IN SEARCH OF JUSTICE
IN DOMESTIC AND FAMILY VIOLENCE

Heather Nancarrow BA (Social Science)

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Statement of Originality

This work has not been previously submitted for a degree or diploma in any other university. To the best of my knowledge and belief, the dissertation contains no material previously published or written by another person except where due reference is made in the dissertation itself.

Heather Nancarrow

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Acknowledgements

I extend my sincere gratitude and heartfelt thanks to the women who participated in the research for this dissertation. In particular I would like to pay special tribute to the Indigenous women who participated, recognising that Indigenous people have been researched extensively and specifically on the topic of family violence in recent years.

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Contents

Introduction

This research emerges from my 21 years involvement in Queensland and at the national level in the domestic violence prevention sector, and my increasing concern that the gains of the women's movement towards eliminating domestic violence seem to benefit some women more than others.

Over the years, and particularly as my work with Murri[1] women and knowledge of their struggles with violence increased, my concern with inequality among women increased. In 2000, a review of state-funded domestic violence services in Queensland confirmed that many of the domestic violence responses were irrelevant or of little benefit to Indigenous women, especially those who live in rural and remote communities. Also in 2000, the Queensland Government released the reports of two Taskforce investigations it had commissioned to inform policy development, largely in the area of violence against women. These were the *Aboriginal and Torres Strait Islander Women's Taskforce on Violence[2]*, comprising only Indigenous women, which I call the "Indigenous[3] women's Taskforce"; and the *Taskforce on Women and the Criminal Code,* comprising only two Indigenous women and nineteen non-Indigenous women, which I call the "non-Indigenous women's Taskforce"[4].

I was struck by the way in which the two Taskforce Reports contradicted each other on the key question of appropriate justice models to deal with violence against women. The contradiction was especially striking because the two Taskforce investigations occurred almost simultaneously and were reporting to the same Government Minister[5], presenting her with a policy dilemma.

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[1] The term 'Murri' is generally applied to Queesland Aborigines, particularly within Aboriginal communities.
[2] The *Aboriginal and Torres Strait Islander Women's Taskforce on Violence* had approximately 50 members at the outset but was undertaken by a core group of twenty women.
[3] I acknowledge the problems and politics of linking Aboriginal and Torres Strait Islander women under this term and admit to doing so for convenience and readability. I regret any offence this may cause.
[4] The *Taskforce on Women and the Criminal Code* comprised 21 members. About half were representing Government Departments and half were drawn from community-based women's services or academic institutions. The membership included one Aboriginal woman and one Torres Strait Islander woman. The rest were non-Indigenous women. As Director of the Domestic Violence Prevention Branch, I represented the Queensland Department of Families on this Taskforce.
[5] The Honourable Judy Spence, MP, Minister for Women's Policy and Minister for Aboriginal and Torres Strait Islander Policy.

The Indigenous women's Taskforce Report discusses restorative justice in broad terms, seeing it as a process that empowers Indigenous peoples and maximises Community[6] participation in crime prevention. It recommends to the Minister that restorative justice is a viable alternative to the criminal justice system and that it must be considered where Indigenous people are disproportionately represented in correctional systems.

In stark contrast, discussion of restorative justice in the non-Indigenous women's Taskforce Report centres on victim-offender mediation, which it describes as one of the most common forms of restorative justice. It states that the terms "community conferencing" and "shaming" (p. 65) are used to reflect the same or a similar process, as victim-offender mediation. The non-Indigenous women's Taskforce recommends to the Minister that victim-offender mediation should never replace the criminal justice system and that as a matter of principle, violent offences should result in criminal prosecution where there is evidence to support the charge (p.69).

Given the composition of each Taskforce, their positions seem to represent a racialized split on the application of restorative justice practices in cases of domestic and family violence. This observation and my concern about equitable responses to domestic and family violence have inspired this study.

The research aims

I wanted to better understand how the two groups of women arrived at their disparate recommendations. The questions I wanted to answer relate to how much and what sort of variation there is in the views of Indigenous women and non-Indigenous women on the application of restorative justice practices in cases of domestic and family violence. Specifically, I set out to examine the Indigenous and non-Indigenous women's understandings and views about domestic and family violence, the criminal justice system, and restorative justice practices. I was also interested in their views about objectives in seeking justice in domestic and family violence, whether they want to achieve the same or different things, and whether the criminal justice system or restorative justice practices seem more effective in achieving these objectives.

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[6] Here the term "community" has a specific meaning, referring to communities under local Indigenous governance, with an elected Community Council Chair.

Structure

I locate this analysis of the Taskforce recommendations in the context of feminist debates as well as debates between black and white women, and on effective methods of addressing men's violence against women. Chapter 1 outlines the role of feminist scholarship and reforms in efforts to address domestic violence, followed by a sketch of black feminists' critiques of the dominant white feminist analyses and discussion of the interface of these debates with the "new"[7] justice responses. While the focus of my enquiry arises from Taskforce investigations in Queensland, the debate is taking place throughout Australia and overseas and this is relevant to my analysis as well.

The research process is described in chapter 2, including discussion of how I am located in the research focus and process. This aims to make the inherent subjectivity in the process transparent, and sets up discussion on the research sample and method. Chapters 3 and 4 present the findings of my research. In Chapter 3 I discuss the results for my interviews with 10 Indigenous women about their understandings of key terms and their perspectives on the criminal justice system and restorative justice practices in responding to cases of domestic and family violence. I have used their own words to illustrate key points and given each participant a pseudonym to better reflect the very human interaction that took place in the interviews. Chapter 4 replicates this approach for the findings from interviews with non-Indigenous women.

Chapter 5 aims to elucidate commonalities in the Indigenous women and non-Indigenous women's views, as well as clarifying the disparity conveyed in the findings of the two Taskforce investigations. Areas where the views of Indigenous women and non-Indigenous women are opposed, where they are in general agreement, and where they are unanimous in regard to the application of the criminal justice system and restorative justice practices in cases of domestic and family violence are identified.

The final chapter summarises the findings and concludes that the justice system and feminist legal reform efforts have largely been in the service of white women only.

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[7] Daly's (2002) way of distinguishing between the 'old' conventional justice based on police and courts and the 'new' justice, which makes victims, offenders and the community all central to the justice process.

Chapter 1:   Feminist perspectives and the interface with 'new' justice

In this chapter I briefly sketch the influence of feminist scholarship and reform efforts to address domestic violence, followed by discussion of black feminist critiques of dominant white feminist responses and the emergence of alternatives. My overview will sharpen the focus and provide a context for considering the research findings in later chapters.

Feminist analyses of domestic violence

The early 1960s' exposure of child abuse and neglect within the family gave rise to the "discovery" of spouse abuse and various attempts to explain its causes. Most of these explanations were framed within a medical model and focused on the individual pathology of the abuser or, worse, the characteristics of the victim that caused her to be abused. This "discovery" of spouse abuse coincided with, and was propelled by, the second wave of feminism, especially in North America, the United Kingdom, and Australia.   Feminists were quick to pick up and address the inadequacy of the medical models of explanation, which failed to account for the gendered profile of spouse abuse. Feminist analyses of domestic violence became, and remain, the dominant foundation for responses to domestic violence in the Western world (Dobash and Dobash, 1992).

As feminist criminologists Kathleen Daly and Meda Chesney-Lind point out, however, "to talk of the feminist analysis of a given social phenomenon is to talk nonsense" (1988: 501). Within feminist thought there is agreement that women suffer as a result of gender inequality and that radical change is needed, but there are differences of opinion about the causes of gender inequality and what can or should be done to bring about the radical change necessary to meet women's needs. Radical feminist and liberal feminist perspectives have been, and continue to be, the predominant influences in feminist scholarship and reform efforts in responding to domestic violence, with "socialist", or class-race-gender, feminist perspectives emerging at a later point and, to some degree, in response to critiques from minority-group feminists (see Daly, 1993).

Drawing from Daly and Chesney-Lind (1988), an outline of the basic tenets of each of these predominant perspectives is provided in Appendix 1.

Feminist responses to domestic and family violence

Early feminist responses to domestic violence centred on establishing refuges for women attempting to escape from male partner violence. Most women's refuges established throughout the 1970s and 1980s, including those in Australia[8], operated along radical feminist lines. Managed by feminist collectives they were "women-only spaces", accommodating the women's children so long as they were not males over a prescribed age. Though not all women's refuges were radical feminist collectives, they were the most prominent, and visible in the media, in advocating for radical change to end violence against women. Therefore, public perception associated women's refuges with rejection of men, generally, and women's separation from their male partners and (often) their male children specifically.

Throughout the 1980s the influence of liberal feminism could also be seen in other emerging responses to domestic violence, including legal reforms. By the end of the 1980s most Australian jurisdictions had undertaken an investigation into the nature and extent of domestic violence within their area and, in response, developed public policy, civil legislation, programs and services to address men's violence against their female spouses. The Queensland Domestic Violence Taskforce Report of 1988, *Beyond These Walls*, resulted in civil domestic violence legislation, the establishment of the Queensland Domestic Violence Council, and a raft of policy and program initiatives.

By the early 1990s, and following the election of the first Queensland Labor Government in decades, a number of State government agencies, such as the Women's Policy Unit in the Office of the Cabinet, were established to improve the status of women in Queensland. Radical feminist theory provided the foundation for a range of new initiatives, as evidenced in the guiding principles of the *Stop Violence Against Women Policy (1992)[9]*, which recognised that violence against women occurs

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[8] In Queensland, many of the women's refuges were operated by Christian organisations such as St Vincent de Paul, Salvation Army, and Uniting Church due to a conservative government and limited state support.
[9] I was a member of the team in the Women's Policy Unit, Office of Cabinet, Queensland Government, that produced this policy.

in a context of the unequal economic and social power structures between men and women.

Radical feminist theory in domestic violence

Within radical feminist theory, domestic violence is understood as a consequence of patriarchal power and the assertion of "male privilege" within the family. This is articulated in a model developed by Pence and Paymar (1986), adopted around the world as best practice. Within this model domestic violence is characterised by a pattern of behaviour designed to dominate and control one's partner, and is represented as a "power and control wheel". The spokes of the wheel represent forms of abuse not involving actual assault. These "tactics" of domination and control include verbal, psychological, financial and social abuse, threats and intimidation and use of "male privilege". The rim of the wheel, holding it all together, represents tactics of physical and sexual assault. The tactics not involving actual assault are often all that is required in achieving the desired control and domination, because of the potential to use, and therefore the ever-present threat of actual physical and sexual assault. Though not specifically drawn out by Pence and Paymar, this model is reminiscent of Brownmiller's (1975) theory of rape as a conscious process of intimidation by which all men keep all women under their control.

Feminist strategies for change

While radical feminism has provided the predominant theoretical model for addressing domestic violence, strategies for change, including community education, women's rights to access women-only services, economic independence and legislative reform, have been predominantly based on liberal feminist analyses. These strategies focussed on: 1) changing attitudes that perpetuate domestic violence, through community education; 2) supporting women and children to leave violent relationships; and 3) reforming the legal system to meet the needs of women affected by domestic violence. Most effort in the area of legal reform has been invested in attempts to change the existing criminal justice system.

Australian feminist legal reform efforts

Queensland's *Domestic Violence (Family Protection) Act 1989* had barely been enacted when feminist critiques of civil responses to domestic violence, such as Scutt's (1990), emerged. These critiques assert that civil responses collude with perpetrators of domestic violence by trivializing and minimizing criminal assault in the home and that violence against women by their male partners must be addressed through the criminal justice system, with serious consequences. This theme was picked up by the National Committee on Violence Against Women (NCVAW)[10] in its *National Strategy on Violence Against Women* (1993). The National Strategy's objectives included the achievement of:

> …more just and equitable responses by the criminal
> justice system, which highlight the seriousness of the
> offences, and to strengthen the authority of the law in its
> effective and important role of influencing community
> attitudes and supporting social change (p. 17).

While the National Strategy was primarily concerned with gender equality in the law, the early 1990s also saw the emergence of concerns about racial and other inequalities. The Australian Law Reform Commission's report *Equality Before the Law: Justice for Women* (1994) identified women from non-English speaking backgrounds, Aboriginal women, women with disabilities and women in rural or remote areas as particularly at risk of structural and personal discrimination, and thus disadvantaged before the law. Because Indigenous women's rates of incarceration continue to be significantly higher than non-Indigenous women's rates of incarceration[11] it seems that any attempts to address this inequality have failed.

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[10] A Commonwealth Government representative chaired the Committee and membership comprised one Government and one non-Government representative from each State and Territory, and two police representatives (one from Western Australia and one from Victoria). There was only one Indigenous member (a Government member from the Northern Territory).

[11] Human Rights and Equal Opportunity Commissioner, Dr William Jonas reports that at June 2002, Indigenous women were over-represented in prison at 19.6 times the rate for non-Indigenous women.

Advocacy groups continue to be concerned that civil justice responses to domestic violence undermine attempts to have domestic violence taken seriously in the criminal justice system. Douglas and Godden (2002) found that domestic violence in Queensland is rarely prosecuted as a criminal offence; they conclude that Queensland's civil law has "trumped" the operation of the Queensland Criminal Code, effectively "decriminalising" domestic violence in this State[12]. Complementing their critique is recent increased pressure from some feminist organisations and individuals for mandatory or pro-arrest policing and no-drop prosecutions for domestic violence. Betty Taylor[13], for example, asserts, "the implementation of pro-arrest policies…'no-drop' and victim-assisted approaches to prosecution of domestic assaults…and specific domestic violence criminal courts…could all enhance existing responses and interventions" (2002b: 5).

This pressure has resulted, in part, from early research by Sherman and Berk (1984), which showed arrest to be a specific deterrent of domestic violence, although further research replicating Sherman and Berk's study found that the effects of arrest were influenced by "the arrested person's stake in conformity" (Sherman et al, 1992: 686) and Sherman (1992) also reported that while arrest deterred violence in the short-term, violence escalated in cities with higher proportions of unemployed black people being arrested. Subsequent research yields conflicting findings on the effects of mandatory, or pro-arrest policies. For example, Sherman (1992; 1995), Smith (2001) and Coker (2001) have shown that reduced recidivism may be short-term and dependent on offender characteristics such as race, employment status, marital status, socio-economic status and the level of abuse. Most evidence that mandatory arrest reduces recidivism relies on the number of re-arrests to measure this, discounting the significant under-reporting of recidivism, which seems even more likely if the initial arrest has had unintended negative consequences for victims. Coker (2001), Smith (2001) and Hirschel and Buzawa (2002) highlight variable effects of mandatory arrest and the unintended negative consequences for victims of violence, including increased incarceration of women, and especially black, Latino and poor women. However,

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[12] See Appendix 3 for discussion of the Queensland Domestic Violence Taskforce intentions for the civil law to complement, not replace, the application of criminal law.
[13] Betty Taylor is Co-ordinator of the Gold Coast Domestic Violence Integrated Response and current Chairperson of the Queensland Domestic and Family Violence Council. She received a Churchill Fellowship to examine the development and progress of integrated responses to domestic violence in the United States of America and Canada, which she undertook in 2002.

Maxwell, Garner and Fagan (2002), whose research methodology gave considerable weight to victim interviews, "support the continued use of arrests as a preferred law enforcement response for reducing subsequent victimization of women by their intimate partners" (p. 69).

Like Coker, Smith and others, Stubbs (1994) is concerned that access to the considerable improvements in legal protection for women subjected to domestic violence is not equally available. She sees that white, urban women from the dominant culture are "most able to mobilize that protection (while) Aboriginal women, women in rural areas and those from non-English speaking backgrounds remain the least protected" (p. 4). In recognition of these limitations, Stubbs throws out the challenge of re-thinking theory and policy in a way that acknowledges "difference in experience, difference in perspective, difference in need, and in developing policy which is responsive to those differences" (p. 4).

