if no objection or if respondent objects, Magistrate determines. S 43: consent orders with consent of both parties
Definition of 'family violence' or 'domestic violence'	S 4: 'personal violence offence' defined to include a range of criminal offences under the Crimes Act, and also the offence under s 13 of stalking or	S 5: Family violence: (a) behaviour towards a family member of that person that— (i) is physically or sexually abusive; or (ii) is emotionally or	S 11: 'Domestic violence': specified acts committed by one member of a domestic relationship including wilful injury, wilful damage, intimidation or	S 8(8) 'Domestic abuse' is an act of abuse committed by persons who are married; domestic partners; in an intimate personal relationship ; children/ step-	S 3: 'Act of abuse' encompass -es family and domestic violence and personal violence. S 6: 'Family and domestic violence': acts committed	S 7: assault, intimidation threats, economic abuse, emotional abuse, stalking, contravention of PO	S 5: 'Domestic violence'- act against someone with whom person is in a domestic relationship – includes physical harm, damage to property including pets,	S 13: 'domestic violence': includes specified acts towards a 'relevant person' including physical/ personal injury; damage to property; a domestic

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>SA</b>	<b>WA</b>	<b>TAS</b>	<b>NT</b>	<b>ACT</b>
	intimidation with intention to cause the other person to fear physical or mental harm. S11: 'Domestic violence offence' means a personal violence offence committed against a person with whom the respondent has or had a domestic relationship	psychologically abusive; or (iii) is economically abusive; or (iv) is threatening; or (v) is coercive; or (vi) in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or (b) behaviour	harassment indecent behaviour, or a threat to commit any of those acts	children; siblings; otherwise related; carers. S 8(1) and (2): act of abuse includes resulting in physical injury, emotional or psychological harm; unreasonable and non-consensual denial of financial, social or personal autonomy; damage to property.	against a person with whom respondent is in a domestic and family relationship physical injury, kidnapping, pursuing with intent to intimidate, damaging property, ongoing behaviour that is intimidating offensive or emotionally abusive, threats		intimidation stalking, economic abuse, attempts/ threat.	violence offence; threat to do any of the above; harassing or offensive behaviour; animal violence offence directed at pets.

	NSW	VIC	QLD	SA	WA	TAS	NT	ACT
		by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).						
Other forms of abuse defined	S 44 of the Crimes Act (one of the offences listed above) prohibits failing to provide a wife/ servant/ apprentice with necessary food, clothing and	S 6: Economic abuse: Behaviour that is coercive, deceptive or unreasonably controls and denies financial autonomy or withholds or	None	S 8(4): Emotional or psychological harm: includes mental illness, nervous shock, distress, anxiety or fear that is more than trivial S 8(5): unreason-	S 6: Personal violence: personal injury, kidnapping, pursuing, threats, against a person not in a family and domestic relationship 'Domestic and family violence'	S 8: Economic abuse: pursuing a course of conduct (made up of one or more actions, such as coercing a partner to relinquish control over assets or income)	S 6: intimidation includes any conduct that has the effect of unreasonably controlling the person or causes mental harm. S 8: 'economic abuse':	S 14: Personal violence against an 'aggrieved person' (not including DV): causes injury or damage to property; threats to above; is harassing or offensive.

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>SA</b>	<b>WA</b>	<b>TAS</b>	<b>NT</b>	<b>ACT</b>
	lodging. S 7: intimidation includes conduct amounting to harassment or molestation .	threatens to withhold financial support for reasonable living expenses. S 7: Emotional or psychologic al abuse: behaviour that torments, harasses, intimidates or is offensive		able and non- consensual denial of autonomy includes exercising an unreason- able level of control and domination over daily life (other exs given).	includes acting in a way that is emotionally abusive.	with the intent to unreason- ably control or intimidate the spouse or partner or cause them mental harm, apprehen- sion or fear. S 9: Emotional abuse: pursuing a course of conduct that the person knows, or ought to know, is likely to have the effect of unreason- ably controlling or	coercing the person to relinquish control over assets/inco me; unreasonab ly disposing of property without consent; unreason- ably preventing person from participat- ing in decisions over household expenditure ; withholding money reasonably necessary for mainten- ance of person/	S 50: Personal violence in the workplace: injury, damage to property, offensive or harassing behaviour

	NSW	VIC	QLD	SA	WA	TAS	NT	ACT
						intimidating or causing mental harm, apprehension or fear in, the spouse or partner	child.	
Who the order protects	S 3: 'protected person' is a person in whose favour an order is made – S 15: a person with whom deft has or has had a 'domestic relationship' (for an apprehended DVO) S 5: includes intimate relationships,	S 8: Family member: includes a person who has had an intimate personal relationship with the other person, as well as relative, child, partner. 'Domestic partner' s 9: includes where people are members of a couple and provide	S 15: Aggrieved person: spouse/ intimate relationship /family relationship /informal carer, or their associate	S 7: any person against whom it is suspected respondent will commit an act of abuse; or any child who may hear or witness or be exposed to effects of an act of abuse. *Note that proceedings relating to intervention against	'Violence restraining orders': Those in a family or domestic relationship – includes partners, relatives, children who normally reside with the other person, those in a 'personal relationship' i.e. personal relationship of a	S 7: Those in a family relationship which includes married persons and those in a significant relationship but not other family members	S 9: those in a domestic relationship includes family relationship ; intimate personal relationship ; person who respondent regularly lives with/lived with; caring and guardian relationship S 11: intimate personal	S 15: For DV, a 'relevant person' is a partner or former partner, relative, child of partner/ former partner; parent of child of respondent; or someone in an intimate relationship (does not require cohabitation).

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>SA</b>	<b>WA</b>	<b>TAS</b>	<b>NT</b>	<b>ACT</b>
	relatives, people living in residential facilities, carer relationships S 18: personal violence order can be made in favour of any person	personal or financial commitment		domestic abuse as far as practicable must be dealt with as a matter of priority (s 9).	domestic nature where lives are so intertwined their actions affect each other; other persons not in a 'domestic and family relationship'		relationship includes persons dating taking into account intimacy in relationship ; length of relationship etc. S 13: a 'protected person' must be in a domestic relationship with respondent	'Aggrieved person' for DV and PPO orders: person against whom the DV or personal violence has been directed or is likely to be directed: Dictionary
Who can apply	S 48: person seeking protection or police officer – only a police officer for a child or a provisional order S 27 and	Part 3 Div 2 - FVSN: police applies to sgt – taken to be an application for a FVIO. FVIO s 45: police officer or affected family	S 14: Aggrieved person, someone authorised by them or police officer.	S 18: police officer may issue interim intervention order if there are grounds for issuing the order and respondent is present. S 20:	S 18 (telephone applications ): 'authorised person' (i.e. police or prescribed person) or a person seeking to be protected if	S 15: police officer, affected person or affected child. For restraint orders: S 106B: a police officer, a person	S 28: adult/young person in domestic relationship with respondent; person acting on their behalf; police officer. S 29:	S 18: non-emergency protection orders – aggrieved person and police officer (and leaves intact other rights e.g. of parents). S 68: for

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>SA</b>	<b>WA</b>	<b>TAS</b>	<b>NT</b>	<b>ACT</b>
	49: police officer must make an application if reasonable suspicion DV has occurred or is likely to occur	member (or someone on behalf of child). S 75: where applicant is an officer, court can grant FVIO even without consent of affected family member (but limit as to conditions that may apply)		Application for an intervention order may be made by police officer; person against whom it is alleged respondent may commit an act of abuse or suitable representative; or a child who may hear or witness	introduced to the Magistrate by an authorised person (S 25 (VROs): a person seeking to be protected or an authorised person – likewise S 38 for a misconduct restraining order (can also be made by a police officer on behalf of the public generally)	against whom the behaviour is directed or a parent/guardian or a person granted leave. S 106DA: a police officer for a telephone interim restraint order if reasonable grounds for believing respondent has intimidated another person and intimidation is likely to continue and give rise to an assault and it is not practicable	Police officer must make application for child if DV has been committed or is likely to be committed and child has been or is likely to be adversely affected	emergency orders, only police. 'Aggrieved person' def. in Dictionary as person who has been the subject or is likely to be of DV or personal violence.

