

*The
Implications
of Victim-oriented
Developments in
the Criminal
Justice System for
Female Victims*

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This paper focuses on a number of victim oriented developments which impact on women in particular. The feminist movement has been identified as influencing the shift in focus from the offender to the victim along with such factors as a disillusionment with rehabilitation, victim surveys, the increased tendency of both the left and the right to take crime seriously and the push to reconnect the community with the response to crime.

The feminist influence has been considerable.

- At a theoretical level the public/private dichotomy has been explored to determine how it has been constructed and supported by the legal system to the detriment of women. This is of particular relevance in the area of criminal justice where it challenges the classic liberal position which upholds freedom of choice and action in matters of private morality and contests the assertion that it is not the role of the criminal law to

intervene in the private sphere. The implications for this in areas of domestic violence, marital rape, prostitution and pornography have been highlighted and the need to abandon the concept of private as a zone of non interference stressed.

- At a practical level, the exposure by feminists of the position of victims of rape, domestic violence and child sexual assault has been addressed by changes in the substantive and procedural law of rape; by pressure for recognition of battered wives syndrome; by increased police powers and new forms of injunctive relief such as domestic restraint or apprehended violence orders; and by changes to evidentiary and procedural laws which have sought to improve the position of child witnesses. In these three areas feminist critiques have informed and shaped the debate on law reform (Egger 1994). They have challenged the idealised view of general doctrinal principles and the focus on the offender and the offender's rights.
- Reviews of the regulation of prostitution have been informed by feminist perspectives.
- Some feminists support developments such as mediation of disputes outside the formal justice system on the ground it provides a way for women's voices to be heard, whereas the formal system reinforces the power of the state and dominant groups. The development of the system for resolution of discrimination disputes provides the victim with a means of resolving allegations which can involve criminal conduct in an informal, confidential and sensitive setting with a restorative rather than a punitive focus.
- Feminists' attention to victims has also influenced other theoretical shifts relevant to a more victim oriented criminal justice system, as discussions of left realism acknowledge (Hogg 1988).

Rape and Sexual Offence Law Reform

Feminist agitation for legislative change has been highly successful. The substantive law of rape has been modified to extend the definition of sexual intercourse to include penile penetration of the mouth, and in some jurisdictions penetration of the vagina or anus by parts of the body other than the penis and by inanimate objects. The immunity of husbands from prosecution for rape has been abolished in most jurisdictions together with the irrebuttable presumption that a male under the age of 14 is incapable of penetration. Statutory definitions of consent have sought to extend the boundaries of rape and clarify the line between rape and lawful sexual intercourse. Recent reforms in Victoria have adopted the Wisconsin approach and placed more emphasis on the need for consent to be communicated in an overt way. In some jurisdictions an alternative approach has been adopted. Rather than requiring the prosecution to prove absence of consent, in Michigan and Illinois the prosecution is required to prove that sexual

penetration occurred in coercive circumstances. In many jurisdictions the laws of evidence have been altered by removing the requirement of corroboration or corroboration warnings in every case. Judges are required to explain to the jury that delay in complaining does not necessarily reflect on the credit of the complainant. Courts are to forbid questions and exclude evidence pertaining to the general reputation of the complainant as to chastity and evidence of the sexual history of the complainant with persons other than the accused is admissible only with the permission of the court if it is relevant to the issues in the case. The campaign in Victoria by feminists and womens groups which led to the enactment of the *Crimes (Rape) Act 1991* was a particularly sophisticated and effective campaign which achieved a number of significant changes not previously favoured by the Law Reform Commission of Victoria (Egger 1994).

These reforms were implemented in the hope that police would be more receptive, the prosecution more sympathetic, judges more sensitive, that myths would be exposed and the definition of what is 'real rape' would change. The result would be increased reporting, less trauma for complainants in the court process, a higher conviction rate, and less rapes. In Michigan and Illinois, replacing the concept of without consent with that of 'coercive circumstances' would reduce the emphasis on consent in rape trials.