Since the early 1990s there have been numerous attempts by predominantly white feminist organisations to recognise and respect difference and to be inclusive of Indigenous women in the policy development process. In hindsight, however, it appears that much of this was, as Huggins (1998) says, merely inviting Indigenous women to join the white women's struggle and facilitating white women to speak for Indigenous women. For example, only one of the 19 members of NCVAW was Indigenous; the Queensland Domestic Violence Council membership included only two Indigenous people (one Aboriginal and one Torres Strait Islander) until December 1999, when four Indigenous people were appointed to the 22-member Council; and the *Taskforce on Women and the Criminal Code* included only one Aboriginal woman and one Torres Strait Islander woman among its 21 members.

Black feminist critiques of dominant feminist analyses
Ladson-Billings (2000) identifies three key features of critical race theory: a perspective that holds racism as "normal, not aberrant"; the integration of experiential knowledge within critical race theorists' struggles to "transform a world deteriorating under…racial hegemony"; and a critique of liberalism because of its perseverance with the current legal system "as a catalyst for social change" although it is seen to be inadequate because of its "emphasis on incrementalism" (2000: 264). This follows a wave of North

American black feminist thought, with bell hooks (1984; 1989) and Patricia Hill Collins (1990) among the most influential. By the early 1990s, feminism and feminist research practice was being criticised in Australia by Aboriginal women, including Jackie Huggins (1994; 1998), Melissa Lucashenko (1994; 1997) and Aileen Moreton-Robinson (2000). Huggins asserts that feminism has had the effect of "…invisibilising race" (1998: 74) and compares the feminist movement's invitation to Aboriginal women to join its (that is, white women's) struggles against male oppression as "being equivalent to the old, patronizing governmental doctrines of integration and assimilation" (1994: 78). Huggins further articulates this point specifically in regard to domestic and family violence:

> In asking Aboriginal women to stand apart from Aboriginal men,
> the white women's movement was, perhaps unconsciously,
> repeating the attempts made over decades by welfare
> administrations to separate Aboriginal women and use them
> against their families (1994: 70).

She takes the critique of feminism and its failure to accommodate the experience of black women a step further in saying, "It is imperative that any discussion of race and gender includes the issue of oppression of black women by white women" (1998: 28).

Moreton-Robinson provides the same critique, and specifically addresses the question of research methodology (employed by feminist anthropologists in their fieldwork), which she says, "occurs in contexts shaped by colonialism" (2000: 91), affecting the way Aboriginal women are represented in white women's writing. Making the same argument as Collins (1990), Moreton-Robinson calls for Indigenous women's standpoint to be the central standpoint, with non-Indigenous women being forced to see themselves and others through the eyes of Indigenous women. This is a direct challenge to what Daly (1993) calls the "additive approach" of white feminism in which racial oppression is seen as a matter to be addressed but which still gives "primacy to gender oppression" (Moreton-Robinson, 2000: 53).

Further, Daly (1997) reminds us that individual experience is multi-dimensional and shaped by external structures and interactions in the context of class, race and gender.

Indigenous men, for example, may simultaneously experience privilege (in relation to Indigenous women) and oppression (in relation to non-Indigenous men and non-Indigenous women). That is, Indigenous men, particularly, can be both victims and perpetrators of violence stemming from power and control dynamics when viewed through the lens of critical race theory. This sets up a moral dilemma for Indigenous women seeking to end male violence against women and children, while recognising the oppression of Indigenous communities, and the need for unity amongst Indigenous people against the forces of colonisation.

The socialist feminist conception inherent in Daly's discussion of class, race and gender, above, is taken up forcefully by Lucashenko in her writing on Aboriginal women and Australian feminism. She argues, "our oppressions are not interchangeable" (1994: 21), and points out that:

> Black women have been torn between the self-evident
> oppression they share with indigenous men – oppression
> that fits uneasily if at all into the frameworks of White
> feminism – and the unacceptability of those men's violent
> sexist behaviours toward their families (1997: 156).

Lucashenko acknowledges that feminism influenced by minority and Third World women is significantly different from earlier radical feminism and is "superficially at least, more palatable and relevant (for Indigenous women) than that of two decades ago" (1997: 157).

The distinct circumstances of Aboriginal and Torres Strait Islander women were also discussed at the 1994 national conference "Challenging the Legal System's Response to Domestic Violence"[14], where Aboriginal and Torres Strait Islander women, represented by three speakers[15], were included in the program. Each spoke on the topic "Time to Take Control", arguing that effective responses to family violence[16]

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[14] Conducted in Queensland and convened by the (Brisbane) Southside Domestic Violence Action Group
[15] Margaret Ahkee; Shirley Christian; Cheryl Buchanan.
[16] It was around this time that Indigenous women began to distinguish their experience from that of white women by referring to 'family violence', denoting the prevalence of violence within a wider range of relationships and specifically including sexual abuse and child abuse, which seemed to be treated separately within the white Australian community, while for Aboriginal women, these were all related and part of the same problem.

required not only Indigenous control over the resources for and processes of these responses, but such control needs to be held within individual communities, reflecting the heterogeneity in Indigenous Australia.

Throughout the 1990s Indigenous women increasingly voiced their concerns about the dominant paradigms in which domestic violence was being addressed. Indigenous women rejected the women's refuge model, which they saw as another means of the dominant culture separating Indigenous families, and established women's safe houses as an alternative model[17]. Indigenous women also emphasised their alternative analyses through calls for reference to "family violence"[18], incorporating understandings of Indigenous people's non-nuclear family structures, rather than the narrower scope of partner violence associated with the term "domestic violence". This highlighted Indigenous women's determination to deal with violence in their communities, and the inadequacy of analyses of violence that gave primacy to gender oppression and ignored racial oppression.

Interface with the 'new' justice responses

At the same time that these developments in feminist responses to domestic and family violence and Indigenous critiques were taking place in Australia and elsewhere, a much broader debate about justice, crime and punishment was taking place internationally. In response to rapidly rising imprisonment rates, and the injustice obvious in the over-representation of minority groups in prisons, a movement emerged which called for the abolition of prisons and, more generally, a major focus on "moving away from criminal law towards civil law/community courts" (Hudson, 1998: 238), such as the restorative justice movement.

In their critical reflections on restorative justice, Daly and Immarigeon credit the North American civil rights and women's movements of the 1960s as "crucial starting points" (1998: 23) in the development of restorative justice practices, although the term "restorative justice" didn't appear in the literature until the early 1990s. The civil rights movement regarded the over-representation of racial minorities in the criminal justice

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[17] These safe houses are used when violence is anticipated or actually occurring, and the length of time spent at the safe house is often only overnight. Unlike women's refuges, safe houses are not regarded as a step in the process of ending a violent relationship, but rather a place of safety in times of crisis.
[18] See Blagg (2002) for further discussion on Indigenous women's preference for the term "family violence".

system as an expression of racial domination by whites; an analysis, which Daly and Immarigeon say, was "central to decarceration actions, including prisoners' rights and alternatives to confinement" (1998: 23). This analysis continues to resonate with many Indigenous Australians. Daly and Immarigeon point out that feminist activists were also involved in prisoners' rights campaigns and that the women's movement was among the first to critique the criminal justice system from the perspective of victims, concluding that women victims of men's violence were further violated by the system. To this extent, offenders and victims shared experiences of "unfair and unresponsive treatment" (Daly and Immarigeon, 1998: 24) in the criminal justice system.

Emerging alternatives to the formal criminal justice system and the development of theoretical frameworks based on academic research in the 1970s and 1980s paralleled these social movements. The evolution of informal justice practices (now, among others, collectively referred to as restorative justice), included Conflict Resolution and Victim-Offender Reconciliation Programs (mid to late 1970s), Victim-Offender Mediation and Victim Advocacy (late 1970s to early 1980s), and Family Group Conferences, developed and introduced in New Zealand in the late 1980s and exported to Australia in the early 1990s. Theoretical developments, as sketched by Daly and Immarigeon, included Abolitionism, Reintergrative shaming, Feminist Theories of Justice, Peacemaking Criminology, Philosophical Theories and Religious and Spiritual Theories.

Even this very brief outline of the development of alternatives to the formal criminal justice system illustrates the complexity of what lies behind the umbrella term "restorative justice". Daly and Immarigeon (1998) say that:

> Although restorative justice is a capacious concept…there is a
> general sense of what it stands for. It emphasises the repair of
> harms and of ruptured social bonds resulting from crime; it
> focuses on the relationships between crime victims, offenders
> and society. Advocates assume that restorative justice practices
> will necessitate changes in how state officials work, both in what
> they do and how they do it. (1998: 22).

Within Australia, a range of informal justice practices are utilised in various contexts, including mediation and conferencing practice in the Legal Aid and Family Court systems. However, restorative justice practices relating to criminal matters in Australia are predominantly found in the juvenile justice system and generally take the form of "community conferencing", adapted from the Family Group Conferences of New Zealand. While various States, including Queensland, have provided a legislative basis for community conferencing in the juvenile justice system, the application of restorative justice practices in the adult system has not been as enthusiastically embraced generally, and domestic violence and sexual assault have been explicitly excluded from its purview.

Restorative justice practices and violence against women

Reactions to the idea of applying restorative justice practices to cases of domestic and family violence vary, as seen in the recommendations of the Indigenous women's Taskforce Report and the non-Indigenous women's Taskforce Report. Some are adamantly opposed; some are wary but open to exploration of the idea, at least theoretically; and others are willing to embrace restorative justice for the potential it has to address the shortcomings of the criminal justice system. Feminist and critical race analyses can be found in all three positions. However, feminist analyses are generally (though not exclusively) positioned within a victim perspective, and race analyses are generally positioned (again not exclusively) within an offender perspective.

Central to both feminist/victim analyses and race/offender analyses is that the restorative justice approach does not challenge, but serves to reinforce dominant paradigms, because of its perceived inability to effectively address power imbalances. For women victims of men's violence this would mean re-victimisation, and reinforcement of men's power and control over women. For offenders who are poor, young or black (and often all of these), it would mean that they would be treated unfairly in the process and their powerlessness, relative to wealthy, older, white people, would be reinforced.

The feminist/victim orientation

Feminists concerned about gender in the criminal justice system acknowledge that the criminal justice system is not effective in delivering what women want and need for protection and validation. Their position on justice responses to domestic violence centres on the criminal justice system's symbolic meaning. Stubbs (1995; 1997; 2002a; 2002b), Lewis (2001), Busch (2002) and others argue that domestic violence and sexual assault against women require strong and overt state sanctioning because they are so serious and frequent and, until recently, were minimised and trivialised by the criminal justice system and the wider community. They are concerned that restorative justice would not, perhaps could not, provide the sanctioning or the safeguards required for domestic violence cases.

McGillivray and Comaskey (1999) also alert us to the importance of the symbolic and instrumental functions of the criminal justice system for some Indigenous Canadian women. They note that:

> Alternatives to the criminal justice system will not be
> acceptable to victims unless diversion can do what jail is
> now seen as doing, however unsuccessfully – *punish*,
> visibly, actually, and symbolically, and *protect,* at least long
> enough for victims to begin to get their lives back on track
> (McGillivray and Comaskey, 1999: 131).

Stubbs (1995; 1997; 2002a; 2002b), Coker (1999; 2001: 2002), Lewis (2001), Busch (2002) and others draw attention to the limitations of restorative justice's claimed virtues[19] for cases involving domestic violence. Their major concerns are the unequal power relationships between victims and perpetrators of domestic violence and the capacity of the perpetrator, through subtle forms of intimidation, to exert power over their victim and therefore the restorative justice process; the assumption of a uniform set of community values that condemns violence against women; and the appeal to

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[19] These include giving victims a voice in the justice process; enabling them to focus on what matters to them, rather than what is legally relevant to the case; reparation for the harms done; validation through community condemnation of the actions; and restoration of the offender and the victim, through apology and forgiveness.

apology and forgiveness. Coker (1999; 2002) refers to these concerns as the coercion problem, the normative problem, and the cheap-justice problem.

The coercion problem
The coercion problem involves both "forced participation in informal adjudicatory processes…and coercive tactics in these processes" (Coker, 1999: 14). The former refers to situations where a battered woman is forced to participate in such processes, most commonly, says Coker, in mediation related to family law matters and especially child custody.   Coker also identifies that this may be a problem particularly in self-referred cases, where there may be no safeguards against coercion. The latter picks up the concerns about the capacity of the offender to control and manipulate the process, referred to above.

Stubbs (2002a; 2002b) draws attention to the inadequacy of restorative justice's assumption of a discrete incident between victim and offender, and argues that a control-based theoretical analysis of domestic violence is more appropriate. Such an analysis recognises domestic violence's often subtle, coercive tactics, its ongoing oppressive nature and its role in sustaining social and cultural beliefs about gender roles.

The cheap-justice problem
The cheap-justice problem refers to the tendency in restorative justice practices such as mediation and conferencing to "over-emphasize the value of an offender apology" (Coker, 1999: 14-15). This says Coker, creates two kinds of cheap-justice problems. First, there is an over-emphasis on offender rehabilitation at the expense of "moral solidarity" with the victim, which may ignore the victim's needs and pressure her into forgiveness (see also Daly, 2002: 84); second, a sincere apology or reconciliation may neglect the victim's primary needs. The apology focus is of particular concern in domestic and family violence because abusers are generally adept at making sincere apologies, and frequently use apology as part of the controlling behaviour that constitutes domestic violence (see also Stubbs, 2002b: 58; Busch, 2002: 224). Further, Daly's (2002b) empirical work on restorative justice in South Australia illustrates a gap between victims' and offenders' understandings of apology, and apologies in domestic violence cases may be couched in terms that seek to justify or minimise the abuse.

Dobash et al's (1998) research with violent men found they tend to minimise the violence, blame the victim and under-report the most serious acts of violence, including sexual violence and violence resulting in injuries. The danger is that even without a proper understanding of the severity of the problem, there may be pressure (spoken or unspoken) on a woman to accept the apology and forgive the abuser, or risk being seen as contributing to the violence against her.

The normative problem

In mediation, the normative problem refers to the interplay between unspoken, informal rules that affect participant behaviour and the conduct of the process, and "the ideology of mediator and norm neutrality" (Coker, 1999: 88). The unspoken rules concern the orientation towards the future, rather than the past, and the focus on compromise and problem solving. They disadvantage victims of domestic violence. An appreciation of the past is necessary to discern what is appropriate in the future, and victims of domestic violence have compromised all too often, to their own and their children's detriment.   While restorative justice does not apply the ideal of a neutral mediator, there remains the problem of norms being applied in a context where feminist and misogynist voices will both be heard (Braithwaite and Daly, 1994). Stubbs and Busch too are concerned that domestic violence is not universally recognised as a crime and there is a tendency for not only offenders and their supporters but also others to attribute blame, at least in part, to the victim. Stubbs's particular concern here is that "it is not necessarily broader community norms that will prevail, but rather the norms of a micro-community, the conference participants" (Stubbs, 2002a: 3).

The race/offender orientation

Blagg (1997; 2002) is highly critical of early models of conferencing[20], including the applicability of the concept of "shaming", as it is generally understood in restorative justice processes, to situations involving Aboriginal people. Blagg's critique centres on the problem of containment of "other cultures by Western/European cultures …(and)… the capacity to essentialise other cultures and denude them of their Indigenous histories" (Blagg, 1997: 248).   Blagg was also concerned about the central role of the police in early conferencing models, given the historical role of police in the oppression

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[20] Here Blagg is referring to the Wagga Wagga model, a police model of conferencing, which has largely been superseded by the New Zealand model, in which police do not facilitate conferences.

of Aboriginal people, particularly the forced removal of children that continues through the juvenile justice system. The consequent lack of trust that Aboriginal people have in police is contrary to effective functioning of police co-ordinated conferences.

