

VIOLENCE AGAINST WOMEN IN THE HOME: KALEIDOSCOPES ON A COLLISION COURSE?*

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We look at the world around us – including gender, violence and the law - through assumptions about ‘reality’. I use the concept of a ‘kaleidoscope’ to illustrate this idea: that when we conceptualise something, say violence against women in the home, our perception is the outcome of a multitude of filters that twist and turn according to our own individual experiences and knowledge to create a picture at the end of the kaleidoscope cylinder.

Given our historical antecedents and the current domination of Australian society by Anglo-Saxon males and a view of culture as holistic (parts inter-related), it is my contention that the images permeating the principal social structures and organisations, tend to be focused by the perspectives of the dominants. I label this as the dominocentric reality. As a community and criminal justice system, we thus tend to use a masculine model of violence - a comparator based on the public and male dominated sphere. Consequently when we think about domestic violence, a singular physical assault, without much if any contextual background, may be what many of us see at the end of the kaleidoscope.

However, domestic violence is not about a single strike; such a perspective is non-inclusive of the victims’ experiences. (I use victims to include the witnesses.)¹ Frequently the ‘incident’ that results in intervention by the criminal justice system is in actuality just a small part of a complex pattern of control and *cannot* be adequately understood nor its gravity measured in isolation from that background.

The following paper first looks at the victims’ experiences and then gives examples of how, either through its ‘black letter’ or implementation, that civil, criminal, family,

* Much of the data and concepts (and Figure 1) appear in or are expanded from my book, *Less Than Equal – Women and the Australian Legal System* (Butterworths, 2001). I would also like to thank the anonymous referee for recognising some lack of annotation and for providing the titles of some excellent Queensland research.

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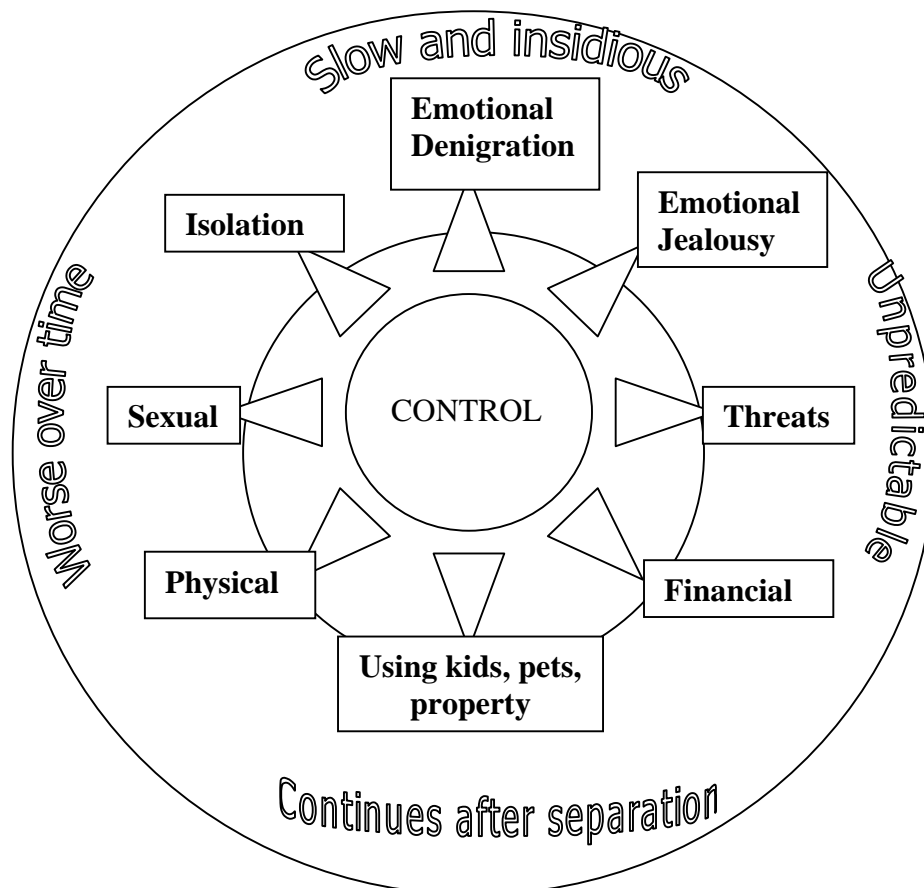
¹ M Johnson, ‘Conflict and Control: Images of Symmetry and Asymmetry in Domestic Violence,’ in A Booth, A Crouter, and M Clements (eds), *Couples in Conflict* (L Erlbaum Associates, 2001) identifies five types of violent behaviour in the home: mutual violent control, violent resistance, common couple violence and patriarchal terrorism. The type of violence described in this article is the last. His data support the hypothesis that ‘terrorism’ is almost exclusively perpetrated by males in heterosexual relationships. Most female violence is found in ‘common couple violence’ and community survey data cited by men’s rights groups often confuse the two.

social security and immigration law obscure and distort the victims' reality through the dominocentric kaleidoscope.

I GETTING THE 'POWER' PICTURE INTO FOCUS

Figure 1 depicts the victims' kaleidoscope picture of violence.

Figure 1: The Victims' Kaleidoscope Picture of Violence



There are many manifestations of violence aside from the more apparent and harder to hide broken bones and bruises. These less visible acts, just like slaps and shoves, are about a need to exert power and are enacted through emotional abuses, rape, financial exploitation, damaging property, injuring pets, harming the children and death threats. The different masks of control are on-going, generally gets more serious and may be joined by a variety of other physical expressions of power. Overall, the abusive behaviours tend to escalate over time but it is a slow, insidious and isolating process punctuated by periods of remorse.

Leaving the relationship does not necessarily mean the violence will stop. In the ABS *Women's Safety Survey*, of those who had experienced violence by a previous partner, for more than one third (35.1%) the violence continued after separation.² For some, it begins at that time. One only has to look at the frequency of breaches to domestic

² Australian Bureau of Statistics ('ABS'), *Women's Safety Survey* (1996). Synopsis of results of 4128.0
<http://www.abs.gov.au/ausstats/abs@.nsf/0/B62DEB3AC52A2574CA2568A900139340?Open>
 at 15 October 2002.

violence orders or restraining orders to know that not even legal intervention may deter the desire for control. Almost half of spousal homicides committed by men targeted the killing of women who had left them, or were attempting to leave them.³

In addition, the violent partner may try to continue – often very effectively - to exert control in non-physically violent ways through on-going questioning of parental responsibilities and decision-making.

A *Emotional Expressions*

The mental, psychological and *spiritual* abuses, generally precede other types of violence. They may start with almost trifling incidents that frequently involve jealousy - denigrating her clothing, make up, hair, how she talks or how she doesn't talk enough, her behaviour, her basic being. The persistent debasement can erode one's soul and spirit to a state far easier to take captive. It is often difficult for the victim to define what is happening as abuse until out of the relationship. Coupled with her downward sense of self-esteem, these behaviours become almost normalised through repetition.

As one survivor writes:⁴

At the same time I see the helplessness in the situation where, by all accounts, I got off comparatively lightly yet still struggle to recover from the impact of the marriage almost a decade later.

I have great difficulty using the term violence because it is too firmly established as 'beatings' and that really wasn't the issue for me. Approximately four years after my marriage ended I had the good fortune to speak to a guy who worked at a women's shelter and, at that point I worked out my marriage had consisted of 5 kinds of abuse: financial, emotional, psychological, physical, and sexual. Unfortunately, I was the perpetrator of the physical violence when I couldn't cope any more and, on two occasions lashed out and hit him. In these instances he stood still, arms by his side and just let me hit him on the torso. He was bigger than I was, I was unable to bruise him and he laughed it off which I now realise simply compounded my feelings of helplessness and inadequacy. It was a power and manipulation game, which used guilt etc to make me feel responsible, inadequate, and incapable. If he had hit me I would have had a better chance of understanding that the marriage was abusive, and a better chance of others supporting me.

He may also attempt to control what she eats, the amount of electricity used – even the number of toilet paper segments. As one ACT survivor wrote to me:⁵

Psychological control is a more effective and long-term form of abuse than physical control. I know. I am a survivor. Do you know what it is like to live in fear? Can you have an opinion that differs from your husband? He continually told me that I was stupid but in more downgrading terms.

³ P Eastal, *Killing the Beloved: Homicide between Adult Sexual Intimates* (Australian Institute of Criminology, 1993).

⁴ From e-mail interview with 'X' 2002 conducted as part of a current project on partner rape, which will be completed in 2004.

⁵ I routinely have contact with survivors, such as this ACT woman and the public servant cited on the following page, who, through letters, e-mail, calls and/or meetings want to share their experiences in the hope that their 'story' can benefit others by being 'heard' in my future publications.

After a while I started to believe him. This is emotional abuse. And then he prevented me from seeing my friends and family – this is social abuse.

The last action, limiting or preventing contact with friends and family (social control) is frequently reported.

