

A DILEMMA AT THE HEART OF THE CRIMINAL LAW: THE SUMMARY JURISDICTION, FAMILY VIOLENCE, AND THE OVER-INCARCERATION OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

TANYA MITCHELL*

The recent publication of the Australian Law Reform Commission's Report on the Incarceration Rate of Aboriginal and Torres Strait Islander peoples and the Report of the Victorian Royal Commission into Family Violence has reinforced the high profile nature of two of the most pressing issues facing the criminal justice system in the 21st century: the over-incarceration of Aboriginal and Torres Strait Islander peoples; and family violence. Much work is being done in practice, at a policy level, and in the academic literature, on these problems, but the impact of change over time to the criminal law has not been subjected to systematic analysis. This article addresses that gap by investigating the issues of over-incarceration and family violence from a novel perspective. Using a socio-historical analysis, it shows how the increased use of the criminal law in summary form has created a cohort of offenders that did not exist prior to the 1980s. The apprehended domestic violence order and accompanying summary offence of contravening an apprehended violence order have brought the front line of the battle against domestic violence to the summary jurisdiction. This socio-historical analysis reveals a dilemma at the heart of the criminal law: that concerns about victims' (usually women's) rights are in tension with concerns about the over-criminalisation of Aboriginal and Torres Strait Islander peoples. This tension is under-examined in the criminal law literature, and yet it is a key reason why the goal of reducing the over-incarceration of Aboriginal and Torres Strait Islander peoples has met with limited success. In conclusion the article suggests that our understanding of the over-

* Senior Lecturer, University of Sydney Law School. I would like to thank Professor Arlie Loughnan, Dr Louise Boon-Kuo, the participants in the 2018 Criminal Law Workshop at the University of Western Australia, and the anonymous reviewer for their generous feedback on earlier drafts of this article. As a white woman, I have endeavoured to confine my comments to the operation of the criminal law, and do not purport to speak on behalf of Aboriginal people.

incarceration of Aboriginal and Torres Strait Islander peoples might be enhanced by a socio-historical analysis of the offences with which they are being charged.

INTRODUCTION

Publication of the Report of the Victorian Royal Commission into Family Violence (VRCFV) in 2016 and the Australian Law Reform Commission (ALRC) Report on Indigenous Over-Incarceration in 2018 has ensured that two of the most pressing issues facing the criminal justice system in Australia in the 21st century remain in the spotlight: family violence;¹ and the over-incarceration of Aboriginal and Torres Strait Islander peoples. In relation to the first issue, the VRCFV notes that '[f]amily violence has a disproportionate impact upon Aboriginal communities, in particular Aboriginal women and children.'² Building on the work of the Indigenous Family Violence Task Force in 2003, the VRCFV sets out the many complex reasons why this is so. They include the ongoing effects of 'dispossession of land and traditional culture', 'breakdown of community kinship systems and Aboriginal lore', 'alcohol and drug abuse', and 'the loss of traditional Aboriginal male roles, female roles and status'.³ However, the VRCFV also notes that '[n]one of this is new'. The disproportionately high victimisation rates among Aboriginal women and children were just as 'shocking' in 2016 when the VRCFV Report was published as they had been at the time of the Indigenous Family Violence Task Force in 2003.⁴ The VRCFV examines how the police and the courts respond to family violence,⁵ but it does not look at how changes to the criminal law have facilitated the criminalisation of domestic violence, nor how those changes are compounding the disproportionate incarceration of Aboriginal and Torres Strait Islander peoples.

Similarly, the ALRC Report on Indigenous Over-Incarceration acknowledges that 'Aboriginal and Torres Strait Islander women experience family violence at a

¹ The preferred term in the literature is 'family violence' because it is broad enough to capture non-normative family relationships, such as those created by Indigenous Kinship systems. However, the NSW legislation examined in this article still uses the term 'domestic violence'. For this reason I use the term 'domestic violence' when discussing NSW law.

² Victoria, Royal Commission into Family Violence, *Report* (2016) vol 5, 48 ('VRCFV').

³ *Ibid* vol 5, 10.

⁴ *Ibid* vol 5, 47.

⁵ *Ibid* vol 3, 117; vol 7, 161.

rate much higher than the broader Australian community.⁶ It also acknowledges submissions from stakeholders stating that there is an ‘intrinsic link between family violence and the over-incarceration of Aboriginal and Torres Strait Islander men, women and young people.’⁷ The ALRC notes that due to the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), it is now well-recognised that the ‘fundamental causes for over-representation of Aboriginal people in custody’ are the background factors of disadvantage that are a legacy of colonisation.⁸ For this reason the ALRC’s task was to examine ‘criminal laws and legal frameworks’ rather than the social and economic issues.⁹ It acknowledges the limitations of such an approach stating that ‘it is difficult to disentangle historical, social and economic disadvantage from legal issues that contribute to the incarceration of Aboriginal and Torres Strait Islander Peoples’.¹⁰ In examining the criminal laws and legal frameworks, the ALRC chose sentencing and bail as its primary foci. Intuitively this makes sense — incarceration happens when bail is refused or when sentencing results in imprisonment.

However, as this article shows, such a focus overlooks a crucial part of the story, which is, how changes to the criminal law, particularly to practices and procedures relating to non-fatal domestic violence, over the last four decades, have resulted in the increasing use of the criminal law. This article presents fresh insights that are produced by a socio-historical analysis of the development of the law relating to non-fatal domestic violence. This analysis reveals the previously under-analysed relationship between the criminal law’s response to non-fatal family violence and the over-incarceration of Aboriginal and Torres Strait Islander peoples.¹¹ Juxtaposition of these two issues exposes a dilemma at the heart of the

⁶ Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander peoples*, Report No 133 (2017), 77 [2.85] (*‘Pathways to Justice’*)

⁷ *Ibid* 77 [2.86].

⁸ *Ibid* 61 [2.24].

⁹ *Ibid* 23.

¹⁰ *Ibid*.

¹¹ Criminologists, particularly Indigenous criminologists, have long recognised the relationship between the role of the criminal law’s response to non-fatal domestic violence and the criminalisation of Aboriginal and Torres Strait Islander peoples. See, e.g., Heather Nancarrow, ‘In Search of Justice for Domestic and Family Violence: Indigenous and non-Indigenous Australian Women’s Perspectives’ (2006) 10(1) *Theoretical Criminology* 87; Harry Blagg et al, ‘Innovative Models in Addressing Violence Against Indigenous Women: Final Report’, Research Report, Horizons Issue 1, Australia’s National Research Organisation for Women’s Safety, January 2018. More recently the impact of domestic violence laws on

criminal law: use of the criminal law to protect women and children from family violence has increased the criminalisation of Australia's most marginalised peoples.

The focus of this article is the Apprehended Domestic Violence Order ('ADVO') and accompanying offence of Contravening an Apprehended Violence Order ('CAVO') in NSW. Together these form what I call the 'ADVO/CAVO mechanism', which became a key weapon in the battle against domestic violence in the 1980s. I use the war metaphor advisedly; feminist scholars, activists, and lobby groups consciously chose to employ the rhetoric of 'gender war' in its campaign to raise awareness of domestic violence.¹² The basis of a socio-historical analysis is a close and careful analysis of the law in its social and historical context. In keeping with this granular approach, this article examines the law in New South Wales (NSW), but the trends detected are applicable to all Australian jurisdictions.

The CAVO offence falls into a broad category that the NSW Bureau of Crime Statistics and Research ('BOCSAR') has labelled 'Offences Against Justice Procedures'. It has become the second-largest offence category in the summary jurisdiction.¹³ As a proportion of total offences finalized in the Local Court, Offences Against Justice Procedures doubled from 9.67 per cent in 1998 to 19.6 per cent in 2014. In 2005, Offences Against Justice Procedures displaced theft from the top three largest offence categories, and in 2011 they took up second place behind

Aboriginal and Torres Strait Islander peoples has been subjected to empirical analysis. Heather Douglas and Robin Fitzgerald present a case study which shows that Aboriginal and Torres Strait Islander peoples are overrepresented as defendants, victims, and offenders sentenced to imprisonment in the domestic violence protection order system in Queensland: Heather Douglas and Robin Fitzgerald, 'The Domestic Violence Protection Order System as Entry to the Criminal Justice System for ATSI People' 7(3) *International Journal for Crime, Justice and Social Democracy* 41-57. However, the impact of the development over time of the criminal law relating to domestic violence has not been analysed.

¹² Kristin Bumiller, *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement against Sexual Violence* (Duke University Press, 2008) 7.