Cunneen (1997), Daly (2002c), Blagg (2002), Behrendt (2002), Kelly (2002) and others are also critical of the tendency for restorative justice advocates to claim that restorative justice is culturally appropriate because it enables greater Indigenous input, or because it derives from traditional Indigenous justice practices. Cunneen points out that there has been very little negotiation with Aboriginal communities in the development of restorative juvenile justice programs and that they have not achieved their stated aims of diverting juveniles from the formal criminal justice system. In fact, the rate of Indigenous juvenile incarceration has rapidly increased in recent years (Cunneen, 1997: 296).

Daly (2002c) and Blagg (2002) draw attention to the risks of "re-colonising" and romanticising Indigenous justice practices, in advocacy for restorative justice based on assumptions of greater sensitivity to Indigenous culture. Behrendt (2002), speaking specifically about mediation, and Kelly (2002) argue that restorative justice programs do nothing to address inherent bias and will remain imbalanced and discriminatory unless they are based in a presumption of self-determination for Indigenous people. For Behrendt, mediation failed because it was merely an extension of the dominant legal system.

Similarly, Kelly is concerned that the impetus for introducing conferencing in Australia was to give police more options for dealing with the "youth problem", while benefits to Aboriginal people were a secondary consideration. She assesses the New South Wales restorative justice program for juvenile justice as a failure in at least four out of five criteria of cultural appropriateness. Kelly states:

> It does not incorporate cultural experts (Aboriginal Elders);
> it is administered by an imposed government bureaucracy;
> it fails to empower grass-roots Aboriginal communities; and
> in relation to outcomes, it has not so far had an impact on

the level of Aboriginal over-representation in the juvenile
criminal justice system" (2002: 213).

While Coker (1999) draws attention to the problems of restorative justice as a response
to domestic and family violence, she also sees much promise particularly in comparison
with the formal criminal justice system and its capacity to respond to the complexity in
the lives of marginalised women abused by their men. Coker (1999) points out that
advocates for increased criminalisation of domestic violence frequently view women's
unwillingness to cooperate with formal legal interventions as a consequence of the
abuser's intimidation or brainwashing. This position essentialises women, failing to
recognise that the context for Indigenous women's decisions about co-operation with
formal legal interventions is much more complex.   The failure to recognise conflicting
loyalties might compound women's vulnerability to violence, particularly where a
woman's disclosure of violence might result in rejection by her community.

Coker (1999, 2001, 2002) argues that restorative justice has greater potential than the
formal criminal justice system to fundamentally change women's material
circumstances and reduce their vulnerability to abuse, by marshalling resources and
support from family and community. She also argues that restorative justice offers the
"possibility of transforming communities as well as interpersonal relationships" (2002:
130), by addressing systemic responsibility for abuse in addition to personal
responsibility.

 What emerges in considering the dominant feminist and black feminist perspectives on
justice interventions in cases of domestic and family violence is an inherent tension
about ownership of the problem: the dominant feminist paradigm holds that the state
must own the problem, while black feminists and advocates hold that solutions will only
be found through community ownership.

State ownership versus individual ownership of crime
In contrast to the criminal justice system, where the parties to a crime are the offender
and the state, and the victim is a mere witness for the state, restorative justice brings
the victim back to centre stage, at least in theory. In response to claims that crimes are

conflicts between individuals and that the state has stolen these conflicts (Christie: 1977), Stubbs argues that this "denies the history of feminist activism…rather than stealing the conflict, the criminal justice system had long ignored women's calls for protection" (2002: 52). Further Stubbs asserts:

> Theorizing crime primarily as a conflict between individuals
> can be challenged on several grounds including because it
> fails to engage with questions of structural disadvantage and
> with raced, classed and gendered patterns of crime. In
> addition…an adequate theoretical understanding…should
> recognize that domestic violence …and…its impact
> contributes to the subordination of women (Stubbs, 2002a: 2).

Yet, Coker says that while critiques of the public/private distinction have been important in organising public opposition to domestic violence, feminists have paid too little attention to the dangers of making domestic violence a public problem; it is "an incomplete analysis of the relationship between battered women and the state" (Coker, 2002: 132) that may contribute to the reinforcement of state control of women. As Coker says, the critical dilemma for feminists is to "develop strategies for controlling the criminal justice system without increasing state control of women" (2002: 129). Here she refers to the unintended consequences of increased criminalisation of domestic violence that has resulted in more women imprisoned and losing custody of their children.

The most recent Social Justice Report of the Human Rights and Equal Opportunity Commission's Aboriginal and Torres Strait Islander Commissioner, Dr William Jonas, highlights this problem in the Australian context. His report states that there is a crisis in the level and type of contact of Indigenous women with correctional systems in Australia. In the decade from 1991 – 2001, the rate, nationally, of Indigenous Australian women's incarceration increased by 255.8%. For the June 2002 quarter, Indigenous women were over-represented at 19.6 times the rate for non-Indigenous women[21]. The

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[21] In the five-year period 1994 -1999, the growth of Indigenous female prisoners in Queensland was 204 per cent compared to 173 per cent for all females, over the same period. In Queensland, where the Indigenous population is less than 3%, Indigenous women represented 28.2 per cent of the female prison population at February 2001.

increased rate of Indigenous women's incarceration coincides with, and may be an unintended consequence of white feminist advocacy for increased criminalisation of domestic and family violence. Dr Jonas states that Indigenous women are more likely than non-Indigenous women to be incarcerated for violence, including assaults. In some cases, Indigenous women may be utilising customary law practices, or less formal, physical payback systems in response to violence perpetrated against them. In any case, Indigenous women on remote communities are living in what Dr Jonas describes as a "landscape of risk" where violence by men and women is often regarded as normal. This may be an example of the problems that arise for Indigenous women when their standpoint is not the central standpoint in advocacy aimed at addressing violence against women.

While gender scholars often argue for more symbolic and instrumental intervention, race scholars argue for less. Hudson (2002) suggests that proponents of using restorative justice in cases of domestic and family violence:

> are often people who have campaigned for penal deflation
> or diversion for other types of offending, and are reluctant
> to add to calls for further penalization for any crimes,
> including those that they themselves may wish to see taken
> more seriously (2002: 621-622).

However, criminal justice system critics are also wary of the pitfalls in the new justices. Daly, who is counted among those described by Hudson, above, asks "how do we 'do justice' in an unequal society?" (Daly, 2002a: 62). Her question concerns the problem of rendering a serious response without engaging in "hyper-criminalisation", particularly as "the vindication of gendered harms via harsh penal sanctions has the potential to incarcerate more minority group men" (Daly, 2002a: 63). For similar reasons, Martin (1998), Snider (1998) and Coker (2001) also query the wisdom of, and point to inherent contradictions in, increased criminalisation as a strategy to render serious responses to domestic violence, and to vindicate women abused by their male partners.

Martin says that despite appearances:

> …recent innovations in criminal law do not represent a triumph for feminism
> (but) appropriation and distortion of feminist goals and techniques for purposes
> quite other than feminist ones, and of the women's movement making a virtue
> out of the necessity of working within an oppressive system (1998: 157).

She argues that reforms successfully advocated by feminists reinforce the criminal justice system as it is and do nothing towards real equality and security. This, she says, is "the dark irony at the core of feminist legal reform" (1998: 155). Martin's analysis is consistent with that of earlier feminist legal theorists such as Smart (1989), who argues that the law's structure, reasoning and processes are fundamentally male, and this has resulted in the construction of the (male-defined) ideal victim, and the disqualification of women's real experiences in the criminal justice system.

Snider (1998) and Coker (2001) also raise concerns about the alliance between feminists and conservatives around law and order policies that seek increased criminalisation. They argue that increased criminalisation strategies have differential effects, which are detrimental to Indigenous women, immigrant women, and poor women. Coker (2001) points out that getting tough on crime is much cheaper, and therefore more appealing, to conservative Governments than any meaningful structural changes that would bring about economic and social independence for women, thus reducing their vulnerability to abuse by their male partners.

However, like Hampton (1998) and Hudson (1998; 2002), Daly is concerned that to move away from harsh criminal justice sanctions for domestic and family violence appears to represent leniency, and therefore acceptance of such violence. Daly notes that "doing justice," means different things to different people: for some it involves finding the right <u>punishment</u> for a wrong, while for others, it entails the right <u>response</u>, given the circumstances and "attention to the wider problem of social justice" (Daly, 2002a: 64).

Daly also notes the "familiar analysis of inequality" (2002a: 64), which addresses the relationship of crime and justice responses to class, race-ethnicity, the impact of colonialism and cultural differences, may inform both positions on "doing justice". However, pointing to inequality as the cause of crime does little to explain men's abuse of women and children they know and who are similarly suffering from social inequality. When sex/gender is included in consideration of the impact of social relations and marginalisation, "different logics, competing loyalties and competing justice claims" (Daly, 2002a: 64) are evident. For marginalised women, this means the risk of prioritising resistance to hegemonic cultural oppression of their men and community as a whole, over resistance to the oppression of themselves by their men. Indigenous women who choose to prioritise resistance to the oppression of women risk being ostracized by their community for turning in "a brother to occupying authorities …" (Coker, 1999:72). Daly calls this situation "the unsolvable justice problem (which) surfaces in our discussions of the impact of inequalities on traditional and alternative justice…practices" (2002: 65).

Towards solving the "unsolvable"
These debates highlight different orientations in preferences for the conventional criminal justice system or restorative justice practices, and have shaped the emergence of increasing support for a kind of hybrid justice response that draws on the desirable features of each model.

Hudson (2002) notes that the formal criminal justice system is still the recognised way of demonstrating that society takes something seriously and that this remains an important problem for proponents of extending restorative justice to include gendered harms. Daly (2000a; 2002) believes this is largely due to a false dichotomy in which the criminal justice system is seen as retributive, and restorative justice as reparative. She argues that to overcome the "unsolvable justice problem" we must stop seeing restorative justice as the opposite of retributive justice, and that retribution is, and should be part of restorative justice practices. Further, Daly says that justice for victims requires vindication of harms to them as the first priority, and the rehabilitation of offenders as the second priority.

Similarly, Hudson (2002) suggests that "expressive and instrumental functions, retribution and restorativeness" (p. 629) be integrated into the criminal justice system. In response to the debate about standards, safeguards and proportionate outcomes, Hudson argues that widening the scope of restorative justice will make it more like formal criminal justice, which could bring us back to negotiating the concerns of Indigenous Australians about the criminal justice system.

Behrendt (2002) and Kelly (2002) conclude that restorative justice offers some potential for a more effective justice response than the criminal justice system, but requires support from the formal criminal justice system. Their conclusions are conditional, however, upon such programs being part of a holistic response, based on an assumption of Indigenous self-determination, built from the grassroots up and with control of the program and process in the hands of respected Indigenous elders. Kelly summarises this in the following terms:

> Family violence programs should be designed and
> implemented in a manner that acknowledges the post-
> colonial context of violence, but which protects the well-
> being and safety of women and children (2002: 208).

Coker (2001) recognises a number of theoretical weaknesses in restorative justice as a response to domestic violence but believes these can be addressed through current feminist theory, critical race theory, social science research on domestic violence, and the theoretical underpinnings of perpetrator programs. A model of family group conferencing for domestic and family violence developed and trialled by Pennell and Burford (2002) supports Coker's position. Busch (2002), who opposes restorative justice practices for the vast majority of domestic violence cases, describes the model as "promising" (2002: 245) and sees its commitment to culturally appropriate responses to domestic violence as a particular strength. Busch's summary of the model highlights the increasing acceptance of a hybrid justice response that straddles restorative justice practices and the formal criminal justice system:

> Its emphasis on protection of victims …willingness
> to use the criminal justice system's protections when

> necessary…commitment to ongoing monitoring and
> evaluation …demonstrate that restorative justice
> processes may be useful in some domestic violence
> cases…in conjunction with other measures…(2002:
> 246 -247).

While the international debate around using restorative justice practices in cases of domestic violence underpins the Pennell and Burford model, no such development has occurred in Australia, to date. This situation was implicit in the development of the research project which seeks to understand Indigenous women's and non-Indigenous women's positions on this, and whether there is a way forward.

Chapter 2:   The research process

In developing the research I was conscious that many of the participants would be my colleagues, that Indigenous women had already been involved in numerous research projects on family violence and that my topic was contentious in my field. I was also aware of the strengths and limitations arising from this and the inherent subjectivity in the process. I provide the following information for the purpose of transparency.

Perspective

I am not an Indigenous woman and I have no right to speak for, or on behalf of, Indigenous women. I am a feminist committed to social justice, generally, and the prevention of violence against women, specifically. I recognise the significantly higher risk of family violence, including homicide, for Indigenous women and the multiple dimensions of their oppression in their colonised land.

As a member of the dominant culture I benefit, albeit indirectly, from the oppression of Indigenous Australians, in the same way that all men benefit from the oppression of women (Brownmiller, 1975). Within this context, I believe I have a responsibility to speak with Indigenous women, and to use the power and opportunities available to me because of my status, in calling attention to what Indigenous women are saying and to assist, if and when I can, to have their voices heard.

In light of the critiques of feminist theory and practice outlined in chapter 1, my position on colonisation and racism, and my work with many Indigenous women on family violence prevention, my research employed feminist research practice within a critical race theory framework. In addition, I established a reference group of Aboriginal women to guide me away from unintended reproduction of the "old colonial ways" in the research enterprise.

The prevalence of extreme levels of violence within Indigenous families in Queensland was documented as early as 1988 in *Beyond These Walls*, the Report of the Queensland Domestic Violence Taskforce. The conceptual framework guiding the work of the Taskforce involved the interaction of factors at four levels (cultural, community, family and individual) as contributing to domestic violence, rather than one

direct cause. This framework is inclusive of, but broader than, feminist analyses wherein the role of patriarchy is embedded in cultural factors. Similarly, I believe that feminist analyses, alone, are insufficient in explaining domestic violence, and even more so in explaining Indigenous family violence. While this phenomenon is perhaps under-theorised, elements of various criminological theories are instructive.

Insights from ecological theory and conflict theory seem particularly relevant, although they were developed mainly with city environments in mind and, here, I mainly have rural and remote communities in mind. These theories conceptualise crime as a product of normal people suffering cultural conflict, social disorganisation and social re-organisation (Einstadter and Henry, 1995). The process of colonisation in Australia involved, in many cases, forcibly removing Indigenous people from land with which they had spiritual, cultural and economic ties and re-locating them to artificially created communities without regard to clan and kinship relations. For others remaining on their traditional lands, spiritual, cultural and economic systems were disrupted by government policies and missionary influences, among other things. I believe the upheaval and relocation of Indigenous communities, and their continued dislocation from mainstream society through racism, are as important as feminist theory in explaining the extreme levels of violence in Indigenous communities and must be recognised in theorising and developing policy around Indigenous family violence. That is not to say that individuals have no agency in perpetrating domestic and family violence, but as Coker (1999) says "women are often aware of the oppressive structures (such as institutionalised racism) operating in her partner's life and while this doesn't excuse the abuse, it can act as an inhibitor for women to seek support from the same societal structures" (p. 72).   Borrowing from Alan Jenkins' model, based on a theory of restraint (1990: 32-45), these oppressive structures also restrain perpetrators from stopping their violence.