Effect of Reforms

How successful have these reforms been in changing reporting and charging practices, trial outcomes and underlying social behaviour?

The empirical evidence, such as it is, suggests limited success. There is no evidence that the prevalence of rape is decreasing. While it is not possible to make reliable estimates of the incidence of rape per se, crime victims surveys appear to show no change in incidence for sexual offences from 1982-83 to 1990-91 (Walker 1994). While the number of rapes reported to the police and the reporting rate per 100 000 population have increased dramatically (Walker 1994), many victims still do not report (Walker & Dagger 1993, p. 19; Australian Bureau of Statistics 1992). The common experience of complainants remains traumatic (Law Reform Commission of Victoria 1991, pp. 120-5). Some judges allow irrelevant facts to influence their sentencing discretion (*Reg v. Hakopian*, Jones, J., Supreme Court Victoria, 8/8/1991).

In Michigan, research has found that even though the statute makes no reference to consent, in practice this has remained a key issue in many rape trials. A large proportion of judges, prosecutors and defence attorneys consider that under the new law it is still essential for the prosecution to establish the victim's lack of consent (Law Reform Commission of Victoria 1991, p. 16). Moreover, the reform package did not have a major effect on reporting or arrest rates, and had only limited impact on prosecution practices and trial outcomes.

In Victoria, a study of rape trials for the Law Reform Commission resulted in a number of important findings. There is evidence that sexual history questions are asked without a prior application to the magistrate or trial judge. In addition, complainants were found to be subjected to questioning of an offensive or prejudicial nature about matters of marginal relevance. On the issue of consent it seems that it is difficult to get a conviction in the absence of the infliction of

physical injury although the common law has long since abandoned the view that overt violence and physical resistance are necessary (Law Reform Commission of Victoria 1991, pp. 95, 101-2).

Currently in Tasmania, we are in the process of evaluating the effectiveness of the 1987 reforms. Has the new definition of consent resulted in the successful prosecution of cases that are outside the common law definition absence of consent? Early indications are not promising. For example in *Crisp v. The Queen* (Unreported, Serial No. A 74/1990) the Court of Criminal Appeal considered the provision which states that a consent is freely given when it is not procured by reason of the person being overborne by the nature or position of another person. The 11-year-old complainant had submitted to sexual intercourse when the accused, who was her foster parent, said he would get aches and pains if she did not submit. His appeal against conviction was allowed. The Court of Criminal Appeal observed that 'at no stage did the complainant say that she did not give her consent to this act of intercourse at any time while it was occurring'.

Trying to get the public, men, judges, and juries to think differently about what constitutes rape is very difficult. To get them to consider the issues without being prejudiced by irrelevant factors about the complainant is difficult. To get them to see that heterosexual intercourse can be coercive when there is no violence or struggle is very difficult. To get them to see that it can be coercive when the complainant appears to communicate agreement is even more difficult. The reason being that in a patriarchal culture distinctions between rape and consensual sex are constantly blurred. Because of the substantive inequality between the sexes, agreement to heterosexual intercourse is often the result of social, economic and cultural pressures. And when coercion is eroticised as it is in our culture, it is difficult to know when consent is free. The male version of consent dominates and it is difficult for the women's version to be accepted. This is important in relation to at least two issues in rape law; the issue of consent and the issue of the mental element. A recent Tasmanian case, *Parker v. The Queen* (Unreported Serial No. A 57/1994) illustrates the difficulty in having a woman's version of what is rape accepted. The accused was separated from his defacto wife after a stormy relationship in which violence and reconciliation were the pattern. He went to the house one evening and heard the complainant in bed with another man. He returned early next morning and when he could not get in, he broke a glass panel in the door and unlocked it. The complainant was trying to ring the police when the accused entered with a gun. He took the telephone and hung it up. With a strong grip on her throat, he propelled her backwards causing her to strike her head causing a superficial laceration to her scalp which bled. She fell to the floor and when she looked up the prisoner was pointing the shotgun at her. The gun was loaded. The complainant believed she was going to be shot and curled up into a ball waiting for it to happen. He then directed her to go the bedroom. He put down the gun and told her to put on some lingerie which he handed to her and demanded that she perform fellatio on him. This was interrupted by one of the children. The complainant said the accused then acted as if everything was all right, but she was still very frightened. The accused was due in court that morning and she tried to keep him calm. She suggested that they have a shower together before he got ready for court. After the shower they