¹³ In addition to Contravening an Apprehended Violence Order, the BOCSAR category includes offences such as assault police, 'prison regulation offences' and offences against the *Jury Act 1977* (NSW). BOCSAR groups the hundreds of offences in this category into the following broad groups: Escape Custody Offences, Breach of Suspended Sentence, Breach of bond – supervision status unknown, Breach of Community Service Order, Breach of bail, breach of bond – supervised and unsupervised, breach of community based order, breach of violence order, breach of non-violence orders, resist or hinder government official (excluding police officer, judicial officer or government security officer), bribery involving government officials, immigration offences, offences against government operations, resist or hinder government officer concerned with government security, offences against government security, subvert the course of justice, resist or hinder police officer or justice official, prison regulation offences and miscellaneous offences against justice procedures. Source: BOCSAR.

traffic offences. The ALRC Report on Indigenous Over-Incarceration, which commissioned an analysis of the national statistics, notes that ‘offences against justice procedures’ is the third most common offence category for Aboriginal and Torres Strait Islander offenders behind acts intended to cause injury (24 per cent) and public order offences (17 per cent), comprising 14 per cent of total charges.¹⁴ BOCSAR reports that while the number of reported incidents of domestic violence ‘has remained relatively stable over the last decade’,¹⁵ the number of convictions for CAVO has increased from 2300 in 1994 to almost 11 972 in 2016, although convictions have stabilised over the last four years.¹⁶

With the prevalence of non-fatal domestic violence, CAVO, which is a purely summary offence,¹⁷ brought the front line of the domestic violence battle to the summary jurisdiction. The socio-historical analysis of the development of the ADVO/CAVO mechanism in Part I of this article, reveals three things. The first is that the ADVO/CAVO mechanism was designed to address the shortcomings of the criminal law as a means of responding to non-fatal domestic violence. The second is that it was the product of the convergence of two social movements: the rise to prominence of ideas of social equality and human rights in the post-war era; and intense lobbying by feminists and victims’ rights advocates in the 1970s. The third is that the criminalisation of domestic violence has been as much a product of changing procedures and enforcement practices as it has been a product of changes to the substantive law. Part II shows how increasing criminalisation in this context has had a disproportionate impact upon Aboriginal and Torres Strait Islander peoples. In conclusion the article offers some comments on the utility of socio-historical analysis for revealing under-explored reasons why the problem of the over-incarceration of Aboriginal and Torres Strait Islander peoples is proving intractable.

¹⁴ The ALRC figures are based on the Australian Bureau of Statistics (‘ABS’) offence categories. ALRC, *Pathways to Justice*, above n 6, 100 [3.31].

¹⁵ At approximately 30 000 per year in NSW. See Sarah Napier, Suzanne Poynton and Jacqueline Fitzgerald, ‘Who goes to prison for breaching an Apprehended Domestic Violence Order? An analysis of police narratives’ (Issue Paper No 107, NSW Bureau of Crime Statistics and Research, 7 September 2015), 1.

¹⁶ Source: New South Wales Bureau of Crime Statistics and Research. But note that the number of ADVOS that are being imposed by the courts had increased exponentially. It should also be noted that comparable statistics date back to 1994 only. Prior to that date different methods of data collection render direct comparisons misleading.

¹⁷ *Criminal Procedure Act 1986* (NSW) s 6.

By exposing the consequences of the use of criminalisation by feminists and victims' rights advocates as a weapon against domestic violence, I should not be understood to be arguing against it. Instead, drawing inspiration from Ely Aharonson, I am attempting to 'decipher the conditions of existence' upon which the practice of the criminalisation of non-fatal domestic violence relies, '(such as its underlying normative assumptions or its modes of institutionalization) and to pinpoint the ways in which these conditions constrain its suitability to achieve its manifested aims.'¹⁸ I share the goal of the feminist and victims' movements to protect women and children from domestic violence. I also share the goal of reducing the incarceration rates of Aboriginal and Torres Strait Islander peoples. But my aim is to inquire into the reasons why the second of these goals has met with limited success.¹⁹

I THE HISTORY OF THE CRIMINALISATION OF NON-FATAL DOMESTIC VIOLENCE

Until the 1980s, the criminal law did not provide an effective response to non-fatal domestic violence. This section analyses the history of the criminal law's response to non-fatal domestic violence revealing how the criminal law's shortcomings influenced the development of the ADVO/CAVO mechanism in the 1980s.

A *The Period Prior to the Late 19th Century*

The direct ancestor of the ADVO/CAVO mechanism was the surety to keep the peace. The surety to keep the peace empowered magistrates to bind a person over to keep the peace and was one of the earliest forms of summary jurisdiction.²⁰ It is akin to (and indeed is an ancestor of) the current-day good behaviour bond, but it lacked an enforcement mechanism. The surety to keep the peace was one of the 'so-

¹⁸ Ely Aharonson, 'Pro-Minority Criminalization and the Transformation of Visions of Citizenship in Contemporary Liberal Democracies: A Critique' (2010) 13(2) *New Criminal Law Review* 286, 287 citing Wendy Brown and Janet Halley, 'Introduction' in Wendy Brown and Janet Halley (eds), *Left Critique of Left Legalism* (Duke University Press, 2002).

¹⁹ In doing so I draw inspiration from Ely Aharonson, *ibid.*

²⁰ By 1885 Pollock describes the bind-over as 'one of the commonest forms of summary jurisdiction'. See Frederick Pollock, 'The King's Peace' (1885) 1 *Law Quarterly Review* 37, 50. The terms 'surety' and 'security' are used interchangeably in the treatises and case law. From 1883 the preferred term was 'recognisance'.

called powers of preventive justice²¹ that have long been a cause of concern to treatise writers and academics.²² These powers stem from an 'executive or ministerial' power which has its roots in the royal prerogative, rather than from a judicial power, and is a legacy of the policing role magistrates formerly performed.²³ When NSW was colonised in 1788, justices of the peace, who brought with them all the powers of justices in England, had the power, pursuant to the Commission of the Peace, to bind a person over to keep the peace. This was the state of the law until 1883.

B *From the Late 19th Century to the Final Quarter of the 20th Century*

During the period from the late 19th century to the final quarter of the 20th century local adaptations of the surety to keep the peace came to be used as a response to non-fatal domestic violence, but they were largely impotent. Magistrates attempted to use these mechanisms as a means of protecting victims when it was not possible to convict the perpetrator of a more serious assault-based offence.

By the latter decades of the 19th century the criminal law intervened in non-fatal domestic violence primarily via two mechanisms: a charge of an offence such as assault or aggravated assault;²⁴ and the surety to keep the peace. Although the police tended to intervene in domestic assaults only where serious injury or death was inflicted,²⁵ there is evidence that domestic violence-related charges were brought far more frequently than scholars have previously recognised, but in the summary jurisdiction.²⁶ These cases, which 'crossed class lines',²⁷ were sometimes commenced by police arrest, but the most common means of commencing a prosecution was a 'victim-initiated summons'.²⁸ This is significant because it disrupts the orthodox narrative that domestic violence was considered to be a

²¹ *Griffiths v The Queen* (1977) 137 CLR 293, 321 (Jacobs J).

²² See, eg, Richard Burn, *The Justice of the Peace and Parish Officer* (W Strahan and W Woodfall, first published 1754, 29th ed, 1845) vol 5, 1217, 1218.

²³ David Feldman, 'The King's Peace, the Royal Prerogative and Public Order: The Roots and Early Development of Binding over Powers' (1988) 47(1) *Cambridge Law Journal* 101, 127.

²⁴ *Aggravated Assaults on Women and Children Act 1854* (NSW).

²⁵ Judith Allen, *Sex & Secrets: Crimes Involving Australian Women since 1880* (Oxford University Press, 1990) 9.

²⁶ Carolyn Ramsey, 'Domestic Violence and State Intervention in the American West and Australia, 1860–1930' (2011) 86 *Indiana Law Journal* 185, 199.

²⁷ *Ibid* 201.

²⁸ *Ibid* 204.

private matter until second wave feminism began to agitate for it to be brought into the public sphere in the second half of the 20th century.

Even though the criminal law intervened in domestic violence more frequently than previously recognised, it was not an effective option for most women. There were two main reasons why. One was the reluctance of police to collect evidence and lay charges in relation to domestic violence. The second was the reluctance of women to give evidence in assault cases, which meant it was difficult for the prosecution to secure a conviction. For this latter reason, courts were often forced to resort to the surety to keep the peace, sometimes for extremely serious assaults, that could not otherwise have been dealt with summarily.²⁹ An example of a serious assault that was dealt with by way of the surety to keep the peace was a case from Victoria where a police officer had found the victim ‘covered in blood from being stabbed with a three-cornered file’ and had intervened to prevent her husband from choking her.³⁰

The reasons why women were reluctant to pursue criminal sanctions are complex. Some relate to the inhospitableness of the criminal justice system. Others relate to the social circumstances in which women found themselves. In the late 19th century, at a time when women were not encouraged to join the workforce, and before the state assumed responsibility for financial welfare, women were largely financially dependent upon their spouses.³¹ In such circumstances the conviction and imprisonment of a woman’s husband would often leave her — and any children for which she may be responsible — without financial support. Bringing charges could also result in reprisals from the husband. For these reasons, among many others, including the patriarchal structure of society, victims frequently refused to testify, or withdrew the charges. It was in the context of failed prosecutions that the surety to keep the peace came to play a central role in the criminal law’s response to domestic violence.