The substantial legislative, program and policy developments arising from *Beyond These Walls*, largely failed, I believe (and in hindsight), to give effect to the recommendations responding to the views and experiences of Indigenous women. As Stubbs says, however, "policy-makers face the dilemma of how to develop policies and programs that are responsive to difference"(2002: 47)*,* so policy and programs tend to reflect the needs of the dominant group, in this case non-Indigenous women for whom

the domestic violence prevention movement was, and is, a key platform in the struggle for women's equality. While I believe this was, and remains, critical in achieving basic human rights and broader social justice for women, it is a Euro-centric vision arising from the gendered roles ascribed by European social, political and economic structures and reflects non-Indigenous women's culturally dominant, majority status.

A non-Indigenous women's standpoint does not reflect the different gendered roles ascribed by Aboriginal or Torres Strait Islander social, political and economic structures, nor the control and dominance of Europeans, male and female, over Indigenous Australians. The focus of the domestic violence prevention movement's concern for violence in Indigenous communities, as in general, has been on men's violence against women. The white feminist movement against domestic violence has, as Huggins says, merely extended its purview to include violence against Indigenous women, without sufficiently analysing the role of colonisation and racism and appropriately contextualising violence in Indigenous communities.

Indigenous women are potentially further marginalised as a consequence of "additive" white feminist analyses employed to address violence against Indigenous women. Interventions based on such analyses are not sufficiently responsive to Indigenous women's contexts and, therefore, cannot result in an equivalent level of violence reduction.

The *Aboriginal and Torres Strait Islander Women's Taskforce on Violence* Report (2000), researched and written by Indigenous women, provides the opportunity to take up Moreton-Robinson's (2000) call for Indigenous women's standpoint to be the central standpoint. With this in mind, and as a non-Indigenous feminist, I have sought to bring to the fore an Indigenous women's standpoint in the debate on restorative justice and, in this light, consider the position of non-Indigenous women who largely set the agenda on responses to domestic and family violence.

Methodology
The approach I have adopted for my research is a "feminist research practice" approach (Kelly, 1988: 6), which includes reflexivity, or locating oneself within the research question; drawing on one's own experience as a woman; and acknowledging

the problems of power and control. These elements are particularly pertinent to my research, given my long-standing role in relation to justice responses to domestic and family violence, my membership of the *Taskforce on Women and the Criminal Code* and my status as a non-Indigenous woman researching Indigenous and non-Indigenous Australian women's positions on this topic.

My research sets out to answer a set of questions about the views of Indigenous women and non-Indigenous women on the application of the criminal justice system and restorative justice practices in cases of domestic and family violence. To answer these questions, I designed a qualitative research plan that involved semi-structured interviews with key women. The flexible nature of the semi-structured interview process accommodates a feminist approach, which Neuman (2000) describes as having two key elements: increased visibility of women's subjective experience; and increased involvement of research participants in the research process. In my view, and within the theoretical framework outlined above, which recognises situated knowledge (i.e. the diverse and constructed experience of women), a positivist approach that assumes a factual reality, that the truth is "out there", is unacceptable. I have adopted a constructionist approach, which accepts that "interviewers and interviewees are always actively engaged in constructing meaning" (Silverman, 2001: 87). This is essential, particularly in regard to cross-cultural contexts, as described above. However, and while I have rejected the notion of a "factual truth" to be discovered, care is also necessary to ensure participants have the freedom to disclose *their* truth.

Holstein and Gubrium (1997) provide a model for "active interviewing" that enables a description of how discussion is situated and how what is being said relates to the experience and lives of the people being interviewed. They advocate that researchers:

> acknowledge and capitalize upon interviewers' and
> respondents' constitutive contributions to the production
> of interview data… attending to the interview process and
> its products in ways …more sensitive to the social
> construction of knowledge (1997: 114).

In the Indigenous/non-Indigenous research relationship, language and culturally based concepts can provide a particular challenge to the researcher who may be struggling to comprehend the "what" and have difficulty attending to the "how" of the process. For this reason, audio-taping of the interview is recommended to free the researcher to concentrate on process. Another advantage of recording interviews is the increased opportunity for visual, as well as aural, observation of the participant and the environment, which also affects the process and content. I found this particularly important when interviewing the Indigenous women where non-verbal communication, mine and theirs, was critical in generating and guiding discussion, giving clues about the degree to which questions were understood, the point had been made, or there was a need for further discussion. Some women used visual props to help make their point. Bonita[22], for example, pointed to a large picture on the wall and said, "see that thing behind you Heather, that's what the children did", when explaining the way children are also affected by violence. This made it inappropriate and almost impossible to divide my attention between actively listening and taking extensive notes. Respectful communication required my undivided attention. To achieve this I sought and was always granted permission to use the audio-tape.

Minichiello et al (1990) offer descriptions of a range of in-depth interview strategies that also accommodate a feminist/constructionist approach to research. Two of these: the use of a themed interview guide rather than a highly structured schedule of questions to be asked dispassionately; and story telling are of particular relevance to my research. The Indigenous women, particularly, conveyed their key messages through stories. The focus on themes rather than a rigid, sequential question and answer style ensured that this process could be relatively free flowing and inclusive of important contextual information that might not otherwise have arisen.

Sample

As I was interested to learn how and why the recommendations of the *Taskforce on Women and the Criminal Code* and those of the *Aboriginal and Torres Strait Islander Women's Taskforce on Violence* were so disparate, the research sample was drawn

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[22] Bonita is a pseudonym. I have used pseudonyms for all research participants to maintain confidentiality.

primarily from the membership[23] of each Taskforce. I also included Indigenous women and non-Indigenous women who are working with victims of domestic and family violence, but were not members of either Taskforce, to round out the sample.

Another factor taken into consideration for sample selection was the geographic locations of the members of each Taskforce. Members of the *Taskforce on Women and the Criminal Code* were drawn mostly from South-east Queensland, including Brisbane, the Gold Coast and the Sunshine Coast. The members of the *Aboriginal and Torres Strait Islander Women's Taskforce on Violence* were drawn from across the State, from as far away, for example, as Thursday Island (located in the Torres Strait between the most northern tip of Australia and Papua New Guinea), Cairns, Woorabinda, Toowoomba and Mt Isa. I felt that local context would have been a factor influencing the results of the Taskforce investigations, and would therefore be an important element in understanding the results. Therefore, I wanted to replicate these geographic locations as much as possible, and, travelling a total of 6,280 kilometres across the State by car, I was able to do so. A map, indicating the interview sites is provided in Appendix 2.

I use the terms "Indigenous women" and "non-Indigenous women" for two reasons. First, it places Indigenous women as the "norm", rather than as "other", and central to the question of how best to respond to domestic and family violence, rather than as an "add on". Second, these terms best describe the two groups of women I interviewed. Some of the Indigenous women identified their ethnicity as both Aboriginal and Torres Strait Islander and some of the non-Indigenous women identified their ethnicity as other than Anglo-Celtic Australian.

Altogether I approached 22 women to request an interview[24]. Two of the Indigenous women approached did not participate, for different reasons. One woman didn't want to participate because she believed, from her experience, that nothing changes as a result

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[23] In regard to the Indigenous women's Taskforce, membership here refers to the 20 women who were core group members.

[24] Practical considerations, such as ability to make direct contact, played a major part in the selection of participants. While the sample was not purely random, it included half the members of the non-Indigenous women's Taskforce (excluding myself) and almost half the core membership of the Indigenous women's Taskforce

of research. The other was very keen to participate but our schedules did not enable us to meet within the timeframe for data collection.

In two cases, Indigenous women who lived on Communities requested that I interview them as part of a group. Although I had anticipated one-to-one interviews, I acknowledged that this approach was more comfortable for them, partly because it could be more inclusive of the Community's, rather than the individual's views. However, in each case there was one woman to whom the others deferred, particularly on some of the more conceptually complex questions. It is the women who were placed in this "leadership role" whom I have counted among the 10 Indigenous women interviewed, and whose responses I have used for the analysis.

Indigenous women

Six of the Indigenous women were core group members of the *Aboriginal and Torres Strait Islander Women's Taskforce on Violence*. Key people in relevant communities referred me to the four women who were not members of the Taskforce and all of those women were working in agencies responding to family violence. Interviews were conducted with Indigenous women from Brisbane (where I was based) and surrounds, Cherbourg and Woorabinda (both Indigenous Communities), Rockhampton, Townsville and Cairns. Most of them disclosed that they had been subjected to family violence themselves and all had been exposed to high levels of violence in their families or communities, as well as through their work.

Three of the Indigenous women interviewed had formal university qualifications; two were trained as teachers (though neither were working as teachers at the time) and one had qualifications in Community Welfare. All of the Indigenous women were working in some capacity with women and children escaping family violence, though in a variety of settings. These included Family Court, Legal Aid, Department of Families, Aboriginal and Torres Strait Islander Medical Service, Aboriginal and Torres Strait Islander Commission, Women's Safe House/Shelter, and a Murri Support Service.

The youngest of the Indigenous women interviewed was 38 years and the eldest was 61 years, with the rest being in their late 40s or their 50s. Their years of experience,

where known, ranged from 5 years to more than 20 years, with most having between ten and 15 years' experience.

Non-Indigenous women

Eight of the 10 non-Indigenous women were members of the *Taskforce on Women and the Criminal Code*. Two of the non-Indigenous women were from the Sunshine Coast, one was from the Gold Coast, one from Townsville and the rest were from Brisbane. None disclosed that they had directly experienced abuse and most indicated that their exposure to high levels of violence was through their work, rather than personal experience.

All of the non-Indigenous women interviewed had formal university qualifications. Six were lawyers, two had Social Science degrees and two had qualifications in Community Welfare. They worked in various settings including academic institutions, legal policy agencies and direct services for women affected by domestic violence.

Of the two women who were not members of the *Taskforce on Women and the Criminal Code*, one was a domestic violence court support worker and the other was the Co-ordinator of a Regional Domestic Violence Service.

The youngest of the non-Indigenous women interviewed was 32 years and the eldest was 58 years, with the majority being in their 30s or their 40s. Their years of experience in responding to domestic violence, where known, ranged from 10 years to more than 20 years. Those working in direct service had a greater number of years' experience, with four of them having had more than 20 years experience, than those who worked in legal policy.

Summary comparison of the sample

The number of Indigenous women who had been a member of the *Aboriginal and Torres Strait Islander Women's Taskforce on Violence* was slightly less than the number of non-Indigenous women who had been a member of the *Taskforce on Women and the Criminal Code*. The Indigenous women in the sample were drawn from various locations throughout the State, while the non-Indigenous women were drawn

from South-east Queensland.   This replicated the geographic locations represented in the membership of each Taskforce.

The Indigenous women were somewhat older as a group than the non-Indigenous women and were more likely than the non-Indigenous women to be working directly with women affected by domestic and family violence. However, the non-Indigenous women generally had more years of experience working in the field of domestic and family violence prevention and all of them had formal qualifications, while only three of the ten Indigenous women had formal qualifications.

Interview method and process

I conducted semi-structured interviews, based on the interview schedule I designed, mostly at the women's workplace. Interviews varied in length from approximately half an hour to approximately two hours, though most were about one hour in length. Interviews with Indigenous women tended to be longer as a result of more discussion of concepts and exploring meanings and experiences. Conversely, the interviews with the non-Indigenous women required less discussion and exploration, as a shared understanding of key terms was generally present between participants and myself.

Each interview covered five areas (see the interview guide at Appendix 4):
1. demographics (including profession, current role, age and ethnicity);
2. meanings of domestic and family violence, the criminal justice system and restorative justice practices;
3. views on the appropriateness and effectiveness of the criminal justice system and restorative justice practices in responding to domestic and family violence ;
4. a comparison of the perceived effectiveness of the criminal justice system and restorative justice practices in achieving eight identified objectives of a justice response to domestic and family violence; and
5. the extent of common ground between Indigenous and non-Indigenous women's views. This was based on discussion of the participants' preferred justice response (the criminal justice system or restorative justice practices) to domestic and family violence and what they thought would need to change about their least preferred option to make it more acceptable.

In the first part of the interview I encouraged the women to talk about themselves and their role in responding to domestic and family violence. I was interested to learn how long each woman had worked in this area, thinking this may be relevant to their views on the criminal justice system and restorative justice practices.

I was also interested to learn what the women mean when they speak of "domestic violence" and "family violence" and what they have in mind when talking about the "criminal justice system" and "restorative justice practices". For example, if a participant sees restorative justice practices as appropriate in cases of domestic and family violence, what are the actions or behaviours she has in mind for restorative justice to deal with?

A constructionist approach proved invaluable in the interview, particularly regarding discussion with some of the women about restorative justice practices. Most participants were unclear about this term and it was necessary to consider it in an abstract form, as they had no practice experience, other than mediation, on which to draw. This involved talking with the women I interviewed about the discussion of restorative justice in the *Aboriginal and Torres Strait Islander Women's Taskforce on Violence Report* and the range of forms, such as mediation and "community conferencing", that restorative justice could take. Using this knowledge, the women were then able to construct their own ideas about how this might fit, in their experience, with addressing domestic and family violence.

A preferred justice response was not always as clearly identified as I had thought it would be during the course of the interview. Where a preferred justice response had not become clear earlier in the interview, I asked directly about a preference, before asking about the changes they would require to make their least preferred response more acceptable.

A professional transcriber transcribed the interview material. From my analysis of the transcripts I created tables of key responses and coded the types of responses (negative, positive, unsure) to the various questions. This enabled me to look for patterns in the characteristics of participants (including Indigenous status, age, years in

the field and professional training) who were saying the same or similar things about the two justice systems in regard to domestic and family violence.

To obtain participants' ratings of the criminal justice system and restorative justice practices (area 4), I constructed a comparative table and a 10-point scale (see attachment 1 in Appendix 4) to gauge each woman's perceptions about the effectiveness of the criminal justice system and restorative justice practices, in achieving eight objectives. Five of the eight objectives were drawn from principles underpinning responses to domestic violence, as identified in various state and national policy documents[25]. Two objectives, restoring relationships between the victim and the offender, and restoring relationships between the victim and the community, specifically relate to restorative justice practices. The remaining objective (compensation) was added as a result of pre-testing the interview guide.

When I pre-tested the interview guide, I saw that questions on comparing the criminal justice system and restorative justice practices could be confusing. I modified my approach by providing each woman with a copy of the comparative table so that they could see the eight objectives and how I would compare their ratings for the criminal justice system and for restorative justice practices for each of the objectives. This was not an easy task for many of the women, particularly for rating restorative justice practices. Four Indigenous women and three non-Indigenous women were unable to give a rating at all for some of the objectives, particularly in relation to restorative justice practices. Some women cited the lack of existing restorative justice practice in cases of domestic and family violence as their reason for not being able to rate this for a particular objective.

The women approached this task in different ways. Some chose to rate the criminal justice system for all objectives first, followed by ratings for restorative justice, while others preferred to rate both the criminal justice system and restorative justice practices before moving on to the next objective.

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[25] Queensland Government Policy: *Stop Violence Against Women* (1992); Partnerships Against Domestic Violence (1997); Queensland Government Policy and Action Plan: *Safe Families – Safer Communities* (2002).

I also asked the women to identify which, in their view, were the three most important objectives and to place these in order of priority. I weighted the results by scoring three points for each appearance in the priority 1 list; two points for each appearance in the priority 2 list; and one point for each appearance in the priority 3 list and adding the scores. I could then identify the three most important objectives for each group of women.

In analysing the results of the research on the most important objectives for the Indigenous women and the non-Indigenous women, I first collapsed the 10-point scale into four categories from very negative (ratings of 1 and 2) through to very positive (ratings of 8 to 10); and included a fifth category "don't know". After this preliminary collapsing of data, I further collapsed the results into three categories: positive, negative, don't know. However, from time to time, I draw on the expanded categories to illustrate variance in the views of women within the two groups.