B *Economic Exploitation*

The ‘perpetrator’ partner in the relationship may take absolute control of the finances doling out little or no money to the other. Immigrant women, particularly those who are sponsored to Australia, are particularly vulnerable due to their relative lack of knowledge about financial and welfare entitlements.⁶

One woman, sponsored from the Philippines:

He said, ‘[n]o, if you want, I can give you \$15.00 as your allowance for the fortnight. That’s your budget for yourself.’

I’m like a robot. He said to me, ‘[I]f you cook, don’t cook one kilo of chicken wings. Cook only just a half a kilo of chicken wings.’ The children are very innocent. They come from the province. He says, ‘[t]hat’s enough, two wings for one child and rice.’

And he is eating ice cream in front of my children. He doesn’t want to give them ice cream.⁷

There are other types of exploitation. A Canberra senior level public servant explained to me (in an interview a few years ago) how her husband forced her to do his accounts at night although she had a full-time day job, plus parenting duties.

Further, as in her case, economic control does not always stop after estrangement.

He left us. He refused to pay any maintenance or to be at the birth. He had mortgaged all the debts of his business against our family home. So he stopped paying the company’s debts and the bank called in its security on our house.

C *Sexual Assaults*

United States studies have found that 10–14 per cent of all married women in that country have been or will be raped by their spouse and that the highest risk period may be during or after a relationship breakdown.⁸ The ABS *Women’s Safety Survey* reveals that only 1% of those currently in a relationship admitted to sexual assault by a current partner whilst 10.2% said it had taken place in a previous relationship.⁹ We also know from various rape victim surveys that husbands or ex-partners are named as the

⁶ P Easteal, *Shattered Dreams: Marital Violence Against Overseas-born Women in Australia* (Australian Government Publishing Service, 1996).

⁷ Ibid 153.

⁸ D Finkelhor, ‘Marital rape: the misunderstood crime’ in S Hatty (ed), *National Conference on Domestic Violence: Proceedings* (Australian Institute of Criminology, 1990) 87.

⁹ ABS, above n 2, 53. The differences in these rates could be, in part, a reflection of those sexually assaulted by their current partner neither to identify it as such nor to disclose.

perpetrator by between 13 and 15 per cent of respondents.¹⁰ And, for just over three-quarters of the marital rape victims in *Voices of the Survivors*, the sexual assault was part of a general pattern of physical violence. In that study and others, rape by a partner or ex-partner correlated with the highest frequency of additional injuries, even more so than rape by a stranger.

When raping his partner, the husband may not use physical force. Within the dynamics of a violent marriage, there are other types of coercion at his disposal. The threat of violence either toward her or the children can act to negate her consent.

Given the range of coercion and the mythology about what constitutes resistance, rape and 'conjugal rights', undoubtedly many women do not see their husbands' behaviour as sexual assault.

I had described incidents to friends saying that the symptoms, such as scrubbing, were consistent with rape but I struggled with the term because it happened within marriage. The cultural stereotype of a dark park and inappropriate clothing didn't fit. I was reminded by peers that every woman has trouble satisfying her husband and that I needed to work harder at the marriage.¹¹

This can of course translate into low reporting, particularly by those from backgrounds that discourage any disclosure or even conversation about sex.¹²

I was not physically battered because I always submitted. Mostly my husband jumped on me when I was asleep, pinned my arms down and clutched my legs with his so that I could not move.¹³

Many who work in the area have observed a correlation between pregnancy and the commencement or escalation of sexual and other physical violence. Between four to nine percent of women are abused during their pregnancy and/or after the birth.¹⁴

I was seven months pregnant with my second child and my husband wanted to have sex with me. I didn't want to so he kicked me several times and I landed on the floor on my stomach. The baby kicked and I was in pain. My husband lunged for me but I was able to get away and outside the front door sobbing. He caught me and said that if I gave him a 'head job' he'd leave it at that. We ended up having sex because I was crying too much to give him a 'head job'.¹⁵

¹⁰ P Easteal, *Voices of the Survivors* (Spinifex Press, 1994) had a sample of 2852 and NSW Sexual Assault Committee, *Sexual Assault Phone-In Report* (1993) a sample of 860.

¹¹ Above n 4 (X).

¹² For a look at some specific issues for Indigenous and some other culturally diverse women see P Easteal, 'Looking through the Prevailing Kaleidoscope: Women Victims of Violence and Intersectionality' (2002) 6 *Sister in Law, A Feminist Law Review*, 48-77.

¹³ Easteal, *Voices of the Survivors*, above n 10, 54.

¹⁴ A Taft, 'Violence against women in pregnancy and after childbirth' (2002) 6 *Australian Domestic and Family Violence Clearinghouse Issues Paper*. In the *Women's Safety Survey* (above n 2, 57) of those who had experienced violence by a previous partner, violence took place during pregnancy for 41.7%, for just about half of these, it began during that time.

¹⁵ Easteal, *Voices of the Survivors*, above n 10, 65.

Theoretical explanations suggest that jealousy or anger toward the unborn child, pregnancy specific violence not directed to the child or ‘business (violence) as usual’ may be the triggers.¹⁶

II THE VICTIMS’ KALEIDOSCOPIES: EFFECTS

Violence in the home is about beating another human down internally to such a point that she becomes consumed with shame—self-blame and low self-esteem. This is one response type to the abuse pattern—internalising his blame, which then contributes to an increasing amount of self-hatred. Consequently, she takes on the responsibility for the violence. When there are no other mirrors to see yourself reflected in, you are stuck with the image that he has created.

And after a while you will be looking into the mirror, and you will not realise who you are. The person you see reflected in the mirror is not you, and you don’t even know how this has happened, because it is such a slow process. And then you just can’t get out of it. You realize you’re stuck. He has done it to you so slowly from the beginning.¹⁷

Some victims, for unknown but theorised reasons like personality type or relatively ‘healthy’ upbringings, do not appear to develop the same sort of negative self-imagery.¹⁸

Through the lenses of the women’s experiences, abuses become so normative that its victims may trivialise or normalise it to the point of invisibility. The bizarre becomes normal. Narrow definitions of violence and the power of words to construct reality may help to obscure the violence from the victim’s own vision. For example, a woman in one case¹⁹ (in which she had ultimately killed her violent partner) was asked specific questions about a background of domestic violence, ‘Were you hit?’ ‘Were you bashed?’

‘No’, she said.

I began to read her story and found ample examples of physical abuses. When she slept later than her partner, he squeezed her breasts and nipples so hard that it brought tears to her face. In addition, it was not uncommon for him to jump— full weight – on her prone body.

Violence? Not as constructed through her filters of language and normative experience.

Escaping can become problematic. Women may see no exit choices from the relationship. Low self-esteem, denial and fear from erratic violence result in an almost magnetic control by the captor. Threatened with death if they leave, we saw earlier that violence may not stop with estrangement and that the threats are not always idle ones.

¹⁶ J Campbell, C Oliver and L Bullock ‘Why Battering During Pregnancy?’(1993) 4 *AWHONN Clinical Issues in Perinatal and Women’s Health Nursing* 343.

¹⁷ Eastal, *Shattered Dreams*, above n 6, 33.

¹⁸ Indeed, there is no one homogeneous battered woman type; no doubt personality type and childhood experiences have impact upon responses. This article does essentialise violence against women in the home to the extent that categorization is a necessity for communication.

¹⁹ *R v Vandersee* [2000] NSWSC 916 revised (Unreported, James J, 15 November 2000).

For the same reasons, reporting to the police may not be seen as an option. A complicity of silence enshrouds many of these dwellings from intrusion by those who dwell in the public realm. Those from diverse cultures may be even less unlikely to seek help if socialised with values that more explicitly place responsibility on the women and/or with different ideas about legal rights or the potential assisting agencies.²⁰ Analysis of the ABS data shows that cases without injury, perpetrated by a current partner, experienced by the young and uneducated 'were less likely than other types of assault to be reported and to result in the use of victim services'.²¹

III THE WITNESSES' KALEIDOSCOPE

Two Australian research projects looked at frequency of violence against women in the home: the ABS Safety Survey of adult women and their experiences of partner or ex-partner violence and one study that sampled 5,000 Australians aged between 12 and 20. Almost one fourth of the latter respondents had witnessed an incident of physical or domestic violence against their mother or stepmother.²² Amongst the adolescent sample, risk increased with a non-biological male, lower socio-economic and/or indigenous backgrounds. Similarly, in the ABS sample, almost one quarter (23%) of women who had ever been married or in a de facto relationship had experienced violence (physical, sexual, threats or attempts). Only 8% of those currently in relationship reported violence, which is in marked contrast to the 42.4% of those ever in a relationship, who responded affirmatively.²³ Often children are a part of the household. For example, in 1997/98, 46 per cent of the children and young people accompanying victims of domestic violence to supported accommodation services were children aged under five years; 43.6 per cent were aged between five and 12 years; and 10.1 per cent were aged 13-16 years.²⁴ Many of these children had witnessed their mothers' victimisation.