At this point it is important to note the distinctive changes over time to the summary jurisdiction’s regulation of Aboriginal people. Aboriginal people were largely absent from the summary jurisdiction until the 1930s. Mechanisms of

²⁹ Ibid.

³⁰ Ibid.

³¹ For a detailed discussion of the development of welfare systems in Australia see Brian Dickey, *No Charity There: A Short History of Social Welfare in Australia* (Allen & Unwin, 2nd ed, 1987).

criminal justice were not used in relation to Aboriginal people in NSW until after dispossession had taken place, circa the 1840s.³² Indeed, in NSW, the summary jurisdiction was not considered to be a useful tool for the regulation of Aboriginal people until the mid-20th century. As is well-known, between the mid-19th century and the middle decades of the 20th century Aboriginal people were largely segregated and their lives were controlled by civil regulatory systems established pursuant to ‘protection’ policies, which kept them out of the summary jurisdiction. While these protection systems were criminalising in their own way,³³ they are the reason why Aboriginal people do not feature in the story of the development of the summary jurisdiction until protection began to be dismantled in the 1930s.³⁴ Even after the demise of the protection system Aboriginal women were reluctant to have recourse to the criminal law, a reluctance that persists in the current era. As the VRCFV reported:

Aboriginal people are less likely to report family violence than non-Aboriginal people for a range of reasons including ‘fear about the consequences of disclosure [in particular child removal], distrust of government agencies and service providers, historical and cultural factors and a lack of access to support services.’³⁵

Returning to the surety to keep the peace, it had many statutory incarnations from 1883 onwards.³⁶ The first ‘native’ version, the recognisance to keep the peace in cases of apprehended violence (‘the recognisance’), was incorporated into the *Criminal Law Amendment Act 1883* (NSW)³⁷ and was in force, almost unchanged,

³² Mark Finnane, *Police and Government: Histories of Policing in Australia* (Oxford University Press, 1994) 111.

³³ *Ibid* 118.

³⁴ This was not the case in all Australian colonies. In Western Australia, for example, which was colonised later, in 1829, the Summary Jurisdiction was used in the dispossession process. See Paul Hasluck, *Black Australians* (Melbourne University Press, 2nd ed, 1970). Between 1936 and 1954 a summary court was established to try Aboriginal people for homicide. See Kate Auty, *Black Glass* (Fremantle Arts Centre Press, 2005).

³⁵ VRCFV, above n 2, vol 5, 28. See also Nancarrow, above n 111; Harry Blagg, Nicole Bluett-Boyd and Emma Williams, ‘Innovative Models in Addressing Violence against Indigenous Women: State of Knowledge Paper (Issue 8, Australia’s National Research Organisation for Women’s Safety, 2015); Blagg et al, above n 11; Kylie Cripps and Megan Davis, *Communities Working to Reduce Indigenous Family Violence*, Brief No 12 (Indigenous Justice Clearing House, 2012).

³⁶ The power was used extensively in the criminal law consolidations in the UK in 1861. In NSW it was adapted to sentencing as an alternative to imprisonment. See *Griffiths v The Queen* (1977) 137 CLR 293, 320 (Jacobs J).

³⁷ Section 466.

for a century.³⁸ This recognisance was the predecessor of the current ADVO.³⁹ It was not directed specifically to domestic violence and was, in practice, unenforceable because, as with its predecessor, the only penalty for breach was forfeiture of the surety, if one had been imposed.

The recognisance was based on a present subjective apprehension of *future* violence to ‘the person ... or of his wife or child, or of apprehended injury to his property ...’.⁴⁰ From the wording it can be seen that it was not originally designed for the protection of women and children from domestic violence; it was adapted to that purpose.⁴¹ It was a broad, imprecise power circumscribed only by the objective test of whether the justice was of the view that the apprehension was reasonable. Like its predecessor it could be imposed for conduct that did not amount to a criminal offence and therefore a conviction was not a prerequisite. Unlike its predecessor, it could be sought only ‘on the complaint of the person apprehending violence to the person’. This made it impossible for women who feared retribution from their assailants to distance themselves from the enforcement process. The only order justices were empowered to make was a general one requiring the defendant to enter a recognisance to ‘keep the peace’ — it could not be tailored to the defendant or the circumstances of the relationship between the complainant and the defendant. If the defendant refused to enter into the recognisance he (or she) could be imprisoned for three months but there was no judicial power to punish for breach. The recognisance persisted in this form in NSW until 1982.

³⁸ It was re-numbered as *Crimes Act 1900* (NSW) s 547. It did not refer to imprisonment. It merely said ‘...the Justice may require the defendant to enter into a recognisance to keep the peace, with or without sureties, as in any case of a like nature’: William Hattam Wilkinson and Frederick Bushby Wilkinson, *The Australian Magistrate* (Law Book Co, 7th ed, 1903), 339. By 1982 this had been amended to read ‘...in default of its being entered into forthwith, the defendant may be imprisoned for three months, unless such recognisance is sooner entered into’: *Crimes Act 1900* (NSW), historical version for 1 July 1982–16 December 1982, avail <<https://www.legislation.nsw.gov.au/#/view/act/1900/40/historical1982-07-01>>.

³⁹ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 16.

⁴⁰ This is an extension of the common law bond, which was not available for apprehended violence to goods. See Burn, above n 22, vol 5, 1203.

⁴¹ Hawkins stated that ‘a wife may demand it against her husband and *vice versa*’: Wilkinson, above n 38, 1109 citing 1 Hawk, c 50 s 2.

C From the Final Quarter of the 20th Century to Present

Against a backdrop of the rise to prominence of ideas of social equality and human rights in the post-war era, the late 1970s was a time of immense social and political change throughout Australia. In 1972 the federal left-leaning Whitlam Labor government was elected after decades of conservative rule. Similarly, in 1976 in NSW the left-leaning Wran Labor government was elected and each government immediately set about implementing their progressive agendas. The impact of second wave feminisms⁴² can be seen in one of the key initiatives in NSW — reform of the public service based on the values of equal opportunity for minorities and women, and promotion on merit rather than seniority.⁴³ At the federal level, the government instituted no-fault divorce and introduced a sole parent pension,⁴⁴ among many other reforms. The federal reforms in particular created conditions that made the introduction of the ADVO/CAVO mechanism possible because they provided women with an avenue of escaping a violent marriage and accessing independent financial support.⁴⁵ In doing so, these reforms went some way towards addressing one of the most significant impediments to the efficacy of the criminal law in addressing domestic violence, namely, the woman's dependence on her spouse.

In 1982, the NSW Wran Labor government's strategy of creating the ADVO, which was based on the recognisance discussed above, brought the battle against domestic violence to the summary jurisdiction. The criminal law's treatment of domestic violence altered radically at this time as Australian jurisdictions, and common law jurisdictions around the world, began to implement varying statutory domestic violence regimes.⁴⁶ The NSW legislation was explicitly drafted 'to make

⁴² I use this term to acknowledge that there is not one homogenous 'feminism'.

⁴³ Peter Wilenski, *Review of NSW Government Administration Further Report: Unfinished Agenda* (NSW Government, 1982), 14. See also Peter Wilenski, *Review of NSW Government Administration Directions for Change: Interim Report* (NSW Government, 1977).

⁴⁴ *Family Law Act 1975* (Cth) s 48; Dickey, above n 311, 179.

⁴⁵ The support provided was not sufficient to lift women above the poverty line: New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 November 1982, 2369 (Neville Wran).

⁴⁶ See, for instance, *Justices Act 1921* (SA) s 99 enacted in 1982. For discussion see Ngaire Naffine, Women's Adviser's Office, Department of the Premier and Cabinet South Australia, *Domestic Violence and the Law: A Study of the Justices Act 1921 (SA) s 99* (1985). On international campaigns against domestic violence, see Dianne Martin, 'Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies' (1998) 36(1) *Osgoode Hall Law Journal* 151.

keep the peace orders more *effective* in relation to domestic violence through the introduction of specific apprehended domestic violence orders.⁴⁷ While it was recognised that violence was also perpetrated against children, the initial focus was on domestic violence against women because of the ‘particularly high incidence of wife beating’.⁴⁸

The public recognition, in the 1970s, of a link between homicide and domestic violence was the immediate impetus for the 1982/83 legislative changes to the criminal law relating to domestic violence in NSW.⁴⁹ This link, which was revealed by studies, both in New South Wales,⁵⁰ and internationally,⁵¹ exposed the fact that a high proportion of murders were committed by intimate partners. This revelation prompted the government to undertake law reform to address the serious end of domestic violence offending.⁵² Changes made to the criminal law included removal of the immunity from prosecution for rape in marriage in 1981,⁵³ and the law relating to provocation began to evolve to enable a defence on the basis of ‘battered women’s syndrome’.⁵⁴ Investigations into the domestic context of homicide revealed that these homicides had often been preceded by incidents of lower level domestic violence.⁵⁵ This realisation in turn led to a focus on the prevalence of lower level, but nonetheless serious, domestic violence. It was in this context of a rising awareness of the prevalence of lower-level domestic violence that attention turned to the potential for a civil-based ADVO to provide a means of protecting women.