Chapter 3:   Indigenous women's views

Meanings

Domestic and family violence

When asked "what do the terms domestic and family violence" mean to you, Dulcie said she defined domestic and family violence as it is set forth in the provisions of the *Domestic Violence (Family Protection) Act 1989*, but she did not elaborate on her understanding of that definition. That Act gives a broad definition of domestic violence, including threatened or actual physical assault, damage to property, intimidation, and harassment. Claire <u>specifically</u> mentioned intimidation and control as behaviours constituting domestic and family violence. More commonly, though, the Indigenous women identified a range of actions covering physical assault, sexual abuse, verbal abuse, and emotional abuse.

The words frequently used to describe these actions were "bashing", "brawls", "fighting". Two key features of domestic and family violence for the women were the impact of the abuse on the *whole* family, and the effects of the abuse on children. The majority (seven out of ten) of the women mentioned these features spontaneously. Other key words and concepts featuring in their understandings of domestic and family violence were the affects of alcohol, drugs and sexual jealousy. Bonita spoke about various forms of violence and abuse used by different families, saying that some families tended to become physically violent very quickly, "not waiting to hear the full story", while others' violence was mainly verbal.

Arlene and Bonita said there was a conscious decision by Indigenous communities to refer to "family violence", rather than "domestic violence", to differentiate their experience from the non-Indigenous communities' experience of, and reference to, "spousal" domestic violence, by reflecting the impact of violence on children and extended family. They understood domestic violence as a white construct that did not represent their experience of violence involving all the family and often the broader community.

Justice responses

Almost all of the Indigenous women had both victim and offender in mind when thinking about justice responses to domestic and family violence. Some women, such as Chrissy, Claire and Bonita, thought more broadly about "all of them, the whole family and children". Referring to the impact of colonisation and racism and the broader context of "family violence", Betty said "offenders are also victims".

Another concern brought up by most Indigenous women was that the criminal justice system is irrelevant for Indigenous communities. The following comments are indicative:

> The system has let them (victims and offenders) down. There
> are no programs for men, no jobs or support so the cycle
> starts again.

> Sentencing people to jail without support (doesn't
> help)…they need programs in prison.

> We need to be holistic about substance abuse, racism
> and offending…we need to deal with this together… (we)
> don't want further separation. We need healing for the
> <u>whole</u> family.

When asked what they had in mind when I asked about justice responses, Bonita and Winnie specifically mentioned safety for women and children. While this was inherent in other women's comments, the focus was generally on the offender when thinking about justice responses.

<u>Criminal justice system</u>

The women were clear about what the term "criminal justice system" meant for them; they consistently described it as being constituted by police, courts and prison, with police playing the pivotal role in the system. Betty defined the criminal justice system, and especially the police, as a means for continued oppression of Indigenous Australians. In this context, the criminal justice system (including youth justice) is seen

as a mechanism through which Indigenous people are forcibly removed from their land and families are separated.

The Indigenous women saw the domestic violence protection order system, mainly operating through the Magistrates' Courts, as part of the criminal justice system because of the role the police play in applying for protection orders and the capacity for criminal charges arising out of a beach of an order.

Restorative justice

The Indigenous women were less confident in their understanding of the term "restorative justice". Some had never heard it. In these cases I talked about the discussion of restorative justice in the *Aboriginal and Torres Strait Islander Women's Taskforce on Violence Report*, and the use of community conferencing in youth justice as a model of restorative justice. During our discussion, the women suggested a range of strategies that constitute "restorative justice", such as mediation involving family members, outstations where elders guide people to achieve a sense of belonging and self worth, families supporting people to stop the violence and community/family meetings.

Common features that emerged in the women's understandings of restorative justice are that it is an alternative to the current criminal justice system, and that it involves a structured meeting between people directly affected and others within the extended family and the broader community, to achieve a satisfactory resolution to the violence.

Central to the concept of restorative justice for these women was that it promised an element of self-determination, for Indigenous people. Arlene exemplified this with the following comment:

> It could be part of empowering ourselves … taking on board our own problems and looking for solutions to our own problems…given that we are not nuclear family people (and) how we operate within our extended family…given expectations on us by the rest of our mob and …my expectations of them.

The criminal justice system as a response to domestic and family violence

Appropriateness

The Indigenous women were overwhelmingly negative about the criminal justice system. Not one of the women felt that the criminal justice system was appropriate in responding to domestic and family violence in its current form.   For most women the problem with the criminal justice system was its irrelevance to Indigenous people's lives and contexts. For example, Selena said:

> It could be (appropriate and effective) if our own people were involved more in the criminal justice system, (for example as) Magistrates…we need ownership of the system to make it work, otherwise it has no meaning.

In a similar vein, Dulcie said the criminal justice system was "not harsh enough, being judged by white law is irrelevant, black lore means more".

<u>Effectiveness</u>

Several Indigenous women also raised grave concerns about how the criminal justice system perpetrates violence against offenders and that this has the effect of escalating violence against the women and children, not only from the initial perpetrator but, subsequently, from his family. Kayla said "People don't want to use police … they want the man in trouble but not that sort of trouble…if a man gets a hiding from the police, he'll give the same to the woman". Claire spoke of men being raped in prison who then, when released, raped women and children. Bonita talked about the violence perpetrated by the extended family saying:

> It could lead to more violence from the man's family to the victim. She might not want to report, but if the police make the application without her approval, she's still blamed. She might still cop it when he is in jail.

Others were ambivalent about the role of the criminal justice system. Winnie was concerned that police take women and children away from the home rather than the man, even though men were breaching protection orders. She said that in her community, men were breaching orders over and over and should be taken to jail, but that this wasn't happening because of "fears about deaths in custody". Pausing for a moment she then said, "in some ways locking them up is the right thing to do and in some ways it's not".

A common concern was that the criminal justice system separates families, at least in the short-term, without enabling resolution of the contributing factors, such as substance abuse and racism, nor the involvement of the family in resolving the matter to their satisfaction. Anna said, "there is no process for dealing with the issues on a personal level … people go to court but there is no process for the families or others affected". She clarified this point most poignantly in speaking about the spousal homicide of her husband's sister. Anna said:

> She was stabbed and no-one gave any support to my
> husband, his brother and sisters or the parents… They went
> to court and everything, to hear the sentencing, but they lost
> a sister, there was no process … and the lad who went to jail,
> they never had anything in there … If my husband saw him in
> the street today, he would probably kill him, but there is
> nothing to bring them together to talk about (what) happened.

Effectiveness in achieving specific objectives

Indigenous women felt that the most important objectives of a justice response to domestic and family violence were, in order of the frequency identified:

- stopping the violence;
- supporting women and validating their stories;
- sending a message to the community; and
- restoring relationships between the offender and the victim, and the offender and the community.

When asked how well the criminal justice system achieved these objectives, most of the women rated the system as poor (less than half on the 10-point scale) for each objective. Of the eight objectives, the women rated the criminal justice system most poorly for supporting women and validating their stories and for stopping the violence.

Some women also wanted to add to the list of objectives in two areas: building self-esteem for offenders, and providing rehabilitative counselling for offenders and victims.

What the criminal justice system could achieve
When asked about what the criminal justice system could, ideally, achieve, most of the Indigenous women talked about ways in which it could be improved. Responses fell into two main categories: (1) greater inclusion of Indigenous people and (2) counselling programs for offenders. For the first, the women advocated greater involvement of families and communities in the criminal justice system itself and its processes. As Selena said:

> It has to work more with Indigenous people. It doesn't understand the lifestyle the people are coming from so it can't achieve much without a core group of people to consult on how to deal with that particular person.

Another strategy was cultural awareness training for criminal justice system officials, as suggested by Bonita, who said, "…police don't know Communities…they need training in the Community for their own safety too".

For the second, the women advocated programs for men in the criminal justice system and post-release from prison. Arlene felt that "if police, the council and family work together to support men returning to the community after prison, the man might be able to stop the violence". The Indigenous women were also emphatic that the programs need to respond holistically to the offender's context. Chrissie said that if violence is to stop, "there needs to be programs in prison and on follow-up outside. They need anti-violence programs and skills development for a productive life outside".

Restorative justice as a response to domestic and family violence

Appropriateness

Seven of the ten Indigenous women strongly felt that restorative justice was an appropriate justice response to domestic and family violence. Their reasons were embedded in their concept of what constituted a restorative justice response. To illustrate, Dulcie said that offenders had "more respect for black lore" and that "Island lore is a better deterrent"*.* Some women saw it as culturally relevant because it can involve the whole family. Selena's assessment of restorative justice was based on her vision of "…elders teaching them (offenders) things, but it must involve Indigenous people". Chrissie said:

> Because of what's happened in history, we want to treasure and
> hold on to our culture…to be able to respond to family violence,
> we need to look deeper (to) underlying factors …and (restorative
> justice) might be the mechanism that at least gets things started.

Others saw it as appropriate because it was responsive to "what the woman wants (which is) usually to stay with the man and get the violence to stop". Anna, Bonita and Winnie saw restorative justice as a preventative measure and an opportunity for communities to take control where there is evidence of violence at an early stage. They thought that restorative justice might be able to prevent violence by letting women know about their rights, and the perpetrators about their responsibilities in terms of the law and looking at the family as a whole (i.e., recognising the effects of the violence on their children).

Anna saw opportunities for restorative justice practices to use affiliation with the land to stop violence, through empowering men and getting them to see the responsibility they have for living peacefully and respectfully on that land. Arlene echoed this theme saying that restorative justice could achieve "respect for culture and for each other, for mothers (wives) and children".

Effectiveness

The women were reluctant to comment on the effectiveness of restorative justice in dealing with domestic and family violence because they had little to draw from to make an assessment. However, some, such as Anna felt that restorative justice practices were "the only way we can really deal with the problem, by working together, even if it is in conjunction with the criminal justice system".

In summary, the women thought that restorative justice could, ideally, achieve a holistic response to domestic and family violence because, in Arlene's words it is about "assisting and supporting both (victim and offender) and it's a family oriented thing".

Effectiveness in achieving specific objectives

The Indigenous women saw restorative justice as being most effective in stopping violence and in restoring the relationship between the victim and the offender. It was also seen, though less consistently, as being effective in sending a message to the community that violence is wrong and in restoring the relationship between the offender and the community.

Preferred justice system

During the course of the interview, it became apparent that none of the Indigenous women preferred the criminal justice system as a response to domestic and family violence. I checked this with each woman by saying "so based on what you've said, you think that restorative justice offers many positives in response to domestic and family violence", followed by questions about what would have to change about the criminal justice system to make it more acceptable to them. While the criminal justice system was not preferred by any of the Indigenous women, this doesn't necessarily mean that they thought restorative justice practices were the answer. Claire and Kayla said that they could not state a preference because they could only imagine what restorative justice might look like in dealing with cases of domestic and family violence. For Selena, an effective justice system would involve both the criminal justice system and restorative justice practices, that is, some sort of amalgamation, particularly where serious assaults, rape and homicide were involved. Dulcie saw the potential for the criminal justice system to assist with the application of restorative justice, particularly at sentencing, because of its established guidelines to protect against arbitrary and unduly harsh, or lenient, treatment of offenders. For others, restorative justice practices offer

some hope of Indigenous control in the justice process and responsiveness to Indigenous familial, cultural and socio-historical contexts.

Classifying the Indigenous women's preferred justice response is not straight forward because of the tendency to want elements of both, ambivalence about some aspects, and uncertainty about what restorative justice might look like. However, Table 1, below, attempts to characterise the Indigenous women's preferences.

Table 1: Indigenous women's preferred justice response

Case	Criminal justice	Restorative justice	Combined / Integrated	Undecided	Comments
1.					"Criminal justice system not at all appropriate because of history /colonization" (no comment on restorative justice)"
2.		✔			"We are not a nuclear family people; strategies need to be in place to cope with extended family dynamics. The problem is in the family and the solutions should be too"
3.			✔		"Some cases need to be dealt with by the criminal justice system because of the seriousness"
4.		✔			"Need to be able to look at underlying factors; criminal justice system only looks at the presenting problem"
5.		✔			"Need to get family and elders involved: look at identity… looking after country … a sense of belonging. When violence starts, the community needs to take control of it"
6.		✔			"Need to respect choices for women. Criminal justice too slow… domestic homicides, sexual assault and child abuse only should be dealt with by criminal justice system, all others to restorative justice"
7.		✔			"Try Murri way first; If it doesn't work, then go with white law"
8.				✔	"No strong view; can only imagine what restorative justice might be"
9.				✔	"I don't know much about how it (the law) operates"
10.		✔			"More respect for Island lore. Anything that's dealt with in the Magistrates Court could be dealt with by Island lore – criminal justice system can assist with advice e.g. sentencing"

Types of cases where the criminal justice system should be used

While some form of restorative justice was their preferred justice model, the Indigenous women agreed there are some cases that are "too big" to be dealt with by the "community". These cases were consistently identified as being homicide, rape and "serious" sexual assault, including cases of sexual assault against children by adults. The concern here was about the level of responsibility in deciding if a defendant is guilty and if so, what would be an appropriate penalty. Participants felt that family or community backlash against a perceived injustice in such decisions was more likely where the case concerned involved one of the matters referred to above. Therefore, the concern was also about the repercussions for the community people who would be making those decisions.

In summary, the Indigenous women preferred restorative justice for domestic and family violence involving physical assault, "minor" sexual assault and non-violent forms of abuse. Even in the most serious cases, however, the Indigenous women saw an important role for some form of restorative justice in addition to the criminal justice system. This is because the criminal justice system responds to individuals on behalf of the state, and does not address the relationships of the offender at the family or community level, or the broader social disadvantage that contributes to the offender's behaviour. Consequently justice is not done, nor seen to be done for Indigenous communities through the criminal justice system, because justice involves recognition of not only the suffering, but also healing for all parties affected by the offending.

Chapter 4:   Non-Indigenous women's views

Meanings

Domestic and family violence

Non-Indigenous women generally described a continuum of abusive behaviours including physical and sexual assault, verbal and emotional abuse, social isolation, denigration, and financial abuse when discussing their understandings of the terms domestic and family violence. The concept of coercion and control featured strongly in their discourse on this topic.   Catherine elaborated on this in saying:

> I guess the first sort of word association is patterns of
> control. That's the immediate thing…Sometimes I think
> it's the lack of autonomy of the other person, I mean
> obviously people can be very seriously affected by
> physical injury, but the lack of autonomy I think is crucial.

Wendy said she always thought of domestic violence as "spousal violence", whereas "family violence" had always meant "Indigenous" violence. Debra defined domestic and family violence as any kind of violence in intimate relationships that resulted in a significant element of ever-present fear.

Justice responses

Most of the non-Indigenous women thought first of the women, as victims, when thinking about justice responses to domestic and family violence. Some of them said this was because they have mainly worked with women victims of domestic violence. Helen said she thought about both the victim and the offender, and Sheree said that until recently she had thought of the offender in terms of the criminal justice system, but has lately been thinking more about what the criminal justice system can do for the victim.

Wendy, whose current work involves directly supporting victims of spousal domestic violence said:

I first think how it fails women and doesn't stop the violence…
My second thought is about the battle to try to get justice for the
victims…My next thought is about the way patriarchy operates to
make sure that men aren't held accountable or have no
consequences for their violence. I think about the rhetoric that
says one thing and doesn't actually carry it out…

Catherine's first thoughts about justice responses to domestic and family violence
included concerns about how the justice system takes on a middle class and male
identity to the detriment of women, particularly those from lower socio-economic
backgrounds.