returned to the bedroom. He asked for a cuddle and she gave him one. He asked whether she wanted sex and she said she did. They had it. She said she was still frightened that he would get angry again. The gun was still on the floor. They were interrupted by a friend of the accused who came into the bedroom. Shortly afterwards a friend of the complainants rang and guessed there was something wrong. When the friend arrived the accused left and the complainant told her what had happened.

The accused was convicted of aggravated assault and rape (on the basis of oral intercourse) but was acquitted in respect of the count of vaginal rape. His defence to aggravated assault was a denial that he threatened her with the gun. He denied that oral intercourse occurred and in relation to the vaginal rape he claimed consent or at least mistake as to consent. On this charge the trial judge directed the jury that the belief had to be reasonable as well as honest. In the course of his directions he said:

... the circumstances might be such that the jury thinks that's just totally unreasonable to think that she's consenting, taking into account all the things he had done to her. It was unreasonable for him to believe that and even if he believed it we're going to disregard it because it wasn't a reasonable belief.

Notwithstanding this direction the jury acquitted: either because they were not satisfied there was no consent, or because they thought the Crown has not proved there was no reasonable belief in consent. The accused did not concede the possibility that she might not have been consenting. His view of consent and the jury's view of consent or what is a reasonable belief in consent, did not coincide with the complainant's view. This case illustrates the difficulty of the jury drawing the line between sexual intercourse and rape. From the woman's point of view her agreement was coerced. In seeking to calm him she made herself available. It was like sex with a ticking time bomb.

If it is, as Mackinnon maintains, hard to know when, if ever, consent of a woman to sex is free, what is to be done (Mackinnon 1983)? Does it mean that it is impossible to draw a line between voluntary and coerced sexual intercourse? Is it worth trying to specify what is meant by free consent in a culture where mutually desired heterosexual sex is problematic? If there is no distinction between acceptable sexual behaviour and the unacceptable then there is no legal boundary to impose. I suggest that it is worth trying to specify what is a free consent. While the boundaries are blurred they still exist. The dominant cultural view accepts some sexual intercourse is rape. It is possible to extend this view to include a wider range of sexual behaviour as real rape. Naffine (1994) points out that while the law is a crude weapon for solving social problems, it can be used to change meaning even though we may not be optimistic about the speed of change. The dominant cultural view of rape has not totally eclipsed the views of women: they do not invariably find coercion erotically pleasurable, many feel exploited and violated. By women speaking up and rejecting the dominant version, giving voice to their feelings of exploitation and violation, the dominant meaning of rape is challenged and extended, coming closer to the extended legal definition of rape which covers an increasingly wider range of violations of sexual autonomy. While extended legal definitions will be resisted and

subverted, this will generate further challenge and this continued struggle of meaning will result in change to both statutory definition and its interpretation.

Does it matter that change is difficult to achieve, that the impact of the reforms seems so small? One of the arguments in Victoria against changing the mens rea for rape from proof of lack of an honest belief in consent to proof of lack of an honest and reasonable belief in consent was that a study of rape prosecution files showed that few accused successfully argued they lacked the mental element (Brereton 1994). The common law mens rea for rape was not the green light for rapists that had been claimed. So what? Allowing a person charged with rape to be acquitted on the ground he had an unreasonable belief in consent sends the wrong signals to the community and symbolises the criminal law's general propensity to prioritise male perceptions over women's experiences. The Tasmanian requirement of a reasonable as well as an honest belief in consent in *Parker* did not lead to a conviction on the count of vaginal rape. But at least the judge could direct the jury in the way he did. The standard of reasonableness should enhance the symbolic and educational function of the law in this area. As Egger (1994) has recently pointed out, the requirement of a reasonable belief in consent does not represent the total abrogation of principle as is sometimes claimed. Modern statutory law contains many offences where liability is attached to negligent acts.