It was widely acknowledged by the early 1980s that the criminal law was, in its current form, an ineffective means of responding to domestic violence for the

⁴⁷ New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 November 1982, 2366 (Neville Wran) (emphasis added).

⁴⁸ New South Wales Task Force on Domestic Violence, *Report* (1981) 32 (*‘NSW Task Force Report’*).

⁴⁹ Julie Stubbs and Anne Wallace, ‘Protecting Victims of Domestic Violence?’ in Mark Findlay and Russell Hogg (eds), *Understanding Crime and Criminal Justice* (Law Book Co, 1988) 52, 53–55.

⁵⁰ *Ibid* 54.

⁵¹ See, eg, R Emerson Dobash and Russell P Dobash, *Violence against Wives: A Case against the Patriarchy*, (Free Press, 1979). For discussion of this and subsequent texts by these authors see Mandy Burton, *Legal Responses to Domestic Violence* (Routledge, 2008); Stubbs and Wallace, above n 49, 54.

⁵² For a history of the reforms in the US see Elizabeth Schneider, *Battered Women and Feminist Lawmaking* (Yale University Press, 2000). In the UK see, eg, Burton, above n 51.

⁵³ *Crimes (Sexual Assault) Amendment Act 1981* (NSW), s 61(4), discussed in Stubbs and Wallace, above n 49, 55.

⁵⁴ Stubbs and Wallace, above n 49, 56.

⁵⁵ *Ibid* 53–54.

reasons discussed above, and because it was *reactive* rather than *proactive*.⁵⁶ In response to research and lobbying by various women's groups, the measures introduced in 1982 took a holistic approach to the problem, addressing allied problems such as health and housing, as well as attempting to make the criminal law more effective.⁵⁷ However, the criminal law was a central measure for both practical and normative reasons. The practical reasons concerned the belief in the criminal law's potential to protect victims through pre-emptive protection orders, incapacitation through incarceration, and deterrence. Such measures included introducing an exception to the rule against the compellability of spouses in cases of domestic violence.⁵⁸ By removing a woman's choice of not giving evidence, this exception was designed to address the impossibility of proving substantive offences when the victim refused to testify.⁵⁹ A further problem was the high criminal standard of proof.⁶⁰ In relation to proactive measures, it was recognised that the recognisance in NSW,⁶¹ and injunctions under the *Family Law Act 1975* (Cth) at a federal level, were 'notoriously ineffective' for protecting women.⁶² This ineffectiveness was attributed to the fact that 'there is no power of arrest attached directly to a breach of the order and it is necessary to institute further legal proceedings of contempt of court to enforce them.'⁶³

The normative reasons why the criminal law was to be a central measure were related to the practical ones and concerned the criminal law's capacity to convey to

⁵⁶ See, eg, the reports of the various domestic violence committees, such as in South Australia, Naffine, above n 46 and in NSW, the *NSW Task Force Report*, above n 48; Reg Baker, 'Domestic Violence: Legal Considerations' (1984) 8 *Criminal Law Journal* 33; New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 November 1982, 2366 (Neville Wran).

⁵⁷ New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 November 1982, 2369–74 (Neville Wran); *NSW Task Force Report*, above n 48, ch 5, ch 7.

⁵⁸ *Crimes Act 1900* (NSW) s 407AA, inserted by *Crimes (Domestic Violence) Amendment Act 1982* (NSW) sch 1. It is now in *Evidence Act 1995* (NSW) ss 18, 19 and *Criminal Procedure Act 1986* (NSW) s 279.

⁵⁹ *Crimes (Domestic Violence) Amendment Act 1982* (NSW); New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 November 1982, 2367 (Neville Wran). The provision was controversial and magistrates and prosecutors were known to circumvent it by excusing, or not calling, the victim to give evidence. See Australian Law Reform Commission, *Domestic Violence*, Report No 30 (1986) [73].

⁶⁰ Heather Douglas and Lee C Godden, 'The Decriminalisation of Domestic Violence: Examining the Interaction between the Criminal Law and Domestic Violence' (2003) 27(1) *Criminal Law Journal* 32, 34.

⁶¹ *Crimes Act 1900* (NSW) s 547.

⁶² New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 November 1982, 2368 (Neville Wran).

⁶³ *Ibid.*

the community that domestic violence is no longer tolerated. As Wran said in his Second Reading Speech; ‘community attitudes still have a long way to go before the last vestige of the tacit sanctioning of wife beating is eliminated.’ Therefore, in addition to ‘making the police and courts more effective’, the government intended the legislative reforms to help to re-shape community attitudes by ‘recognising that domestic assault is assault’.⁶⁴

The long list of individuals and organisations that Premier Wran thanked in his Second Reading Speech when introducing the 1982 Bill to the NSW Parliament provides evidence of the impact of lobbying by feminists and victims’ groups on these reforms.⁶⁵ The Women’s Legal Resources Centre, the Women Lawyers’ Association and the Women’s Electoral Lobby were on the list, and the extent of public concern about domestic violence was reflected in the inclusion of the NSW Police Association, refuges, churches, universities, hospitals and numerous government departments.

Why did feminists and victims’ groups choose to channel reform efforts into the criminal law rather than, for example, the civil family law jurisdiction? An examination of the injunction against violence that had been available in the federal family law jurisdiction since 1975 provides a clue to this puzzle. It too had been criticised for its ineffectiveness,⁶⁶ as the recognisance and its predecessors in the criminal jurisdiction had been, but reform of the family law injunction was not pursued with the same vigour as reform of the recognisance in the criminal jurisdiction. A key reason for this was the criminal law’s capacity to communicate the state’s condemnation of male violence against women and children through the responsibility attribution practices of the criminal law.⁶⁷ Pursuit of the attribution of responsibility to men was a ‘key strategy of feminists ... to seek to make lines of accountability for gendered violence clear’ in order to disrupt patriarchal social

⁶⁴ New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 November 1982, 2366 (Neville Wran).

⁶⁵ New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 November 1982, 2369-74 (Neville Wran).

⁶⁶ Naffine, above n 46, 60-70.

⁶⁷ Antony Duff, *Punishment, Communication, and Community* (OUP, 2001). It is also one of the purposes of sentencing to recognise and denounce the ‘harm done to the victim and the community’: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g).

structures.⁶⁸ On the practical side of the ledger, because police are often the first to respond to domestic violence, their activities feed easily into the infrastructure of the criminal law, and legal aid was more readily available for state criminal matters than for federal family law matters. Despite the pursuit of law reform, feminists were alive to its contradictions and did not presume that the criminal law would provide protection to women from family violence.⁶⁹

D *The Apprehended Domestic Violence Order*

This section examines the content of the ADVO/CAVO mechanism in order to understand how subsequent changes to the substantive law, procedures, and practices have facilitated the criminalisation of non-fatal domestic violence. The ADVO, enacted in 1982, was a civil order that empowered a court of summary jurisdiction to impose 'such restrictions or prohibitions on the behaviour of the defendant as appear necessary' if satisfied on the balance of probabilities that 'the person in need of protection' ('PINOP') 'apprehends' 'the commission by a person of domestic violence upon another person' and the court is satisfied 'that the apprehension is reasonable.'⁷⁰ Thus the pivotal criterion for the imposition of an ADVO was the PINOP's subjective perception of threat, and women's groups chose the civil standard of proof to overcome the difficulties of meeting the criminal standard.⁷¹ The potentially expansive combination of the subjective test and the civil standard of proof was circumscribed by an objective test that the court be satisfied that the apprehension was reasonable.

⁶⁸ Julie Stubbs, 'Introduction' in Julie Stubbs (ed), *Women, Male Violence and the Law* (Institute of Criminology, 1994) 1, 6. Despite this article's focus on changes to the criminal law it must be acknowledged that it was recognised that the criminal law alone cannot solve the problem of domestic violence. In the 2007 tranche of amendments, for example, both the government and the opposition pointed to the complexity of the issues underpinning domestic violence, including gender inequality, learned behaviour and socioeconomic factors that require a more nuanced approach than the criminal law is capable of delivering: New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2007, 4569 (Verity Firth, Prue Goward).

⁶⁹ See, eg, Stubbs, above n 68, 9; and Margaret Thornton, 'Feminism and the Contradictions of Law Reform' (1991) 19 *International Journal of the Sociology of Law* 453.