Witnessing is generally used in the literature to include observing domestic violence, hearing the violence, being threatened, using the child as a physical weapon against a

²⁰ For additional reading on specific issues concerning domestic violence among migrant groups see: R Aldunate, 'Issues for Women of Non-English Speaking Backgrounds' *Domestic Violence Court Assistance Conference* (1999) <http://www.iwss.org.au/iwss_publications/alduna_3.html> at 12 August 2002; The Law Foundation of New South Wales, *Quarter Way to Equal - A Report on Barriers to Access to Legal Services for Migrant Women* (1994); DVIRC and Office of the Status of Women, *Not the Same: Conference Proceedings and a Strategy on Domestic Violence and Sexual Assault for Non-English Speaking Background Women* (1996); Fairfield Multicultural Family Planning, *Many Voices, Different Stories: Speaking Out About Cultural Diversity and Sexual Assault* (1996); Aboriginal women's issues are discussed by S Payne, 'Aboriginal Women and the Law' in C Cunneen (ed), *Aboriginal Perspectives on Criminal Justice* (Institute of Criminology, 1992) 31; D Eades, 'Legal Recognition of Cultural Differences in Communication: The case of Robyn Kina' (1996) 16 *Language & Communication*; L Hancock, 'Aboriginality and Lawyering: Problems of Justice for Aboriginal Defendants in Partner Homicide Cases' in S Cook and J Bessant (eds), *Women's Encounters with Violence: Australian Experiences* (Sage Publications, 1997) 88; P Greer 'Aboriginal Women and Domestic Violence in New South Wales' in J Stubbs (ed), *Women, Male Violence and the Law* (Federation Press, 1994) 64.

²¹ C Coumarelos and J Allen, 'Predicting Women's Responses to Violence: The 1996 Women's Safety Survey' (1999) *Contemporary Issues in Crime and Justice* 47.

²² The Partnerships Against Violence research is documented in D Indermaur, 'Young Australians and Domestic Violence' (2001) 195 *Trends and Issues in Crime and Criminal Justice* and in Attorney General's Department, *Young People and Domestic Violence* (2001).

²³ ABS, above n 2.

²⁴ Women's Services Network, *Domestic Violence in Regional Australia: A Literature Review* (2000) 11.

spouse; forcing a child to be involved in physical or stalking assaults, and experiencing the variety of consequences of spousal violence such as helping the mother with her need for medical attention. It is difficult though to isolate the effects of witnessing since the presence of domestic violence increases the likelihood of other child maltreatment in the family²⁵ - it has been estimated that between 40-60% of men who abuse their partners also inflict violence upon the children in the family.²⁶

Plus not all those who witness evidence the same signs of trauma. It is suggested that the degree of effect is affected by age, coping strategies and individual resiliency; gender; the nature, severity and frequency of the violence (witnessing domestic violence *and* also being physically maltreated, is associated with higher levels of distress and/or acting out, compared with only witnessing violence); whether the pattern of violence has ceased; attendant environmental factors, such as the mother's ability to parent, and the availability of legal and social protection are also important in reducing or exacerbating effects.²⁷ Having someone caring and trustworthy to talk to has been identified as an important ameliorator.²⁸

As Liang²⁹ points out, being a witness is far more than a passive act. 'They are actively involved in seeking to make meaning of their experiences and in dealing with the difficult and terrifying situations which confront them.'

In a recent Australian study involving focus groups, witness/children describe effects on their scholastic performances and impacts on their self-esteem, suicidal ideation and difficulties in trusting others.³⁰ The child witnesses to violence in the home also feel ashamed because they have done nothing to stop him except to survive.

I can hear the yelling. And then there's that terrible sound of her skull hitting the wall-over and over again. Maybe I should go down there and stop him. I can't go down there because then he'll turn on me. I can't say anything because I'm afraid. Oh God I can hear her crying now. I should have stopped him. I should have stopped him.³¹

There are other possible consequences that affect the child's well being at the time of the violence and later in life. These include developing a hyper-vigilance to potential threat, a greater risk of emotional and behavioural problems, and enhanced potential for

²⁵ L Laing, 'Children, young people and domestic violence,' (2000) 2 *Domestic and Family Violence Clearinghouse Issues Paper* for reviews of the literature and A M Tomison, 'Exploring family violence: links between child maltreatment and domestic violence,' (2000) 13 *Issues in Child Abuse Prevention* for reviews of the literature about such 'intergenerational transmission' theories.

²⁶ Youth Affairs Council of Western Australia, *Break the Cycle: The Extent and Effects on Young People of Witnessing Domestic Violence* (1992).

²⁷ Above n 25. Tomison citing overseas literature – the most recent Jeff Edleson 'Children's witnessing of adult domestic violence' (1999) 14 *Journal of Interpersonal Violence* 839 and M Suderman and P Jaffe, 'Children and youth who witness violence: New directions in intervention and prevention' in DA Wolfe, RJ McMahon and RDeV Peters (eds), *Child Abuse: New Directions in Prevention and Treatment across the Lifespan* (Sage Publications, 1997).

²⁸ D Bagshaw and D Chung, *Women, Men and Domestic Violence* (University of South Australia, 2000).

²⁹ L Laing, 'Progress, Trends and Challenges in Australian Responses to Domestic Violence' (2000) 2 *Domestic and Family Violence Clearinghouse Issues Paper*.

³⁰ Bagshaw and Chung, above n 28.

³¹ Correspondence with the author, above n 5.

conflict in relationships.³²

The girl witness grows up and may develop a relationship as an adult with a male who treats her abusively.

I have been married (10-20) years and have lived with domestic violence for the majority. I never really believed I was living under these conditions because until recently I was never physically harmed. I grew up in a household where my father was always violent and he continues to verbally abuse my mother and his children to this day. I was so anxious to turn 18 so I could run away from that way of life, but didn't realise that I would choose someone that was just like my father simply because I knew no better way of life. I have always held such a low self-esteem and didn't realise that it was a result of all the mental abuse I went through as a child and during my married life.³³

The boy child may become a perpetrator. His role model was a batterer.

They both possess similar low self-worth, shame and repressed feelings. And so the violence can continue from generation to generation.

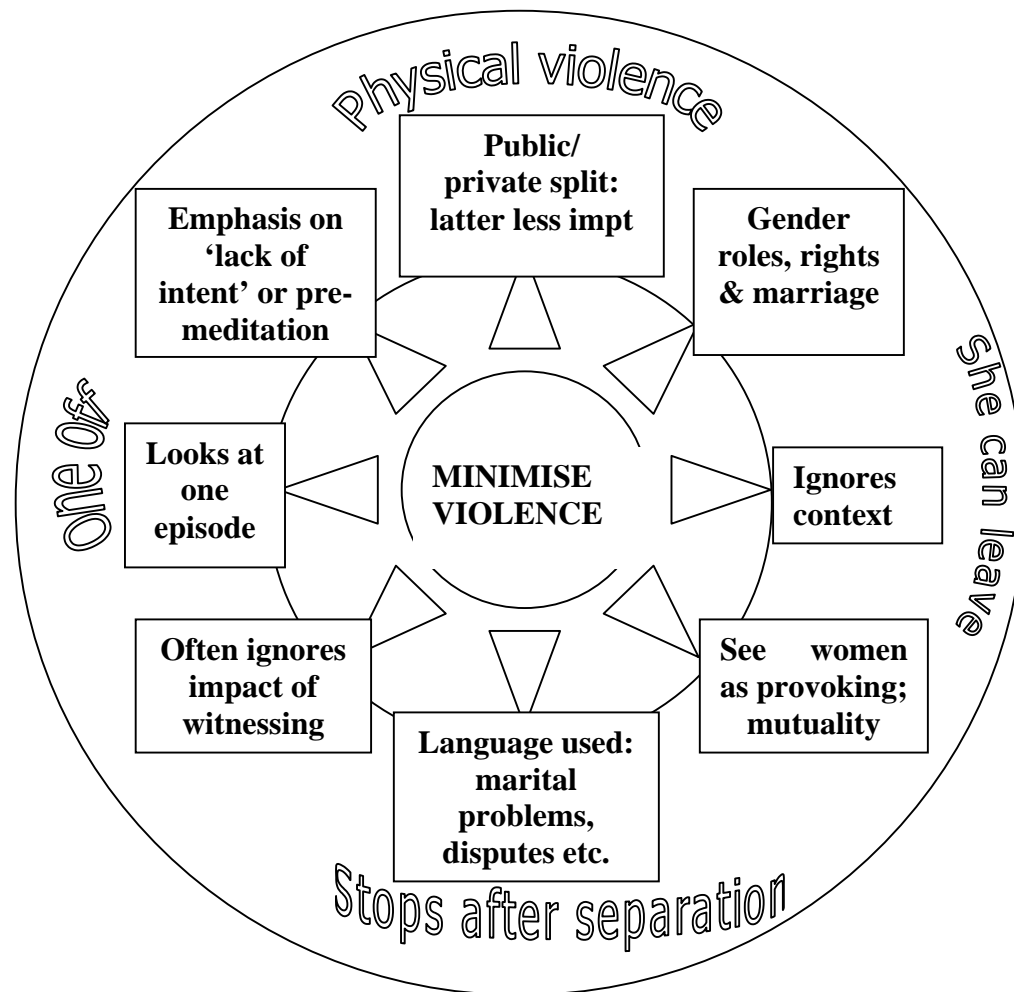
IV COLLIDING (AT TIMES) WITH THE DOMINOCENTRIC KALEIDOSCOPE...

