

**STALKING AND DOMESTIC VIOLENCE:  
VIEWS OF QUEENSLAND MAGISTRATES**

Susan Currie  
Queensland University of Technology

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## **Abstract**

In 2000 a survey was conducted of Queensland magistrates views on issues concerning domestic violence and the operation of the Domestic Violence (Family Protection) Act 1989 (Qld). Within this survey Magistrates were asked to engage with the issue of stalking as it related to domestic violence. More specifically, their opinion was canvassed on two issues: how well the Domestic Violence legislation dovetailed with the stalking provisions of the Queensland Criminal Code; and how comfortable they were making domestic violence orders when the harassment complained of included, for example, making phone calls, driving past or the constant sending of flowers etc. Initial findings indicate that the majority of Magistrates surveyed believe that there is a good working relationship between the Domestic Violence Act and the stalking provisions of the Queensland Criminal Code. Also, the majority of Magistrates are comfortable making domestic violence orders when the harassment complained of is of a non-physical nature. In light of this, our paper will do two things. First, it will review the current law on stalking and the factors that led to amendments being made to the Queensland Criminal Code in 1999. Second, it will present a detailed analysis of Magistrates responses to the issue of stalking in the context of making domestic violence orders.

## **Stalking law in Queensland**

In 1989 the Queensland parliament passed the Domestic Violence (Family Protection) Act which enabled a limited group of people, namely spouses or the parents of a child, the right to make application for protection orders against domestic violence by their present or former partners. The legislation was amended in 1999 to also cover same-sex relationships. Some of the behaviours coming within the definition of domestic violence are in the nature of stalking.<sup>i</sup>

On 23 November 1993, Queensland became the first state in Australia to create a specific criminal offence of stalking.<sup>ii</sup> The Explanatory notes for the legislation indicate that the impetus for the reform had come from the community and women's interest groups, and had the support of the Women's Policy Unit within government along with the Police Service. It was directed at behaviour that reasonably caused fear of potential violence.

The stalking legislation was amended<sup>iii</sup> on 30, April 1999 firstly to remove phraseology that had hindered enforcement; secondly to give the courts power to make orders in the nature of protection orders at the time of trial of stalking offences, and thirdly not only to proscribe behaviour that caused fear of violence but also behaviour that had in fact caused a detriment. Detriment was defined broadly<sup>iv</sup>.

## **Part 1: The Survey and its Research Rationales**

### *1.1 The Survey*

The survey was conducted in May and June 2000. All 96 Magistrates and Acting Magistrates in both city and regional areas in Queensland were invited to respond to the survey via a mail-out. A follow-up invitation was made in June at the Magistrates Conference in Brisbane.

The survey instrument used was a modified version of the one developed by the NSW Judicial Commission for their survey of NSW Magistrates conducted in 1998.<sup>v</sup> The survey instrument was quite lengthy and searching in the questions it posed. All questions were of an open-ended nature. Questions ranged from ones relating to Magistrates views on the causes of domestic violence to questions concerning specific issues to do with the operation of the Domestic Violence (Family Protection) Act, 1989 (Qld). The NSW survey did not, however, ask questions regarding stalking. The questions on stalking in the Queensland survey were developed because of the overlap in

behaviour relevant to stalking and domestic violence and also because the 1999 amendments to the stalking provisions of the Criminal Code gave the Courts power to issue protection orders to stalking victims (a more expansive group than those able to apply for protection orders). We were interested to know whether police were charging spouses with stalking under the Criminal Code or restricting the use of the stalking provisions to non-domestic situations.

Of the 96 surveys sent, 38 responses were received. This is a response rate of 40%. The NSW Judicial Commission's response rate was 56%. 9 of the 12 female Magistrates in Queensland responded (a response rate of 75%) and 28 of the 84 male Magistrates and Acting Magistrates responded (a response rate of 33.33%).

