

WOMEN'S EXPERIENCE IN COURT:
THE IMPLEMENTATION OF FEMINIST LAW REFORMS IN CIVIL
PROCEEDINGS CONCERNING DOMESTIC VIOLENCE

A DISSERTATION

SUBMITTED TO THE LAW SCHOOL

AND THE COMMITTEE ON GRADUATE STUDIES

OF STANFORD UNIVERSITY

IN PARTIAL FULFILLMENT OF THE REQUIREMENTS

FOR THE DEGREE OF

DOCTOR OF JURIDICAL SCIENCE

Rosemary Hunter

December 2005

ABSTRACT

This dissertation investigates how civil courts hear and understand women's experiences of domestic violence, and examines women's experiences of attempting to tell their stories in those settings, focusing on domestic violence intervention order and family law proceedings in Australia. The legislation governing both of these jurisdictions is either partly or wholly a product of feminist legal activism. The dissertation therefore seeks to determine whether the feminist claim that the criminal law silences women is also true of new civil claims specifically designed to respond to women's experiences.

The dissertation begins with the hypothesis that feminist law reforms will not be implemented as intended, due to both structural and cultural factors. Structural factors include legal forms, categories, doctrines, procedures, evidentiary rules, physical facilities, and broad issues of access to justice, while the internal legal culture of lawyers and judges may incorporate narratives about the incidence, causes and dynamics of domestic violence, and its impacts on women and children, that are at odds with the feminist understandings upon which the reforms were based. This hypothesis is tested by reference to an empirical study of the two jurisdictions, together with evidence from other relevant studies undertaken in Australia and overseas. Field work consisted of court observations, an analysis of Family Court files and reported cases, and interviews with survivors of violence, lawyers and support workers with experience of the relevant proceedings.

The study found that survivors of violence enjoyed considerable success in their cases, but at the same time, the legal processes were unsatisfactory, women's 'success' did not necessarily guarantee their own or their children's safety, there was little systemic

acknowledgement of women's experiences of violence or of the widespread nature of domestic violence, and non-feminist understandings of domestic violence went unchallenged. As anticipated, different combinations of structural and cultural impediments operated in each jurisdiction, including factors not previously documented in the literature. The study also uncovered examples of good practices among lawyers and judges. The dissertation concludes with recommendations for future feminist activism, suggestions for overcoming the implementation problems identified, and an assessment of the possibilities for further reform.

TABLE OF CONTENTS

Abstract	iv
Acknowledgments	vi
List of Tables	xi
1. INTRODUCTION	1
I THE INCIDENCE OF DOMESTIC VIOLENCE	2
II FEMINIST LAW REFORM	6
III METHODOLOGY	13
2. FEMINISM, VIOLENCE, AND LAW	22
I FEMINIST UNDERSTANDINGS OF DOMESTIC VIOLENCE	22
A. <i>The Mainstream Feminist Account of Domestic Violence</i>	22
B. <i>Women's Accounts from Positions of 'Difference'</i>	29
II NON-FEMINIST UNDERSTANDINGS OF DOMESTIC VIOLENCE	39
A. <i>Social Narratives</i>	40
B. <i>Legal Narratives</i>	44
III LEGAL STRUCTURES AND PROCESSES	48
A. <i>Legal Categories</i>	49
B. <i>Legal Doctrine – the Cause of Action</i>	50
C. <i>The Rules of Procedure and Evidence</i>	52
D. <i>Speaking in Court</i>	55
E. <i>Conclusion</i>	57
3. THE INTERVENTION ORDER PROCESS	59
I INTRODUCTION	59
II THE LEGISLATION	62
III OBSERVATIONS	70
IV REPRESENTATION AND SUPPORT	75
A. <i>The Need for Representation</i>	75
B. <i>The Availability of Representation and Support</i>	78
C. <i>Lawyers' Understandings of Domestic Violence</i>	86
D. <i>Lawyering for Survivors of Domestic Violence</i>	88
V PHYSICAL FACILITIES	93
A. <i>The Waiting Area</i>	93
B. <i>The Hearing Venue</i>	97
VI THE BREVITY OF PROCEEDINGS	100
A. <i>The Substance of the Hearing</i>	101
B. <i>The Magistrate's Demeanor</i>	104
C. <i>The Applicant's (Missing) Voice</i>	111
1. <i>Insufficient Time</i>	111
2. <i>Language Barriers</i>	113
3. <i>Protective Silence?</i>	116