Without an understanding or willingness to look at the pattern of domestic violence, the one 'alleged assault' or incident that propels the woman into contact with a friend, acquaintance, police or gate-keeper, may be decontextualised and seen as a spontaneous, impulsive (no premeditation) action (more easily trivialised) as Figure 2 illustrates.

³² From literature cited by Tomison, above n 25. Liang provides many examples of studies that have illustrated links in two publications, above n 25 and n 29.

³³ E-mail interview with 'Y', 2002.

Figure 2: A Dominocentric Kaleidoscope Picture of Violence



As we have seen though, through the kaleidoscope of the victim, the physical assault is but one, often relatively insignificant, component of the violence. Yet, the courts (and many in the community) tend to look at the seriousness of physical injury, and not at the longer lasting emotional harms. One survivor describes this lack of support for these types of injury that she received from friends and family just a few years ago:

Society currently has significant problems in accepting domestic violence in its more traditional, or extreme, forms. Until society is re-educated about domestic abuse, women will find it difficult to identify it, stand up against it, and speak out. Other members of society will not be forced to accept it, acknowledge and recognise it in sufferers, and help available to victims of the more subtle forms will remain limited ... It is easier to believe and support someone who fits into the 'extreme' cases. In my discussions with other divorced women my age (early 30s) it appears that my experience is the norm not the exception. The problems faced by women such as myself are compounded because they are subtle yet pervasive, incredibly manipulative and controlling yet very hard to prove, near impossible to speak up against because it seems so improbable to others or that the victim is simply a whiner.³⁴

Often people on the 'outside' are not looking at the 'big picture' through the kaleidoscope of the victims and witnesses and are unable to appreciate how jealousy

³⁴ Above n 4.

and possessiveness are an integral part of the pattern. This means that few in either the community or the legal system understand that the violence may well continue after separation and also contributes to the women's inability to leave. The paradox is that the worse the violence inflicted, the harder it is for most in the community to understand the woman's inertia or her return. Most can probably comprehend that equation in the context of political hostages but not within the domestic dwelling.

Not surprisingly then, acceptance of domestic violence and its perception as private have been identified among a segment of Australians, including various types of professionals and the general public. As a community, the language that we use reflects this minimising. Phrases like 'wife abuse' and 'battered wives' and the term 'domestic violence' understate the seriousness and criminality of violence within the home. 'Domestic' means private, or relatively unimportant in contrast to the 'real' world outside of the home. By prefixing violence with the word 'domestic', as a general category of offence, it becomes less criminal and more easily seen as 'relationship problems'.

In one 1988 survey initiated by the Office of the Status of Women, nearly one in five Australians believed that it was acceptable for a man to use physical violence against his wife under certain circumstances.³⁵ A follow-up 1995 survey³⁶ did show some enlightenment about these issues with 93% agreeing that domestic violence was criminal and four fifths stating that it was not a private matter. However, 18% still perceived circumstances in which physical force was acceptable (mostly self-defence). Only 8% believed that it was justified when the man is provoked as compared to 14% in 1987 (eg infidelity, nagging).

Similarly, in the Partnerships Against Violence research that sampled 5,000 Australians aged between 12 and 20, only a small proportion did not identify extreme acts of violence as domestic violence. Females were more apt to label acts of domestic violence with males normalizing them. Over one quarter (27%) of respondents still believed that that it is private and should be handled by the family. Not surprisingly, those who minimized DV were apt to hold more traditional attitudes about gender roles.³⁷

Before becoming too hopeful about changing community kaleidoscope lenses, we must be aware of informants' tendency to express the ideal. In other words, what may have changed is not what people actually think but what they believe that they *ought* to. Concurrent with community education programming has been a rather strong backlash in Australia by men's rights groups who argue that males experience a similar amount of violence by female partners, that many women obtain domestic violence orders as a strategy in divorce cases and that the criminal justice system is overly sympathetic to the women (as is government funding).

³⁵ Public Policy Research Centre, *Domestic Violence Attitude Survey* (1988).

³⁶ ANOP Research Services, *Community Attitudes to Violence Against Women* (1995).

³⁷ Partnerships, above n 22.

...backlash has attempted to reinforce old, and reimpose new, practices of subjugation and silences in relation to sexual and domestic violence.³⁸

In fact, despite the plethora of legal reform to deal with violence against women in the home,³⁹ when we next turn to the responses of the criminal justice and other legal systems to domestic violence, we find variation⁴⁰ with adherence to that trivialising that results from perception of domestic violence through at least some of the lenses shown in Figure 2. In the remainder of this paper, I will explore a number of areas of law and provide examples of their lenses and the picture of violence against women at the end of their kaleidoscopes.

A *In the Context of Issuing Protection Orders*

The wording of domestic violence civil legislation, such as the laws enacted in each Australian jurisdiction through the 1980s, can affect police response. For instance, the Model Criminal Code Committee's⁴¹ 'black letter law' has been found wanting with the persistence of: a too narrow definition, a precipitating or 'trigger' incident and proof that the defendant is likely to perpetrate another violent act.⁴² Further, in most jurisdictions, the onus of prosecution or action is placed upon the victim. Plus to some unknown extent, there is still a view of violence against women as involving mutuality and provocation. As one officer summonsed to a domestic violence call in the ACT told the victim, 'The reason men hit women is that you've got the gift of gab and you overpower men in an argument.'⁴³ And in Queensland, recent research has revealed a similar minimising of the violence with more than half of the DVO applications made by the 'aggrieved spouse'.⁴⁴

In NSW where police must apply for orders (except for certain circumstances),⁴⁵ they initiated 52% in 1995 in contrast to 16% of the 1994/1995 protection orders applications in Victoria.⁴⁶ Research in the ACT revealed that, although empowered to do so (but not required) police were reluctant to take out domestic violence orders (DVOs) on behalf

³⁸ J Breckenridge, 'Subjugation and silences: the role of the professions in silencing victims of sexual and domestic violence' in J Breckenridge and L Liang (eds) *Challenging Silence* (Allen & Unwin, 1999) 6.

³⁹ See R Alexander, *Domestic Violence in Australia – The Legal Response* (Federation Press, 3rd ed, 2002) for an overview of relevant laws.

⁴⁰ S Egger and J Stubbs, *The Effectiveness of Protection Orders* (1994) and earlier work on police by S Hatty and J Sutton, 'Policing Violence Against Women' in S Hatty (ed), *AIC Seminar Proceedings* (Australian Institute of Criminology, 1986); and J Scutt, *Even in the Best of Homes* (McCulloch, 1983); J Mugford, P Easteal and A Edwards, *ACT Community Law Reform Committee, Domestic Violence* (Publications and Public Communications for ACT Attorney-General's Department, 1993); R Wearing, *Monitoring the Impact of the Crimes (Family Violence) Act 1987* (1993) and a report by J Hickey and S Cumines, *Apprehended Violence Orders: A Survey of Magistrates* (Judicial Commission of New South Wales, 1999).

⁴¹ Domestic Violence Legislation Working Group, *Model Domestic Violence Laws: Discussion Paper* (1997).

⁴² R Hunter and J Stubbs, 'Model Laws or Missed Opportunity?' (1999) 24 *The Alternative Law Journal* 12.

⁴³ 'Sharon' had several DVOs through the 1990s that had been breached over 20 times, over the course of eight years. See above n 5.

⁴⁴ H Douglas and L Godden, 'The Decriminalisation of Domestic Violence' (2002) 58, <<http://www.gu.edu.au/school/law/slrc/reports.html>> 18 March 2003.

⁴⁵ *Crimes Act 1900* (NSW) s 562C.

⁴⁶ Hunter and Stubbs, above n 42, 15.

of women, most believing that the victim should be the applicant for an order.⁴⁷ Officers' reluctance may derive in part from their experiences with the Magistrates Court.

Indeed, studies have shown that some Magistrates do examine women's experiences through at least a few of the dominant lenses. This is illustrated by their occasional lack of acceptance of a woman's reasonable fear as sufficient grounds for granting an intervention order.⁴⁸ For these magistrates, physical signs of abuse were necessary to fulfil their image of violence.⁴⁹ In the Northern Territory some failed to give women an order by treating the violence as a family problem or as something requiring counselling and as in part the responsibility of the victim. They were able to do this in part by not looking at the pattern of the behaviour and simply noting the most recent action in a decontextualised and trivialising way.⁵⁰ Similar requirements of recent physical violence were identified in a survey by the NSW Judicial Commission⁵¹ in Victorian research⁵² and in a Queensland study.⁵³ Most did believe though (in response to specific queries) that they understood the uniqueness of violence in the home and the need to understand the process and context. 'Blaming the victim' or provocation can be discerned though from the 54% in NSW⁵⁴ and the 42% of Queensland magistrates⁵⁵ who agreed with the statement that 'it takes two to tango in any relationship'.