⁷⁰ Section 547AA, inserted by *Crimes (Domestic Violence) Amendment Act 1982* (NSW).

⁷¹ See Heather Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30(3) *Sydney Law Review* 439, 444. The objective test is an important point of difference between the ADVO and the ASBO. On the vast scope of the ASBO see Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford University Press, 2012).

The ADVO extended the reach of the criminal law by criminalising a broader range of behaviours than were previously captured by the recognisance (and its ancestor, the surety to keep the peace). It did so by shifting the focus from protection of the king's peace to protection of personal autonomy. As such, it was constructed around an expanded conception of 'the person' of the victim; specifically, as originally designed, 'the person' of a class of women.⁷² Some scholars, such as Peter Ramsay, have charted the development of similar mechanisms such as the Anti-Social Behaviour Order ('ASBO') in the English context in detail,⁷³ but their impact on the operation of the criminal law in the summary jurisdiction has been little studied in Australia.⁷⁴ As Lindsay Farmer's work shows, personhood now extends beyond harm to the body of the person to the 'victim's own perception of threats and of their vulnerability in particular contexts ... Personhood is understood as a kind of personal space in which an individual is able to exercise or develop their autonomy and sense of self.'⁷⁵ As a result of this new understanding of personhood, our understanding of the responsible individual has extended to incorporate 'responsible conduct in relation to others',⁷⁶ both of which developed in the domestic violence context.⁷⁷ The ADVO brought about this change to the criminal law in NSW.

Changes to enforcement practices that were designed to improve the effectiveness of the ADVO/CAVO mechanism had an equally significant impact on criminalisation. For example, either the aggrieved person or a police officer could lay a complaint, instead of the aggrieved person only.⁷⁸ This was an important change that went some way towards addressing victims' fears of reprisals from the perpetrator. Further, the court was empowered to impose 'such restrictions on the behaviour of the defendant as appear necessary or desirable', which enabled orders to be moulded to the defendant and the particular

⁷² It has since been recognised that men are also victims of domestic violence, and the concept of a relationship has moved away from a hetero-normative construct.

⁷³ Ramsay, above n 71; see especially Lindsay Farmer, *Making the Modern Criminal Law: Criminalisation and Civil Order* (Oxford University Press, 2016) ch 8, 253–63.

⁷⁴ A notable exception is Heather Douglas who has studied the implementation of domestic violence protection orders in Queensland, but her work is not framed around this shift to protection of personal autonomy. See Douglas, above n 71.

⁷⁵ Farmer, above n 73, 260.

⁷⁶ *Ibid* 261.

⁷⁷ *Ibid*.

⁷⁸ *Crimes Act 1900* (NSW) s 547AA(2).

circumstances of the relationship. Moulding orders in this way had the effect of creating a 'personalized criminal law'.⁷⁹

When first enacted, the ADVO provision contained two important restrictions that have since been discarded. The first restriction was that a court could only make an order if the complainant feared being subjected to behaviour that was already a criminal offence. Additionally, it could not be a fear of just any offence, but only a selection of offences classified as 'domestic violence offences'.⁸⁰ The legislation did not create a new domestic violence offence, but rather, deemed pre-existing offences to be domestic violence offences.⁸¹ Only one year after its enactment, the ADVO provision was extended to include an apprehension of conduct, which, at that time, did *not* constitute an existing criminal offence, namely, 'conduct consisting of harassment or molestation, falling short of actual or threatened violence.'⁸² This amendment extended the reach of the criminal law significantly.

The second restriction was that the period of the order was limited to six months. In 2007 the duration of an order was extended to 'as long as is necessary, in the opinion of the court, to ensure the safety and protection of the protected person',⁸³ or 12 months if the court fails to specify the period of the order.⁸⁴ This is a considerable expansion of the reach of the criminal law by extending the duration of what Andrew Ashworth and Lucia Zedner have called 'self-policing' mechanisms.⁸⁵ Self-policing mechanisms are community-based orders like the ADVO which, Ashworth and Zedner argue, have reoriented the criminal law away from its traditional 'retrospective orientation of punishment for past actions

⁷⁹ Ibid s 547AA(3)(a). This provision set out examples of conduct that the court could restrict, including 'approaches by the defendant to the aggrieved spouse of the defendant'. See Ramsay's discussion of the ASBO in England which contains a similarly broad power: Ramsay, above n 71. On the personalisation of the criminal law via hybrid civil/criminal mechanisms see Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP 2014), ch 4, 77.

⁸⁰ See Stubbs, above n 68, 6.

⁸¹ *Crimes Act 1900* (NSW) s 4(1) inserted by the *Crimes (Domestic Violence) Amendment Act 1982* (NSW).

⁸² Stubbs, above n 68, 7.

⁸³ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 79(2).

⁸⁴ Ibid s 79(3).

⁸⁵ Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (2008) 2(1) *Criminal Law and Philosophy* 21, 42.

towards what might be termed “future law”⁸⁶. They govern behaviour by eliciting a quasi-contractual consent from the defendant to be subjected to punishment in the future if they breach the conditions of the mechanism.⁸⁷ This expansion of the use of self-policing mechanisms is significant in the context of research by Jeffries and Bond which suggests that NSW courts are imposing harsher penalties upon Indigenous offenders for domestic violence offences than for non-Indigenous offenders.⁸⁸ The ALRC Report on Indigenous Over-Incarceration notes that breaches of community-based orders, such as good behaviour bonds, are one of the primary contributors to the over-incarceration of Aboriginal and Torres Strait Islander peoples,⁸⁹ but it does not examine the offence of contravening an apprehended violence order.

E *Contravening an Apprehended Violence Order*

The offence of contravening an apprehended violence order (‘CAVO’) created a new regime for regulating behaviour. It served both normative and practical purposes. The terms of the offence were that ‘a person against whom an [ADVO] has been made’ and who ‘has been personally served with a copy’ of the order, and who ‘knowingly fails to comply with a restriction or prohibition specified in the order’, is guilty of an offence.⁹⁰ In normative terms it gave effect to the criminal law’s denunciation function by conveying the state’s moral condemnation of domestic violence. Initially, CAVO was punishable by six months imprisonment.⁹¹ The penalty has now been increased to 2 years imprisonment, and if the breach ‘was an act of violence against a person’, the defendant *must* be sentenced to

⁸⁶ Ibid 21.

⁸⁷ Ibid 42–3.

⁸⁸ They speculate that this may be due to recognition of the social cost of the prevalence of domestic violence in Aboriginal communities: Samantha Jeffries and Christine Bond, ‘Taking the Problem Seriously? Sentencing Indigenous and non-Indigenous Domestic Violence Offenders’, (2015) 48(4) *Australia and New Zealand Journal of Criminology* 475–6.

⁸⁹ Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander peoples* Discussion Paper No 84 (2017) ch 7. <https://www.alrc.gov.au/sites/default/files/pdfs/publications/discussion_paper_84_compressed_cover2.pdf>. (‘*Incarceration Rates*’)

⁹⁰ Section 547AA(7) was inserted into the *Crimes Act 1900* (NSW) by the *Crimes (Domestic Violence) Amendment Act 1982* (NSW), sch 3.

⁹¹ Section 547AA(7). The penalty for breach has now been increased to two years imprisonment but it remains a summary offence: *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s 14(1).

imprisonment ‘unless the court otherwise orders’.⁹² If the court otherwise orders it must give reasons for doing so.⁹³ These provisions are evidence of the seriousness with which the behaviour is regarded and reflects the impact of demands for greater recognition of harm to victims. However, they also erode the presumption that imprisonment should be a penalty of last resort,⁹⁴ and can be characterised as quasi-mandatory sentencing.⁹⁵ As the ALRC Report notes, mandatory sentencing is another cause of the over-incarceration of Aboriginal and Torres Strait Islander peoples.⁹⁶

In practical terms, the offence of CAVO addressed the main criticism of its predecessor, the recognisance to keep the peace; namely, its lack of enforceability. As Premier Wran said when introducing the legislation to Parliament: ‘I believe that this last reform [i.e., the creation of the offence of CAVO] will provide effective and immediate relief for those women who spend their lives worrying when the next battering will be.’⁹⁷ Enforceability encompasses not only the power of courts to impose a punishment for breach, but also the power of the police to arrest for a suspected breach. When considering how best to adapt the recognisance to the domestic violence context, the various law reform bodies around Australia considered various models, including those implemented in the United States and the United Kingdom.⁹⁸ In NSW, the Domestic Violence Task Force recommended the English model, but with important adaptations. In the English model, the police had no power to arrest for breach of a recognisance unless the court had attached such a power to the order.⁹⁹ This created uncertainty for the police about their powers of arrest in each case, and either delayed or

⁹² *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14(4).

⁹³ *Ibid* s 14(5).

⁹⁴ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5.

