

# Women and the Criminal Code Chapter 3

## PROCESS, PROCEDURE AND PROTOCOLS

### PART 1: INTRODUCTION

In examining the impact of the criminal justice system on women the Taskforce identified an area it termed "process, procedure and protocols" for investigation. This term refers to the non-legal and the "operational" aspects of the criminal justice system that can nonetheless be as important as the provisions of the Criminal Code in their impact upon women's experiences of criminal justice.

This Chapter addresses issues related to the following:

- Legal System - Access and Procedures;
- Criminal Justice System Procedures and Protocols:
- Sexual offences
- Domestic Violence
- Integrated Approaches to Violence Against Women;
- Victim Involvement in the Criminal Justice System:
- Restorative Justice and Victim Offender Mediation
- Victim Support and Services
- Police Support for Victims
- Criminal Offence Victims Act 1995 (Qld)
- Court Support to Victims of Crime; and
- Court Design.

As we have noted, women's experiences are not homogeneous and are influenced by issues other than gender, for example, location, race and differing abilities. New criminal laws will not necessarily address such issues but they may be addressed, in part, through the processes, procedures and protocols of criminal justice agencies.

### PART 2: LEGAL SYSTEM - ACCESS AND PROCEDURES

#### Issues for rural and remote communities

There are many issues facing women in rural and remote communities that make accessing the criminal justice system particularly difficult. Some of these have to do with the nature of small town living - others are the effect of justice system processes and procedures.

One issue for women in these communities is the lack of anonymity. Attending court, as either a complainant or an accused, in a small community can cause enormous embarrassment and social stigma. At least in larger towns there is some chance of anonymity. Women in rural communities reported problems of labelling and pre-judgment. They told us that even if the community believes the complainant she could still be stigmatised as a victim .

To overcome this problem, it was suggested to the Taskforce that trials of rural and remote offenders should be conducted outside the local area, or in a closed court and further, that assistance should be given to those in need to travel to court. Technology such as video-conferences could also be used in rural and remote areas for witnesses.

On the other hand, having to travel long distances can also cause problems. Where the law requires an offence to be dealt with by a higher court than the accused must travel to the centre in which the court is sitting, either permanently or on circuit. For accused women in remote parts of the State this can involve a journey of considerable distance and cost. Circuit courts now hear sentences in four remote communities: Kowanyama, Aurukun, Weipa and Thursday Island. However, in these communities a plea of not guilty still means a trial in the closest higher court in Cairns. The only practical means of travel (particularly in the wet season) is by air. The cost of a return airfare from Kowanyama to Cairns, for example, is \$680.

Everyone living in rural and remote parts of the State faces these same difficulties where the nearest court is a long way away. The problem is worse for people with limited financial resources.

We are aware, however, that there are many issues associated with conducting trials in rural and remote communities that mean they are neither feasible nor logistically possible. The difficulty in forming juries is one example of the practical problems.

Nonetheless the Taskforce is concerned about some of the practical consequences for these communities that can arise from distance and obstacles to accessing the justice system. Such consequences include:

- police, in determining which offence to charge, may be inappropriately influenced by which court (and its location) an offence is required to be dealt with;
- defendants, in deciding how to plead, may be inappropriately influenced by which court (and its location) the offence is required to be dealt with;
- defendants on bail, in order to get their costs of travel met by the State, may be indirectly encouraged to commit an offence under the Bail Act by failing to appear in court. When this happens, a warrant for their arrest may be issued to ensure further attendance. The problem is then compounded by the practice of giving one-way tickets. After the matter is finalised, the defendant, if not sentenced to a period of imprisonment, may be stranded with no money and no way to return home.

These consequences have been supported by submissions to the Taskforce and community consultations.

The Taskforce recognises that in some Indigenous communities, legal services meet the expense of travel by defendants to court.

The Taskforce questions whether it would be more cost effective for criminal justice system agencies to meet the travel expenses of defendants on bail in remote areas, on a means tested basis. For example, now when a defendant fails to appear a bench warrant may be issued for their arrest, a police escort is required to accompany the defendant to court - a more costly exercise than an airfare for one party would have been.