	NSW	VIC	QLD	SA	WA	TAS	NT	ACT
						to immediately apply for a restraint order because of the time and place at which the intimidation occurred.		
Criteria for granting	S 16(1): if the person who has/had a domestic relationship with the respondent has reasonable grounds to fear and in fact fears the commission of a personal violence offence (actual fear	Part 3 Div 2 – FVSN: can be granted if a FVIO/ Family Law Act orders are not in place; if officer believes on reasonable grounds the order is necessary to ensure safety of affected family member/pr	S 20: if respondent has committed an act of DV and two are in a domestic relationship and it is likely another act of DV will be committed/ if act is a threat it is likely threat will be carried out.	S 6: It is reasonable to suspect the respondent will, without intervention commit an act of abuse against a person; and the issuing of the order is appropriate in the circumstances.	S 11A: respondent has committed an act of abuse and likely to do so again; or person applying reasonably fears that respondent will commit an act of abuse and it is appropriate in all the circumstances.	S 16: that person has committed family violence and may again commit family violence. Restraining orders: S 106B: justices are satisfied on balance of probabilities that a person has caused	S 18: reasonable grounds for protected person to fear the commission of DV against them by respondent.	S 29: interim orders of both types – necessary to ensure safety of an aggrieved person/ child of aggrieved person or prevent substantial damage to property of aggrieved person. S 46: for



	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>SA</b>	<b>WA</b>	<b>TAS</b>	<b>NT</b>	<b>ACT</b>
	not required where person has been subject to a personal violence offence and there is a reasonable likelihood the person will be subjected to a further personal violence offence)	eserve property S 74: FVIO (final order): if satisfied on balance of probs that respondent has committed family violence and is likely to do so again	S 39A: temporary protection orders if an act of DV has been committed		ces S 34: misconduct restraining orders: if respondent is likely to behave in a manner that could reasonably be expected to be intimidating or offensive and would in fact intimidate or offend; damage property; or behave in a manner likely to breach the peace, and order is appropriate in all the circumstances	personal injury or damage to property and unless restrained person is likely to again do so; or a person has threatened to cause injury or damage and unless restrained is likely to carry out that threat; or a person has behaved in a provocative or offensive manner, behaviour is likely to lead to a breach of peace and		DV order, that respondent has committed an act of DV; for PPO, that respondent has committed personal violence and may engage in personal violence if the order is not made. S 69: emergency order – judicial officer can make if there are reasonable grounds to believe respondent would cause

	NSW	VIC	QLD	SA	WA	TAS	NT	ACT
						<p>unless restrained is likely again to behave in a similar manner; or that a person has stalked the person for whose benefit application is made or a third person.</p> <p>S 106D: interim restraint orders – need not be satisfied of any of these things.</p> <p>S 106DA(4): for telephone interim RO- if</p>		<p>injury or substantial damage to property of aggrieved person or child, the aggrieved person is a 'relevant person' and it is not practicable to arrest and it is outside sitting hours of court</p>

	NSW	VIC	QLD	SA	WA	TAS	NT	ACT
						magistrate considers there is sufficient cause – need not be satisfied of matters above.		
Period of order	SS 79 and 32: for as long as necessary to ensure safety of protected person (default is 12 mths). Provisional order lasts for 28 days or until replaced by ADVO or removed	S 97: court may specify period of final order (no limit specified)	S 34A: 2 years or longer if special circumstances exist	S 11: Order is ongoing until revoked	S 16: 2 years or other specified period S 37 (misconduct restraining order): 1 yr or other specified period	Ss 14 and 19: such period as court considers necessary – PFVO in force for up to 12 mths or longer as extended by court Restraining orders: S 106B(6): such period as justices consider necessary to protect the person for whose benefit the	S 27: period specified in order	S 37: interim orders – 2 yrs S 55: up to 2 years or longer if special or exceptional circumstance (DV order). S 56: up to 1 yr (PPO). S 77: emergency orders – earliest of COB 2 <sup>nd</sup> day after order was made, order is

	NSW	VIC	QLD	SA	WA	TAS	NT	ACT
						order is made or until a revoking order is made.		revoked or interim or final order is made.
Considerations	S 17: court must consider personal safety of protected person and any child	S 36: if FVSN has an exclusion condition, must consider accommodation needs of respondent and take reasonable steps to ensure access to temporary accommodation. S 80: safety of affected family member and children is paramount	S 25(5): need to protect the aggrieved and any named person and welfare of child of the aggrieved are paramount. S 25(6): court may consider accommodation needs of all parties; effect of orders on child of aggrieved; any custody orders in	S 10: Principles for intervention : abuse occurs in all areas of society, regardless of SES, health, age, culture, gender, sexuality, ability, ethnicity and religion; abuse may involve overt or subtle exploitation of power imbalances and	S 12: (first four are paramount) : (a) the need to ensure that the person seeking to be protected is protected from acts of abuse; (b) the need to prevent behaviour that could reasonably be expected to cause fear that the person seeking to	S 18: safety and interests of the person for whose benefit the order is sought and any affected child to be of paramount importance; must consider whether contact between the person for whose benefit the order is sought, or the person against	S 19: safety and protection of protected person is paramount. Also any family law orders in force in relation to respondent; accommodation needs of protected person; respondent's criminal record and previous conduct and any other conduct court considers	S 7: paramount consideration is: (a) for a domestic violence order—the need to ensure that the aggrieved person, and any child at risk of exposure to domestic violence, is protected from domestic violence; and (b) for a personal protection

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>SA</b>	<b>WA</b>	<b>TAS</b>	<b>NT</b>	<b>ACT</b>
		consideration S 82: in making an exclusion order must consider all circumstances including desirability of minimising disruption and ensuring continuity of employment etc of protected person. S 91: in deciding about contact with child must take into account whether that would jeopardise the safety	place. S 46C: court must consider whether contact between aggrieved/respondent and child is relevant or the existence of relevant family court orders	isolated incidents or patterns; primary importance to prevent abuse and prevent children from exposure; as far as practicable, intervention should be designed to encourage D's to accept responsibility and take steps to avoid committing abuse; minimise disruption to protected persons and any child living with them;	be protected will have committed against him or her an act of abuse; (ba) the need to ensure that children are not exposed to acts of family and domestic violence; (c) the wellbeing of children who are likely to be affected by the respondent's behaviour or the operation of the proposed	whom the FVO is to be made, and any child who is a member of the family of either of those persons is relevant to the making of the FVO; must consider any relevant Family Court order of which the court has been informed.  S 106B(4AAB): the protection and welfare of the person for	relevant. S 20: court must presume protection of protected person and child are best served by them living in the home (where there is a child)	order (other than a workplace order)—the need to ensure that the aggrieved person is protected from personal violence; and (c) for a workplace order—the need to ensure that employees and other people at the workplace are protected from personal violence at the workplace.

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>SA</b>	<b>WA</b>	<b>TAS</b>	<b>NT</b>	<b>ACT</b>
		of a protected person or child		allow training, education, and employment of protected person and any child to continue	order; (d) the accommodation needs of the respondent and the person seeking to be protected; (da) the past history of the respondent and the person seeking to be protected with respect to applications under this Act, whether in relation to the same act or persons as are before the	whose benefit the order is sought is of paramount importance; and must consider whether access between the person for whose benefit the order is sought or the person against whom the order is sought and any child who is a member of the family of either is relevant; and must consider any relevant family		Order must be least restrictive of liberty of respondent as will still achieve paramount consideration. S 47: the principles and purpose of the Act, accommodation needs of aggrieved person and any child; any hardship to respondent; financial means of respondent if proposed to require not dealing with personal

	NSW	VIC	QLD	SA	WA	TAS	NT	ACT
					<p>court or not;</p> <p>(e) hardship that may be caused to the respondent if the order is made;</p> <p>(f) any family orders;</p> <p>(g) other current legal proceedings involving the respondent or the person seeking to be protected;</p> <p>(h) any criminal record of the respondent;</p>	<p>contact order.</p> <p>S 106B(5): re ouster order, must consider the effect on the accommodation of the persons affected and on any children and the need for suitable arrangements to be made to allow the respondent to take possession of personal property.</p>		<p>property; contact between parties and child and any family contact orders;</p> <p>previous violence or contravention</p> <p>S 71: for emergency order must consider any contact between parties and child and any family contact orders.</p>

	NSW	VIC	QLD	SA	WA	TAS	NT	ACT
					(i) any previous similar behaviour of the respondent whether in relation to the person seeking to be protected or otherwise; and (j) other matters the court considers relevant. S 35(1): similar considerations as above for misconduct restraining orders			
Conditions available	S 35: such conditions as appear necessary	S 81: any conditions that appear necessary	S 17: respondent must be of good	S 12: prohibit from being on	S 13: such restraints as the court considers	S 16: such conditions as necessary	S 21: such restraints as necessary	S 35: may prohibit respondent from being



	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>SA</b>	<b>WA</b>	<b>TAS</b>	<b>NT</b>	<b>ACT</b>
	or desirable to ensure the safety and protection of the protected person and any children, including restricting approaches to person, access to premises, restricting approaches within 12 hrs of consuming alcohol, possession of firearms and interference with property (all contain conditions prohibiting assault,	or desirable in the circumstances, inc an order to respondent to stay away from protected person, or excluding respondent from protected person's residence S 93: if court considers that contact with respondent could jeopardise safety of protected person or child must make an order prohibiting contact with	behaviour and not commit acts of DV and comply with any other orders the court makes S 25: any other conditions the court considers necessary in the circumstances and desirable in the interests of the aggrieved, any named person and respondent. Includes prohibiting contact/ Approaching	premises; prohibit from approaching, contacting, etc; prohibit from damaging property; surrender weapons or articles used in an act of abuse; impose any other requirement to take specified action	appropriate to prevent an act of abuse including prohibiting being in a place or contact, or requiring respondent not to use property. S 14: subject to exceptions, every VRO contains a restraint prohibiting respondent from possessing firearms or licence. S 36 (misconduct restraining orders): such restraints	or desirable to prevent commission of FV including vacate premises and not possess firearms Restraining orders: S 106B: such restraints as necessary or desirable to prevent the person from acting in a manner specified (as above). S 106B(4B): may include an order to vacate premises; an order prohibiting	or desirable to prevent commission of DV against PP; also such obligations as necessary or desirable to ensure respondent accepts responsibility for violence and encourages respondent to change behaviour S 22: may require respondent to vacate premises occupied by protected person S 24: may	on premises where aggrieved person lives/works (only if necessary to ensure safety of aggrieved person). S 40: firearms licence suspended automatically unless a PPO respondent applies and court is satisfied not necessary (s 80 same for emergency orders). S 57: licence is cancelled if