<i>D. Consent Without Admissions</i>	118
<i>E. Standardized Terms of Orders</i>	124
<i>F. Conclusion</i>	126
4. THE DISCOURSE OF INTERVENTION ORDERS	128
I THE ROLE OF THE REGISTRAR	128
II MAGISTRATES' UNDERSTANDINGS OF DOMESTIC VIOLENCE	131
<i>A. Incident Focus and Emphasis on Physical Violence</i>	133
1. Recency	133
2. Lack of Understanding of Fear	134
3. Emphasis on Physical Violence	139
<i>B. Relationship Conflict as the Source of Violence</i>	140
1. Dysfunctional Couples	141
2. Obligation to Leave	143
3. Encouragement of Reconciliation	145
<i>C. Denial and Minimization of Violence</i>	150
<i>D. The Influence of Ethnicity and Class</i>	154
III CONTESTED MATTERS	157
<i>A. The Nature of the Relationship</i>	159
<i>B. 'Fright' Narratives: The Bad Mother and the Vindictive Ex-Wife</i>	167
<i>C. The Influence of Class</i>	168
IV THE TERMS OF ORDERS	170
<i>A. The Duration of Orders</i>	170
<i>B. Sole Occupancy Orders</i>	173
<i>C. Mutual Orders</i>	177
V CONCLUSION	182
5. FAMILY COURT PROCEEDINGS	186
I INTRODUCTION	186
II PROCEDURE	189
III FILES AND OBSERVATIONS	193
IV GOING TO COURT	200
<i>A. Safety Issues in Court</i>	200
<i>B. The Court Setting</i>	208
<i>C. Court Proceedings as a Form of Harassment</i>	210
V CONSENT ORDERS	213
<i>A. The Prevalence of (Failed) Consent Orders</i>	214
<i>B. Reasons for 'Consent'</i>	215
1. Cost Considerations	215
2. Bullying and Appeasement	217
3. The Court's Promotion of Settlement	219
4. The Role of Lawyers	220
5. Legal Uncertainty	221
<i>C. The Results of Consent Processes</i>	222
VI SPEAKING IN COURT	226
<i>A. Evidence in Chief</i>	227

<i>B. Cross Examination</i>	228
1. The Traumas of Cross Examination	229
2. Direct Cross Examination by a Self-Represented Ex-Partner	231
<i>C. Reliance on Interpreters</i>	233
6. FAMILY LAW, LEGAL CULTURE, AND DOMESTIC VIOLENCE	238
I THE LEGISLATION AND CASE LAW RELATING TO DOMESTIC VIOLENCE	238
<i>A. Children's Matters Before the Family Law Reform Act</i>	238
1. The Influence of 'No-Fault'	238
2. The Emerging Jurisprudence of the Early-Mid 1990s	240
<i>B. Children's Matters After the Family Law Reform Act</i>	242
1. The Legislative Amendments	242
2. Post-Reform Act Case Law and Legal Culture	246
<i>C. Property Matters</i>	250
1. Property Division Under the Family Law Act	250
2. Tort Claims Under the Cross-Vesting Legislation	254
<i>D. Competing Understandings of Domestic Violence</i>	256
II FAMILY LAWYERS' UNDERSTANDINGS OF DOMESTIC VIOLENCE	257
<i>A. The Relevance of Violence</i>	259
<i>B. Asking About Violence</i>	261
<i>C. Responding to Violence</i>	263
III CHILDREN'S REPRESENTATIVES, CHILD EXPERTS, AND FAMILY REPORTS	266
IV JUDICIAL RESPONSES TO ALLEGATIONS OF VIOLENCE	273
<i>A. Judicial Sympathy</i>	273
<i>B. Judicial Understandings of Violence</i>	275
1. The Privileging of Physical Violence	275
2. The Need for Independent Evidence of (Psychological) Harm	277
3. Conceptual Separation Between the Interests of Mothers and Children	280
<i>C. The (Ir)relevance of Violence Against Women</i>	281
V CONCLUSION	290
7. THE JURISDICTIONAL INTERSECTION: INTERVENTION ORDERS IN THE FAMILY COURT AND CHILDREN'S ISSUES IN THE MAGISTRATES' COURT	294
I THE LEGISLATION: PART VII, DIVISION 11 OF THE FAMILY LAW ACT	294
<i>A. In Theory</i>	294
<i>B. In Practice</i>	297
II MAGISTRATES' VIEWS OF FAMILY LAW	301
<i>A. Exceptions Allowing for Child Contact</i>	301
<i>B. The Father's Right of Contact</i>	304

C. <i>Family Law Belongs in the Family Court</i>	305
D. <i>The Strategic Use of Intervention Orders</i>	308
III INTERVENTION ORDERS IN THE FAMILY COURT	311
8. CONCLUSION	315
I STRUCTURAL FACTORS	316
II INTERNAL LEGAL CULTURE	320
III MOVING FORWARD	323
Appendices	330
<i>Appendix 1. Court Observation Form</i>	330
<i>Appendix 2. Interview Schedule for Lawyers and Support Workers</i>	334
<i>Appendix 3. Interview Schedule for Women Litigants</i>	337
<i>Appendix 4. Demographic Questionnaire for Women Litigants</i>	339
<i>Appendix 5. Power and Control Wheel</i>	341
Bibliography	342
<i>Cases</i>	342
<i>Legislation</i>	344
<i>Secondary Materials</i>	345
<i>Interviews</i>	375