In their submission to the Taskforce Legal Discussion Paper the Justices of the Supreme Court commented on this issue with respect to defendants from remote Aboriginal and Torres Strait islander communities:

The judges consider that funding should be made available for transporting alleged offenders from remote Aboriginal and Torres Strait Islander communities to regional centres for hearing whether or not bail is granted. The source of that funding is a matter for discussion and determination by the Executive and Legal Aid Queensland.

#### **Recommendation 22**

That a working party made up of representative from the QPS, JAG (Courts Division), LAQ and the Queensland Aboriginal and Islander Legal Service be established to investigate this issue with a view to developing a practice of funding (means tested) all defendant's attendance at higher courts where the defendant resides in a remote community.

#### **Bail**

The legal issues associated with bail are discussed in Chapter 11. There are, however, some general practice and procedure issues connected with bail of concern to the Taskforce. In particular, bail orders and undertakings can present problems. There can be serious consequences for those, especially some non-English speakers, who cannot read or understand court forms. Literacy in the community generally, and refugee communities particularly, should not be assumed.

The BEA, as it then was, noted that in criminal matters, the form for the bail undertaking has been a particular source of difficulty:

Many people from countries which do not have legal systems similar to that in Australia do not understand the concept of bail. Legal practitioners and court staff advise there had been cases of defendants who did not understand that by signing the bail form they promised to return to court and, furthermore, thought that the signing of the bail undertaking indicated that the case was over.

The danger of failing to understand, and to comply, with bail conditions is not only serious for the accused, it can be dangerous for women victims/survivors. For NESB women whose current or former partners are charged with crimes of violence against them, the inability of that partner to comprehend conditions of bail (such as conditions to refrain from any contact with the victim/survivor) is potentially fatal.

#### **Recommendation 23**

Preparation of an instruction sheet in multiple community languages explaining the purpose of the bail undertaking, to be signed by the Defendant in addition to the undertaking, and to be used in all bail applications involving non-English speakers whether in inferior or superior courts.

### **PART 3: SYSTEM PROCEDURES AND PROTOCOLS - SEXUAL VIOLENCE AND DOMESTIC VIOLENCE**

The Taskforce recognises that it is not only the law that can impact upon a person's experience of the criminal justice system - but also the way the law is implemented, observed and monitored.

Generally the first agency to respond to a criminal incident is the QPS which means that a victim's first encounter with the criminal justice system is with the police. The QPS has acknowledged the importance of their role in dealing with victims of crime and has comprehensive Operational Procedures Manuals (OPMs) to assist with the broad range of their duties.

The Taskforce, fortunately, has had the opportunity to review the OPMs and the Taskforce includes a representative from the QPS.

## **Sexual offences**

### **Police procedures**

In addition to the OPMs, for some types of crime, the QPS has additional operational protocols to assist with investigating the offence and dealing with the victim. For example, the Rape and Sexual Assault Protocols for Police have been developed for dealing with crimes of sexual violence.

The Taskforce has one particular concern with the QPS police protocol directing investigating officers to "take a statement from the complainant as soon as possible after the offence". While we are aware that the police have an important investigative role, the Taskforce considers that a victim/survivor should have the choice of providing a statement immediately or be allowed a rest period, depending on the circumstances surrounding the reporting.

Jennifer Temkin's report *Plus %C7a Change - Reporting Rape in the 1990s* is a qualitative study involving 23 women whose cases were recorded by the Sussex police in the United Kingdom. Temkin details that women reported feeling exhausted and distressed when giving police statements, some said that their tiredness led to confusion. The policy of the London Metropolitan Police is to allow victims/survivors to return home to rest after the basic information has been obtained. To ensure that victims/survivors have a proper opportunity to provide their statements, the Taskforce supports this kind of policy.

### **Recommendation 24**

That QPS protocols for rape and sexual assault be amended to allow a complainant to provide a statement either immediately upon reporting or following a rest period.

### **Police attitudes**

The Taskforce is of the view that it is not the gender of the police officer to whom a complaint of sexual violence is made that is usually an issue for female complainants, but rather the degree of empathy shown by the officer. Dissatisfaction with the police handling of a matter may influence whether the complainant pursues it. However, women who opt out of the system because of their experience of police are not likely to complain, and therefore attitudinal problems in the police service persist.