Domestic Violence Law Reform

In the area of domestic violence as well as rape, attempts to achieve legislative change have also been successful. In all States legislation has been passed to provide a more adequate statutory response (Seddon 1993). The main features of such legislation include:

- the provision of protection orders (variously called restraint or restraining orders, apprehended violence orders, or intervention orders) obtained on the civil standard of proof protecting the victim against further attacks or harassment;
- making a breach of a protection order a criminal offence and automatic grounds for arrest;
- clarification and extension of police powers of entry to a dwelling house where violence is suspected to have occurred;
- provision for the compellability of spouses as witnesses in domestic violence offences or for all criminal offences
- encouraging the laying of charges and making of applications by the police rather than requiring the victim to do so.

Public attitudes which deny or condone domestic violence have led to underreporting and under policing of a problem which is so widespread 'almost to the point of being a normal, expected behaviour pattern in many homes'

(Chappell 1990, p. 212). The laws which did exist to provide protection for domestic violence were not being used, or at least not to maximum advantage. Nor were they adequate to provide full protection for victims of such violence. Conduct such as harassment by constant telephoning or following in a car was not within the scope of the criminal law. Police powers to enter private premises when domestic violence was suspected were vague and uncertain. The new laws were designed to improve the legal response to domestic violence by making assault within the privacy of the family home as serious as assault committed on the street or between strangers. They were designed to redress the reluctance of police to intervene in 'domestics', their reluctance to lay charges, and the perceived lenient response of the courts to assaults of a domestic nature. A greater degree of protection was to be provided by the availability of protection orders specifically tailored to deal with a variety of violence and harassment. The violent party can be required to leave the home and not approach the victim. The orders can be obtained more quickly and cheaply than family court injunctions and the enforcement regime is more effective than that provided for breach of family court injunctions and recognisances to keep the peace. Because breach of a protection order is a criminal offence, the criminal law is extended by making a breach of any condition of the order a criminal act. At the same time the extension of police powers has empowered the police to enter private premises and to arrest in a wider variety of circumstances in cases of domestic violence; for example, in Tasmania the police have the power of arrest to facilitate the making of a restraint order (*Justices Act 1959* (Tas.) s 106L).

Effect of Reforms

How effective have these reforms been? Seddon (1993), having reviewed the operation of protection order procedures in a number of jurisdictions, concluded that the system works reasonably well in some jurisdictions while not in others despite similar legislative machinery. Quite clearly, the laws depend for their effectiveness on the police and magistrates. In Victoria, for example, a report on the operation of the domestic violence legislation found serious problems with the implementation of the law (Wearing 1992). Problems related to lack of privacy in court when relating distressing experiences, reluctance of police to apply for protection orders on behalf of victims and reluctance of magistrates to make orders removing the violent party from the home. But in South Australia, the police play an important role in applications for orders. Seddon (1993) reports that they initiate proceedings on behalf of applicants in 97 per cent of cases. In New South Wales Hatty (1988) found in a survey of police responses to domestic violence in 1985 and 1986, that police were not implementing their powers in relation to domestic violence conscientiously or effectively and they utilised their discretion to minimise the arrest of violent men. Seddon affirms that the police initially had little involvement in making applications on behalf of victims, but by 1992 approximately 53 per cent of orders were applied for by the police (Seddon 1993, p. 89). Police practices in Queensland responded quite quickly to policies encouraging police officers to use their powers to apply for protection orders, with 58 per cent of applications being initiated by the police in 1990 (Mugford & Mugford 1992, p. 336). Partial police inaction has been

evident in relation to breaches of protection orders. Stubbs and Powell found that in New South Wales no action at all had been taken in the majority of breaches reported to police, solicitors and chamber magistrates (Stubbs & Powell 1989).