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>SA</b>	<b>WA</b>	<b>TAS</b>	<b>NT</b>	<b>ACT</b>
	intimidation harassment etc).	child. S 95: may suspend or revoke firearms authority	residence.		as appropriate to prevent behaviour that is intimidating /likely to damage property/ likely to breach peace.	or restricting possession of firearms; prohibiting stalking.	include a rehabilitation order if D is a suitable person and consents.	final order is made. S 48: such conditions as necessary or desirable (other than workplace order) including respondent not to be on premises where aggrieved person lives/works, or being within a particular distance of aggrieved person; prohibit contact; prohibit damaging property. S 54: workplace orders –

	NSW	VIC	QLD	SA	WA	TAS	NT	ACT
								such conditions as necessary or desirable including that respondent not be at workplace. S 76: emergency orders – may prohibit respondent from being where aggrieved person lives only if necessary to ensure safety of aggrieved person
Consequences of failure to comply	S 14: 2 yrs imp/50 pu – unless court otherwise orders (and	S 37: failure to comply with FVSN – 2 years/240 pu/both.	S 80: if at least 2 breaches of order not less than 3 yrs prior 2	S 31: Failure to comply with intervention program order -	S 61: breach of VRO/police order – 2 yrs and/or \$6,000;	S 35: first offence: fine not exceeding 20 penalty units or 12	S 120: offence to contravene – strict liability. S 121:	S 90: failure to comply with protection order – 500 pu/5 yrs or

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>SA</b>	<b>WA</b>	<b>TAS</b>	<b>NT</b>	<b>ACT</b>
	gives reasons) must be imp for a breach that is an act of violence	S 123: failure to comply with FVIO – 2 years/240 pu/both	yrs; otherwise 40 pu/1 yr	\$1,250 and expiation fee of \$160; any other term of order – 2 yrs	breach of misconduct restraining order - \$1,000 S 62: defence if person was using a family dispute resolution process	mths imprisonment; second offence: fine not exceeding 30 penalty units or 18 mths imprisonment; third offence: fine not exceeding 40 penalty units or 2 yrs imprisonment; fourth or subsequent offence: imprisonment for a term not exceeding 5 years  S 106l: for contravention or	penalty 400 pu/2 years imp; court must record conviction and sentence for at least 7 days if previous contravention of DVO (unless there was no harm to protected person)	both

	NSW	VIC	QLD	SA	WA	TAS	NT	ACT
						failure to comply with order, liable on summary conviction to fine not exceeding 10 pu/6 mths imp.		
Provisions available to non-partners	Yes, 'domestic relationship' extends to relatives, members of a household/residential facility and those in a caring relationship S 18: Act also provides for 'Apprehended Personal Violence Orders' in	All provisions relate to 'affected family members' which includes partners and other relatives	Ss 11-12: extends to spouses, those in an intimate relationship (dated and lives enmeshed to the extent actions of one affect the other); family relationship (relatives); informal caring relationship Children can only be	Yes, applies to all acts of abuse both domestic and non-domestic	Same provisions available regardless of type of relationship	Provisions apply only to violence committed against a spouse or partner. General restraining orders are available under the <i>Justices Act 1959</i>	Yes, to other family members and those in a 'domestic relationship' but not to non-family relationships	Yes, DV orders are available to 'relevant persons' which includes relatives. PPOs are available to any 'aggrieved person' who has been the subject of violence.

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>SA</b>	<b>WA</b>	<b>TAS</b>	<b>NT</b>	<b>ACT</b>
	similar terms available to those not in a domestic relationship .		aggrieved person/ respondent if spouse/ intimate relationship /informal carer					
Other relevant provisions	S 38: any order made to protect an adult must also include a child with whom the adult has a domestic relationship unless there are good reasons for doing so	Part 3 – Police Protection before Court: allows an officer who intends to make an application for a FVIO/FVSN to direct the person to stay in a place or go to a place for up to 6 hours (can be extended) where s/he believes it is	S 23: if order is made, Weapons Act applies to persons who would otherwise be exempt under s 2 of that Act. S67: if officer reasonably suspects a person is aggrieved, there is a duty to investigate. If satisfied they are aggrieved and there is	S 13: May require assessment for intervention program (defined s 3 as including supervised treatment or rehab; behaviour management; access to support services designed to address behavioural problems.	S 8(1)(i): court must explain to both parties that counselling is available and refer parties to counselling where appropriate S 62C: police officer who enters premises on suspicion of DV must make application for RO or record	S 13: makes provision for counselling S 106DA(3): police officer making application for telephone interim RO may detain person using such force as necessary and reasonable for as long as reasonably	SS 60 and 61: clerk may vary/revoke DVO if both parties consent S 124A: creates an offence if a person believes on reasonable grounds another person has caused or is likely to cause (serious physical) harm to a person they are in a	S25: for protection orders if registrar believes more effectively dealt with by mediation, can refer parties to that. S 75: for emergency order, respondent can be detained for up to 4 hours while order is made. S 83: if

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>SA</b>	<b>WA</b>	<b>TAS</b>	<b>NT</b>	<b>ACT</b>
		necessary to ensure the safety of a person or their property. Part 5 – allows the court to make orders for respondent to attend counselling to make him more accountable for violence and encourage behaviour change. Court must usually make an order requiring assessment for counselling and	sufficient reason to take action, may apply for a protection order. S 69: police officer who reasonably suspects DV has been committed and a person is in danger of personal injury or property damage may take respondent into custody using force that is reasonable and necessary. S 71: police officer who		reasons. S 62F: police officer may detain a person while police order/ telephone application is being made.	necessary to obtain order. S 106DA(14) Before a telephone interim RO expires police officer must apply for a restraint order or report to the magistrate who made the order why an application is not being made. S 106F: Justices may remand respondent in custody during adjournment,	domestic relationship with or life or safety of another person is under serious or imminent threat and fails to report it – penalty 200 pu (defence of reasonable excuse). On receipt of such a report, PO must take reasonable steps to ensure report is investigated.	police officer believes on reasonable grounds physical injury may be caused if emergency order is not applied for and it is not practicable to arrest respondent, officer must record reasons for not applying for emergency order. S 90: court may recommend respondent, aggrieved person or other relevant person to

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>SA</b>	<b>WA</b>	<b>TAS</b>	<b>NT</b>	<b>ACT</b>
		respondent must be assessed as eligible except if specified circumstances apply. If assessed as eligible, court must usually make an order for respondent to attend counselling.	takes a person into custody must apply for a protection order. S 81: court to be closed during proceedings			taking into account protection and welfare of person for whose benefit order is sought of paramount importance and also any previous violence by respondent.		attend counselling, mediation, training, etc.
Reporting	S 104: A report is to be tabled in Parliament within 12 m of the end of a period of three years.	S 40: Chief Commissioner of Police and Chief Magistrate must give report to AG 12 mths after legislation comes into effect	N/A	N/A	S 30I: Minister must review police orders powers 2 years after they commence and report to Parliament	S 38: places obligations on professional groups to report to police where they believe or suspect on reasonable grounds that family violence	S 124A: creates an offence if person has reasonable grounds to believe harm has been caused or is about to be caused to person in domestic relationship	N/A



	NSW	VIC	QLD	SA	WA	TAS	NT	ACT
						involving a weapon, sexual or physical violence (against adults) has occurred or is likely to occur ( <i>not commenced as at November 2011</i> )	or life or safety is under imminent threat and fails to report it	
Relationship with Family Law Act	S 42: Applicant must inform the court of any relevant parenting order. Court must have regard to any parenting order in place in deciding whether to make an	S 57(1)(g): Permits variation of Family Law Act orders if inconsistent with an interim order. S 87: re orders relating to property, FLA orders prevail. S 90: court has power	S 46C: Court must take into account family law orders in deciding whether to make protection order	S 10(2): must take into account any relevant Family Law Act order. S 16: intervention order invalid to extent of inconsistency with Family Law Act order referred to	S 65: if court does not have jurisdiction to vary a family order, cannot make a RO that conflicts with a family order. S 66: applicant must inform the court of	S 18: court must consider the issue of contact between the applicant and the subject of the FVO and any child; and must consider any FCA orders of which it is	S 90: applicant must inform authority of any family law orders existing/ pending. Police must make reasonable inquiries about family orders before granting	S 31: for interim orders must consider whether contact between aggrieved person/ respondent and any child is relevant to making of order or to family contact orders (but

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>SA</b>	<b>WA</b>	<b>TAS</b>	<b>NT</b>	<b>ACT</b>
	order	under s 68R Family Law Act to vary, suspend or revoke the FLA orders to the extent of inconsistency. But s 176: s 68Q Family Law Act – FC can declare FVIO invalid to extent of inconsistency with FLA orders		in s 68R (though court may vary the Family Law Act order)	any family order they are aware of	informed S 106B(4AA): application must include information of any relevant family contact order or pending application of which applicant is aware. S 106GE: restraint orders are subject to any declaration made under s 68S Family Law Act 1975.	police DVO	if does not do so, does not invalidate order). S 47: for final orders same and also s 71 (emergency orders)
Evidentiary Provisions	S 16: criteria for	S 65 and 66: court	S 84: court may inform	S 28: Court is to decide	S 26: applicant	S 16: standard	S 18: criteria for	S 16: if magistrate