I think that in some cases this is true. Some perpetrators are simply using victims as punching bags. Others, however, finally snap when outmatched verbally in an argument.⁵⁶

B *In the Context of Breaches of Protection Orders*

Three studies of police and breaches (one in Victoria⁵⁷ and two in NSW⁵⁸) have found a high rate of non-action with officers certainly not charging if the breach did not include physical assault or property damage.⁵⁹ Officers may even witness breaches at police

⁴⁷ Mugford et al, above n 40, 92, found that 94% of members believed this. More recent research examining the effects of an integrated model introduced in the late 1990s see Urbis Keys Young, *Evaluation of the ACT Family Violence Intervention Program Phase II* (ACT Department of Justice and Community Safety, 2001).

⁴⁸ In the Department of Justice, *Crimes Family Violence Act 1993/94 Monitoring Report*, 40.8% of applications for interim orders were not granted at 40. Unfortunately, data were not cross-tabulated by gender so we do not know if this is more apt to happen to husbands and defacto men; they constituted only 11.4% of 'partner' applicants at 42.

⁴⁹ Wearing, above n 40.

⁵⁰ H Spowart and R Neil, 'Stop in the Name of Love' (1997) 22 *The Alternative Law Journal* 82.

⁵¹ Hickey and Cumines, above n 40. Discussed also by R Simpson, *Incidence and Regulation of Domestic Violence in NSW* (NSW Parliamentary Library, Briefing Paper 4/2000).

⁵² Wearing, above n 40.

⁵³ B Carpenter, S Currie and R Field, 'Domestic Violence: Views of Queensland Magistrates' (2001) 3 *Nuance* 15.

⁵⁴ Hickey and Cumines, above n 40, 59.

⁵⁵ Carpenter et al, above n 52, 20.

⁵⁶ Hickey and Cumines, above n 40, 6.

⁵⁷ Wearing, above n 40.

⁵⁸ L Trimboli and R Bonney, *An Evaluation of the NSW Apprehended Violence Order Scheme* (NSW Bureau of Crime Statistics and Research, 1997) 59.

⁵⁹ H Katzen 'How Do I Prove I Saw His Shadow?' *Responses to Breaches of Apprehended Violence Orders: A Consultation with women and police in the Richmond Local Area Command of NSW* (Prepared for the Northern Rivers Community Legal Centre, 2000).

stations during contact ordered handovers and not act by identifying the incident as a family matter or parental conflict.⁶⁰ Police may play another more intangible role in decisions not to arrest. As Katzen⁶¹ points out, the woman's wishes can be influenced by officers neither explaining the criminality of the act(s) or the range of options available.

Again, this lack of police use of their powers could be, at least in part, a consequence of what they perceive of as a less than punitive approach by the courts [on breaches].⁶² Women in a Queensland study did identify such trivializing with complaints that magistrates were failing to either penalize or direct offenders to programs.⁶³ A NSW police officer discussing a man arrested four times for breach of a protection order stated that on each of these occasions, the penalty imposed for the breach was a good behaviour bond.⁶⁴ Such minimising by magistrates has enabled tragic outcomes to occur by releasing those who breach on bail.⁶⁵ Actually, it is not so much minimising as an inability to look at the 'big picture' through the victims' kaleidoscope. Instead, the breach is perhaps being compared to a male standard of a one-off assault that stands by itself.

The existence of domestic violence legislation, then, as concluded in recent Queensland research:⁶⁶

Arguably then, the effect of domestic violence legislation has been to separate 'intimate partner' violence out from other forms of assault. The repositioning of violence between intimate partners within the private, less publicly accountable sphere has been to subtly construct it against the 'more serious' categories of criminally vilified violence. Violence between intimates can now be legitimately examined in a different light to criminal matters and different assumptions and rules are applied to the way it is dealt with. The construction of domestic violence as a counter poise to 'more serious' forms of violence illustrates the continuing relevance of gender to the issue.

C *In the Context of Defining Provocation or Self-Defence*

Through a variety of lenses, then ...

... many solicitors, judges and/or juries do not possess the requisite knowledge of the dynamics of domestic violence to be in any position to judge the availability of the defence generally and its applicability in the particular case.⁶⁷

⁶⁰ H Katzen 'It's a Family Matter, not a Police Matter: The Enforcement of Protection Orders' (2000) 14 *Australian Family Law Journal* 119.

⁶¹ Ibid 138-39.

⁶² Department for Justice, above n 48 66 found that in Victoria, 1993, bail was granted in 76% of the breaches.

⁶³ *The Taskforce Report on Women and the Criminal Code* (2000) 11-112. One possible solution suggested was to enact a specific domestic violence assault offence.

⁶⁴ A Matheson, 'Stalking', *New Woman*, July 1997, 82.

⁶⁵ Some of these cases, such as Andrea Patrick's murder in 1993, receive a great deal of media coverage in part because they were preceded by a lengthy period of stalking, protection orders and breaches. See W Owens, 'Beaten, stalked, and then murdered', *Sunday Telegraph*, 12 March 1995, 4.

⁶⁶ Douglas and Godden, Above note 44, 19.

⁶⁷ S Kift, 'Defending the Indefensible: The Indefatigable Queensland Criminal Code Provisions on Self-Defence' (2001) 25 *Criminal Law Journal* 28.

In their judgments of women who have killed a violent partner, judges sometimes use phrases like ‘marital problems’,⁶⁸ ‘matrimonial discord’,⁶⁹ ‘domestic dispute’,⁷⁰ ‘difficult relationship’⁷¹ and ‘stormy’ relationship’⁷² to summarise antecedents (such as extreme jealousy, possessiveness, threats to kill with sharp instruments or guns, and much physical abuse such as violent beatings, punching, poking, prodding) to the homicide. These ‘umbrella’ labels trivialise even the most horrific acts of violence. They each neutralise the role of the perpetrator allocating responsibility to all parties.

When the events preceding the homicide are constructed as spats or difficulties, it becomes difficult, or even impossible, to equate them with criminal offences of the same calibre as assaults outside the home. Without such an understanding, judges and jurors find it hard to comprehend a woman’s action of killing her violent partner as ‘reasonable’, when ‘reasonable’ has traditionally been interpreted through a dominant framework. Thus, in numerous cases, one finds judges remarking ...

... [however] even in situations of acute domestic violence, the community cannot condone the extreme measure of the killing of the aggressor party. ... It cannot be accepted that the victim may take the law into her own hands to the extent of extinguishing the life of another.⁷³

This denial of the seriousness or the effects of the precipitating violence was evident when in sentencing Lynette Vandersee to a minimum term of five years imprisonment, the judge stated that the degree of provocation ‘should be assessed as medium, rather than great.’⁷⁴ He iterated that the dead man ...

... had sought to control and dominate the defendant and used cruel and abusive language to the prisoner... made cruel comments about her alleged lack of intelligence and about her physical appearance ... smacking her legs and buttocks with a ruler, pinching her, lightly punching her in the stomach or arm, twisting her nipples and requiring her to have sexual intercourse with him, when she was unwilling, indicating that he was using the prisoner for his own sexual relief.

However, although the judge goes on to acknowledge that these actions were ‘humiliating and distressing’ for the defendant, he seems to be unaware of how the bizarre becomes normalised in a violent home, and is more impressed with the defendant’s own trivialising of the violence in her interview with police. ‘They (the violent acts) had been regarded by the prisoner primarily as psychological abuse, rather than as physical violence.’

Other (apparent from reading judgments) perceptions of domestic violence make it difficult for judges to assess its existence as leading to an act of self-defence or even

⁶⁸ *R v Bobach* (Unreported, Supreme Court of NSW, Lee J, 11 November 1988).

⁶⁹ *R v Broadrick* (Unreported, Supreme Court of NSW, Hunt J, 31 August 1988).

⁷⁰ *R v Simington and Saunders* (Unreported, Supreme Court of NSW, Loveday J, 4 November 1988).

⁷¹ *R v Osland* (Unreported, Supreme Court of Victoria, Hedigan J, 12 November 1996).

⁷² *R v McIntyre* (Unreported, Supreme Court of NSW, McInerney J, 15 March 1996).

⁷³ Particular quote from *R v Taylor* (Unreported Supreme Court of South Australia, Olsson J, 16 June 1993) 14. For similar comments, see *R v King* (Unreported, Supreme Court of NSW, Studdert J, 13 August 1998); *R v Melrose* [2001] NSWSC 847 revised (Unreported, McClellan J, 14 May 2002).

⁷⁴ *R v Vandersee* [2000] NSWSC 916 revised (Unreported, James J, 15 November 2000).

provocation. Another example - *R v McIntyre*⁷⁵, Justice McInerney said, 'She was free to leave at any time'; a viewpoint that disregards the power of emotional abuses to erode self-esteem and the other dynamics that contribute to making it very difficult for the woman to escape.