14 of the respondents had fewer than 5 years experience as a Magistrate, 5 had between 5 and 10 years experience, 6 had between 10 and 15 years experience and 11 respondents had over 15 years of experience. 2 respondents failed to enter their years of service as they felt that it was an identifying factor. 18 of the respondents were in the 51-60 age group, 14 were in the 41-50 age group and 5 respondents were between 30 and 40. 8 of the respondents sat in city courts, 11 in country courts and 17 sat in both city and regional areas.

## *1.2 The Research Rationales*

There are a number of research rationales behind the survey.

First, there is a paucity of empirical qualitative research on domestic violence in Queensland. In particular, there has been no research to date on the views of Queensland Magistrates in this area. This is concerning because Magistrates around the state are making orders under the Domestic Violence (Family Protection) Act on a daily basis. They are key players in ensuring that victims of violence achieve justice through the legal system.

Secondly, the Australian Law Reform Commission (ALRC) reported in 1994 that "All over Australia women came to the Commission to explain how the legal system had failed them.... How the horror of the violence against them ... had been compounded by the law's failure to protect them. They complained of ... their humiliation by a system of justice that they perceived as trivialising their injuries and disbelieving them."<sup>vi</sup> Queensland statistics indicate, however, that there has been an increase in the number of applications for domestic violence orders from 11,082 in 1994 to 14,041 in 1999. This might reflect an increased confidence in using the legal system on the part of survivors of violence, and this research aims to test that further.

Thirdly, although research and writing in the field of domestic violence is increasing, there is a great need to expedite the development of the legal discourse on domestic violence. The ALRC, again in their 1994 Report, called for more research and better data on women and the legal system.<sup>vii</sup> This research aims to be a contribution in responding to that call.

Further, the ALRC was concerned in its Report that much of the legal research that had been undertaken in areas such as domestic violence is not comparable due to different methodologies used in different projects and in different jurisdictions. By replicating the Judicial Commission's survey this project will produce knowledge which is comparable, although unfortunately not on the issue of stalking. This should enable us to assess current assumptions of Magistrate's understandings of domestic violence and also identify common areas of concern between Magistrates in NSW and Queensland.

Finally, this was also seen as a good time to do the research because of the recent amendments to the Domestic Violence (Family Protection) legislation in Queensland which were aimed at enhancing its effectiveness (in ways not particularly relevant to the issue of stalking).<sup>viii</sup>

### **Part 3: The responses to stalking.**

Magistrates were asked two questions in relation to stalking. The first was, 'how well does the domestic violence (Family Protection) Act, 1989, dovetail with the stalking provisions of the Criminal Code?'. The second was 'are you comfortable making orders when the harassment complained of is, for example, the constant sending of flowers/letters, making phone calls, driving past, etc?'

#### **Question 1. (Statistics needed)**

With regard to the first question, eighteen (18) males and five (5) females (or 73% of the sample of males, 62% of the sample of females or 60% of the sample as a whole) argued that the legislation worked well together. Two (2) males and two (2) females (10% of the sample as a whole, 25% of the sample of females, 7% of the sample of males) claimed that it did not work well together. Four (4) males gave no response and two (2) males and two (2) females maintained that they had too little experience to comment.

We did not get detailed answers as to why most Magistrates thought the legislation dovetailed. With hindsight, a specific question asking whether police were charging offenders with stalking in domestic contexts, might have elicited a more productive response. Some responses suggested a flexible police response:

*'quite well – there is a large amount of discretion by police and prosecutors as to which way to go';*

*'Anti-stalking provisions routinely appear in DVOs. No contact orders routinely appear in bail undertakings.'*

They did not clarify whether police were likely to construct stalking by a spouse primarily as a criminal or as a civil issue. One Magistrate suggested that stalking should be an offence under the Domestic Violence (Family Protection) Act as well as under the Code. This suggests that he thought that domestic stalking was being treated as a civil issue.