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>SA</b>	<b>WA</b>	<b>TAS</b>	<b>NT</b>	<b>ACT</b>
	granting must be satisfied on balance of probabilities	may take evidence as it sees fit and may allow evidence by affidavit or written statement. S 70: protected witness (includes affected family member) cannot be personally cross-examined without their consent S 73: allows expert evidence about family violence	itself as it thinks fit and is not bound by rules of evidence	questions of fact on balance of probabilities. S 29: court may order special arrangements for taking evidence of a person against whom it is alleged an act or abuse has been or might be committed	may choose whether to have first hearing in absence of respondent. S 27(2) hearings to be in closed court. S 44A: rules of evidence do not apply. S 44C: respondent cannot cross-examine family member directly.	for making order is balance of probabilities	granting must be satisfied on balance of probs even if protected person denies or does not give evidence. S 106: court may close court for vulnerable witness. Pt 4.1 Div 4: special provisions for evidence by children and vulnerable witnesses. S 114: unrepresented respondent cannot cross-	is required to be satisfied of something, standard is the balance of probabilities

	NSW	VIC	QLD	SA	WA	TAS	NT	ACT
							examine protected person directly	
Legal assistance for applicants	N/A	S 72: If respondent is legally represented, court can order Victoria Legal Aid to give legal assistance to applicant who is a protected witness for the purposes of cross-examination by respondent's legal representative	N/A	N/A	N/A	N/A	N/A	N/A
Consent by applicant to breach	N/A	s 57/ s 96(1)(e): Respondent is informed	N/A	S 17: court must endeavour to explain that	S 8(1)(f): court must explain that order must be varied or	N/A	N/A	N/A

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>SA</b>	<b>WA</b>	<b>TAS</b>	<b>NT</b>	<b>ACT</b>
		that order is a civil order and affected family member cannot give permission to breach		protected person cannot give permission for contravention of order.	cancelled if parties intend to resume contact. S 46(4): court must grant leave to continue application by respondent to cancel/vary order if there is evidence the person protected by the order has persistently invited or encouraged respondent to breach the order (hearing is in absence of that person)			
Consequen	S 14(7): a	S 125:	N/A	S31(3): a	N/A	N/A	N/A	S 85: court

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>SA</b>	<b>WA</b>	<b>TAS</b>	<b>NT</b>	<b>ACT</b>
-ce of permitting breach by applicant	person cannot be liable for aiding or abetting a breach if they are a person protected by the order	protected person not guilty of aiding, abetting, counselling or procuring commission of an offence contrary to s 52 Magistrates Court Act by encouraging or allowing non-compliance with FVIO or FVSN		person is not guilty of aiding, abetting etc an offence if the person is a person protected by the intervention order and the conduct did not constitute contravention of the order in respect of another person protected				must explain to aggrieved person if present that they may commit an offence if they aid/abet a breach
Entry, search and detention powers	S 89: Police officer may direct person to remain at a place while application for PO is	S 157: officer may enter where reasonably believes a person has assaulted or threatened	S 609 <i>Police Powers and Responsibilities Act</i> : police officer may enter on premises if	S 34: If police officer proposes to issue an interim order, may require person to	S 30A-30C: police may make police order in nature of VRO in situation of urgency if satisfied an	S 11: may arrest without warrant where reasonably suspects committed FV (allows	S 84: if police officer reasonably believes grounds exist for making a DVO and it	N/A

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>SA</b>	<b>WA</b>	<b>TAS</b>	<b>NT</b>	<b>ACT</b>
	made. <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> allows police to enter premises if reasonably believes DV offence occurring/ occurred and invited by an occupier onto premises	a family member, or is in breach of a FVIO/FVSN – no warrant required and may use reasonable force	reasonably suspects DV offence occurring or has occurred. S 67: police officer obliged to investigate where reasonably believes person may be an ‘aggrieved person’ and if so, may apply for a PO	remain at a particular place for as long as necessary and if failure to comply may arrest and detain for up to 2 hrs or longer period approved by court S 35: If police officer believes on reasonable grounds that (in conjunction with serving an intervention order) it is necessary to arrest and detain for a short	act of family and domestic violence has occurred and is likely to occur again, or if officer reasonably fears or believes person reasonably fears they will be subjected to such an act; and making a police order is necessary to ensure safety of the person. May include restraints considered appropriate	detention to enable police to carry out a safety audit) Restraining orders: S 106I: where police officer has reasonable cause to suspect person has contravened RO may arrest and detain without warrant. S 106L: police officer may enter premises for such period as necessary to prevent a breach of peace and	is necessary to remove person to prevent imminent risk of harm/ damage, can take person into custody and detain for up to 4 hours	

	NSW	VIC	QLD	SA	WA	TAS	NT	ACT
				<p>period to prevent immediate commission of abuse, may do so for up to 6 hrs or longer period approved by court.</p> <p>S 36: may arrest and detain if reason to suspect person has contravened an intervention order</p> <p>S 37: powers to enter or search for a weapon or article required to be surrendered under</p>	<p>to prevent an act of family and domestic violence or to prevent a person behaving in a manner that could reasonably cause fear of such an act. Order must be the least restrictive that will still ensure protection of other person.</p> <p>S 62A: police to investigate if reasonably suspect person has committed an act of domestic</p>	<p>may arrest without warrant to facilitate making of a RO at request of a person who resides on premises or if reason to believe a person may be under threat/ attack or has recently been.</p>		



	NSW	VIC	QLD	SA	WA	TAS	NT	ACT
				order	and family violence which is a criminal offence or has put the safety of a person at risk S 62B: power of entry without warrant where reasonably suspects an act is being committed or has been committed			
Relationship with criminal law	S 39: court must make an order if a person is found guilty of a domestic violence offence. S 14: if	S 155: FVIO can be granted even though person has been charged with offence	S 30: court may make order on own initiative if respondent is convicted of DV offences	N/A	S 63A: court must make a RO for the life of the person committing a 'violent personal offence'	N/A	S 45: if person convicted of offence involving DV, DVO may be made if court is satisfied a	S 113: magistrate may make protection order if person has been charged or convicted arising out

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>SA</b>	<b>WA</b>	<b>TAS</b>	<b>NT</b>	<b>ACT</b>
	police reasonably suspect breach must initiate prosecution or record reasons for not doing so	arising out of same conduct			(specified offences in the section). S 63B: in sentencing for a violent personal offence where respondent is in a domestic and family relationship with a victim or a restraining order was in place, court must take that into account in assessing seriousness. S 63C: court may make a RO even though		CSJ DVO could be made. S 86: DVO may be made even if person has been charged in relation to same conduct. S 87: making of DVO does not affect civil or criminal liability of respondent	of same conduct.

	NSW	VIC	QLD	SA	WA	TAS	NT	ACT
					person has been charged with an offence out of same conduct.			
Restrictions on publication	S 45: restriction on publication of name of child; provision for a court to make orders restricting publication of name of protected person who is not a child	S 166: identifying particulars must not be published unless court orders. S 169: Exception if publication is in the public interest (e.g. to raise awareness of family violence)	S 82: offence to publish anything identifying an aggrieved, respondent or named person	S 33: person must not publish a report about proceedings under this Act or an order registered under the Act if it identifies any person involved in the proceedings (not the respondent )	S 70: prohibits publishing information that would reveal the whereabouts of any party to the proceeding	S 32: court may make order in the interests of the administration of justice  S 106K: where it appears to justices that it is in the administration of justice desirable may prohibit publication of the name of any party or witness	S 26: court may order no publication of personal details of protected person /witness if it would expose them to harm. S 123: offence to publish details identifying child S 124: offence to publish details of person if court has	S 111: offence to publish account of proceedings that identifies a party to proceeding

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>SA</b>	<b>WA</b>	<b>TAS</b>	<b>NT</b>	<b>ACT</b>
							prohibited it	

ANNEXURE C: BREACH OF DOMESTIC VIOLENCE PROTECTION ORDER  
CASES

*Arman v Wall and O'Neill* [2008] ACTSC 61 (Unreported, Penfold J, 26 June 2008)  
*Bara v Ballchin* [2006] NTSC 79 (Unreported, Riley J, 11 October 2006)  
*Bell v Bay-Jespersen* [2004] 2 Qd R 235  
*Bonnar v Fischbach* [2001] NZFLR 925 (Unreported, NZ Family Court, 13 August 2001)  
*Burns v Pryce; Burns v Ryan* [2000] NTSC 83 (Unreported, Riley J, 5 October 2000)  
*Chandra v Chandra* [2001] NZFLR 222 (Unreported, District Court NZ, 3 November 2000)  
*D v G* [2004] QDC 477 (Unreported, McGills DCJ, 3 December 2004)  
*Denham v Hales* [2003] NTSC 87 (Unreported, Martin CJ, 1 August 2003)  
*DPP v Munesh Kumar* [2000] VSC 377 (Unreported, Cummins J, 21 September 2000)  
*Favell v Mills* [2002] NZFLR 396 (Unreported, NZ Fam Ct, 20 August 2001)  
*Fox v Police* [2001] NZFLR 145 (Unreported, NZ High Court, 13 December 2000)  
*George v O'Neil* [2009] NTSC 41 (Unreported, Thomas J, 5 August 2009)  
*Gokel v Althouse* (2010) NTLR 179  
*Gray v Burt (by her next friend McGregor)* [2005] ACTSC 93 (Unreported, Bennett J, 23 September 2005)  
*Hales v Williams* [2004] NTSC 41 (Unreported, Riley J, 12 August 2004)  
*Hazelbane v Hales* [2006] NTSC 53 (Unreported, Southwood J, 4 July 2006)  
*Head v Palmer & Anor* [2002] QDC 331 (Unreported, McGill DCJ, 25 October 2002)  
*Jones v Hales* [2003] NTSC 73 (Unreported, Riley J, 27 June 2003)  
*Kancheff v Police* [2004] SASC 46 (Unreported, Perry J, 2 March 2004)  
*McDonagh v Hales* [2003] NTSC 93 (Unreported, Riley J, 28 August 2003)  
*Midjumbani v Moore* [2009] NTSC 27 (Unreported, Riley J, 26 June 2009)  
*Miller v McDonald* [2006] ACTSC 76 (Unreported, Connolly J, 30 June 2006)  
*N v D* [2001] NZFLR 491  
*Norris v Sanderson* [2007] NTSC 1 (Unreported, Riley J, 12 January 2007)  
*Ofa v The Police* [2001] NZFLR 857 (Unreported, Laurenson J, 1 August 2001)  
*Palmer v Bryce* [2000] NTSC 7 (Unreported, Angel J, 9 March 2000)  
*Peel v Perry* [2004] NTSC 52 (Unreported, Thomas J, 29 September 2004)  
*Pungatji v Woodcock* [2003] NTSC 31 (Unreported, Riley J, 2 April 2003)  
*R v Ball* [2001] QCA 201 (Unreported, McPherson JA, Muir J, Atkinson J, 28 May 2001)  
*R v Bedford* [2007] QCA 417 (Unreported, McMurdo P, Keane JA, Daubney J, 23 November 2007)  
*R v Bell* [2000] QCA 485 (Unreported, Williams JA, Pincus JA, Cullinane J, 23 November 2000)