Do courts treat offenders more leniently in cases where the assault is domestic in nature? Are breaches of protection orders which are technically assaults treated less seriously than similar assaults which are prosecuted as criminal assault? It is certainly the perception that this is the case and that protection orders and breaches thereof are a soft response to criminal violence in the home. There are promising indications that some judges at least treat domestic violence at least as seriously as other violence. In *Parker v. The Queen* (Unreported, Serial No. A57/1994 at 11). Underwood J, in dismissing an appeal against sentence for aggravated assault and rape, stated that sentencing for crimes of domestic violence should proceed according to the principles stated by the Alberta Court of Criminal Appeal in *R v. Brown* ((1992) 73 CCC (3d) 242 at 249):

When a man assaults his wife or other female partner, his violence toward her can be accurately characterised as a breach of the position of trust in which he occupies. It is an aggravating factor. Men who assault their wives are abusing the power and control which they so often have over the women with whom they live. The vulnerability of many such women is increased by the financial and emotional situation in which they find themselves, which makes it difficult for them to escape.

Insisting upon 'equity of process' between domestic assault and other assault has been criticised on the ground that this will only improve the position for domestic assault cases if and only if the system for other assaults is demonstrably effective. As it is not, Mugford and Mugford (1992, pp. 342-8) have argued for a system which incorporates Braithwaite's concept of reintegrative shaming like the system in Bellevue, Washington, (Braithwaite 1989).

What is my response to this suggestion? I am impressed by Braithwaite's theory, but I do not want to see it operationalised in the area of domestic violence at this stage. At least not until stranger assaults are also diverted and dealt with in ceremonies of reintegrative shaming. While the failings of the criminal justice system are conceded, one of the reasons for the prevalence of domestic violence is that it is both denied and condoned by our society. Braithwaite himself concedes that his theory works best where there is a strong consensus that the criminal behaviour in question is unacceptable. Opinion surveys indicate that we have yet to reach this position. Until there has been a very significant attitudinal shift it would seem not in the interests of victims to introduce changes which could be seen as a soft option for domestic violence offenders. Until this happens, rather than diverting such offenders from the strict sanctions of the criminal law, a forceful and comprehensive approach, including a commitment to arrest, prosecution and more severe sentencing practices is to be preferred, together with supportive services for domestic violence victims. The Duluth, Minnesota Domestic Abuse Intervention Project model has attracted considerable interest. Rather than concentrating simply on pro-arrest policies or relying upon legal machinery such as protection orders and increased police

powers, the central assumption is one of close cooperation between the agencies involved, the police, the court, the prosecutor's office, the probation department and the victims' crisis service.

Battered Wife Syndrome

Is the battered wife syndrome a much needed solution for infiltrating the traditional male oriented pleas of self-defence and provocation? Or have women too much to lose in placing reliance on syndrome evidence which does not challenge fundamental problems of the legal system's failure to comprehend women's experience?

Provocation and self-defence are excellent examples of the way in which the legal system's supposedly objective standards of reasonableness and ordinariness embrace male standards which largely exclude the experience of women. The immediacy requirement, an implied requirement of self-defence and explicit in the requirement of suddenness in provocation is absent in the usual response of women who are constantly abused. The requirement that force used in self-defence be reasonable in the circumstances and the objective requirement for provocation of a provocative act which is sufficient to deprive an ordinary person of the power of self-control are predicated on male standards. The use of battered wives' syndrome evidence to explain why it is that the force was believed to be reasonable in the circumstances, or why there was a loss of self-control provides an opportunity to insert women's experience into these defences and to modify the male standard. But there are concerns about the use of such evidence.

- Concerns that it does not confront the male standard on which reasonableness is based. Will it really encourage the courts to recognise the gendered nature of the allegedly objective standards they invoke?
- Concerns that instead a standard may emerge of reasonable conduct of a battered woman that is prescriptive and not descriptive, penalising those women who resort to lethal self-help and who do not fit within the psychological profile.
- Concerns that such evidence reinforces notions of irrationality and disorder and stereotypes of women as emotional and passive.
- Concerns that medicalising the response of women who retaliate to abuse may result in the syndrome being seen as a cause and not an effect.
- Concerns that a focus on the psychological characteristics of the woman on trial obscures the importance of political, social and structural factors pertinent to an understanding of male violence.
- Concerns that a focus on the syndrome as a reason for not leaving deflects attention from other reasons such as lack of police response, shelters, lack of social support, affordable housing, child care,

employment and the poverty which awaits so many women who leave violent men.