Specialist units in larger centres may help to ensure a high standard of professionalism by the QPS in the policing of sexual (and domestic) violence. However, the Taskforce acknowledges the benefit of all officers being trained in these issues.

For many victims/survivors of sexual violence the offence involves a breach of trust - whether the offence is committed by a stranger or someone known to the victim/survivor. Following the offence issues of trust frequently present as important concerns for victims/survivors of sexual violence. The involvement of several different officers in the matter does not help a woman with these concerns. Continuity is very important, and where possible the same officer needs to take the statement, investigate and be the point of contact throughout the process. The responsible officer must also be accessible. Many women in consultations report that it is almost impossible to contact the investigating officer due to the structure of shifts and leave. At present the continuity emphasis appears to be on evidence rather than on interaction with the victim. In Part 5 of this Chapter we discuss the value of establishing a QPS Victims Advisory Unit which would address these concerns.

### **Other agencies**

Police are one of many criminal justice agencies with whom a victim/survivor of a sexual offence has contact. Government and non-government agencies working with women who have been raped or sexually assaulted each have their own policies and protocols but there is no coordination between agencies with respect to these.

Draft protocols (across agencies) for working with women who have been raped or sexually assaulted were developed in 1994 with a further draft completed in 1996. Three different working parties comprising all relevant government and non-government agencies (legal and non-legal) developed these protocols.

Changes of government since the completion of the last draft have contributed to the delay in endorsement of the document. Queensland Health (QH), the government agency with responsibility for the area, has advised the Taskforce that a dedicated project officer has been appointed to review, develop and implement the protocols over the next 12 months. The Taskforce has been advised that QH will consult with government and non-government agencies in the process.

Most sexual assault support services are provided by community-based agencies, and the Taskforce recognises the importance and value of input from service providers in developing and up-dating the 1996 draft protocols.

The Taskforce emphasises the importance of protocols across the sectors to assist in improving the experiences of victims/survivors of sexual violence with the criminal justice system.

### **Recommendation 25**

25.1 That Queensland Health consult with all government and non-government agencies involved in service provision for victims of rape and sexual assault in the development of protocols focused on the needs of victims.

25.2 That these protocols be endorsed by agencies and implemented as a matter of urgency.

25.3 That all government and non-government agencies be appropriately funded to adhere to the protocols.

### **Domestic violence**

Domestic violence has been a major concern for the Taskforce and not surprisingly, aspects of domestic violence are discussed in many places throughout this Report. Legal Issues associated with domestic violence are discussed in detail in Chapter 5. Services and support for women who are victims of domestic violence are discussed in Chapter 2 and in Part 5 of this Chapter. Training and education for police in responding to victims of domestic violence are dealt with in Chapter 4.

This Chapter is concerned with aspects of the criminal justice system's response to domestic violence - the need for improved police responses; the need for more integrated and coordinated responses to domestic violence; and perpetrator programs.

A protection order is a civil remedy for domestic violence provided under the Domestic Violence (Family Protection) Act 1989 (the DV Act). Where the behaviour also amounts to a criminal act then police can bring criminal charges under the Criminal Code.

Police can pursue remedies under each Act<sup>68</sup> with the DV Act providing a statutory duty to investigate.<sup>69</sup> The DV Act provides that breaches of protection orders are criminal offences.

The rationale for providing a civil remedy under the DV Act is:

- not all acts of domestic violence as defined by the DV Act amount to criminal acts;
- a lower standard of proof is required (so it should be easier to prove);
- it provides some protection but does not preclude criminal prosecution where the acts of domestic violence amount to criminal behaviour;
- protection orders (temporary and final) under the DV Act are directed at protecting the victim/survivor from future behaviour by their spouse, whereas criminal proceedings are directed at punishing past behaviour; and
- recognition that not all victim/survivors want to pursue a criminal "remedy".

On some occasions women may choose not to pursue criminal charges. Workers within agencies dealing with domestic violence are familiar with these reasons and these were also reflected in submissions to the Taskforce and in community consultations. They can include: fear of reprisals, wanting the violence to stop but not the relationship, not wanting to give evidence against her partner, and the negative impact that a criminal sentence may have on the woman and her family.