Criminal justice system

Like the Indigenous women, the non-Indigenous women saw the criminal justice
system as constituted by the police, courts and the corrections system. However, they
also included additional agencies such as community based domestic violence services
working with the system (for example, those agencies involved in co-ordinated
community responses to domestic violence that incorporate criminal justice agencies).

Some of the women were explicit about excluding domestic violence protection orders
from the meaning of the criminal justice system, unless an order had been breached
and the breach had been acted upon. Others' meanings were inclusive of the protection
order itself, regardless of whether a breach had occurred.

Restorative justice

Non-Indigenous women also had a relatively low level of understanding of the concept
of restorative justice and offered a range of meanings. Their responses included
references to:
- repairing the offender, making him accountable to his immediate community
  and enabling the community to express anger, aim to repair the harm,
  resolve and move forward;
- attempts to put people back in the same kind of position as before the
  offence occurred;
- community conferencing and victim-offender mediation;

- a focus on the victim not the perpetrator;
- economic restoration; some-one who has done damage acknowledges wrong doing, apologises to the victim and pays for the damage done.

The women commonly saw restorative justice as an alternative to the criminal justice system. It was understood to be a structured process involving the offender, the victim, and the broader community, with the aim of resolving disputes so that the parties can put the matter behind them and get on with their lives. However, three women (Helen, Rebecca and Sheree) spontaneously talked about some form of mediation in their discussion of the appropriateness of restorative justice practices, suggesting that they mainly had mediation in mind when thinking of restorative justice.

The criminal justice system as a response to domestic and family violence

Appropriateness

For all but two of the women, the criminal justice system was seen to be the most appropriate response to domestic and family violence. The views ranged from Debra's adamant "yes…it's critical to have legal sanction with regard to domestic violence" through to more qualified affirmative responses such as Kara's view that "…it has to form part of the response, but a legal response to domestic and family violence shouldn't be the only response".

Central to their views was the notion of the criminal justice system as representative of community views and values. In Madeline's words it "acts in the public interest when individuals don't want to proceed with cases".   However, the women also expressed some concerns about the appropriateness of the criminal justice system. For example, Blanca said, "It's not always appropriate…It depends on what the victim wants" and Judith, who thought the criminal justice system was neither appropriate nor effective, said, "there is a tendency to blame the victim…It doesn't address victims' needs".

Effectiveness

While the views of the non-Indigenous women varied about the appropriateness of the criminal justice system in dealing with domestic and family violence, none of them thought that it was effective.   In Rebecca's words, "it needs infrastructure around it to

be effective for domestic violence", while Catherine felt that it was fundamentally flawed because "it distances the offender from taking responsibility for his offending … (he) doesn't have to speak or acknowledge the harm that has been done or to apologise (and) victims want acknowledgement". Wendy said that from the perspective of victims of domestic violence, the criminal justice system is not effective because they "can't tell their stories" and they "don't always get the outcome they want".

Effectiveness in achieving specific objectives

Non-Indigenous women felt that the most important objectives of a justice response to domestic and family violence were, in order of the frequency identified:

- stopping the violence;
- preventing further violence;
- supporting women/validating their stories; and
- holding men accountable.

They agreed with the Indigenous women that stopping the violence, and supporting women and validating their stories are top priorities for a justice response to domestic and family violence. However, the non-Indigenous women gave less weight than Indigenous women to restoring relationships, while Indigenous women gave less weight to holding men accountable than non-Indigenous women.

The non-Indigenous women believed that the criminal justice system, ideally, was useful in stopping domestic violence. This was especially so in the short term and where the offender was incarcerated, or otherwise removed and denied access to the victim of his violence. However, they were less consistent about the effectiveness of the criminal justice system in preventing further violence. Some felt very positive about this, rating it 8 or more on the 10-point scale, while just over half rated the effectiveness of the criminal justice system in preventing further violence negatively (at 5 or less on the scale). The women were negative, overall, about the effectiveness of the criminal justice system in supporting women and validating their stories.

The women believed that the greatest strength of the criminal justice system was its effectiveness in holding men accountable for their violent behaviour. Eight of them were positive, (four very positive), about this. Although "holding men accountable" was

linked to punishment in the way I conducted the interview, some women indicated that they saw "holding men accountable" as something different. One woman said, for example, that while she agreed that punishment played an important role, "holding men accountable" necessarily involved "a person of authority …in our community, who actually … confirms that violence is totally inappropriate", while another said it was about acknowledging to the victim and others that what they had done was wrong and accepting full responsibility for their actions.

Restorative justice as a response to domestic and family violence

Appropriateness

All of the women were wary of the use of restorative justice practices in cases of domestic and family violence, because, in Helen's words, "domestic and family violence are fundamentally different from other crimes". However, only Wendy and Debra were vehemently opposed to the idea. Wendy said that restorative justice is "absolutely not" appropriate because "it might work in the same way as the civil response (which) trivialises and minimises" domestic violence. Debra said it was "not on, never, ever". On the other hand, most of the women said that restorative justice (other than victim-offender mediation) could be appropriate in certain cases or under certain circumstances, or that both systems of justice could play a complementary role in responding to domestic and family violence.

Catherine said that restorative justice was appropriate in some cases and as some sort of amalgamation with the criminal justice system because it is "currently the only medium to make the offender acknowledge what they have done". Helen thought restorative justice practices could be appropriate for Indigenous family violence, "where their notion of family violence isn't limited to two parties", and Kara said it could be appropriate for broader family violence because:

> There are different dynamics… With family violence you've got people who have not chosen to be in a relationship with each other, but they're …connected as a result of their family relationship and the dynamic in which they function is quite different, whereas the spousal relationship is two completely

separate individual people who have come together to some extent by choice … I see this completely different dynamic … operating.

While open to the idea of some restorative justice practices in certain cases or circumstances, the women stressed the importance of safeguards being in place to protect women from being coerced into such practices, or agreeing to participate where they had not had the opportunity to make a genuinely informed decision about this participation.   Concerns also included the difficulties for women (as victims of violence) to negotiate what they really want, that it shouldn't be used repeatedly for ongoing violence, and that it may not get the message across sufficiently that domestic violence is not okay.

Effectiveness
The women saw some areas in which restorative justice practices could be effective, including:

- making the offender accountable (including having to show real remorse);
- increased accountability within the family (more people know about it and can look out for the woman and keep the offender in check);
- opportunities for rehabilitation; and
- the victim has the opportunity to safely confront the offender.

Effectiveness in achieving specific objectives
The women were divided on whether or not restorative justice would be effective in stopping violence and were mostly negative about the effectiveness of restorative justice in sending a message to the community that violence is wrong. They were also mostly negative about the effectiveness of restorative justice in holding men accountable for their violence. The non-Indigenous women were very positive, however, about the effectiveness of restorative justice in supporting women and validating their stories.

Preferred justice system

As with the Indigenous women earlier, and for the same reasons, it is difficult to accurately identify the non-Indigenous women's preferred justice system. However,

Table 2, below, characterises as best possible their general preference for the criminal justice system as a response to domestic and family violence.

Table 2: Non-Indigenous women's preferred justice response

Case	Criminal justice	Restorative justice	Combined / Integrated	Undecided	Comment
1.	✔				"Violence has to be dealt with through the criminal justice system but social issues around it could be dealt with by restorative justice"
2.	✔				"Imperative to have conventional legal system response …not that it is more effective (and) it's not necessarily the ultimate solution for victims"
3.	✔				"In most situations there must be a criminal justice response but because of it's deficiencies…we have to keep exploring ways of being more creative and building something around the criminal justice system…whether it's restorative justice or something else…it depends…back to the definition"
4.			✔		"Need to be amalgamated. Going through the criminal justice system is an important message …don't give up… improve it"
5.				✔	"Depends on the particular case...each has advantages and disadvantages"
6.			✔		"Would like to see them as an adjunct to each other...don't see the criminal justice system as effective (e.g. not really going to stop violence because it deals with current offences), but restorative justice not an appropriate alternative in all cases"
7.	✔				"Restorative justice may work in the same way as the civil response and trivialise domestic violence"
8.	✔				"Restorative justice shouldn't replace the criminal justice system because participants may not condemn domestic violence like they would if it was theft"
9.		✔			"If restorative justice is victim-centred"
10.	✔				"For violence involving familial relationships, restorative justice is not on, never, ever"

An amalgamation of the criminal justice system and restorative justice practices, of some sort, was seen by a number of the participants as desirable. Such an amalgamation was seen as having potential to address the inadequacies of the criminal

justice system while retaining that system, as a matter of principle, as the key response to domestic and family violence. For most women, the importance of this principle related to the role of the criminal justice system in communicating society's condemnation of violence against women, and thus related to upholding a broader community interest. Debra held this position most strongly saying, "For violence involving familial relationships, restorative justice is not on, never, ever".

Some women referred to the long-term investment made by women in seeking co-operation from the criminal justice system in addressing violence against women. For example, Wendy commented that "so much has been achieved, we can't go backwards".   Wendy and Debra each had about 20 years' experience advocating for criminal justice system reform in regard to domestic violence. This may indicate that the basis of their preference for the criminal justice system in response to domestic violence is the personal and professional investment they have made in enhancing such responses.

Types of cases where restorative justice could be used

Overall, the non-Indigenous women felt that restorative justice could be used as a vehicle for women to tell their stories and directly confront the perpetrator, in a supported environment, if that is what they wanted to do. However, they felt that restorative justice should only be used to complement the criminal justice system, which must be applied to deal with the violence. Further, they felt very strongly that the use of restorative justice must never be imposed and that it must always be based on the victim's informed choice. Some thought restorative justice could be used where women wanted to retain the relationship and made an informed choice to be involved in a conferencing process. Others thought it might be appropriate to use restorative justice in some cultural situations (particularly Indigenous contexts) or broader non-spousal family violence. This last point related to perceived differences in the power and control dynamics operating, and the view that partners or ex-partners, who had come together through choice, could extricate themselves from the relationship, whereas in other family relationships the ties were seen as inextricable.

Chapter 5: From racial cleavage to consensus: a summary of the findings

Drawing from the interviews with Indigenous women and non-Indigenous women this chapter identifies areas of cleavage, where the views of Indigenous women and non-Indigenous women seem to be split along racial lines; convergence and divergence, where their views tend to meet and separate; and consensus, where there is apparent unanimity between Indigenous women and non-Indigenous women on justice responses to domestic and family violence.

Racial cleavage

There is a race-based split in judgements of the criminal justice system. Indigenous women are "caught between a rock and a hard place" because of the extreme levels of violence perpetrated on them by their own men, and the history of violence perpetrated on Indigenous communities by the state, through the criminal justice system. Indigenous women see the criminal justice system, at best, as irrelevant and ineffective and, at worst, as a tool of oppression that continues to perpetrate violence on Indigenous Australians and separate Indigenous people from their families and communities. For them, the criminal justice system seems to perpetuate, not ameliorate, violence by Indigenous people against their own families and communities. The criminal justice system is generally rejected by the Indigenous women, not because it is gender biased but because it is racially biased and threatens Indigenous unity.

The Indigenous women's focus was largely on rehabilitation of the offender, and restoration of the relationship between the offender and the victim, and between the offender and the broader community. My research identified two major factors that influenced Indigenous women's views on the relative appropriateness of the criminal justice system and restorative justice practices in cases of domestic and family violence. First, there are the complex, non-nuclear, relational systems operating in Indigenous communities that integrate the actions or expectations of one person, or a spousal couple, for example, with the actions or expectations of others. That is, individuals' actions must be in the interests of the extended family and broader community, and the extended family and broader community must act in the interests of

the individual.   Second, there is the impact of colonisation and its ongoing effects on Indigenous communities. These influence Indigenous women's commitment to justice strategies that don't collude with processes of domination and enforced separation, but which unify and empower Indigenous communities to seek their own solutions. Restorative justice practices offer hope in achieving such strategies and solutions.

In contrast, the non-Indigenous women embraced the criminal justice system, not because it is effective, but because it represents the pinnacle of the dominant (non-Indigenous) culture's system of legal and social organisation. The way the criminal justice system deals with violence against women is symbolic of women's social, legal, economic and political status relative to men.

Indigenous women see the criminal justice system as a direct source of violence and as contributing to increased violence, by the offender's family and by the offender himself. Conversely, non-Indigenous women believe that a failure to use, and a lack of response from the criminal justice system represents systemic abuse of women and perpetuates domestic violence because it conveys a general message that domestic violence is socially and legally acceptable.

Some non-Indigenous women see the role of the criminal justice system as being so critical to ending domestic violence, or at least achieving justice for women, that they advocate the pursuit of criminal assault charges through mandatory or pro-arrest policing and "no-drop" prosecution policies, against the wishes of the victim. This approach is reflected in Catherine's comments that the criminal justice system "represents community views… (it) acts in the public interest when individuals don't want to proceed with cases".

For the Indigenous women, the needs and wishes of victims regarding criminal action are paramount. This is because criminal action may result in more abuse, and community rejection, of an Indigenous woman and because the criminal justice system doesn't represent broader Indigenous community interests.

Convergence and divergence

Within these starkly different start positions on the value of the criminal justice system, Indigenous women and non-Indigenous women contemplate restorative justice practices. They tend to agree that restorative justice practices have the potential to address some of the inadequacies of the criminal justice system.   I must emphasise here that while most Indigenous women preferred restorative justice practices to the criminal justice system, and non-Indigenous women saw a potential role for restorative justice practices in certain cases, their concepts of restorative justice were discussed only in broad terms and held various meanings for them.

Table 3 shows convergence and divergence in the views of Indigenous women and non-Indigenous women about priorities for justice responses to domestic and family violence.

Table 3.   Most important objectives for a justice response to domestic and family violence

Objective	Indigenous women	Non-Indigenous women
1. Stopping the violence	Priority **1**	Priority **1**
2. Preventing further violence for this victim and others (changing the individual man's violent behaviour, replacing it with respect for women)		Priority **2**
3. Supporting women by validating their stories and experiences	Priority **2**	Equal Priority **3**
4. Holding men accountable for their violence (that is, punishing them)		Equal Priority **3**
5. Sending a message to the community that violence is wrong (changing other men's behaviour)	Equal Priority **3**	
6. Restoring harmony/repairing relationships between a victim and offender	Equal Priority **3**	
7. Restoring harmony/repairing relationships between offender and community		
8. Compensation		

The Indigenous and non-Indigenous women agreed that stopping violence and supporting women by validating their stories and experiences were two of the top three priorities. They diverged on the priority they gave to sending a message to the community. Indigenous women rated this as equal third priority (with restoring relationships between the offender and the victim and the community). The non-Indigenous women placed higher priority on holding men accountable, which they rated as important as supporting women by validating their stories and experiences.

Table 4 identifies convergence and divergence in the views of the Indigenous women and non-Indigenous women on the effectiveness of the criminal justice system and restorative justice practices in relation to these identified priorities. White indicates an overall positive rating and grey indicates an overall negative rating.

Table 4.   Effectiveness of justice systems for priority objectives: Comparison of ratings

	1. Stopping violence		2. Support/validate women		3. Sending message to community		4. Hold men accountable	
	CJS	RJ	CJS	RJ	CJS	RJ	CJS	RJ
Indigenous women	grey	white	grey	white	white	white	white	white
Non-Indigenous women	white	grey	grey	white	white	grey	white	grey

The Indigenous and non-Indigenous women most strongly diverged in their views about the most effective justice model in stopping violence, the number one priority of both groups. The strongest convergence was in relation to the effectiveness of the criminal

justice system and restorative justice practices in supporting women by validating their stories and experiences. The two groups of women agreed that the criminal justice system was not effective and that restorative justice practices were potentially effective in achieving this objective. In fact, the data indicate that the Indigenous women are not quite as confident about restorative justice achieving this objective as the non-Indigenous women. The results for priority 3 (sending a message to the community that violence is wrong) and priority 4 (holding men accountable) indicate that the Indigenous women did not judge the criminal justice system or restorative justice as more effective, while for both these objectives the non-Indigenous women saw the criminal justice system as more effective. This might reflect the Indigenous women's hesitance to comment strongly on the application of restorative justice practices when they could only imagine what it might mean in practice, and the tendency for some of the non-Indigenous women to conflate restorative justice and mediation, with which some had negative experiences in legal aid and family law contexts.