Despite these concerns I do not think we should oppose the use of the syndrome. I agree with Elizabeth Sheehy et al.(1992, p. 388) that:

In the context of widespread denial of the reality and immediacy of this violence, I see the use of the battered woman syndrome as offering mercy for women who have defended their own or their children's physical integrity or very lives, and as providing an opportunity for public and legal education about the factors of women's lives.

With or without feminist opposition to the use of BWS, defence lawyers are likely to rely upon it to secure an acquittal or a better result. The Canadian Supreme Court has explicitly approved of BWS evidence and it has been accepted in Australian courts on at least three occasions. Rather than opposing the use of BWS, the better approach is to try to influence the way in which it is used, to demedicalise it, to take advantage of the opportunity some cases provide to educate the public about domestic violence and to adopt long-term strategies to challenge the stereotypes surrounding battered women and to focus on the need for broader solutions to the problem of domestic violence.

While in the short term it may be necessary to rely upon expert evidence to assist in meeting the subjective test of loss of self-control in provocation and to enable battered women's actions to be seen as reasonable self-defence, the reactions of women to domestic violence should not be seen as a syndrome or a medical or psychological problem of the woman, but as a reaction to a social problem.

The attempt must be made to expose the gendered nature of the objective standards used and to change the meaning of what is reasonable self-defence and what is sufficient to deprive an ordinary person of the power of self-control. This does not require abandoning the attempt to achieve justice in individual cases for the greater good of challenging inequities and stereotypes. By seeking to change the way in which the battered wife syndrome is used, inroads can be made on legal standards of reasonableness by incorporating women's experiences. In *Lavallee* ((1990) 55 CCC (3d) 97 at 114) Madam Justice Wilson said: 'The definition of what is reasonable must be adapted to circumstances which are, by and large foreign to the world inhabited by the hypothetical 'reasonable man'. As Sheehy (1992) has pointed out, judicial rulings like *Lavallee* can have an educative effect changing the male meaning of what is reasonable. They can also have a positive impact on other areas of law. Sheehy mentions criminal responsibility imposed on mothers for failure to protect them from abusive fathers, narrow interpretations of defences such as duress and necessity, preconditions for criminal injuries compensation such as immediately reporting to the police and full cooperation, and discounting factors such as contributing to the offence. To this list could be added male standards of reasonableness of belief in consent. Acceptance of battered woman syndrome type evidence in the court should also influence prosecutorial discretion, leading to decisions not to prosecute in some cases or to prosecute for less serious offences.

Short-term strategies include developing and shaping the use of battered woman syndrome evidence so it is demedicalised, does not undermine a woman's claim to have acted reasonably and the emphasis is not on the psychological condition of the woman, but is on the social problem of domestic violence and the reality of the choices available to women who are subjected to it. It has been suggested that the category of person who is eligible to give expert evidence of the experience of battered women should be widened to include shelter workers, counsellors and women who have lived in violent relationships (Sheehy 1992, p. 393), members of community policing squads, criminologists and sociologists (Freckleton 1994, p. 48). Experts should only be allowed to give evidence of commonly encountered reactions in women subject to cycles of violence and to explain and describe those reactions. They should not give evidence that it is a syndrome, or that the accused woman fits it, nor that such a woman is likely to have misconceived the threat posed to her because she suffers from a syndrome (Freckleton 1994, p. 49). In such a way standards of reasonableness may be changed to include the experiences of women as well as men. The use of such evidence has been opposed on the ground it would leave unaltered the current structure of the law and its male standards of reasonableness and perhaps would entrench inequities rather than ameliorate them (Tarrant 1990, p. 604, Stubbs 1991, p. 270). But there is no reason why modern statements of self-defence necessarily imply a requirement that a physical attack be ensuing or imminent (*Criminal Code (Tas) s 46, Zecevic (1987) 162 CLR 645; Yeo 1992*). There is room for the meaning of self-defence and reasonable force to be shaped to include women's experience of violence. In my view this approach is better than constructing a new and separate defence for domestic violence self-defence (Tarrant 1990, p. 604; South Australian Domestic Violence Council 1987).