⁹⁵ Amendments to the *Crimes (Sentencing Procedure) Act 1999* (NSW) that commenced in September 2018 require a court that ‘finds a person guilty of a domestic violence offence...’ to impose ‘either (a) a sentence of full-time detention, or (b) a supervised order’: *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017*, sch 1[4], s 4A. ‘Protection and safety of victims’ is the paramount concern when courts are considering making a supervised community-based order: sch 1[4], s 4B. These new provisions do not appear to alter the sentencing regime for CAVO.

⁹⁶ *Incarceration Rates*, above n 89, 74.

⁹⁷ New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 November 1982, 2368 (Neville Wran).

⁹⁸ In South Australia it was the Domestic Violence Committee, see Naffine above n 466, 4; in NSW it was the NSW Task Force on Domestic Violence. See *NSW Task Force Report* above n 4848.

⁹⁹ For discussion see Naffine, above n 466, 5–6.

deterred intervention.¹⁰⁰ To avoid this uncertainty, the NSW Parliament enacted a specific police power to arrest for CAVO.¹⁰¹ The legislative changes also confirmed the right of police to enter premises when invited and empowered magistrates to issue warrants to police via radio or telephone.¹⁰² These legislative changes have facilitated criminalisation by helping to render a relatively unregulated field of social interaction amenable to regulation by the criminal law.

It might be objected that the ADVO/CAVO mechanism has resulted in de-criminalisation rather than criminalisation. In a study of breaches of domestic violence orders in Queensland, Heather Douglas found that convictions for the Queensland equivalent of CAVO were being accepted in cases where the facts warranted a conviction for more serious assault offences; or, the nature of the breach that was recorded in court minimised the violence actually experienced by the victim.¹⁰³ Douglas observes that this constitutes *de*-criminalisation (or a failure to criminalise) because the offender is being held liable, and being punished, for an offence that is much lower in the offence hierarchy than that actually committed, and some offenders are escaping conviction entirely. NSW has faced similar issues.¹⁰⁴ Examining individual cases in this way indeed paints a picture of de- or non-criminalisation. However, an analysis of change over time to substantive law that incorporates an examination of procedures and practices paints a different picture. It shows that the law is facilitating convictions for CAVO in circumstances where offenders have previously escaped conviction for the reasons set out earlier in this chapter, the main one being the refusal of the victim to give evidence in court. Viewed from this perspective, the ADVO/CAVO mechanism represents criminalisation rather than de-criminalisation. Douglas' study was conducted in 2008 and much has changed since then. A study by Douglas and Fitzgerald published in 2018 shows how the Queensland equivalent of the ADVO/CAVO

¹⁰⁰ Ibid 6.

¹⁰¹ Section 547AA(7). South Australia took the same approach, although their offence was broader: *Justices Act 1921* (SA) s 99. For discussion of the SA provision see Naffine, above n 466, 6–7.

¹⁰² *Crimes (Domestic Violence) Amendment Act 1982* (NSW) sch 2; New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 November 1982, 2366 (Neville Wran).

¹⁰³ Douglas, above n 71.

¹⁰⁴ New South Wales, Department of Attorney General and Justice, *The NSW Domestic Violence Justice Strategy: Improving the NSW Criminal Justice System's Response to Domestic Violence 2013–2017* (2014/15) <http://www.crimeprevention.nsw.gov.au/domesticviolence/Documents/domestic-violence/jag2391_dv_strategy_book_online.pdf> ('*NSW Domestic Violence Justice Strategy*').

mechanism has increased the criminalisation of Aboriginal and Torres Strait Islander peoples.¹⁰⁵ In the next section, my analysis of recent legislative changes in NSW illustrates how changes to police enforcement practices is facilitating criminalisation.

F *The Impact of Practices and Procedures on Criminalisation*

In the 21st century, the prevention of domestic violence has become a high-profile national priority. In response to a series of reports and inquiries, broad-ranging domestic violence regimes designed to address the problem holistically have been introduced across Australia. Due to Australia's federal structure, those regimes differ across jurisdictions, but there have been moves to develop a national strategy.¹⁰⁶ The most prominent and comprehensive inquiry has been the VRCFV which issued a seven-volume report in 2016.¹⁰⁷ In NSW, the 2006 Ombudsman's special report to Parliament, *Domestic Violence – Improving Police Practice* ('2006 Ombudsman's Report'), led to the NSW government's Domestic Violence Justice Strategy 2013–2017.¹⁰⁸ The strategy 'outlines the approaches and standards that justice agencies in NSW will adopt to improve the criminal justice system's response to domestic violence'.¹⁰⁹ A central pillar of that strategy was implementation of the *Code of Practice for the NSW Police Force Response to Domestic and Family Violence* ('NSW Police Code of Practice').¹¹⁰ The core goal of the *NSW Police Code of Practice* is 'building trust and confidence in the NSW Police Force amongst victims ... with the aim of increased reporting and legal action rates'.¹¹¹ Increasing the reach of the criminal law — which will be achieved primarily through the ADVO/CAVO mechanism in the summary jurisdiction — is therefore a central aim of these initiatives.

¹⁰⁵ Douglas and Fitzgerald, above n 11.

¹⁰⁶ Finance and Public Administration References Committee, Commonwealth of Australia, *Domestic Violence in Australia*, Report (2016); Commonwealth, Department of Social Services, *National Plan to Reduce Violence Against Women and their Children 2010-2022*, (2011) ('National Plan').

¹⁰⁷ VRCFV, above n 2.

¹⁰⁸ *NSW Domestic Violence Justice Strategy*, above n 104.

¹⁰⁹ NSW Police Force, *Code of Practice for the NSW Police Force Response to Domestic and Family Violence NSW* (2013) 8 ('NSW Police Code of Practice').

¹¹⁰ The Code was implemented in 2013 and updated in 2016. It seems that NSW is always a few steps behind Victoria where a Police Code of Practice was introduced in 2004: VRCFV, above n 2, vol 8, 2.

¹¹¹ *NSW Police Code of Practice*, above n 109, 8.

Amendments to the ADVO/CAVO mechanism made since the tabling of the 2006 Ombudsman's report can best be understood as attempts to increase the criminalisation of non-fatal domestic violence. A selection of the amendments made in 2007, 2013 and 2015 illustrate the ongoing nature of those efforts. In response to calls from women's group advocates,¹¹² in 2007 the domestic violence regime was removed from the *Crimes Act* and enacted in a stand-alone Act, the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).¹¹³ The government expressed its reasons for doing this in the language of denunciation and improving the effectiveness of the criminal law. In the parliamentary debates, members of the government said the stand-alone regime would give 'full recognition to the seriousness of violence against women and children', make it 'easier for women and children to obtain apprehended violence orders', and easier for police and practitioners to navigate the legislation.¹¹⁴

Two examples illustrate how the 2007 amendments facilitated criminalisation. The first was the granting of a power to magistrates to impose an interim apprehended violence order automatically where the alleged assailant was charged with a 'serious personal violence offence'. This was introduced 'to spare victims of violence the trauma of being cross-examined at the hearing for an apprehended violence order as well as at the hearing of the criminal charges'.¹¹⁵ The second was a mechanism 'to identify repeat offenders' by requiring domestic violence offences to be noted on an offender's criminal record.¹¹⁶ It will be recalled that there is no specific 'domestic violence' offence. Instead, offenders are convicted of offences such as assault and assault occasioning actual bodily harm. Before the 2007 amendment, when these offences were entered on an offender's criminal record, there was no indication of the domestic violence context of the offence. The

¹¹² New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2007, 4569 (Angela D'Amore).

¹¹³ This followed a discussion paper and a report by the New South Wales Law Reform Commission ('NSWLRC') on Part 15A of the *Crimes Act 1900* (NSW): NSWLRC, *Apprehended Violence Orders: Part 15A of the Crimes Act*, Discussion Paper No 45 (2002); NSWLRC, *Apprehended Violence Orders*, Report No 103 (2003).

¹¹⁴ *Crimes (Domestic and Personal Violence) Bill 2007* (NSW); New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 November 2007, 4327 (Tanya Gadiel).

¹¹⁵ New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 November 2007, 4327 (Tanya Gadiel).