### **Police responses**

Anecdotal evidence from consultations and from members of the Taskforce suggests that police rarely bring criminal charges in relation to domestic violence incidents.

The QPS includes an extensive chapter in its OPM on domestic violence. Chapter 9 of the OPM provides guidance to officers on pursuing action other than under the DV Act, but does not specifically refer to criminal proceedings. Instead, the direction is drafted in wide terms:

9.6.1 An officer, who reasonably believes after investigation that:

(i) the person is an aggrieved spouse; and  
(ii) there is reason to take action and there is sufficient evidence to a civil standard - 'balance of probability';

is to:

(i) apply for a protection order against the spouse of the aggrieved spouse; and  
(ii) take other action that the officer is required or authorised to take under the Domestic Violence (Family Protection) Act or any other Act.

The Taskforce accepts that the policy and procedural framework for the investigation of offences involving domestic violence and sexual assault in Queensland is sound. However, concerns from consultations and submissions indicate that police responses, particularly with respect to domestic violence, are sometimes inadequate.

Section 9.6.1 of the OPM leaves open the possibility of bringing criminal charges under the Criminal Code. The Taskforce considers that where criminal behaviour has occurred in a relationship there should be a positive obligation on police to make the victim aware of the option to pursue both a protection order and criminal prosecution. The Taskforce considers that this should be clearly stated in section 9.6.1 of the OPMs.

The Taskforce acknowledges that many police officers in Queensland adhere to the guidelines and protocols and, in some cases go beyond them, to fulfil their duty. It is also likely that in some regions police do make victims aware of the option to pursue a protection order and criminal prosecution. However, sadly, reports continue to describe police responses as inadequate or at the least, inconsistent across the State.

#### **Recommendation 26**

That OPM 9.6.1 emphasise or specifically refer to the possibility of officers taking action under the Criminal Code where the acts of domestic violence also amount to criminal acts.

#### **Recommendation 27**

That all police attending domestic violence call-outs be directed to inform the aggrieved spouse of the possibility of pursuing criminal charges where the acts of domestic violence amount to criminal acts.

#### **Integrated approaches to violence against women**

In written submissions and community consultations women commonly called for an integrated response by the criminal justice system and support services to violence against women (in relation to both domestic violence and sexual

violence). For this to occur, there needs to be coordinated protocols and agreed principles across agencies, as well as appropriate communication channels and adequate resources.

Specifically, a continuum of advocacy and support services, including professional and peer support, which monitor the process and support the victim need to be offered pro-actively.

The Taskforce is of the view that the response to all forms of violence against women, by government and non-government agencies, should be as seamless as possible. The current artificial distinction in responses to domestic violence and sexual violence are partly the result of funding arrangements for agencies working in these areas (for example, DFYCC is responsible for domestic violence, Queensland Health for sexual assault). Such divisions are not unique to Queensland, but have affected service delivery throughout Australia and other countries.

However, the Taskforce has necessarily dealt with responses to domestic violence and sexual assault separately since this reflects the fact that responses at the local community level have maintained the distinction. Pulling together all processes under an umbrella of an Integrated Response to Violence Against Women is a goal for the future.

Chapter 2 discusses the issues in relation to services for women and women's demand for smooth progress through the criminal justice system. To achieve this, the different roles and skills of the different workers/agencies need to be made clear and mechanisms put in place to guide women through the process - government and community services need to coordinate, cooperate and develop appropriate linkages. Court support workers require funding and support to develop and maintain their links with coordinated community responses.

This Chapter examines the linkages necessary to provide women with a holistic response that prioritises their safety, provides support and respects their dignity. An appropriately diverse, well-resourced and effectively distributed network of services is essential to the development of an integrated response. The recommendations in Chapter 2 provide the foundation for the ideas explored in this Chapter.

To realise the goal of a fully integrated response the Taskforce believes that government should establish a committee or council with appropriately broad membership and terms of reference to undertake the task of merging the sectors and formalising processes. To some extent interaction between the different sectors and workers in the area already occurs at an informal level. It appears to the Taskforce, however, that women and service providers from all spheres are searching for strategic direction. The recommendation in Chapter 2 for structural advocacy calling for commitment to the community sector's role in socio-economic policy development and law reform in the area of violence against women, is recognition of this.