*R v Burns* [2000] QCA 201 (Unreported, McMurdo P, McPherson JA and Douglas J, 8 May 2000)  
*R v Clewes* [2008] QCA 46 (Unreported, Keane JA, Holmes and Mullins JJ, 7 March 2008)  
*R v Eastwell* [2007] QCA 272 (Unreported, Holmes JA, Wilson and Philippides JJ, 20 August 2007)  
*R v Edigarov* [2001] NSWCCA 436 (Unreported, Wood CJ at CL, Studdert and Bell JJ, 5 October 2001)  
*R v Gibbon* [2008] NSWDC 227 (Unreported, Murrell DCJ, 17 September 2008)  
*R v Hibberd* [2009] NSWCCA 20 (Unreported, Tobias JA, James and Price JJ, 1 March 2009)  
*R v Kolb* [2007] QCA 180 (Unreported, Holmes JA, Fryberg and Philippides JJ, 1 June 2007)  
*R v Lyon* [2006] QCA 146 (Unreported, Jerrard JA, Fryberg and Douglas JJ, 21 March 2006)  
*R v Marumaru* [2005] QCA 332 (Unreported, McMurdo P, Keane JA and Fryberg J, 9 September 2005)  
*R v Millar* [2002] QCA 382 (Unreported, de Jersey CJ, Helman and Jones JJ, 25 September 2002)  
*R v Peirson* [2006] QCA 251 (Unreported, Jerrard JA, Cullinane and Jones JJ, 14 July 2006)  
*R v Reuben* [2001] QCA 322 (Unreported, Davies JA, Williams JA and Byrne J, 7 August 2001)  
*Richards v Richards* [2001] NZFLR 935 (Unreported, Robinson J, 24 April 2001)  
*Russell v Commissioner of Police* [2008] QCA 10 (Unreported, McMurdo P, Mackenzie AJA, Dutney J, 29 July 2008)  
*R v Smith* [2008] QCA 133 (Unreported, Muir JA, Mackenzie AJA, Jones J, 29 May 2008)  
*R v Taylor (no 2)* [2008] ACTSC 97 (Unreported, Rares J, 12 September 2008)  
*Redden v Slavin-Malloy* [2008] ACTSC 37 (Unreported, Penfold J, 29 April 2008)  
*SI bhnf CC v KS bhnf IS* (2005) 34 Fam LR 468  
*Sullivan v Roberts* [2007] ACTSC 22 (Unreported, Gray J, 15 March 2007)  
*Tudor-Stack v Hill* [2003] NTCA 15 (Unreported, Martin CJ, Thomas and Riley JJ, 12 September 2003)  
*Tysoe v Kennedy* [2005] WASC 148 (Unreported, McKechnie J, 22 June 2005)  
*Whyms v Rowe* [2004] ACTSC 18 (Unreported, Connolly J, 16 April 2004)  
*Wilfred v Rigby* [2004] NTSC 31 (Unreported, Mildren J, 30 June 2004)  
*Wilkins v R* [2009] NSWCCA 22 (Unreported, McClellan CJ at CL, RA Hulme and Davies JJ, 30 September 2009)

## ANNEXURE D: LIST OF TERRORISM SENTENCING DECISIONS

*Benbrika v R* (2010) 247 FLR 1  
*Della-Vedova v R* [2009] NSWCCA 107 (Unreported, McClellan CJ at CL, Simpson J, Buddin J, 21 April 2009)  
*Demirian* (1988) 33 A Crim R 441  
*Lodhi v R* (2006) 199 FLR 303  
*Lodhi v R* (2007) 179 A Crim R 470  
*Lodhi v The Queen & Anor* [2008] HCATrans 225 (Unreported, Gummow ACJ, Hayne and Crennan JJ, 13 June 2008)  
*R v Atik* [2007] VSC 299 (Bongiorno J, 23 Aug 2007)  
*R v Benbrika & Ors* (2009) 222 FLR 433  
*R v Elomar & Ors* (2010) 264 ALR 759  
*R v Kent (No 1)* [2009] VSC 300 (Unreported, Bongiorno J, 10 July 2009)  
*R v Kent* [2009] VSC 375 (Unreported, Bongiorno J, 2 September 2009)  
*R v Khazal* [2009] NSWSC 1015 (Unreported, Latham J, 25 September 2009)  
*R v Lodhi* (2006) 163 A Crim R 448  
*R v Lodhi* (2006) 199 FLR 364  
*R v Mallah* [2005] NSWSC 317 (Unreported, Wood CJ, 21 April 2005)  
*R v Mulahalilovic* [2009] NSWSC 1010 (Unreported, Whealy J, 30 January 2009)  
*R v Roche* (Unreported, Healy J, 1 June 2004)  
*R v Roche* [2005] WASCA 4 (Unreported, Murray ACJ, Templeman and McKechnie JJ, 14 January 2005)  
*R v Sharrouf* [2009] NSWSC 1002 (Unreported, Whealy J, 24 September 2009)  
*R v Thomas* [2006] VSC 120 (Unreported, Cummins J, 31 March 2006)  
*R v Thomas* [2008] VSC 620 (Unreported, Curtain J, 29 October 2008)  
*R v Thomas (no 4)* [2008] VSCA 107 (Unreported, Maxwell ACJ, Buchanan and Vincent JJA, 16 June 2008)  
*R v Touma* [2008] NSWSC 1475 (Unreported, Whealy J, 24 October 2008)  
*R v Vinayagamoorthy & Ors* [2010] VSC 148 (Unreported, Coghlan J, 31 March 2010)  
*Thomas v Mowbray* (2007) 233 CLR 307  
*Thomas v R* (2006) 14 VR 475

ANNEXURE E: LIST OF DOMESTIC HOMICIDE CASES WITH MALE  
PERPETRATORS AND FEMALE VICTIMS

(Cases marked \* represent appeals or subsequent resentencing decisions of other cases also considered).

*\*Aytugrul v R* [2010] NSWCCA 272 (Unreported, McClellan CJ at CL, Simpson and Fullerton JJ, 3 December 2010)  
*Delavale v WA* [2009] WASCA 111 (Unreported, Owen, Wheeler and Miller JJA, 6 Apr 2009)  
*DPP v Egan* [2007] VSC 485 (Unreported, Teague J, 26 November 2007)  
*DPP v Rhodes* [2007] VSC 55 (Unreported, Curtain J, 8 March 2007)  
*DPP v Sypott* [2003] VSC 537 (Unreported, Redlich J, 5 September 2003)  
*\*DPP v Sypott* [2004] VSCA 9 (Unreported, Vincent JA, Smith and O'Brien AJJA, 13 February 2004)  
*DPP (Vic) v Nhat Anh Tran* [2006] VSC 394 (Unreported, Teague J, 26 October 2006)  
*Goebel-McGregor v R* [2006] NSWCCA 390 (Unreported, James, Hidden and Hislop JJ, 15 December 2006)  
*Jacobs v R* [2009] NSWSC 473 (Unreported, McClellan CJ at CL, 5 June 2009)  
*Jacovic v R* [2002] WASCA 149 (Unreported, Murray, Parker and Miller JJ, 7 June 2002)  
*Kaiser v R* [2009] NSWCCA 130 (Unreported, McClellan CJ, Simpson and Howie JJ, 29 April 2009)  
*\*Margach v R* (2008) 173(2) A Crim R 149  
*\*Mencarious v R* (2008) 189 A Crim R 289  
*Miles v R* [2002] NSWCCA 276 (Unreported, Stein JA, Bergin J, Carruthers JA, 18 July 2002)  
*Perry v R* [2006] NSWCCA 351 (Unreported, Spigelman CJ, Howie and Rothman JJ, 8 November 2006)  
*R v Alexander* [2006] VSCA 142 (Unreported, Buchanan, Vincent and Neave JJA, 6 July 2006)  
*R v Andrew* [2008] VSC 138 (Unreported, Forrest J, 1 May 2008)  
*R v Andrews* [2003] NSWCCA 7 (Unreported, Heydon, Hulme and Hidden JJ, 6 February 2003)  
*R v Auberson* [1996] QCA 321 (Unreported, Fitzgerald P, Pincus JA, de Jersey J, 3 September 1996)  
*R v Aytugrul* [2009] NSWSC 275 (Unreported, Hulme J, 16 April 2009)  
*R v Badanjak* [2004] NSWCCA 395 (Unreported, Wood CJ, McClellan AJA and Smart AJ, 25 October 2004)  
*R v Baggott* [2000] QCA 153 (Unreported, McMurdo P, McPherson JA, Mackenzie J, 3 May 2000)  
*R v Barrett* [2008] VSC 234 (Unreported, Curtain J, 27 June 2008)  
*R v Barry* [2000] NSWCCA 138 (Unreported, Stein JA, Dunford and Sperling JJ, 13 April 2000)  
*R v Bateman* [2000] NSWSC 867 (Unreported, Barr J, 30 August 2000)  
*R v Biggs* [2007] NSWSC 932 (Unreported, Bell J, 22 August 2007)  
*R v Bond* [2001] NSWSC 1059 (Unreported, James J, 7 December 2000)