¹¹⁶ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 12. See New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2007, 4569 (Greg Smith).

proposal to note the domestic violence context of such offences on the offender's record was intended to serve two functions. The first was to make it easier for courts to identify repeat offenders and impose harsher penalties. It is well-known that repeat offenders are sentenced more harshly.¹¹⁷ The second was the use of labelling to shame repeat offenders.¹¹⁸

In 2013, police powers in relation to domestic violence were expanded,¹¹⁹ and recorded statements were introduced in 2015.¹²⁰ The 2015 amendments enable the complainant in Local Court trials relating to a domestic violence offence to 'give evidence in chief ... wholly or partly in the form of a recorded statement that is viewed or heard by the court.'¹²¹ With the aim of reducing the stress of the court process upon the victim, these changes in the practices of procedure and proof were explicitly designed to overcome two impediments to criminalisation: domestic violence incidents not being brought to the attention of the police; and the failure of complainants to attend court.¹²² Failure to report domestic violence to police has been recognised as a problem at least since the issue of domestic violence rose to prominence in the late 1970s. In his Second Reading Speech the then Attorney General (Brad Hazzard) noted a 2014 BOCSAR study which estimates that 'only half of domestic assaults are reported to police.'¹²³ There is evidence that the number of domestic violence matters amongst Aboriginal and Torres Strait Islander peoples reported to police is far lower, although that is changing in Victoria where 'reporting of Aboriginal family violence incidents has increased at a higher rate than reporting in non-Aboriginal communities'.¹²⁴ The 2015 amendments in NSW were also designed to 'increase the number of early guilty

¹¹⁷ Robin Fitzgerald and Timothy Graham, 'Assessing the Risk of Domestic Violence Recidivism' (2016) 189 *NSW Bureau of Crime Statistics and Research Crime and Justice Bulletin*, <<http://www.bocsar.nsw.gov.au/Documents/CJB/Report-2016-Assessing-the-risk-of-domestic-violence-recidivism-cbj189.pdf>> 9.

¹¹⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2007, 4569 (Barry Collier).

¹¹⁹ *Crimes (Domestic and Personal Violence) Amendment Act 2013* (NSW) – see especially ss 89, 89A.

¹²⁰ *Criminal Procedure Amendment (Domestic Violence Complaints) Act 2014* (NSW), which came into operation on 1 June 2015.

¹²¹ *Criminal Procedure Act 1986* (NSW) s 289F, inserted by *Criminal Procedure Amendment (Domestic Violence Complaints) Act 2014* (NSW) sch 1 [19].

¹²² *NSW Police Code of Practice*, above n 109, 18.

¹²³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 October 2014, 1486 (Bradley Hazzard).

¹²⁴ *VRCFV*, vol v, 17.

pleas',¹²⁵ which, Hazzard argued on behalf of the government, would have the dual benefits of improving efficiency and reducing the trauma of the process for victims.

It must be noted that in addition to ongoing reforms aimed at increasing the criminalisation of domestic violence, initiatives have been introduced that go some way towards 'redefining success' in terms of participant satisfaction.¹²⁶ In 2005 the Domestic Violence Intervention Court Model ('DVICM') was implemented in two Local Courts, one in western Sydney at Campbelltown, and one in the regional town of Wagga Wagga. Its purpose was 'to apply good practice in the criminal justice process for domestic violence matters and improve the coordination of services to victims and defendants.'¹²⁷ The 'inter-agency' scheme is designed to ameliorate the inhospitableness of the criminal justice system for victims and to facilitate the collection of evidence by police.¹²⁸ The VRCFV has recommended augmenting moves towards a similar 'therapeutic approach' in Victorian Magistrates Courts.¹²⁹ While schemes such as the DVICM provide an opportunity to redefine success in terms of participant satisfaction rather than by the number of convictions, or a reduction in the incidence of domestic violence, criminalisation through securing convictions remains at the heart of the process.

We are yet to see whether the NSW Parliament will be influenced by the recommendations of the Victoria RCFV, but one legislative measure recently introduced in Victoria portends increasing criminalisation via the summary

¹²⁵ *NSW Police Code of Practice*, above n 109, 18. This is not just aimed at efficiency and cost, but also at reducing trauma for victims, a central focus of the amendments. New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 October 2014, 1486 (Bradley Hazzard).

¹²⁶ David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001) 119.

¹²⁷ Chief Magistrate Henson, Local Court of NSW, *Annual Review 2014*, 16 <<http://www.localcourt.justice.nsw.gov.au/Pages/Publications/annualreviews.aspx>> ('*NSWLC Annual Review 2014*').

¹²⁸ *Ibid.* By 2007 the evidence kits were being rolled out around the State: New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2007, 4569 (Karyn Paluzzano) where parliament debated the *Crimes (Domestic and Personal Violence) Bill 2007*. For evaluation of the scheme see Laura Rodwell and Nadine Smith, 'An Evaluation of the NSW Domestic Violence intervention Court Model' (Research Report No 58, New South Wales Bureau of Crimes Statistics and Research, 21 May 2008); and Emma M Birdsey and Nadine Smith, 'The Domestic Violence Intervention Court Model: A Follow-Up Study' (2012) 155 *NSW Bureau of Crime Statistics and Research Crime and Justice Bulletin* <https://www.justice.nsw.gov.au/Documents/Media%20Releases/2012/060312_BOCSAR_CJB155.pdf>.

¹²⁹ *VRCFV*, above n 2, vol 8, 118. For discussion see Anne Wallace, 'Australia's Lower-Level Criminal Courts: Tackling 21st Century Problems in a 19th Century Paradigm?' in Ron Levy et al (eds), *New Directions for Law in Australia* (Australian National University Press, 2017) 201.

jurisdiction. In July 2016 Victoria introduced self-executing interim family violence intervention orders (the equivalent of the NSW interim ADVO) despite the recommendation of the Victoria RCFV that they not be adopted.¹³⁰ The benefits of self-executing orders include that they save court time and they relieve the victim of having to return to court for confirmation of the final order. However, as the Victoria RCFV noted, they make the ‘person subject to the order responsible for independently challenging the order.’¹³¹ In light of evidence demonstrating that a high proportion of defendants (and PINOPs) do not understand family violence orders when they are dealt with in court,¹³² self-executing orders carry the obvious risk of exacerbating that lack of understanding. The inevitable result of such far-reaching criminalisation will be greater numbers of prosecutions by an increasingly vigilant police force that will swell the ranks of defendants and increase the prison population, as the final part of this paper shows.

II THE DISPROPORTIONATE IMPACT OF THE INCREASING CRIMINALISATION OF NON-FATAL DOMESTIC VIOLENCE UPON ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

In the current era the offence category of breach of justice orders has created new cohort of offenders that contains a disproportionate number of Aboriginal and Torres Strait Islander peoples. The overrepresentation of Aboriginal people in the summary jurisdiction charged with low-level public order offences, such as offensive language, has been examined in detail in the criminal law literature, due, in large part, to the revelations of the Royal Commission into Aboriginal Deaths in Custody in 1991.¹³³ What is less well-known is the impact that the increasing use of the summary jurisdiction to regulate harmful behaviours such as domestic violence is having on the Aboriginal charging and incarceration rates. The oft-quoted statistics on the overrepresentation of Aboriginal people in prison are well-known: ‘Aboriginal and Torres Strait Islander adults make up around 2 per cent of the national population, and yet constitute 27 per cent (10 596) of the national

¹³⁰ *VRCFV*, above n 2, vol 8, 180.

¹³¹ *Ibid.*

¹³² *Ibid* 121.

¹³³ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1, ch 7. For a synthesis of the latest literature, see also *Incarceration Rates*, above n 89.

prison population'.¹³⁴ BOCSAR has drawn attention to the fact that the broad category of 'offences against justice procedures' has contributed to the overrepresentation of Aboriginal people in the criminal justice system,¹³⁵ but a less-well-known statistic is the extent to which Aboriginal people are overrepresented as both victims and defendants of, and among those sentenced to imprisonment for, CAVO.¹³⁶

Victimisation rates are notoriously difficult to measure but a number of policy documents have noted that 'the occurrence of violence in Indigenous communities and among Indigenous people "is disproportionately high in comparison to the rates of the same types of violence in the Australian population as a whole"'.¹³⁷ As stated in the Introduction, the reasons for this are complex and are beyond the scope of this article.¹³⁸ The Australian Bureau of Statistics reports that in NSW, 'Aboriginal and Torres Strait Islander people had more than three times the victimisation for Assault compared to non-Indigenous people, and the rates are rising',¹³⁹ while the national rates of assault have been decreasing since 2011–2012.¹⁴⁰ A disproportionately large proportion of the victims of such violence are

¹³⁴ ABS, 'Aboriginal and Torres Strait Islander Population Nearing 700,000' (Media Release, 15/4/2013, 30 August 2013)

<<http://www.abs.gov.au/ausstats/abs@.nsf/latestProducts/3238.0.55.001Media%20Release1June%202011>>
ABS, Catalogue Number 4517.0, Prisoners in Australia (8 December 2016)

<<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>>. See also, *Incarceration Rates*, above n 89, 26.

¹³⁵ This is a broad offence category that incorporates hundreds of diverse offences such as resist or hinder government official, immigration offences and breach of community based orders. Source: BOCSAR. On the impact of this offence category on Indigenous imprisonment rates see Jacqueline Fitzgerald, *Why are Indigenous Imprisonment Rates Rising?*, Issues Paper No 41 (BOCSAR, 2009).

¹³⁶ As mentioned above, Douglas and Fitzgerald's forthcoming piece notes this phenomenon in Queensland: Douglas and Fitzgerald, above n 11.