### **Recommendation 28**

That an End Violence Against Women Council be established in Queensland with representation from relevant government departments and the community sector. Its Terms of Reference should cover service issues, the development and support of integrated responses and advice to Government on social and legal issues. The final Terms of Reference and membership should be determined by community consultation.

## **Integrated responses to domestic violence**

Consultations showed that significant resources and energy should be put into developing an integrated response to domestic violence throughout the State. Such responses involve close co-operation between all agencies and individuals that come into contact with the victim/survivor or the perpetrator. Often these models develop at a local level but they require support and resources from government, the community sector and private agencies to be successful.

- intervention projects coordinating the responses of the police, legal systems and social services have been developed ... out of a recognition that inconsistent social responses have failed to adequately support and protect victims of domestic violence.

Successful examples of integrated responses have been developed in the USA, New Zealand and the United Kingdom.

## **Coordinated community responses in Queensland**

During 1999 the QDVC conducted a survey of existing coordinated community responses to domestic violence in Queensland. It received 12 responses that showed different levels of development and sophistication. However, service providers strongly believe that such approaches are required and this has been translated into action in a number of places.

Community-based agencies have generally initiated such efforts, and they have drawn in government agencies. Many of these community agencies are, however, funded by the DFYCC.

At the government level there has been a notable lack of policy development around this issue and no formal policy development across agencies on a statewide basis. Each project operates in its own way, fighting its own fights and struggling to bring all of the relevant agencies and individuals on board. Further, there is no central data bank of information on the models under development, although we are aware that there are quite sophisticated projects now in place.

Table One at the end of this part sets out information from four of the respondents. The examples provide a snapshot of the variety of responses in place currently.

There is considerable diversity in the existing coordinated community responses. The QDVC concluded that:

Arguably the most essential element of a coordinated community response to domestic violence is a coordinating structure such as a local steering committee. This is responsible for the development of a philosophy and principles which are shared by the agencies participating in the response. The committee also coordinates the activities of the response.

Some other common or desirable features include:

- standard protocols and procedures within and across agencies;
- cross agency training;
- 24 hour service to victims;

- court support and advocacy;
- case management and review;
- specialist police units;
- children's counselling;
- voluntary and mandated perpetrator programs;
- ongoing community awareness and education;
- program evaluation, including client participation.

The Gold Coast Domestic Violence Service coordinates one of the most advanced integrated responses in Queensland. It recently published a report (1999) that provides information on the model that has been adopted. The guiding principles which underpin the Gold Coast Integrated Response are:

- victim safety is of paramount importance;
- perpetrators of domestic violence must be held accountable for their behaviour;
- domestic violence is a crime that needs a criminal justice response;
- everyone has a right to a life free from domestic violence;
- the cultural diversity of society requires that all strategies and programs are inclusive and culturally appropriate;
- victims of domestic violence are entitled to access services which are immediate, consistent, and who work together to lessen the occurrence of secondary victimisation;
- domestic violence needs to be understood in the political, social, cultural and economic conditions which create unequal power between men and women.

There is substantial work in developing coordinated community responses in local areas but the concept is widely supported and practised. Such responses can enhance the capacity of the legal system and other support services to respond effectively to domestic violence. Such efforts will however require time, training and resources.

It is outside the Terms of Reference and expertise of the Taskforce to provide detailed recommendations on the establishment, development and maintenance of integrated response models. Nevertheless it is clear from our work that this is an issue requiring urgent attention in Queensland.

### **Police action and responsibility**

The role of the police is critical to the development of an integrated response to domestic violence. The Taskforce acknowledges the weight of community expectations of the QPS in respect to domestic violence, and that police will struggle to find ways of dealing with this complex social issue. Police are expected to understand the dynamics of domestic violence situations and to be aware of its social implications, but they are also expected to be the first line of response - often in a highly charged and emotional environment. The QPS has made significant progress since the Domestic Violence (Family Protection) Act

came into operation in 1989. Police responses to domestic violence are discussed in this part in the context of integrated approaches.

### **Breaches of protection orders**

Many comments to the Taskforce related to lack of, or inappropriate, police responses to breaches of protection orders. One submission somewhat gently described the prob