There may also be a failure to understand why the killing did not take place immediately following an attack. In *R v Vandersee*,⁷⁶ Justice James highlighted the period of time that 'elapsed between the last provocative conduct on the part of the deceased before he went to bed and the killing of the deceased.' However, as Stubbs and Tolmie⁷⁷ note, such a view of the victim's perception of threat is ...

...(W)holly inappropriate because the danger that women who are habitually and seriously abused face is not so much embodied in a single attack as in the day to day experience of living under continuous threat.

D In the Context of Marital Rape

Since 1981, Australian jurisdictions have struck down the immunity of husbands from prosecution and a license to rape.⁷⁸ However, very few rapes in marriage make it to court. As mentioned earlier, part of the reason is non-reporting. Yet, even if the victim who is still cohabiting with her perpetrator does report, one suspects from both the virtual absence of these cases (particularly those in which the couple are still cohabiting), plus from comments in which recent consensual sex casts doubt upon the legitimacy of the act as a rape, that the court's ability to construct rape within cohabitation remains highly problematic.

Given that the last of those occasions [reconciliation] was only a month or so before this offence took place, it might not be possible to say that the relationship was then obviously at an end. The respondent probably hoped to repair the rupture and resume living with his wife ... However, the fact was that the parties were living apart, and this cannot be explained as the case of a husband losing his self-control during the continuance of the cohabitation.⁷⁹

Rape is equated with sex and male sexuality as irrepressible plus the underlying premise appears to be that if the victim had engaged in consensual sex with her ex-partner the day before or in the recent, any future act would be difficult to define as rape.

Looking at the issues of prosecution incidence, consent, and sentencing, one wonders if attitudes about husband's so called conjugal rights, are changed or changing.

⁷⁵ *R v McIntyre* (Unreported, Supreme Court of NSW, McInerney J, 15 March 1996) 22.

⁷⁶ *R v Vandersee* [2000] NSWSC 916 revised (Unreported, James J, 15 November 2000).

⁷⁷ J Stubbs and J Tolmie, 'Battered Woman Syndrome in Australia,' in Julie Stubbs (ed), *Women, Male Violence and the Law* (Federation Press, 1994) 196.

⁷⁸ *Crimes Act 1900* (ACT) s 92R; *Crimes (Sexual Assault) Amendment Act 1981* (NSW); *Criminal Code* (NT) s 192 as amended in 1994; *Criminal Code* (Qld) s 347 as amended in 1989; *Criminal Law Consolidation Act Amendment Act 1992*; *Criminal Code* (Tas) s 185(1) as amended in 1987; *Crimes Act 1958* (Vic) s 62(2) as amended by *Crimes Act Amendment Act 1985* and *Crimes (Sexual Offences) Act 1991*; *Criminal Code 1913* (WA) s 325 was repealed by Act No. 74 *Acts Amendment (Sexual Assault) Act 1985*.

⁷⁹ *DPP v Cowey* (Unreported, South Australia Criminal Court of Appeal, Cox, Prior, Lander JJ, 18 July 1995).

There are special difficulties in reaching a just verdict where the rape or attempted rape is alleged to have occurred in the matrimonial bed or the bed of parties to a continuing sexual relationship. There is the risk of motives, disclosed or undisclosed, arising out of tensions in the relationship. There is the risk of misunderstandings as to consent arising out of the habitual physical contact inherent in the relationship. The opportunities for corroboration are slight and an accused can do little to defend himself apart from denying the allegation.⁸⁰

As a consequence of these values, the cases that are prosecuted are only representative of the most violent (estranged) marital rapes and do not reflect many women's experience of coercion. Neither the language nor the legal interpretation of consent correspond with the victim/women's reality nor capture the range of coercive behaviours such as interpersonal intimidation that involves threats that are not only physical.

E In the Context of Immigration Law

A similar failure to appreciate the complex dynamics and effects of domestic violence can be seen in immigration law. In the early 1990s, remedies were enacted to ameliorate the plight of women who migrated to Australia as the fiancé or spouse of an Australian citizen who then abused them and acted to have them denied permanent residency if they left the violent home.⁸¹ These reforms enabled such women to apply for permanent residency if they could show a restraining order, a *Family Law Act* injunction or a court conviction or finding of guilt against the sponsor for assault.

Modified in 1995 to broaden the means of establishing that violence had taken place,⁸² the Regulation added 'acceptable evidence that violence has been suffered' to the other means of proof. 'Acceptable evidence' had to consist of a statutory declaration by the person who had experienced the violence and two by 'competent' people (or one declaration by a 'competent' person and a police record of assault). The two 'experts' stat decs must be from different categories or occupations such as doctors, psychologists plus women's service staff like the coordinator of a woman's refuge. *Du*⁸³ has been cited over the last two years to uphold the principle that the expert must not just note consistency between a person's presentation and their account of domestic violence, or even the occurrence of domestic violence but that the competent person must...

express an opinion in very specific terms, namely, as to whether relevant domestic violence as defined in regulation 1.23 has been suffered by a person. ... This involves not only an opinion that past acts of violence have occurred but also an assessment of the state of mind of the alleged victim.

⁸⁰ Case stated by the SA DPP (No 1 of 1993) per CJ King.

⁸¹ Enacted in 1991. S Bowrey, 'Immigration: Domestic Violence Amendments in Practice' (1992) 24 *On The Record*, 12; M Mottee 'Immigration law and women in domestic violence situations' Women in Migration Conference 6 (1992) *BIR Bulletin* 11.

⁸² D Hansen and M Le Sueur, 'Separating Mothers and Children: Australia's Gendered Immigration Law and Policy' (1996) 21 *Alternative Law Journal* 203. See *Migration Regulation Amendment 1995* (Cth) No 117, Schedule 1, Regulation 5, Division 1.5, ss 121-127, special provisions relating to domestic violence.

⁸³ *Du v Minister for Immigration and Multicultural Affairs* [2000] FCA 1115 (Unreported, Mathews J, 2 August 2000).

Obtaining this degree of specificity can be problematic even for women who have sought help, and more so for those unable to obtain professional assistance due to their fear, shame and lack of access to services. Further, the 'stat dec' process is only available if an actual visa application has been made. According to one lawyer I interviewed who had worked for numerous years on these matters, some men only obtain one visitor or fiancé visa for the woman and do not make a second application. Thus, she unwittingly becomes an illegal immigrant. A sponsor may also allege that the woman only married him for a visa. In at least one case that the solicitor had been involved with, such an allegation was weighted more heavily than the history of violence and the woman's visa was cancelled.⁸⁴

Another obstacle is a narrower definition of domestic violence than that experienced through the victim's kaleidoscope. Unlike some other areas of law, certain types of emotional abuse do qualify for the label 'domestic violence'; however, they must be considered by tribunal members to have been serious enough to cause fear or apprehension for the individual's personal well-being or safety. *Malik*⁸⁵ is cited in many of the post-2000 relevant cases as further delineating the boundaries of serious emotional abuse as excluding acts that just have the 'effect of causing diminution of a person's feeling of well being'.⁸⁶ Thus, in *Wright*,⁸⁷ the hearing officer included emotional deprivation, financial deprivation and manipulation since their effects extended beyond reduced 'well-being' and caused fear or apprehension. And in *Kularatne*,⁸⁸ the tribunal found that the sponsor's hostile conduct, such as raising his voice, refusing to let his partner out of the house, threatening to end the relationship and her fear of physical violence if she argued with him did constitute domestic violence since they caused the woman to suffer 'fear or apprehension about her personal well-being and safety.'

F In the Context of Social Security

For a substantial proportion of females alleged to have committed social security fraud, their 'conjugal condition' (living with a member of the opposite sex on a *bona fide* domestic basis) was the basis of the charge.⁸⁹ Social security officers (and tribunal members) are supposed to consider the financial aspects of the relationship, the nature of the household, the social aspects of the relationship, sexual relationship and the nature of the commitment.⁹⁰ How these aspects of 'conjugal' relationship are defined is of course subjective; indeed, some believe that the cohabitation rule is capable of arbitrary and capricious application.⁹¹

⁸⁴ In early 2001, in order to up-date material for *Less than Equal*, I held informal interviews with several legal practitioners who possess specific expertise on this type of case.

⁸⁵ *Malik v Minister for Immigration and Multicultural Affairs* [2000] FCA 562 (Unreported, Wilcox J, 19 April 2000).

⁸⁶ See for example, *Helmsesi* [2002] MRTA 5231 (Unreported, Megan Hodgkinson, 8 November 2001) in which the Tribunal accepted that the woman was stressed and unhappy but did not see how the sponsor's conduct would have caused fear.

⁸⁷ *Wright* [2001] MRTA 6123 (Unreported, Deborah Morgan, 20 December 2001).

⁸⁸ *Kularatne* [2000] MRTA 1780 (Unreported, David B Mitchell, 27 June 2000).

⁸⁹ 38.2% from July 1996 through June 1999. From data provided to the author by The Department of Family and Community Services (FaCS) Risk, Audit and Compliance Branch for Chapter 4 in P Eastal, *Less Than Equal* (Butterworths, 2001).

⁹⁰ The *Social Security Act 1991* (Cth) changed with the addition of ss 3A and 4(3).