¹³⁷ Janet Stanley, Adam M Tomison and Julian Pocock, *Child Abuse and Neglect in Indigenous Australian Communities* (Australian Institute of Family Studies, 2003) quoting Paul Memott, et al, Commonwealth of Australia, *Violence in Indigenous Communities*, Report to Crime Prevention Branch of the Attorney-General's Department (2001). See also Douglas and Fitzgerald, above n 11; *VRCFV*, above n 2, vol 5, 48.

¹³⁸ See, eg, Kylie Cripps and Megan Davis, above n 355.

<http://www.healthinonet.ecu.edu.au/uploads/resources/23797_23797.pdf>.

¹³⁹ ABS, Catalogue Number 4510.0, Recorded Crime – Victims, Australia, 2015 (13 July 2016) ('Recorded Crime-2015')

<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4510.0~2015~Main%20Features~Victims%20of%20Crime,%20Aboriginal%20and%20Torres%20Strait%20Islander%20Victims~5>>.

¹⁴⁰ Steering Committee for the Review of Government Service Provision, *Report on Government Services 2017* (Commonwealth of Australia) vol C, 10.

women, accounting for 65 per cent of Aboriginal and Torres Strait Islander assault victims.¹⁴¹

Conviction rates are more readily determined, but they are not without their problems. Because the way in which statistics are recorded and organised changed in 1994 it is not possible to compare the data gathered between 1982 (when CAVO was introduced) and 1994 with post-1994 data. Even the post-1994 data must be approached with caution. For example, it is clear that the recording of Indigenous status improved between 1994 and the mid-2000s such that the size of the category of offender whose Indigenous status was 'unknown' decreased from 431 in 1994 to three in 2008. Nevertheless, this is still likely to be an under-representation.¹⁴² Despite these limitations it is possible to make some general observations.¹⁴³ Between 1995 and 2015 the total number of CAVO offences finalised in the NSW Local Court more than doubled from 1555 to 3626. In 1995, Indigenous people accounted for 19 per cent of CAVO charges finalised in the Local Court of NSW. By 2005 this proportion had increased to 24.5 per cent, but this increase may be explained to an extent by the improvements in the recording of Indigenous status. In 2008, after the enactment of amendments in 2007 discussed above that changed police enforcement practices, that figure had increased to 28 per cent and it has remained between 27 per cent and 30 per cent ever since.¹⁴⁴

Perhaps more striking is the proportion of offenders sentenced to imprisonment for CAVO, and, of those, the proportion that is Indigenous. Between 1995 and 2015 the total number of offenders sentenced to imprisonment almost tripled from 217 to 565. Over the same period, the proportion of those that were Indigenous fluctuated between 38 per cent and 50 per cent.¹⁴⁵ Contributing to the disproportionately high Indigenous imprisonment rate is the fact that Indigenous offenders sentenced to imprisonment for CAVO have 'significantly

¹⁴¹ ABS, 'Recorded Crime 2015', above n 139.

¹⁴² Boyd Hunter and Aarthi Ayyar, 'Some Reflections on the Quality of Administrative Data for Indigenous Australians: The Importance of Knowing Something about the Unknowns' (Working Paper No 51/2009, Centre for Aboriginal Economic Policy Research, March 2009) i.

¹⁴³ The source of all of the data referred to in this section is: BOCSAR. I use the term 'Indigenous' in this section because that is the term used by BOCSAR.

¹⁴⁴ Source: BOCSAR.

¹⁴⁵ Source: BOCSAR.

higher' reconviction rates than their 'non-Indigenous counterparts'.¹⁴⁶ One reason for this is that Indigenous offenders are more likely to have a lengthier prior history of offending,¹⁴⁷ which is one of the predictors of being sentenced to imprisonment.¹⁴⁸ Similarly, offenders from 'socio-economically disadvantaged areas' also had higher recidivism rates for CAVO,¹⁴⁹ and it is well known that a disproportionately high number of Indigenous people experience socio-economic disadvantage.¹⁵⁰ There are also suggestions that Aboriginal and Torres Strait Islander peoples who are subject to court orders are targeted by police as part of a new 'proactive' approach to policing.¹⁵¹ The *NSW Police Code of Practice* pledges what may be interpreted as extra-curial surveillance: 'Police will work with local communities and external agencies to reduce and prevent domestic and family violence through *monitoring the behaviour of offenders*.'¹⁵² The NSW police have implemented a Suspect Target Management Plan ('STMP'), according to which police subject offenders who are on community-based court orders to frequent compliance checks. Such surveillance has been introduced to answer criticisms that the police have been failing to protect victims of domestic violence effectively. And yet it leads to more frequent arrests and prosecutions for non-compliance, not to mention exacerbation of the fraught relationship between Aboriginal people and the police.¹⁵³ Over-policing has long been recognised, and criticised, as being one of the factors contributing to the overrepresentation of Aboriginal and Torres Strait Islander peoples in prison.¹⁵⁴

¹⁴⁶ Fitzgerald and Graham, above n 117, 9 <<http://www.bocsar.nsw.gov.au/Documents/CJB/Report-2016-Assessing-the-risk-of-domestic-violence-recidivism-cbj189.pdf>>.

¹⁴⁷ Don Weatherburn, *Arresting Incarceration: Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014) 55.

¹⁴⁸ Napier, Poynton and Fitzgerald, above n 15, 7.

¹⁴⁹ Fitzgerald and Graham, above n 117, 9.

¹⁵⁰ Productivity Commission, *Overcoming Indigenous Disadvantage; Key Indicators 2016—Report* (2016).

¹⁵¹ Senate Report: *Inquiry into Aboriginal and Torres Strait Islander Experiences of law Enforcement and Justice Services* (2016) 80 [5.76]–[5.78].

¹⁵² *NSW Police Code of Practice*, above n 109, 11 (emphasis added).

¹⁵³ *Ibid.*

¹⁵⁴ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 2, ch 13; Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen & Unwin, 2001).

III CONCLUSION: THE DILEMMA AT THE HEART OF THE CRIMINAL LAW

Choosing the criminal law as a key state response to non-fatal domestic violence, then, gives rise to a dilemma. If the criminal law is to be held out as offering equal protection to Aboriginal and non-Aboriginal victims of family violence, incarceration rates will increase. If, to reduce the incarceration rates of Aboriginal and Torres Strait Islander peoples, the impact of the criminal law is ameliorated by, for example, imposing more lenient sentences than those imposed on non-Indigenous offenders, the state risks sending the message that Indigenous victims are less deserving of the state's protection.¹⁵⁵ This dilemma is played out every day in local (magistrates) courts across Australia. Of course, feminisms' responses to family violence have moved on and have always been more nuanced than can be accommodated by the criminal justice system. This can be seen, for example, in the *National Plan to Reduce Violence Against Women and their Children 2010-2022* which advocates for a focus on changing attitudes, especially amongst young people.¹⁵⁶ There is also evidence to suggest that the feminist push to use criminalisation as a means of protecting women from family violence has been hijacked by neoliberalism.¹⁵⁷ Nevertheless, the legacy of increasing criminalisation persists and is a key reason why the goal of reducing the over-incarceration of Aboriginal and Torres Strait Islander peoples has met with limited success. By contrast, Olsen and Lovett present emerging evidence that Indigenous-led community-based programs employing different models (such as health-based approaches) to reduce the levels of family violence in Indigenous communities, are achieving a notable degree of success.¹⁵⁸ Whatever the answer may be, this study

¹⁵⁵ The ALRC notes that overall, Indigenous offenders receive shorter sentences of imprisonment than non-Indigenous offenders. This contrasts with Jeffries and Bond's research mentioned above which suggests that NSW courts are imposing harsher penalties upon Indigenous offenders for domestic violence offences than for non-Indigenous offenders: Jeffries and Bond, above n 88, 475-6.

¹⁵⁶ The National plan notes that 'Some of the strongest predictors for holding violence-supportive attitudes at the individual level are low levels of support for gender equality and following traditional gender stereotypes.' Commonwealth, Department of Social Services, *National Plan*, above n 10606, 14.

¹⁵⁷ See Bumiller, above n 12. The Victorian state government's adoption of self-executing interim family violence intervention orders in defiance of the recommendations of the *VRCFV* discussed in Part I above could be seen as an example of such appropriation.

¹⁵⁸ Anna Olsen and Ray Lovett, 'Existing Knowledge, Practice and Responses to Violence against Women in Australian Indigenous Communities' (Australian National Research Organisation for Women's Safety (ANROWS), 2016). See also the Bourke Justice Reinvestment Project:

<http://www.justreinvest.org.au/justice-reinvestment-in-bourke/>

has shown that our understanding of the over-incarceration of Aboriginal and Torres Strait Islander peoples might be enhanced by a socio-historical analysis of the offences with which they are being charged.