Of those Magistrates who did not believe that the legislation dovetailed, two female Magistrates make reference to domestic stalking being treated as a civil issue. One suggests that this may be the victim's choice:

*'Many examples of domestic violence are stalking, I do not know who makes the decision how to proceed ie DV or Stalking. Many women may prefer a DV Order as they may not want the perpetrator imprisoned, they only want it to stop.'*

The other female Magistrate stressed the importance of criminal charges for 'serious' stalking 'especially for relationships.'

Responses by 3 male Magistrates suggest a lack of understanding of the relationship between stalking and domestic violence:

*'Of no interest to me – each has its own purpose'  
'I am not sure there is intended to be a dovetailing  
'I am not sure what the question is'*

## Question 2. (Statistics needed)

With regard to the second question, twenty five (25) males and eight (8) females (65% of the sample of males, 89% of the sample of females or 87% of the sample as a whole) said that they were comfortable making orders when the harassment was of a non-physical nature. Four (4) males and one (1) female (14% of the male sample, 12.5% of the female sample, or 13% of the sample as a whole) said that they were not.

Some Magistrates took the view that these behaviours **clearly constituted** domestic violence. One female Magistrate said that:

- *'I know what it is like to be harassed.'*

A male Magistrate responded that:

- *'There are as many forms of harassment as there are persons engaging in such conduct. The categories of harassment should never be closed.'*

Another male Magistrate said that:

- *'experience shows these types of situations are often the most intimidating.'*

And a third male Magistrate:

- *'considered that above behaviour is totally unacceptable.'*

**Less categorical** were the Magistrates who said:

- *'In some instances no. But generally yes.'*
- *'providing it is shown to be harassment.'* ;

the female Magistrate who responded:

- *'My comfort is not relevant. If after the application of the rules of law, the acts are acts of domestic violence, I will make the order. The acts in themselves may not be domestic violence, it would depend on the circumstances of the case.'*;

and the Magistrate who said he was comfortable making such orders:

- *'as long as the aggrieved spouse is not using the application as an easy way to end the relationship.'*

(We wonder how many people would consider going to court as easy way to end a relationship!)

The Magistrates who were **opposed** to making orders in these situations stated as follows:

- *No unless their actions are almost continual*
- *'I have seldom, if ever, made orders on that basis alone'*
- *'Most trials are those where there is no physical injury. Driving past is one of the most frequently denied allegations and is difficult to prove.'*

And again the covert purpose argument:

- *I am especially vigilant, and immediately suspect that the legislation is being used as a means of shifting the unpleasantness of severing a relationship from the person who seeks it.'*

It would therefore appear that while most Magistrates clearly categorise stalking behaviour as actionable by a protection order, some have difficulty either in constructing it that way or in being satisfied the behaviour has occurred. The fact that at least 2 Magistrates believe that allegations of non-physical violence are routinely made to end the relationship rather than to obtain protection suggests that the historical legal construction of female complainants as deceitful and devious has yet to die a death.

### What is domestic violence?

**11.(1) “Domestic violence”** is any of the following acts that a person has committed against his or her spouse—

- (a) wilful injury;
- (b) wilful damage to the spouse’s property;
- (c) intimidation or harassment of the spouse;
- (d) indecent behaviour to the spouse without consent;
- (e) a threat to commit an act mentioned in paragraphs (a) to (d).

*Examples—*

- 1. Following the spouse when the spouse is out in public, either by car or on foot.
- 2. Positioning oneself outside the spouse’s residence or place of work.
- 3. Injuring, or threatening to injure, the spouse’s pet.
- 4. Repeatedly telephoning the spouse at home or work without consent (whether during the day or night).

**(2)** A spouse need not personally commit the act or threaten to commit it.

### Who is a “spouse”?

**12.(1)** A “spouse” means—

- (a) either 1 of a male or female who are or have been married to each other; or
- (b) either 1 of the biological parents of a child, whether or not they are or have been married or are residing or have resided together; or
- (c) either 1 of 2 persons, whether of the same or the opposite sex, who are residing or have resided together as a couple.