The Indigenous women were much more inclined than the non-Indigenous women to distinguish between more and less serious cases of family violence and they thought that only the most serious cases of domestic and family violence, including repeated breaches of protection orders, should be referred to the criminal justice system. For some of the women, this relates more to concerns about the capacity of communities to handle these serious cases, than any symbolic meaning of power and authority attached to the criminal justice system. Unlike the women in McGillivray and Comaskey's (1999) study, the Indigenous women I interviewed did not see the removal and imprisonment of their men as offering short-term safety, but was likely to lead to more violence against them. McGillivray and Comaskey point out that their findings may be different to other research findings because their sample was drawn from women who had used shelter services, and they had in mind repeated and long-term violence. The Indigenous women in their study and mine, however, were ambivalent about the value of the criminal justice system particularly because of its failure to rehabilitate their men. McGillivray and Comaskey quote one of their participants as saying, "putting them in jail aint helping them. I think that (treatment) would make them aware that it's not right for them to do that. A lot of them need ongoing therapy when they get out" (1999: 122). This sentiment was shared by many of the Indigenous women in my study.

While the non-Indigenous women thought that restorative justice represented a soft option, Indigenous women thought that a "restorative justice" meeting of the offender, the victim, their respective extended families, community elders and others would in fact be a much harsher option for the men than facing court. For them, a Magistrate's disapproval holds less symbolic meaning than family, elders and other community members because they represent white justice, rather than community values and they are not members of the local community, with whom offenders have to live and interact.

In summary, the Indigenous women were optimistic about the potential of restorative justice practices, while the non-Indigenous women were generally sceptical, but willing to envisage how some forms of restorative justice (other than mediation) might be a useful supplement to the criminal justice system. Indigenous women also saw potential for a "partnering" of restorative justice and the criminal justice system, but they were more inclined to see restorative justice as the major partner, supplemented by the criminal justice system in dealing with recidivism and certain types of "serious" cases.

Consensus
There was consensus among the Indigenous women and non-Indigenous women in their condemnation of violence against women and children. There was also consensus overall, that the criminal justice system was not effective in achieving two of the key objectives of justice responses to domestic and family violence. These objectives were supporting women by validating their stories and experiences, which was a priority for both groups of women, and restoring harmony/repairing the relationship between the victim and offender, which was a priority for the Indigenous women. Nevertheless, Indigenous women and non-Indigenous women agreed that the criminal justice system should be applied in cases of domestic homicide, "serious assault", rape, and child sexual abuse by adults. For some Indigenous women this view was held because of the degree of responsibility associated with dispensing justice in such cases, and the ramifications of this responsibility within Indigenous communities. For the non-Indigenous women, only the criminal justice system could be seen to have the necessary status, or clout, needed to convey the community's abhorrence of such levels of violence.

Chapter 6:   Summary and Implications

Having elucidated the perspectives of the Indigenous and non-Indigenous women, I can now consider the research findings in light of the literature.

Feminist analyses and state ownership of domestic and family violence

The Indigenous women confirmed the theoretical limitations of a radical feminist analysis of domestic and family violence for them. Their analysis of family violence and its causes had a dual emphasis: 1) the impact of racist oppression and the need to address this, and 2) men's abuse of Indigenous women and children. As observed by Blagg (2002), and discussed by some of the Indigenous women I interviewed, the term "family violence" was, for some, a deliberate move to distance Indigenous women from the feminist movement, because it was seen as irrelevant and potentially damaging for them. For the Indigenous women, the overarching goal is an end to violence against women and children through methods that empower and unite them, rather than split their communities along gender lines. They echoed Lucashenko's (1994) contention that Indigenous and non-Indigenous women's oppressions are not interchangeable and that the Indigenous women must also focus on survival as a race in a colonised land.

The Indigenous women's discussion about the role of police in their oppression gave further depth to Coker's (2001; 2002) concern about making domestic violence a problem of the state, without due regard for the relationship between abused women, particularly marginalised women, and the state. Apart from resulting in increased incarceration of Indigenous women, they reported that state intervention frequently resulted in an escalation, rather than a reduction, of violence against Indigenous women perpetrated by their partner and other members of his family or clan.

The non-Indigenous women reinforced a radical feminist position that alternatives to the formal criminal justice system were unacceptable, mainly because of the claimed benefits of the symbolic power and authority of the court. This was the case even though it was widely recognised that the formal criminal justice system failed to meet a number of priority justice objectives. The non-Indigenous women's support for the formal criminal justice system extended to its application in the broader public interest,

when individual women were reluctant to prosecute matters. This is consistent with pro-arrest and "no-drop" prosecutions policies aimed at consistently strong responses to domestic and family violence. The non-Indigenous women believed that the criminal justice system could provide appropriate punishment and at least short-term safety for women and children where men were incarcerated, though some acknowledged that rarely happens.

The potential for new justice responses to domestic and family violence

There was a sense of hope among the Indigenous women that restorative justice could work for them, and a sense of desperation that something that will work is urgently needed.   Their position was not so much an embrace of restorative justice, but rather a rejection of the formal criminal justice system. Although not fully developed, their notion of restorative justice involved individual, family and community "healing" through some kind of community meeting, controlled and operated by local Indigenous people including elders and extended family members. This is highly consistent with the models out-lined by Behrendt (2002) and Kelly (2002) to address the shortfalls of early restorative justice models regarding Indigenous communities. The Indigenous women distinguished between more and less serious cases of family violence, and believed the most serious (murder, serious assaults and sexual abuse of children) should not be dealt with at the community level. They also believed a restorative justice meeting would be a harsher option for men than the formal criminal justice system.

The Indigenous women's notion of restorative justice meets two of Daly's (2002) conditions towards "solving the unsolvable justice problem": recognition that retribution is and should be part of restorative justice processes; and seeing gendered harms as concrete rather than abstract, more and less serious.

The non-Indigenous women seldom made distinctions between more or less serious cases of domestic and family violence. They emphasised the need to treat all forms of domestic violence as serious, and that only the formal criminal justice system could do so adequately. Their ideas about types of cases that might be suitable for restorative justice concerned types of relationships, such as non-spousal, family relationships, or ethnicity, rather than types of abuse. While there was much scepticism about the

application of restorative justice as an alternative to the formal criminal justice system, there was a surprising level of support for restorative justice as an adjunct to the criminal justice system. This finding is consistent with Curtis-Fawley and Daly's research (forthcoming, in *Violence Against Women*), based on interviews with victim advocates in Queensland and South Australia about their views on the utility of restorative justice in cases of domestic violence. However, the possibility of some sort of amalgamation of the two systems was less about any perceived virtues of restorative justice *per se,* and more about the inherent weaknesses of the criminal justice system in responding to the needs of women to be heard in the justice process.

Further, an acceptable form of restorative justice for the non-Indigenous women would have to guarantee a victim's right to make an informed choice about participating in any process (and then only if it was linked with a formal justice system impact). This position reflects concerns about restorative justice raised by Stubbs (1995; 1997; 2002a; 2002b), Busch (2002), Lewis (2001) and Coker (1999) that restorative justice may expose women to further victimisation. While I share this concern, critiques of restorative justice regarding women's safety have yet to articulate if, and how, the criminal justice system more effectively guards against this. Indeed the experience of the Indigenous women is that the criminal justice system does not protect them from re-victimisation at all. Further, the criminal justice environment is not immune to the offender's control of the victim through intimidation; it may be less so than a conferencing environment where the conference facilitator or the victim's supporters, as "insiders", may be aware of and able to speak up about the abuser's tactics of intimidation, even if the victim is not.

I also find a contradiction in the non-Indigenous women's view that the criminal justice system holds men accountable. This finding could have been misconstrued, however, by the way in which the research process raised this question (see the Interview Guide in Appendix 4) and, in hindsight, it would have been better not to link this objective with "punishment". However, five of the non-Indigenous women specifically said they saw accountability as something other than punishment. For example, Judith said it included, "facing them (offenders) with the fact that other people consider that what they have done is not right", Madeline saw accountability as, "some recognition that what he did was wrong", while Helen and Wendy associated it with a more public

denouncement, referring to an offender's name appearing in the news as a form of accountability. However, as Catherine said, the adversarial criminal justice system encourages men to avoid acknowledging guilt. In their report on sexual offence cases finalised in court, by conference and by formal caution, Daly et al (2003) find that half the cases finalised in court were dismissed or the charges were withdrawn, though it seems implausible that in half the cases the defendant was wrongly accused. The key for the young men in their study was to know that "not talking will often mean you walk (so) they will deny that they have done anything wrong, or refuse to talk to legal authorities" (Daly et al, 2003: 20). Community conferencing proceeds only after an admission to an offence has occurred and the focus is then on vindicating the victim and negotiating appropriate redress. Holding men accountable involves having them accept responsibility for the abuse; acknowledge to the victim and others that the abuse was wrong; acknowledge the harm caused and sincerely apologise for it (bearing in mind this is often also a tactic in maintaining control in domestic violence); and undertaking specific actions to make amends. In terms of holding men accountable, Daly et al conclude that, "the court, not conference, is the site of cheap justice" (2003: 21).

Conclusion

My research was inspired by conflicting Indigenous and non-Indigenous women's Taskforce Report recommendations, both made to the Minister responsible for domestic and family violence, about the use of restorative justice in cases of domestic and family violence. The Indigenous women's Taskforce Report recommended that restorative justice be considered as an alternative to the formal criminal justice system, in response to extremely high levels of family violence in their communities. The non-Indigenous women's Taskforce Report recommended that restorative justice must never be used as an alternative to the formal criminal justice system. To date, the Government has not acted, specifically, on these recommendations, although there were significant amendments to the Queensland Criminal Code immediately following the release of the *Report of the Taskforce on Women and the Criminal Code*. A further inquiry into violence in Indigenous communities was established after the release of the Indigenous women's Taskforce Report, resulting in a focus on reducing alcohol abuse and availability.

I was interested in the apparent racialized split represented in the recommendations of the two Taskforce Reports and wanted to explore this in more detail. Through semi-structured interviews with members of each Taskforce and other women working with victims of domestic and family violence, I examined Indigenous and non-Indigenous women's understandings and views about domestic and family violence, the criminal justice system, and restorative justice practices. I also considered their views about the most important objectives in seeking justice in domestic and family violence, and whether the criminal justice system or restorative justice practices seem more effective in achieving these objectives.

My research finds a racialized split in the views of Indigenous women and non-Indigenous women about the utility of the criminal justice system and restorative justice in responding to domestic and family violence. This is not an unexpected finding, but I have drawn out more directly the reasons for these different views and situated them in dominant white feminist analyses and black feminist critiques. At the core of this racialized split is a contest over the appropriate location of ownership of the problems of domestic and family violence. The dominant feminist paradigm holds that the state must own the problem of domestic violence, in spite of the evidence that the state response largely serves to reinforce patriarchal relations, rather than deliver justice for women. The non-Indigenous women I interviewed rejected restorative justice as an alternative to the criminal justice system for several reasons. First, many of them had mediation in mind when they thought of restorative justice, an earlier form of restorative justice that is still used with negative consequences for women in Legal Aid and Family Court processes. Second, most of them had only a vague understanding of the concept of restorative justice, but assumed it would minimise or trivialise the seriousness of domestic violence.

These findings are similar to Curtis-Fawley and Daly's research based on interviews with victim advocates in Queensland and South Australia about their views on the utility of restorative justice in cases of domestic violence. The Queensland advocates in their study also had mediation mainly in mind when thinking of restorative justice, and assumed that restorative justice meant not taking the violence seriously. The advocates interviewed in South Australia, where gendered harms are included in community conferencing for juvenile offenders, were more accepting of the idea of

restorative justice in cases of domestic violence, than their Queensland counterparts. A third major concern for the non-Indigenous women with restorative justice, as an alternative to the criminal justice system, was an assumption that women would be coerced into participating in a restorative justice process.

Black feminists and advocates hold that solutions to family violence will only be found through community ownership of the problem. Indigenous women conceptualise family violence as both racialized and gendered, and asking them to give primacy to gender oppression over racial oppression is tantamount to continuing white-centred policies that separate and divide Indigenous communities. The Indigenous women largely rejected the criminal justice system as an appropriate response to family violence because they believe that the state cannot effectively represent Indigenous women's interests. They saw the criminal justice system as increasing violence in their communities and reinforcing state control over, and forced separation of Indigenous people. Apart from the concerns expressed by the women I interviewed, the rate of Australian Indigenous women's incarceration has increased by more than 250% since the early 1990s, with Indigenous women being more likely than non-Indigenous women to be incarcerated for violence, including assaults. In some cases, Indigenous women's violence may occur in a context of customary social control, or informal "payback", and in other cases may be a result of violence being accepted as a norm in their communities. Either way, the increase in Indigenous women's incarceration coincides with, and is perhaps an unintended consequence of, white feminists' advocacy for increased criminalisation of domestic and family violence.

Although the Indigenous women largely rejected state ownership of the problem of domestic and family violence, they saw some cases, including homicide and serious sexual assault, as "too big" for communities to handle. Even in these cases, though, they saw a role for restorative justice.

While my research found a more or less expected racialized split concerning the application of the criminal justice system and restorative justice in cases of domestic and family violence, I also found what I did not expect. I found a surprising level of agreement between the Indigenous and non-Indigenous women that there is potential

for an amalgamation of the criminal justice system and restorative justice, conditional on various factors specific to each group.

Each group of women saw that the criminal justice system fails to deliver key justice objectives, and that restorative justice offers hope in addressing the shortfalls. For the non-Indigenous women, restorative justice offers an opportunity to give voice to women in the justice process and enable them to highlight what is significant for them, rather than what is legally relevant to an outcome of guilt or innocence. For Indigenous women, restorative justice offers the opportunity of healing for victims, offenders, families and communities. For them, "doing justice" means finding the right response, with "attention to the wider problem of social justice" (Daly, 2002a: 64).

The two groups had different understandings of restorative justice, however, and different views about the role of restorative justice. For the Indigenous women, restorative justice was preferred as the primary response, with the criminal justice system assisting in more serious cases. The non-Indigenous women preferred the criminal justice system as the primary response, with potential for restorative justice as a supplement to address weaknesses in the criminal justice system, where women wanted it. While there are still significant racialized differences, this position suggests more willingness to utilise restorative justice in cases of domestic and family violence, than the recommendations of the Taskforce on Women and the Criminal Code suggest.

My research began with concerns that some women benefit more than others from strategies developed over the past two decades to respond to domestic and family violence. What I have learned is just how profoundly the justice system and feminist legal reform efforts have been in the service of white women. The feminist movement has been, and continues to be, committed to the inclusion of Indigenous women and their interests in the development of strategies to deal with domestic and family violence. But Indigenous women's experiences cannot be simply added onto the dominant feminist paradigm. Instead, effective strategies must make Indigenous women's standpoint the central standpoint. Further, it seems to me that Indigenous women's relationship to the state is far more complex than non-Indigenous women, generally, imagine. The scope of this study did not enable a closer examination of this

relationship, though it seems necessary to fully appreciate Indigenous women's standpoint in regard to justice responses to domestic and family violence.