*R v Boyle* [2008] VSC 71 (Unreported, Forrest J, 18 March 2008)  
*R v Brown* [2004] NSWSC 194 (Unreported, Hulme J, 6 February 2004)  
*R v Butay* [2001] VSC 417 (Unreported, Flatman J, 2 November 2001)  
*R v Butler* [2007] VSC 185 (Unreported, Curtain J, 1 June 2007)  
*R v Cao* [2003] NSWSC 715 (Unreported, Kirby J, 8 August 2003)  
*R v Chalmers* [2009] VSC 251 (Unreported, Osborne J, 22 June 2009)  
*R v Cikos* [2001] NSWSC 35 (Unreported, Dunford J, 9 February 2001)  
*R v Clark* [2009] QCA 2 (Unreported, McMurdo P, White AJA, McMeekin J, 6 February 2009)  
*R v Conway* (2004) 149 A Crim R 206  
*R v Conway* [2005] VSC 205 (Unreported, Bell J, 10 June 2005)  
*R v Copland* [2006] VSC 224 (Unreported, Eames J, 23 June 2006)  
*R v Croft* (1981) 3 A Crim R 307  
*R v Culleton* [2000] VSC 559 (Unreported, Vincent J, 27 November 2000)  
*R v Daniels* [2004] NSWSC 1201 (Unreported, Hidden J, 14 December 2004)  
*R v Darcy* [2007] 1392 (Unreported, Berman AJ, 13 November 2007)  
*R v Diver* [2008] VSC 399 (Unreported, Coghlan J, 24 September 2008)  
*R v Doherty* [2003] VSCA 158 (Unreported, Winneke P, Vincent JA and Ashley AJA, 10 October 2003)  
*R v Dowley* [2009] NSWSC 722 (Unreported, Hidden J, 30 July 2009)  
*R v Farfalla* [2001] VSC 99 (Unreported, Vincent J, 7 May 2001)  
*R v Ferguson* [2007] NSWSC 949 (Unreported, Michael Grove J, 27 August 2007)  
*R v Foster* [2009] VSC 124 (Unreported, Osborn J, 2 April 2009)  
*R v Frost* [2008] NSWSC 220 (Unreported, Barr J, 17 March 2008)  
*R v Galante* [2008] NSWSC 319 (Unreported, Adams J, 11 April 2008)  
*R v Gardiner* [2001] NSWSC 1147 (Unreported, Whealy J, 6 December 2001)  
*R v Gardner* (1989) 42 A Crim R 279  
*R v Gojanovic* [2002] VSC 118 (Unreported, Coldrey J, 13 March 2002)  
*R v Gojanovic (No 2)* [2007] VSCA 153 (Unreported, Ashley and Kellam JJA and Kaye AJA, 14 August 2007)  
*R v Goodwin* [2001] VSC 519 (Unreported, Coldrey J, 21 December 2001)  
*R v Gordon* [2000] WASCA 401 (Unreported, Kennedy, Anderson and Wheeler JJ, 15 December 2000)  
*R v Graham* [2000] NSWSC 1033 (Unreported, Whealy J, 10 November 2000)  
*R v Green* [1986] 2 Qd R 406  
*R v Grief* [2005] VSC 60 (Unreported, Teague J, 10 March 2005)  
*R v Hamoui (No 4)* [2005] NSWSC 279 (Unreported, Kirby J, 15 April 2005)  
*R v Hawkins* [2001] NSWSC 420 (Unreported, O'Keefe J, 24 May 2001)  
*R v Hill* [2006] VSC 149 (Unreported, Hollingworth J, 2 May 2006)  
*R v Hunt* [2002] NSWSC 66 (Unreported, Dowd J, 19 February 2002)  
*R v Hunter* [2002] VSC 162 (Unreported, Teague J, 14 May 2002)  
*R v Hurley* [2001] NSWSC 1007 (Unreported, David Levine J, 2 November 2001)  
*R v Huynh* [2003] NSWSC 1066 (Unreported, Kirby J, 21 November 2003)  
*R v Jagroop* [2008] VSC 25 (Unreported, Teague J, 13 February 2008)  
*R v Jans* [2000] NSWSC 525 (Unreported, Groves J, 14 June 2000)  
*R v Johnson* [2005] SASC 1 (Unreported, Perry J, 13 January 2005)

*R v Jones* [2001] VSC 186 (Unreported, Teague J, 20 February 2001)  
*R v Joseph* [2003] NSWSC 1080 (Unreported, Greg James J, 21 November 2003)  
*R v Kaiser; R v Hunt* [2007] NSWSC 1362 (Unreported, Graham Barr J, 29 November 2007)  
*R v Karageorges* [2006] VSCA 49 (Unreported, Buchanan, Vincent and Neave JJA, 9 March 2006)  
*R v Keir* [2000] NSWSC 111 (Unreported, Adams J, 29 February 2000)  
*\*R v Keir* [2004] NSWSC 1164 (Unreported, MW Campbell AJ, 13 December 2004)  
*R v Laures* [2003] NSWSC 785 (Unreported, Studdert J, 27 August 2003)  
*R v Lem* [2005] SASC 405 (Unreported, Doyle CJ, Bleby and Gray JJ, 28 October 2005)  
*R v Leonboyer* [2001] VSCA 149 (Unreported, Phillips CJ, Charles and Callaway JJA, 7 September 2001)  
*R v Lever* [2001] NSWSC 1131 (Unreported, Bell J, 13 December 2001)  
*R v Lewis* [2001] NSWCCA 448 (Unreported, Hodgson JA, Barr and James JJ, 9 November 2001)  
*R v Lynch* [2002] NSWSC 1140 (Unreported, Whealy J, 20 November 2002)  
*R v Mahoney* [2009] VSC 249 (Unreported, Hollingworth J, 15 June 2009)  
*R v Margach* [2006] VSC 77 (Unreported, King J, 8 March 2006)  
*R v Massei* [2005] NSWSC 1030 (Unreported, Adams J, 2 September 2005)  
*\*R v Massei* [2006] NSWSC 1298 (Unreported, Adams J, 2 November 2006)  
*R v Matheson* [2006] NSWSC 332 (Unreported, Mathews AJ, 28 April 2006)  
*R v Mehmet* [2002] NSWSC 1154 (Unreported, Bell J, 12 December 2002)  
*\*R v Mehmet* [2004] NSWCCA 24 (Unreported, Levine, O'Keefe and Whealy JJ, 24 February 2004)  
*R v Mencarious* [2006] NSWSC 719 (Unreported, Michael Grove J, 17 July 2006)  
*R v Miguel* [1994] QCA 512 (Unreported, Fitzgerald P, McPherson JA, Derrington J, 25 October 1994)  
*R v Mills* [2008] QCA 146 (Unreported, Keane, Holmes and Fraser JJA, 28 May 2008)  
*R v Newling* [2005] VSC 54 (Unreported, Teague J, 8 March 2005)  
*R v Nicol* [2005] NSWSC 547 (Unreported, Hulme J, 27 May 2005)  
*R v Olig* [2000] NSWSC 1246 (Unreported, Adams J, 21 December 2000)  
*R v Parsons* [2000] 1 VR 161  
*R v Prasoeur* [2006] VSC 41 (Unreported, Bell J, 17 February 2006)  
*R v Raccanello* [2001] VSC 258 (Unreported, Teague J, 25 July 2001)  
*R v Ramage* [2004] VSC 508 (Unreported, Osborn J, 9 December 2004)  
*R v Robinson* [2007] NSWSC 460 (Unreported, Hall J, 11 May 2007)  
*R v Robinson* [2010] VSC 10 (Unreported, Whelan J, 29 January 2010)  
*R v Rye* [2006] VSC 6 (Unreported, Teague J, 6 April 2006)  
*R v Shepherd* [2006] NSWSC 799 (Unreported, Hoeben J, 11 August 2006)  
*R v Sievers* [2002] NSWSC 1257 (Unreported, Sully J, 18 December 2002)  
*\*R v Sievers* [2004] NSWCCA 463 (Unreported, Levine, Simpson and Barr JJ, 17 December 2004)