Clearly, efforts to address the problem of domestic violence should not be confined to law reform and attempts to broaden concepts of reasonableness and challenges to legal notions of objectivity and rationality.

Alternative Dispute Resolution

Three of the outcomes of the new wave of enthusiasm for methods of alternative dispute resolution are the emergence of community justice centres or neighbourhood mediation centres, the use of special administrative agencies to solve discrimination disputes and trials of victim offender mediation schemes and family group conferences within the criminal justice system.

Advocates of ADR are attracted by the informalism of disputes in non-industrial societies and by the failure of our adversarial legal system to control crime and resolve disputes. ADR is seen as providing a greater level of participation and access to justice while overcoming deficiencies of the formal legal process.

Community justice or neighbourhood mediation centres are now well established in the most populous parts of Australia. They provide an alternative to the court system for the resolution of disputes, a significant proportion of which involve criminal acts. Discrimination legislation emerged in Australia

because the traditional legal system had failed to provide justice for women, Aboriginal people, other racial minorities, gays and people with disabilities and minority beliefs. Discrimination includes harassment and harassment complaints can involve allegations of criminal conduct. The main method of determining complaints of discrimination is by conciliation.

Clearly it was hoped that women victims would benefit by improved access to justice through community justice centres and anti-discrimination legislation. Have they benefited? Are these developments in the interests of women victims?

Some of the criticisms of ADR are of particular relevance to women as victims of crime. Astor and Chinkin (1992) have pointed out that the rhetoric of ADR may conceal a reality that is flawed. It claims to be an inexpensive, speedy and efficient form of consensual, accessible and participatory justice may not be able to be substantiated. The potential of ADR to increase the state control of many types of disputes and to neutralise protest has been recognised. By offering individualised compromise rather than real solutions to genuine injustices, social control is maintained and critics appeased. Similarly, as a privatised model of justice, both its educative and its empowering roles have been questioned. Jocelyn Scutt (1986) was an early and strong critic of informal justice for its tendency to neutralise protest by providing private solutions. She has argued that it deflects women's disputes, demands and claims for redress into a privatised system of mediation, conciliation and counselling. She sees privatisation of justice as detrimental to the interests of women and other disadvantaged groups because it shuts off from public view the very nature of the inequality from which the individual and the group suffer. Informal justice individualises abuses and renders the person apolitical.

Scutt's criticisms apply also to conciliation of discrimination disputes. The confidentiality of conciliation outcomes has the disadvantage of denying its educative effect. Moreover dealing with it in a private and confidential manner can be viewed as trivialising it. 'Violations are treated not as public transgressions in the way crimes are treated, but as private peccadilloes' (Thornton 1990, p. 144). A further disadvantage of relevance to women is the issue of power imbalance. Almost invariably the respondent will be more powerful than the complainant by virtue of employment status and access to financial and other resources. There is a power imbalance which is difficult for the conciliation officer to redress and the experience of the conciliation process may be empowering in some cases, but in others it may well be negative. Margaret Thornton's research suggests that settlements in conciliated cases may be less favourable than in litigated cases (Thornton 1989).

Victim offender mediation has received widespread support in Australia because of its potential to address the needs of victims as well as offenders and to promote the restoration of victim losses. There are a number of models of victim offender mediation. In Australia, as elsewhere, there has been considerable debate about the most appropriate time for it to occur. Mediation can take place prior to the trial; as a court order prior to sentencing; as a condition of sentence; or after the imposition of the sentence if requested by an offender or victim. A New Zealand version of victim offender mediation, the family group conference, has been enthusiastically received in this country. It

operates primarily as a diversion from court proceedings, but also before sentence.