In view of the extreme levels of violence in Indigenous communities, the rate of incarceration of Indigenous women (and Indigenous men), and in response to Ruth Busch (2002), we must ask "who pays if we've got it wrong?" Burford and Pennell (2002) have developed and tested a model of restorative justice that meets with some approval from even the most ardent critics of restorative justice, such as Busch. Indigenous women, including Behrendt and Kelly have a clear notion of what would constitute an appropriate restorative justice model for cases of Indigenous family violence. Further developing, trialling and evaluating restorative justice models from an Indigenous standpoint, while ensuring the safeguards wisely advocated by Stubbs, Busch and others, seems a necessary course of action in the search for justice in domestic and family violence.

Appendices

Appendix 1: Feminist perspectives

Radical feminist

Radical feminism holds that patriarchy, (men's "ownership" of women, enabling control over their sexuality and ability to reproduce), is the primary cause of gender inequality. Men, as a group and as individuals, control women. For example, rape, and fear of rape, is seen as a conscious process of intimidation by which all men keep all women in a state of fear and under the control of men (Brownmiller, S; 1975). Even those who don't rape are complicit in the control of women through rape, as they benefit from women's subordination.

Within the radical feminist perspective, the socialisation of boys and girls into gender roles is understood in terms of psychological and psychoanalytic theories involving power relations between men and women. Heterosexuality – an expression of sexuality as defined by men – is seen to exemplify the male/female power relationship.   The overthrow of patriarchal relations, replaced by women-centred institutions and women-only spaces, including organisations and services, is integral to radical feminist strategies for gender equality.

Liberal feminist

The liberal feminist perspective is concerned with equal rights and equal opportunity, such as women's equal access to education, employment and other areas of public life. Gender is seen to be the result of socialisation through psychological processes involving social learning and cognitive development.   Gender equality is to be achieved through improving the status of women within the existing "system", with an emphasis, say Daly and Chesney-Lind (1988: 537), on legal change to bring about equality.

Socialist feminist (now more commonly known as class, race, gender analyses)

Daly and Chesney-Lind describe the socialist feminist perspective as a "flexible combination of radical and Marxist feminist categories" (p. 538). This perspective focuses on gender, class and racial relations of control, wherein women's sexuality and labour (whether paid or unpaid) are connected and controlled by men.   It extended radical feminist explanations of the process of socialisation into gender roles, by adding a racial dimension and making the psychological and psychoanalytic arguments historically and culturally specific. This perspective also considers women's agency and resistance in the formation of gender.   The racial dimension is not explicit in strategies put forward to end gender inequality, which focuses simultaneously on overthrowing patriarchy and capitalism to end male ownership of women's sexuality and labour.

Appendix 2: Sites of interviews

Below is a map of mainland Australia that identifies the approximate location of sites where interviews for the research were conducted. One of the Indigenous women participants, Dulcie, who was also a core group member of the Indigenous women's Taskforce, was from the Torres Strait Islands. The Torres Strait Islands are located between the northern tip of Australia and Papua New Guinea.   I was unable to travel to the Torres Strait myself, so I interviewed Dulcie while she was visiting Brisbane (the State's capital city).

The distance between the Gold Coast, the most southern location in which interviews were conducted, and Cairns, the most northern location, is approximately 1,900 kilometres. The interviews required several long journeys from my base in Brisbane, as I was unable to co-ordinate interviews in Cherbourg, Woorabinda and Rockhampton with those scheduled for the trip to Townsville and Cairns.
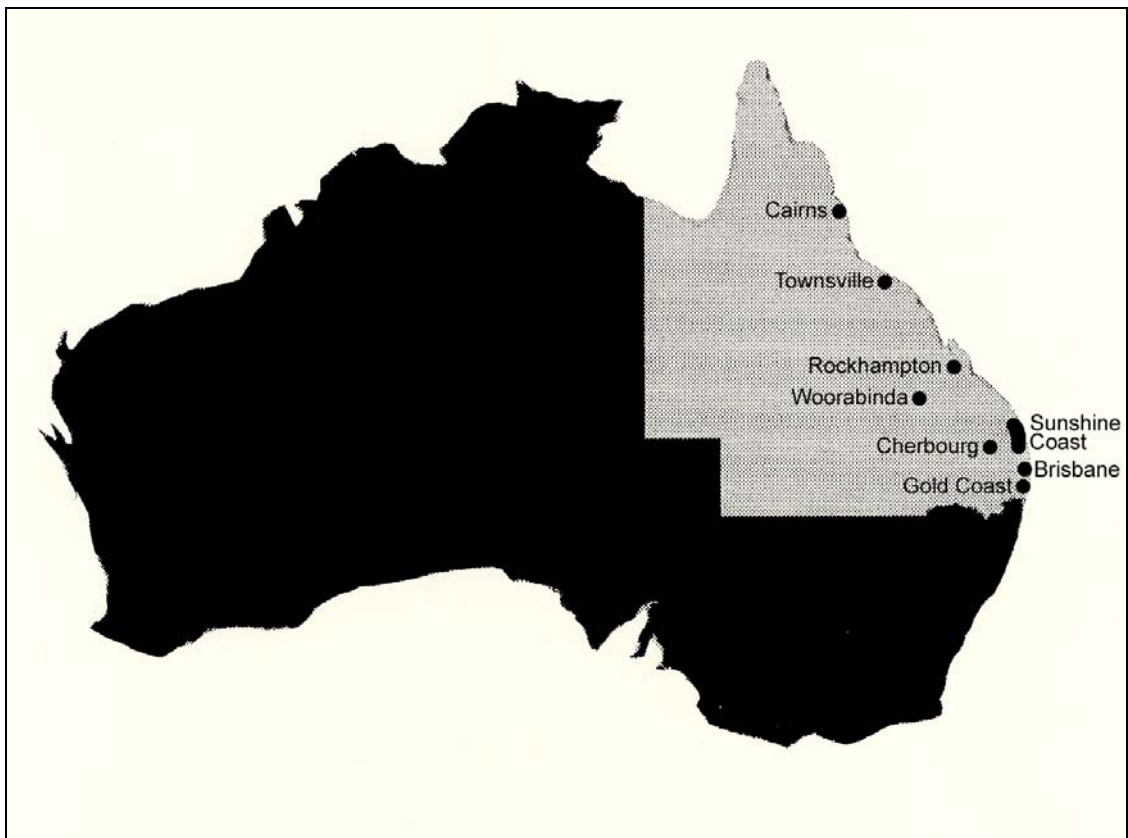
Appendix 3: Civil and criminal justice responses to domestic violence – the Queensland Domestic Violence Taskforce position

While the *Domestic Violence (Family Protection) Act 1989* resulted from the recommendations of *Beyond These Walls*, the Queensland Domestic Violence Taskforce did not intend it to be the only response. It advocated for the application of the criminal law as well as a preventative system of court orders to protect victims. In regard to the criminal law, the Taskforce asserted:

> the severity of injuries and the suffering caused to the victims, require apprehension of the perpetrator to face society's condemnation…in a court of law… the criminal law is appropriate (1988: 145).

Recognising that abusive relationships are frequently characterised by a pattern of escalating violence over time, the Taskforce also stated that:

> Of paramount concern…is the protection of victims from further violence and abuse. In our view, effective protection can only be achieved by orders made in a court of law…to disrupt the pattern.

Significantly, the Taskforce found that the Criminal Code, on the face of it, generally provided for the prosecution of domestic violence matters under the criminal law and limited its recommendations on criminal law to clarifying police powers of entry, further consideration of criminalising rape in marriage[26], further consideration of some aspects of the criminal law regarding cases where victims of domestic violence kill their abusive partner, and criminal compensation for victims of domestic violence. The Taskforce recommended civil legislation to provide court ordered protective measures for victims "as an adjunct to the criminal law in areas where the criminal law has not provided effective protection…and where the conduct complained of does not amount to criminal assault" (1988: 160). In supporting this recommendation the Taskforce noted that many victims did not want the relationship to end – they just wanted the violence to stop – and that intervention as close as possible to the event appeared to have the greatest impact on the perpetrator of the violence.

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[26] The Criminal Code was amended in 1989 to this end.

Appendix 4: Interview Guide

Section 1 – demographics

1.1   I want to get a picture of your professional background and experience, as context for the discussion to follow. Could you tell me about some of the highlights around your work including professional training and work history?

Currently working with women affected by violence?

1.2   So, do you mind if I ask about how old you are?

1.3   I'm assuming that you would identify yourself as (suggest ethnicity where appropriate) – is that right?

Section 2 – Clarifying meanings

2.1   I'm going to be asking you questions about domestic and family violence. What sort of behaviours/actions do you mainly have in mind when you refer to domestic and family violence?

2.2   Also, when I ask you about domestic and family violence and justice responses, do you mainly have in mind the victims, or offenders, or what?

Section 3 – Views on criminal justice system and restorative justice

I'm interested in your views on the criminal justice system, restorative justice practices and domestic and family violence. The following questions are about this.

3.1   In relation to the criminal justice system:

(a) What do you think is meant when referring to the criminal justice system as a response to domestic and family violence?

Does this include the domestic violence protection order system?

(b) Do you think the criminal justice system is an appropriate and/or effective response to domestic and family violence?

(c) Ideally, what can a criminal justice system response accomplish in cases of domestic and family violence   [themes of punishment, changing the man's behaviour, validating the victim's suffering]

3.2   In relation to restorative justice:

(a) What do you understand restorative justice practices to mean? [this is the general question for everyone, but some people may need more detail/info from

a report – e.g. Aboriginal and Torres Strait Islander Women's Taskforce on Violence report]

(b) Do you think that restorative justice is an appropriate response to domestic and family violence? Why?

(c) Ideally, what can a restorative justice response accomplish in cases of domestic and family violence?

3.3.1   So, based on what you've just said, you think that _ is a more appropriate response to domestic and family violence? (Insert whichever method participant thinks is better – if can't decide on one or other say so and talk about why)

Section 4. - Comparative framework

4.1   Comparing the ideal for each, I want you to rate on a scale of 1 to 10 the effectiveness or usefulness of the criminal justice system and the effectiveness or usefulness of restorative justice for each objective on this list (see attachment 1).

4.2   Which three objectives from the list (see attachment 1, next page) do you think are most important?   Could you please put these three in order from most important to least important?

Section 5 - Extent of feeling whether there is any common ground.

5.1   So based on what you've said, you think that _ offers more positives in response to domestic and family violence (insert whichever method participant thinks is better – if can't decide on one or other say so and talk about why)

Now:

a) Thinking about the offender, what kinds of things would have to change to make _ more acceptable to you?

b) Thinking about the 'victim,' what kinds of things would have to change to make _ more acceptable to you?

5.2   While _ is the generally preferred response for you, are there situations or kinds of cases where _ would be acceptable?

Interview Guide

Section 4: Comparative Framework

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1  |--------------------------------------------------------------------| 10
   not effective                                    extremely effective
```

Objective	CJ system	RJ practices
Stopping the violence		
Preventing further violence for this victim and others (changing the individual man's violent behaviour, replacing it with respect for women)		
Supporting women by validating their stories and experiences		
Holding men accountable for their violence (that is, punishing them)		
Sending a message to the community that violence is wrong (changing other men's behaviour)		
Restoring harmony/repairing relationships between a victim and offender		
Restoring harmony/repairing relationships between offender and community		
Compensation		
Other (please specify)		

Appendix 5: Participant Information Package

In Search of Justice in Domestic and Family Violence

Ms Heather Nancarrow
Post-graduate Student
MA (Hons) Criminology and Criminal Justice
School of Criminology and Criminal Justice
Griffith University Qld 4111
Email: h.nancarrow@mailbox.gu.edu.au

RESEARCH PARTICIPANT CONSENT PACKAGE

Information about research on the application of restorative justice practices in cases of domestic and family violence titled: "In search of justice in domestic and family violence".

Currently there is an international debate about the use of restorative justice practices in cases of domestic and family violence. In Queensland, this debate is reflected in the results of two separate taskforce investigations established to investigate and report to Government on matters that relate to violence against women. These were the Taskforce on Women and the Criminal Code, and the Aboriginal and Torres Strait Islander Women's Taskforce on Violence. Their reports, presented within three months of each other in 1999, gave opposite advice to the Government about the application of restorative justice practices in cases of domestic and family violence.

I am undertaking research to better understand how and why women think differently about restorative justice practices in relation to domestic and family violence and whether there is the possibility for agreement. This research forms part of the requirements for me to be awarded an MA (Hons) in Criminology and Criminal Justice. Associate Professor Kathleen Daly, School of Criminology and Criminal Justice, Griffith University, Queensland is supervising the research project, which aims to:

- Identify various understandings, or definitions, of 'restorative justice processes';

- clarify the extent to which the views for and against the use of restorative justice practices in domestic and family violence cases are polarised;

- identify areas of agreement between those for and against;

- identify the potential for addressing the concerns with restorative justice practices; and

- ensure considered perspectives of those for and against are coherently documented and made publicly available.

The research process involves a review of the literature and semi-structured interviews with advocates for the criminal justice response and advocates for alternatives to the criminal

justice response, mostly drawn from membership of the Taskforce on Women and the Criminal Code and the Aboriginal and Torres Strait Islander Women's Taskforce on Violence.

The interview will take between 45 minutes to one hour. It will include some demographic information about the person being interviewed to provide some context for the responses to the interview questions. Interviews will be tape- recorded, if agreed to by the person being interviewed, to ensure accuracy when transcribing the responses to interview questions. Individual interview responses and the tape recordings will only ever be available to the researcher and the research supervisor. At the completion of the study all data will be stored securely at the School of Criminology and Criminal Justice.

Participation in the research is voluntary and an interview or the tape recording can be stopped at any time. All information that is gathered through the research project is completely confidential. When the research is complete responses to interview questions will be grouped, and reported on as statistical aggregates and any discussion of individual responses will use pseudonyms, rather than real names, to protect the identity of individuals who participated in the study. Other information that could identify an individual, such as specific location and professional role, will not be used for the same reason.

The conduct of ethical research in Australia requires that if any participant has a complaint about the manner in which a research study has been conducted, the complaint can be made to the Project Director, or if an independent person is preferred, to the University. Contact details are as follows:

1. Heather Nancarrow (Chief Investigator), Post-Graduate Student, School of Criminology and Criminal Justice, Mt Gravatt Campus, Griffith University, Qld 4111. Telephone (07) 3217 1214. Email: h.nancarrow@mailbox.gu.edu,.au

2. Griffith University's Research Ethics Officer, Office for Research, Bray Centre, Griffith University, Kessels Road, Nathan, Qld 4111. Telephone (07) 3875 6618

or

3. the Pro-Vice Chancellor (Administration), Office of the Vice Chancellor, Bray Centre, Griffith University, Kessels Road, Nathan, Qld, 4111. Telephone: (07) 3875 7343.

When the research report is finalised, I will send a copy to all participants at an address to be confirmed at the time of interview. Participants will receive a copy of the research results even if the interview is not completed.

Yours sincerely

Heather Nancarrow.

In Search of Justice in Domestic and Family Violence

Ms Heather Nancarrow
Post-graduate Student
MA (Hons) Criminology and Criminal Justice
School of Criminology and Criminal Justice
Griffith University Qld. 4111
Email: h.nancarrow@mailbox.gu.edu.au

Research Participant Consent Form

I consent to participate in the research project: "In search of justice in domestic and family violence" as described in the Information Sheet, which I have read and understood. I understand that my participation is voluntary, that I can end the interview and/or the recording of the interview at any time, and that the researcher and research supervisor will protect the confidentiality and privacy of the information I give.

Signature: _____

Name (please print): _____

Date: _____

Address for final paper to be sent to:

_____
_____
_____

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