*R v Smith* [2000] QCA 169 (Unreported, McPherson JA, Davies JA and Mackenzie J, 9 May 2000)  
*R v Stevens* [2008] NSWSC 1370 (Unreported, Hall J, 18 December 2008)  
*R v Tjami* (2000) LSJS 309  
*R v Toki* [2003] NSWCCA 125 (Unreported, Levine J, Hidden J, Smart AJ, 13 May 2003)  
*R v Tran* [2003] NSWSC 373 (Unreported, Greg James J, 2 May 2003)  
*R v Tuncay* [1998] 2 VR 19  
*R v Verdins; R v Buckley; R v Vo* (2007) 16 VR 269  
*R v Vu* [2005] NSWSC 271 (Unreported, Barr J, 1 April 2005)  
*R v Walkington* [2003] NSWSC 517 (Unreported, Newman AJ, 6 June 2003)  
*R v Wallace* [2006] NSWSC 897 (Unreported, James J, 8 September 2006)  
*R v Whiting* [1994] QCA 425 (Unreported, Davies and McPherson JJA, Derrington J, 24 October 1994)  
*R v Williams* [2004] NSWSC 189 (Unreported, O'Keefe J, 22 March 2004)  
*\*R v Williams* [2005] NSWCCA 99 (Unreported, Tobias JA, Buddin and Hall JJ, 24 March 2005)  
*R v Yasso* [2005] VSC 75 (Unreported, Hollingworth J, 21 March 2005)  
*R v Zammit* [2008] NSWSC 317 (Unreported, Howie J, 9 April 2008)  
*Schubring; ex parte AG* [2005] 1 Qd R 515  
*Spencer v R* [2005] NTCA 3 (Unreported, Martin CJ, Thomas and Riley JJ, 29 April 2005)  
*Tyne v Tasmania* (2005) 15 Tas R 221  
*Vella v State of Western Australia* (2007) 33 WAR 411

**ANNEXURE F: TABLE OF MURDER/MANSLAUGHTER PROVISIONS AND PENALTIES (AUSTRALIA)**

<b>Jurisdiction</b>	<b>Offence</b>	<b>Fault element</b>	<b>Provision</b>	<b>Maximum penalty</b>
ACT	Murder	(a) intending to cause the death of any person; or (b) with reckless indifference to the probability of causing the death of any person; or (c) intending to cause serious harm to any person.	Crimes Act 1900 s 12	Life imprisonment
	Manslaughter	Unlawful homicide that is not murder	Crimes Act 1900 s 15	20 yrs
	Manslaughter – aggravated offence when committed against pregnant woman		Crimes Act 1900 ss 15 and 48A	26 yrs
NSW	Murder	Done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to	Crimes Act 1900 s 19A (murder defined s 18)	Life imprisonment

<b>Jurisdiction</b>	<b>Offence</b>	<b>Fault element</b>	<b>Provision</b>	<b>Maximum penalty</b>
		commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.		
	Manslaughter	Every other homicide	Crimes Act 1900 s 24 (manslaughter defined s 18)	25 yrs (provision for discharge if judge considers nominal punishment would be sufficient)
Northern Territory	Murder	The person intends to cause the death of, or serious harm to, that or any other person by that conduct.	Criminal Code Act 1983 s 157 (murder defined s 156)	Life imprisonment (mandatory)
	Manslaughter	The person is reckless or negligent as to causing the death of that or any other person by the conduct	Criminal Code Act 1983 s 161 (manslaughter defined s 160)	Life imprisonment
Queensland	Murder	(a) if the offender intends to cause the death of the person killed or that of some	Criminal Code Act 1899 s 305 (murder defined s 302)	Life imprisonment

Jurisdiction	Offence	Fault element	Provision	Maximum penalty
		<p>other person or if the offender intends to do to the person killed or to some other person some grievous bodily harm;</p> <p>(b) if death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;</p> <p>(c) if the offender intends to do grievous bodily harm to some person for the purpose of facilitating the commission of a crime which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or</p>		

Jurisdiction	Offence	Fault element	Provision	Maximum penalty
		<p>attempted to commit any such crime;            (d) if death is caused by administering any stupefying or overpowering thing for either of the purposes mentioned in paragraph (c);            (e) if death is caused by wilfully stopping the breath of any person for either of such purposes.</p>		
	Manslaughter	Such circumstances as do not constitute murder	Criminal Code Act 1899 s 310 (manslaughter defined s 303)	Life imprisonment
South Australia	Murder	Not defined but Includes committing an intentional act of violence while acting in the course or furtherance of a major indictable offence punishable by imprisonment for ten years or more	Criminal Law Consolidation Act 1935 s 11	Life imprisonment

<b>Jurisdiction</b>	<b>Offence</b>	<b>Fault element</b>	<b>Provision</b>	<b>Maximum penalty</b>
	Manslaughter	Not defined	Criminal Law Consolidation Act 1935 s 13	Life imprisonment
Tasmania	Murder	(a) with an intention to cause the death of any person, whether of the person killed or not; (b) with an intention to cause to any person, whether the person killed or not, bodily harm which the offender knew to be likely to cause death in the circumstances, although he had no wish to cause death; (c) by means of any unlawful act or omission which the offender knew, or ought to have known, to be likely to cause death in the circumstances, although he had no wish to cause death or bodily harm to any	Criminal Code Act 1924 s 158 (murder defined s 157)	Term of defendant's natural life



Jurisdiction	Offence	Fault element	Provision	Maximum penalty
		<p>person; (d) with an intention to inflict grievous bodily harm for the purpose of facilitating the commission of any of the crimes hereinafter mentioned or the flight of the offender upon the commission, or attempted commission, thereof; (e) by means of administering any stupefying thing for either of the purposes mentioned in paragraph (d); or (f) by wilfully stopping the breath of any person by any means for either of such purposes as aforesaid—although, in the cases mentioned in paragraphs (d), (e) and (f), the offender did not intend to cause death, and did</p>		

Jurisdiction	Offence	Fault element	Provision	Maximum penalty
		not know that death was likely to ensue.		
	Manslaughter	Culpable homicide not amounting to murder	Criminal Code Act 1924 (manslaughter defined s 159)	No penalty specified
Victoria	Murder	Not defined  Separate offence for unintentionally causing the death of another through violence done in the course of furtherance of a crime	Crimes Act 1958 s 3  S 3A	Life imprisonment or such other term as fixed by the court
	Manslaughter	Not defined	Crimes Act 1958 s 5	20 yrs
Western Australia	Murder	(a) the person intends to cause the death of the person killed or another person; or (b) the person intends to cause a bodily injury of such a nature as to endanger, or be likely to endanger, the life of the person killed or another person; or (c) the death is caused by means of	Criminal Code Act Compilation Act 1913 s 279	Life imprisonment mandatory unless it would be unjust and person would not be a threat to community when released – then 20 yrs

Jurisdiction	Offence	Fault element	Provision	Maximum penalty
		an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life		
	Manslaughter	Such circumstances as not to constitute murder	Criminal Code Act Compilation Act 1913 s 280	20 yrs

**ANNEXURE G: TABLE OF TERRORISM OFFENCES**

<b>Provision of the Commonwealth Criminal Code</b>	<b>Offence</b>	<b>Introduced by</b>	<b>Penalty</b>
S 101.1	Engaging in a terrorist act	Security Legislation Amendment (Terrorism) Act 2002	Life imprisonment
S 101.2(1)	Providing or receiving training in connection with a terrorist act – knowledge of connection	Security Legislation Amendment (Terrorism) Act 2002, am. Anti-Terrorism Act 2005	25 yrs
S 101.2(2)	Providing or receiving training in connection with a terrorist act – reckless as to connection	Security Legislation Amendment (Terrorism) Act 2002, am. Anti-Terrorism Act 2005	15 yrs
S 101.4(1)	Possessing things connected with terrorist acts – knowledge as to connection	Security Legislation Amendment (Terrorism) Act 2002, am. Anti-Terrorism Act 2005	15 yrs
S 101.4(2)	Possessing things connected with terrorist acts – reckless as to connection	Security Legislation Amendment (Terrorism) Act 2002, am. Anti-Terrorism Act 2005	10 yrs
S 101.5(1)	Collecting or making documents likely to facilitate terrorist acts – knowledge as to connection	Security Legislation Amendment (Terrorism) Act 2002, am. Anti-Terrorism Act 2005	15 yrs
S 101.5(2)	Collecting or making	Security Legislation	10 yrs

<b>Provision of the Commonwealth Criminal Code</b>	<b>Offence</b>	<b>Introduced by</b>	<b>Penalty</b>
	documents likely to facilitate terrorist acts – reckless as to connection	Amendment (Terrorism) Act 2002, am. Anti-Terrorism Act 2005	
S 101.6(1)	Doing an act in preparation for a terrorist act	Security Legislation Amendment (Terrorism) Act 2002, am. Anti-Terrorism Act 2005	Life imprisonment
S 102.2(1)	Directing the activities of a terrorist organisation – knowledge as to the fact it is a terrorist organisation	Security Legislation Amendment (Terrorism) Act 2002	25 yrs
S 102.2(2)	Directing the activities of a terrorist organisation – recklessness as to the fact it is a terrorist organisation	Security Legislation Amendment (Terrorism) Act 2002	15 yrs
S 102.3(1)	Membership of a terrorist organisation	Security Legislation Amendment (Terrorism) Act 2002, am. Criminal Code Amendment (Hizballah) Act 2003 and Criminal Code Amendment ( Hamas and Lashka-e-Tayabba) Act 2003; Anti-Terrorism Act 2004	10 yrs
S 102.4(1)	Recruiting for a terrorist organisation – knowledge as to the fact it is a terrorist	Security Legislation Amendment (Terrorism) Act 2002	25 yrs