In Victoria, the Law Reform Committee has supported both pre-court and post conviction models for both adults and young offenders. In Western Australia, a Working Party of the Department of Community Corrections expressed a preference for a pre-court model in the long term, but recommended the post conviction model as most appropriate in the short term because of its relative simplicity (Western Australian Department of Corrective Services 1992).

Currently, pilot victim offender conciliation programs are operating as pre-sentence programs. After considerable debate, pilot presentence victim offender mediation programs were introduced in both Queensland and Western Australia (Murray 1991; Western Australian Department of Corrective Services 1992). In Queensland the program applies to both adults and juveniles, in Western Australia it applies to adults only. Victoria also has a pilot program which began in October 1993 (Law Reform Committee 1993, p. 137).

A version of victim offender mediation, family group conferencing, has considerable support. It differs from other victim offender mediation programs in that it is a communitarian process, not simply a matter of mediation between two individuals. While both are concerned with reparation for the victim rather than retribution, FGCs place more emphasis on the offender's behaviour. By involving the offender's family and significant people in his or her life, the conference is envisaged as a ceremony of reintegrative shaming. It has now been operating with some success in Wagga in New South Wales and there are plans to introduce it elsewhere in that State. South Australia has legislated to introduce it on a state-wide basis and it is being trialed in Western Australia.

There are a number of criticisms of victim offender mediation schemes which are particularly pertinent to women. In common with other forms of ADR, imbalance of power between the parties has been identified as a problem. Victims may be afraid of the offender and be prepared to accept too little by way of compensation. Another criticism of victim offender and conferencing programs is their failure to tackle social injustice. Concentrating on the conferencing or mediation process as a way of dealing with crime may deflect community attention away from wider institutional problems such as patriarchy, family violence and unemployment (Polk 1994, pp. 130-3; White 1994, pp. 183-7).

Conclusion

Much then has been achieved by law reform in an attempt to improve the position of women as victims in the criminal justice system.

But the practical gains have been rather moderate. I do not think that this means that too much effort has been expended on law reform. It merely means that our efforts cannot be confined to that sphere and that they must be accompanied by a realisation that the law is very blunt instrument with which to achieve social change. Laws and policies depend upon the police, the courts, the legal profession and the public for their effectiveness. To reduce the occurrence

of crimes against women such as rape and domestic violence we must seek to change meanings and challenge attitudes and beliefs sanctioned by our society. It is not enough to extend the meaning of absence of consent, to provide that a belief in consent must be reasonable if the commonly understood meaning of what is real rape remains the same. It is not enough to increase police powers to intervene in cases of domestic violence if police perception of domestic violence is that it is really a private matter. We must challenge the dominant male perception of what is 'real rape', what is 'criminal assault' and what is 'reasonable force' in self-defence. We must seek to modify male standards and allow the woman's voice to be heard. In so doing we should make use of the legal mechanisms available. There is force in the view that we should neither create special laws to deal with violence in the home nor new methods of resolving disputes informally because in so doing we undermine the fact we are dealing with criminal assault, trivialise and in the case of informal dispute resolution, privatise and neutralise conflict. However, in the area of domestic violence, not only were existing laws not fully utilised, they were inadequate to provide appropriate protection. Moreover, as an addition to the use of the criminal law, protection orders have the advantage of being able to be obtained cheaply, quickly and on the balance of probabilities. As for ADR, it does provide a way for women's voices to be heard and for a more informal and confidential hearing. Some concessions can be made without undermining the aim of emphasising the criminality of conduct or sacrificing attempts to insert a female voice into the so called objectivity of the criminal law.

In seeking to change meanings progress will be slow. Public attitudes, police attitudes and judicial attitudes are slow to change. But there is evidence that they are changing. Some of the judicial comments I have referred to in this paper indicate this. As well as criticising judges' comments and rulings when they are sexist and exclude the voice of women, I think we should praise them when they acknowledge the woman's perspective. In both ways we can seek to change meanings.

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