⁹¹ M Wilkie, *Women Social Security Offenders* (University of Western Australia, Crime Research Centre, 1993) 115.

Violence translated into duress can very much affect the circumstances of so-called 'cohabitation'. Not only might the violent partner not be contributing financially but in cases of economic exploitation, the victim may be compelled, under the psychological chains manifest in this type of relationship, to stay and sometimes, to support him. As we have seen though, the dominocentric kaleidoscope does not consistently perceive the pressures that are operating on the victim to remain in the dwelling with the abuser. Thus, despite their discretion⁹² to treat a person who is legally married to another and not living apart from that person as not being a member of a couple, the Social Security Tribunal and/or the Administrative Appeals Tribunal may respond as they did in the following cases with the underlying presumption, that despite violence, the 'unit' still constituted cohabitation.

In *Bruce*,⁹³ the applicant argued that there was no over-payment since she had not actually been a part of a 'couple' although she had lived with her husband and gone out socially as a 'couple.' She recounted years of no emotional support, extreme possessiveness, physical violence, and death threats towards her and her children (if she left), police intervention, restraining orders and breaches. In addition, her 'partner's' intermittent income went towards his alcohol and gambling problems. Her major argument was duress: that she felt little choice in presenting as a couple or in having a sexual relationship - the latter taking place mostly against her will or because she would 'give in just to get a bit of peace and quiet'. For Ms Bruce, their living together was a 'situation' rather than a 'relationship'.

The Tribunal did find in her favour but the decision was *not* based upon the merits of her argument that financial aspects, a sexual relationship and social factors must be considered in the context of the abuses and unhappiness⁹⁴ but rather upon the applicant's financial circumstances and the prospects of recovery of the debt.

In *Watson*,⁹⁵ an over-payment was the result of the violent husband earning additional wages unreported by his wife. The Administrative Appeals Tribunal, at one level, acknowledged the severe psychological and physical violence, requiring hospitalisation and police intervention and death threats towards the woman and the children but it still upheld the Social Security Appeals Tribunal's decision that this battered Filipino woman was responsible for a debt of overpayment of partner newstart and parenting allowances. Her representative (unsuccessfully) argued that due to the fear for her life and her children, June Watson was not in a position to do anything about reporting his work and change of income.

The Applicant replied that she did not know how to report to Centrelink. She added that her husband was '*a very dangerous man*' and that she '*developed being scared*'. It was like '*living in a cage*' as he was physically violent over small things.

⁹² *Social Security Act 1991* (Cth) s 24(1).

⁹³ *Bruce v SSAT*, Perth, 15 September 1995, November 22, 1995, March 11, 1996.

⁹⁴ A similar lack of perception of domestic violence as vitiating the definition of a defacto relationship can be found in other cases such as *Williams v Secretary, Department of Social Security*, [1997] AAT No 11793A (Unreported, TE Barnett and Y Haslam, 2 July 1997).

⁹⁵ *Watson and Secretary, Department of Family and Community Services* [2002] AATA 311 (Unreported, N Isenberg, 6 May 2002).

She also alleged that their relationship involved continual arguments about money and that she did not know when and if he received additional salary since there was never any money.

Thus, duress induced by violence can play another distinct role in the context of social security fraud. Besides forcing the woman to remain in the relationship, the batterer can force her 'through physical bashings and threats' to continue to receive payments. Taking the unusual step of introducing experts to testify about the effects of domestic violence, Shirley Stephenson⁹⁶ was acquitted of seven counts of imposing upon the Commonwealth, contrary to s 29B of the *Crimes Act 1914* (Cth) by obtaining two unemployment benefits and rent assistance (\$45,000) from the Department of Social Security when she was employed. The matter was defended on the basis of duress. Her defence was able to match Shirley Stephenson's behaviour against the standard or test of whether 'an average person of ordinary firmness of mind, of like age and sex, in like circumstances, involving like risks in respect of the alternatives open, would have availed herself of the opportunity in question'.⁹⁷

G *In the Context of the Family Court and Children Matters*⁹⁸

In the Family Court, traditionally, the effects of witnessing and/or the correlation of violence towards a partner with that directed at children have not been understood as illustrated in Justice Murray's comment in *Heidt*:

... there is no suggestion that Mr Heidt has ever mistreated his children with the violence with which he has treated his wife. ... Mr H's affection for his children is evident, and in assessing his potential as a custodial parent I have largely disregarded his behaviour as a husband.⁹⁹

The mid-1990s evidenced some judicial recognition that spousal violence could be a risk to children's emotional development:¹⁰⁰

For children to grow up in a climate of potentially violent and dominating relationship between their parents seems to be to be an unacceptable model of family relationships, and would be very likely to create a situation of stress and fear that may well be damaging over a period. It is quite wrong, in my opinion, to assume that violence can be relevant only if it is directed at the children or takes place in their presence.¹⁰¹

Such more attuned to the victims' kaleidoscope-type comments from the Full Court and from individual judges¹⁰² though have not stopped others from continuing to minimise

⁹⁶ In *Winnett v Stephenson* [1993] ACT Magistrates Court (Unreported, 19 May 1993).

⁹⁷ *R v Lawrence* (1980) 11 NSMR 122, 143.

⁹⁸ There are other matters that relate to domestic violence and family law that are not discussed in this section including property settlements and tortious action. See J Behrens and K Bolas, 'Violence and the Family Court' (1997) 11 *Australian Journal of Family Law* 164-166, 175-178.

⁹⁹ *Heidt* (1976) FLC ¶90-077 (Murray J).

¹⁰⁰ *Jaeger and Jaeger* [1994] FLC Full Court Appeal No. EA 74 of 1993 No PA3795 of 1990 (Unreported, Fogarty, McCall, Finn JJ, 21 March 1994); *Patsalou and Patsalou* (1994) FLC Appeal No NA23 of 1994, File No DN743 of 1993 (Baker J with whom Kay and Tolcon JJ agreed, 27 October 1994).

¹⁰¹ *JG and BG* (1994) Fam LR 261 (Chisholm J).

¹⁰² In *M v M* (2000) FLC 93-006, Justice Mullane ordered no contact in other than the short term because 'the father's abusive behaviour presents a multi-faceted danger to the children in that there

spouse assault in residence, contact and specific orders as shown in other more recent appeal courts' summaries of first instance judgements. Some judges are still finding that the violence was 'somehow a product of the relationship between the parties rather than of the husband's personality',¹⁰³ an exaggeration of a histrionic woman¹⁰⁴ or describing pushing or hitting with an open hand which sometimes resulted in bruising to her face and body as 'of a relatively minor nature and do not appear to be part of any long term strategy on the part of the husband to cause harm to the wife or to the children ...'¹⁰⁵ And, post the 1995 reforms discussed next, one still hears judicial comments like those in *Heidt* that entirely negate the effects of witnessing:

Although there have been allegations made by the wife of violence perpetrated upon her by the husband, culminating in the vicious assault upon her on 28-29 December 1996, there is no evidence to suggest that the husband has behaved inappropriately towards the children, or exhibited any violence towards them.¹⁰⁶

A higher profile for abuse issues was reflected in statutory law with the enactment in late 1995 of the *Family Law Reform Act 1995* (Cth). Now specified as a factor relevant to decisions made about the 'best interests of the children',¹⁰⁷ the need to ensure safety from family violence was now stated as one of the guiding policy principles.¹⁰⁸ However, while the Act states that DV is a relevant factor in making orders what has not been outlined is *how* it should be taken into account. Further as Behrens emphasises, the assessment of 'best interests' is an indeterminate process:

There is an attempt in the legislation to give the best interests standard some content. One way in which this occurs is through the mechanism of a checklist of factors (s 68F(2)) ... it leaves a fairly broad discretion. The checklist does not, for example, exclude particular outcomes. Nor is any priority of factors indicated. The normative content of the list consists largely of hints- nothing stronger. For example, paragraph (b) requires the decision-maker to examine the nature of the relationships involved, but does not indicate what kinds of relationships are to be valued. There is a paragraph at the end of the subsection that enables consideration of 'any other fact or circumstance that the court thinks is relevant'.¹⁰⁹

The *Family Law Reform Act 1995* (Cth) also emphasised parents' ongoing 'parental responsibility' for children in the best interest list and the objects (s 60B (1) and principles (s 60B (2) provisions. A focus on (a theoretical) shared parenting and the reform's emphasis on private agreement (with mediation that is often inappropriate given the power inequities)¹¹⁰ as the bases for decision-making about the children, are

is the risk of injury and fear, and the risk that the children will learn from the abusive behaviour and ultimately treat it as acceptable.'

¹⁰³ *Blanch & Blanch & Crawford* (1998) 25 Fam LR 325.

¹⁰⁴ In *T and S* (2001) 28 Fam LR 342, the Full Court (Nicholson CJ, Ellis and Mullane JJ) upheld her appeal and ordered a new trial. Discussed further below.

¹⁰⁵ *A and A and The Child Representative* [1998] Fam CA 25 (Fogarty, Kay and Brown JJ, 2 April 1998).