<b>Provision of the Commonwealth Criminal Code</b>	<b>Offence</b>	<b>Introduced by</b>	<b>Penalty</b>
	organisation		
S 102.4(2)	Recruiting for a terrorist organisation – recklessness as to the fact it is a terrorist organisation	Security Legislation Amendment (Terrorism) Act 2002	15 yrs
S 102.5(1)	Training a terrorist organisation or receiving training from a terrorist organisation – recklessness as to whether it is a terrorist organisation	Security Legislation Amendment (Terrorism) Act 2002, am. Anti-Terrorism Act (No 2) 2005	25 yrs
S 102.5(2)	Training a terrorist organisation or receiving training from a terrorist organisation – organisation is specified as a terrorist organisation by regulation	Security Legislation Amendment (Terrorism) Act 2002, am. Anti-Terrorism Act (No 2) 2005	25 yrs
S 102.6(1)	Getting funds to, from or for a terrorist organisation – knowledge as to the fact it is a terrorist organisation	Security Legislation Amendment (Terrorism) Act 2002, am. Anti-Terrorism Act (No 2) 2005	25 yrs
S 102.6(2)	Getting funds to, from or for a terrorist organisation – recklessness as to the fact it is a terrorist organisation	Security Legislation Amendment (Terrorism) Act 2002, am. Anti-Terrorism Act (No 2) 2005	15 yrs
S 102.7(1)	Providing support to a	Security Legislation	25 yrs

<b>Provision of the Commonwealth Criminal Code</b>	<b>Offence</b>	<b>Introduced by</b>	<b>Penalty</b>
	terrorist organisation – knowledge as to the fact it is a terrorist organisation	Amendment (Terrorism) Act 2002	
S 102.7(2)	Providing support to a terrorist organisation – recklessness as to the fact it is a terrorist organisation	Security Legislation Amendment (Terrorism) Act 2002	15 yrs
S 102.8(1)	Associating with terrorist organisations - associating on two or more occasions	Anti-Terrorism Act (No 2) 2004, am. Anti-Terrorism Act (No 2) 2005	3 yrs
S 102.8(2)	Associating with terrorist organisations – previous conviction	Anti-Terrorism Act (No 2) 2004, am. Anti-Terrorism Act (No 2) 2005	3 yrs
S 103.1(1)	Financing terrorism – provides or collects funds reckless as to whether they will be used to facilitate or engage in a terrorist act	Suppression of the Financing of Terrorism Act 2002, am. Anti-Terrorism Act 2005 and Anti-Terrorism Act (No 2) 2005	Life imprisonment
S 103.2(2)	Financing a terrorist – makes funds available to another person or collects funds for/on behalf of another person reckless as to whether the other person will use the funds to engage in or facilitate a terrorist act	Anti-Terrorism Act (No 2) 2005	Life imprisonment





## ANNEXURE H: FATAL SHOOTINGS OF SUSPECTED TERRORISTS

### *The shooting of Jean-Charles de Menezes*

The shooting of Jean Charles de Menezes occurred at Stockwell Tube Station on 22 July 2005, following one successful bombing and an attempted bombing that occurred in London the previous day. De Menezes lived in the same building as one of the suspects police had identified; upon leaving his building on the morning of 22 July 2005 he was mistakenly identified as one of the persons of interest and followed to Stockwell tube station, where he entered the station and boarded a train.

When the weapons team arrived, one of the operatives identified de Menezes as the suspect. As de Menezes stood up, an operative (identified as 'Ivor') grabbed him and pinned his arms behind his back; while he was in a prone state, each of two members of the weapons team (operatives identified as 'Charlie 12' and 'Charlie 2') discharged a firearm into his head. In total, de Menezes suffered seven shots to the head and one to the shoulder.<sup>1</sup>

The first report into the incident by the Independent Police Crime Commission (IPCC), known as 'Stockwell One', revealed that police in counter-terrorism operations had been instructed to 'shoot to kill', as it was feared that any terrorist confronted by authorities would immediately detonate any explosive device on their person – a policy known as Operation Kratos.<sup>2</sup>

After the shooting, it was discovered that de Menezes had no explosive devices on his person, nor was he linked in any way to the attempted bombings of 21 July 2005. It was revealed that key errors had been made in identification and reporting of de Menezes' movements. There were other breakdowns in communication also, with operatives believing that they had been ordered to

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<sup>1</sup> 'Police shot Brazilian eight times', BBC News, 25 July 2005, <[http://news.bbc.co.uk/2/hi/uk\\_news/4713753.stm](http://news.bbc.co.uk/2/hi/uk_news/4713753.stm)> (viewed 19 November 2008).

<sup>2</sup> See Peter Kennison and Amanda Loumansky, 'Shoot to kill – understanding Police use of force in combating suicide terrorism' (2007) 47 *Crime Law and Social Change* 151.

prevent de Menezes entering the Stockwell tube station 'at any cost' despite no authorisation of lethal force having been given by the head of the operation. There were also a number of aspects of conduct of the police following the shooting that indicated an attempt to reconstruct the events leading up to the shooting.<sup>3</sup>

On 14 March 2006, the IPCC released Stockwell One to the Metropolitan Police, and on 17 July 2006, the Crown Prosecution Service announced that the only charge that would be laid in the matter was a corporate charge against the Metropolitan Police for breach of health and safety laws. The charge was contested and a verdict of guilty handed down in November 2007, with an unusual 'rider' by the jury that no personal responsibility was to attach to Clarissa Dick, the leader of the operation. Only one officer, who was suspected of altering a surveillance log after the fact, was recommended to face disciplinary charges.

In late 2008, a coronial inquest was held into the incident. The jury's verdict was returned on 12 December 2008.<sup>4</sup> By a majority they handed down an 'open verdict' as the coroner, Sir Michael Wright, had earlier ruled that 'unlawful killing' was not open to them as a verdict; thus the only other available option was 'lawful killing'. In relation to specific questions asked of the jury, they found unanimously that the officer known as 'Charlie 12' had not shouted 'armed police' at de Menezes prior to shooting, as he had claimed. They also found that de Menezes had not moved toward officer 'Charlie 12' before he was grabbed in a bear hug by the officer 'Ivor' as police had claimed. The jury also made findings in relation to failings of the Metropolitan police that had contributed to de Menezes' death.

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<sup>3</sup> Stockwell One, [17.20], p. 87.

<sup>4</sup> The transcript of the jury's verdict and answers to questions is available at: <[http://stockwellinquest.org.uk/hearing\\_transcripts/index.htm](http://stockwellinquest.org.uk/hearing_transcripts/index.htm)> (viewed 13 December 2008).

## *The Shooting of Rigoberto Alpizar*

On 7 December 2005, Rigoberto Alpizar was on board a plane at Miami International Airport that was en route to Florida.<sup>5</sup> He was travelling with his wife. While the plane was still on the runway, Alpizar had an argument with his wife and announced that he was leaving. Other passengers and two air marshals travelling on the plane heard him say that he had a bomb on him. Alpizar's wife followed him down the aisle of the plane, calling out that he was sick.

Alpizar dismounted from the plane and stood on the runway. He was challenged by the two air marshals repeatedly and told to place his hands in the air. Alpizar was heard to state again that he had a bomb and made a movement to place his hand in the bag he was carrying. At that point, he was fatally shot by the two air marshals.

It was later revealed that Alpizar had suffered from bipolar disorder and that while on the trip with his wife from which he was returning had ceased taking his medication and been acting strangely. The Miami-Dade State Attorney's office released its report on 23 May 2006, finding that the shooting by the two marshals had been justified and that no charges would be laid.

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<sup>5</sup> An outline of the facts of the shooting is provided in Office of the State Attorney (Miami-Dade State Attorney's office) (2006).

ANNEXURE I: CASES INVOLVING SELF-DEFENCE RESPONSES BY FEMALE  
ACCUSED

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## ANNEXURE J: CORONIAL CASES

*Malcolm Bell* (Queensland Coroners' Court, 26 May 2006)  
*Luke Donaghey* (Unreported, SA Coroner's Court, 15 September 2000)  
*Clay Hatch* (Qld Coroners' Court, 19 June 2009)  
*Warren l'Anson* (Unreported, ACT Coroner's Court, 26 February 1999)  
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*Sonya Mercer and Darren Batchelor* (2004) TASCDC 57 (Unreported, 12 February 2004)  
*Anne Chantel Millar* [2005] NTMC 056 (Unreported, 2 Sept 2005)  
*Michelle Morcom and Jamie Venn* (2004) TASCDC 55 (Unreported, 12 Feb 2004)  
*Geoffrey Nicholls* (Unreported, SA Coroner's Court, 29 October 2003)  
*Jodie Palipuaminni* [2006] NTMC 083 (Unreported, 23 Oct 2006)  
*Daniel Cory Rhodes* (Queensland Coroners' Court, 24 March 2006)  
*Thomas Waite, Mieng Huynh, James Jacobs, James Gear* (Queensland Coroners' Court, 17 March 2008)  
*Grant Wanganeen* (Unreported, SA Coroner's Court, 9 October 2002)  
*Gary Whyte*, Record of Investigation into Death (Unreported, Victorian Coroner's Court, 21 January 2005)  
*Edward Wilson* (Unreported, SA Coroner's Court, 13 November 2008)  
*Andrea Wrathall and Stephen Pugh* (2007) TASCDC 360 (Unreported, 2 Nov 2007)

## ANNEXURE K: LIST OF ABBREVIATIONS

AFP	Australian Federal Police
AG	Attorney-General
COAG	Coalition of Australian Governments
DPP	Director of Public Prosecutions
DV	Domestic Violence
FBI	Federal Bureau of Investigation (US)
FV	Family Violence
IPCC	Independent Police Crime Commission
NTMC	Northern Territory Magistrates Court
PADV	Partnerships against Domestic Violence
PO	Protection Order
RC	Refused Classification
TASCD	Tasmanian Coronial Division
VRO	Violence Restraining Order

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*Osland v R* (1998) 197 CLR 316  
*R v Boughey* (1986) 161 CLR 10  
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