¹⁰⁶ *Ibid.*

¹⁰⁷ *Family Law Act 1975* (Cth) ss 68F (g), (i), (j).

¹⁰⁸ *Family Law Act 1975* (Cth) s 43.

¹⁰⁹ J Behrens, 'The Form and Substance of Australian Legislation on Parenting Orders: A Case for the Principles of Care and Diversity and Presumptions Based on Them' (2002) 24 *Journal of Social Welfare and Family Law* 404.

¹¹⁰ H Astor, *Guidelines for Use if Mediating in Cases Involving Violence Against Women* (Australian Government Publishing Service, 1992).

likely to disadvantage survivors of violence and provide a violent partner with opportunities to exert power¹¹¹ and enable further abuse of the woman/mother and /or the child(ren).¹¹²

Rhoades, Graycar and Harrison¹¹³ suggest that the ‘violence’ reforms have made little or no difference and are counteracted by the pro-contact provisions. Their research found an increased reluctance by judges to refuse contact with a parent with Orders suspending contact rarely being made at interim hearings since 1996. At final hearings, the number of no contact orders has not changed which means that children are spending time in potentially unsafe situations.

Given the relative heavy weighting of shared parental responsibility, consistency between family violence orders and contact orders can be a problem despite s 68K which ‘requires (subject to best interests!) that the court ensure the order is consistent with a family violence order and does not expose a person to an unacceptable risk of family violence.’¹¹⁴ If there is inconsistency the order made under the *Family Law Act 1975* (Cth) prevails.¹¹⁵ Thus, contact conditions can make enforcement of a civil protection order difficult. In one NSW report, women reported that when they turned to the police for breaches of AVOs, the officers on occasion had advised them that there had not been a breach, as contact was permitted by the order through a pro forma condition, which allowed the defendant to contact the protected person for the purpose of arranging, or exercising contact with the children as ordered by the Family Court.

Even with the phone calls, because I don’t have an AVO which says no contact, they can’t even enforce the court order . . . the only recourse I have is to go back to court, and say he is not doing that.¹¹⁶

The situation for women in the Family Court was made worse in 1996 when the federal government slashed \$100 million from Legal Aid over three years. Thus in *T and S*¹¹⁷ the mother had to represent herself for five of the first six days of the hearing since legal aid was withdrawn after the interim hearing. She had to cross-examine the man who had victimised her. Although she had counsel when the trial resumed, the Judge did not accept her evidence of domestic violence and found much of her affidavit evidence inadmissible. She lost residency of the two-year-old son and received specified contact.¹¹⁸ The Full Court upheld her appeal and ordered a new trial with Chief Justice Nicholson stating:

This case highlights the fact that, as also occurs in the area of criminal law, women who have suffered serious domestic violence may be unable to present their cases unaided in

¹¹¹ Critique is drawn from J Behrens, ‘Ending the Silence, But ... Family Violence Under the Family Law Reform Act 1995’ (1996) 10 *Australian Journal of Family Law*, 35.

¹¹² Brisbane Women’s Legal Centre, *An Unacceptable Risk* (2000).

¹¹³ H Rhoades, R Graycar and M Harrison, *The Family Reform Act: The First Three Years* (University of Sydney and Family Court of Australia, 2000).

¹¹⁴ Behrens, above n 108.

¹¹⁵ *Family Law Act 1975* (Cth) s 68S. If a s 68R contact order is inconsistent with a family violence order, the s 68R contact order prevails and the family violence order is invalid to the extent of the inconsistency.

¹¹⁶ Katzen, above n 59, 134.

¹¹⁷ *T and S* (2001) 28 Fam LR 342.

¹¹⁸ *Ibid.*

family law proceedings. The present legal aid system does not appear to be able to cope with these problems.

V SLOW RE-FOCUSING?

Adopting a holistic approach to law and society, one is aware that the best of reforms are limited in their capacity to allow the victims' kaleidoscope given the prevailing dominocentrism of the courts and indeed the other structures and values of Australian society such as the public/private dichotomy, gender division of labour and gender power inequity.

Perhaps though (to be an optimist), it is just a question of time. In each of the areas of law that we have briefly looked at, there have been some positive outcomes for victims with random 'enlightened' cases or comments. For instance, I accessed the first 30 cases with a female applicant and domestic violence on AustLII Migration Review Tribunal database and found that a high proportion of those turned down by DIMA who appealed were successful. In 25 (83%) the Member sent it back to DIMA for reconsideration.¹¹⁹

In the Family Courts, as shown in *T v S*¹²⁰ and *Blanch v Blanch and Crawford*¹²¹, the Full Court appears to be allowing appeals based on the trial judge's treatment of domestic violence. In the latter, the Full Court allowed an appeal by the wife partly on the basis that the trial judge had failed to deal adequately with serious issues of domestic violence. Specifically, he had failed to recognise the range of offences:

There was no consideration in any detail of extensive allegations of a pattern of abusive behaviour by the father over a prolonged period by way of assaults on the mother, damage to property as expressions of anger and verbal and emotional abuse of the mother.¹²²

The initial judge also had not addressed the potential effects upon the children:

The other aspects of his Honour's treatment of this issue which I find less than entirely satisfactory are his apparent perception of it's relevance to the overall welfare of the children, and his assessment that the husband's violence towards the wife was a product of the marital relationship rather than of the husband's personality... A risk of at least equal if not greater significance is that referred to by both Baker and Chisholm JJ in the passages from their respective judgments in *Patsalou* and *JG and BG* which I previously quoted, namely the risk to the children's emotional development arising from growing up in a violent household under the tutelage and influence of a violent parental role model.¹²³

And, in the area of domestic violence legislation and its somewhat erratic implementation by police and magistrates, integrated models may be the answer. These programmes, involving a consistent coordination of police, court staff and human

¹¹⁹ See for instance, *Coad* [2001] MRTA 0943 (Unreported, Eftimiou, 12 March 2001); *Wallis* [2001] MRTA 2683 (Unreported, Fadjar, 19 June 2001); *Montgomery* [2000] MRTA 1174 (Unreported, Fadjar, 16 May 2000); *Lepinzan* [2002] MRTA 579 (Unreported, Morgan, 31 January 2002); *Berriman* [2000] MRTA 3387 (Unreported, Hunt, 25 October 2000).

¹²⁰ *T and S* (2001) 28 Fam LR 342.

¹²¹ *Blanch v Blanch and Crawford* (1998) 24 Fam LR 325.

¹²² *Ibid* Mullane J.

¹²³ *Ibid* Lindenmayer J.

service providers, include developing a shared philosophy and set of protocols, training of police and other key players, networking, monitoring, evaluation and provision of services for victims and perpetrators with penalties for the latter if they do not cooperate.¹²⁴ Some examples of applications in Australia include Armidale, Western Australia, Logan and the Gold Coast in Queensland and the ACT. A recent evaluation of the last – the ACT Interagency Family Violence Intervention Program¹²⁵ showed that over the two years that the integrated model had been operating, there were increases in the number of: family violence cases commenced and completed during a 12 month period, matters finalised by way of an early plea of guilty without the police being required to produce a full brief of evidence and in number of defendants convicted.

Certainly the ACT Program has shown a dramatic difference in attitudes between officers who, had participated in special training sessions. They were more likely to disagree (68%) that victims who stay with their violent partners have only themselves to blame. This compared to only 12% of the non-trained officers. More than half (56%) of those who had been specially trained disagreed that ‘Spousal assault is often the result of provocation by the victim’. This contrasts markedly with the 61% of untrained who agreed with the assertion.¹²⁶

This confirms that police, like the other gatekeepers, are not immune from enculturation. Education can play an important role in affecting attitudes but needs to be provided on an on-going basis. Such programming is a necessary small step in the journey towards recognition of biases in perception of violence against women. As I state elsewhere:¹²⁷

Thus, the ability to question fundamental assumptions about the law and yet be heard by those who retain these assumptions as basic mirrors within their kaleidoscope must remain, I am afraid, somewhat of a challenge. Most of those implementing the laws and also those who dominate the practitioner and academic fields who read feminist analyses will therefore place them within their traditional lenses of truths. Paradoxically then, those presenting law from a feminist perspective are almost doomed to be as silenced as the victim of violence in the court. Only the already ‘converted’ have the kaleidoscope lenses that can see past or through the distortion of conventional knowledge.

It is indeed a classic conundrum of the ‘box inside of the box.’

¹²⁴ E Pence and M Shepard, ‘Integrating Feminist Theory and Practice: The Challenge of the Battered Women’s Movement’ in K Yllo and M Bograd (eds), *Feminist Perspectives on Wife Abuse* (Sage Publications, 1988); R Busch, ‘Hamilton Abuse Intervention Pilot Project’ *Challenging the Legal System’s Response to Domestic Violence Conference Papers* (1994) and in the same proceedings, M Paymar, ‘Duluth-An Integrated Model: Working Together to Stop Violence Against Women.’

¹²⁵ Urbis Keys Young, above n 47

¹²⁶ Ibid 33-34.

¹²⁷ Easteal, above n 3, 229.