**(1A)** For subsection (1)(c), 2 persons are a couple if they reside together in a relationship that is normally considered by the community to indicate that they are a couple.

**(1B)** A relationship mentioned in subsection (1A) is one formed on the basis of intimacy, trust and personal commitment and does not include, for example, a relationship where the 2 persons are merely cotenants.

**(2)** An “**aggrieved spouse**” means the spouse for whose benefit a domestic violence order is in force or may be made under this Act.

**(3)** A “**respondent spouse**” means a person against whom a domestic violence order is in force, is sought or may be sought, under this Act.

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### ‘Unlawful stalking 9

**‘359A.(1)** A person must not unlawfully stalk another person. 10

**‘(2)** A person (the “**offender**”) unlawfully stalks another person (the 11  
“**victim**”) if— 12

- (a) the offender engages in a course of conduct involving doing a 13  
concerning act on at least 2 separate occasions to another person 14  
or other persons (whether the victim, another or others); and 15
- (b) the offender intends that the victim be aware that the course of 16  
conduct is directed at the victim, even if the concerning acts or 17  
particular concerning acts are done to, or to the property of, a 18  
person other than the victim; and 19

(c) the victim is aware that the course of conduct is directed at the 20  
victim; and 21

(d) the course of conduct would cause a reasonable person in the 22  
victim’s circumstances serious concern that an offensive act (a 23  
“**concerning offensive act**”) may happen. 24

**‘(3)** For the purpose of subsection (2)(d), the victim’s circumstances are 25  
those known or foreseen by the offender and those reasonably foreseeable 26  
by the offender. 27

**‘(4)** It is a defence to a charge under this section to prove that the course 1  
of conduct was engaged in for the purposes of a genuine— 2

- (a) industrial dispute; or 3
- (b) political or other public dispute or issue carried on in the public 4  
interest. 5

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‘(5) The offence under this section may only be committed against an individual. 7

‘(6) Unlawful stalking is a crime for which the offender is liable to a maximum penalty of— 9

(a) imprisonment for 5 years if, for any of the concerning acts constituting the offence, the offender— 11

(i) unlawfully uses or threatens to use unlawful violence against another person or another person’s property; or 13

(ii) has possession of a weapon within the meaning of the *Weapons Act 1990*; or 15

(iii) contravenes an injunction or order imposed or made by a court under a law of the State, the Commonwealth, another State or a Territory, or threatens this; or 18

(b) imprisonment for 3 years in any other case. 19

‘(7) In this section— 20

“concerning act” means any of the following acts— 21

(a) following, loitering near, watching or approaching another person; 23

(b) telephoning or otherwise contacting another person; 24

(c) loitering near, watching, approaching or entering a place where another person lives, works or visits; 26

(d) interfering with property in the possession of another person; 27

(e) leaving offensive material where it will be found by, given to or brought to the attention of, another person; 29

(f) giving offensive material to another person, directly or indirectly; 30

(g) an act of harassment, intimidation or threat against another person; 31

(h) an unlawful act committed against the person or property of another person; 3

“concerning offensive act” means an unlawful act of violence by the offender against— 5

(a) the victim’s person or property; or 6

(b) a person, other than the victim, about whose health or custody the victim would reasonably be expected to be seriously concerned if the act were done, including, for example, a dependant, relative, friend, employer or associate of the victim; or 10

(c) the property of a person, other than the victim, about whose property the victim would reasonably be expected to be seriously concerned if the act were done, including, for example, the premises where the victim lives or works, or the property of a dependant, relative, friend, employer or associate of the victim; 15

“property” of a person other than the offender includes property in which both the offender and the other person have an interest; 17

“unlawful” act means an unlawful act constituting an offence; 18

“violence” against the person includes an act depriving a person of liberty; 19

“violence” against property includes an unlawful act of damaging, destroying, removing, using or interfering with property. 21

#### ‘Summary proceedings for unlawful stalking 22

‘359B.(1) A proceeding for an indictable offence against section 359A may be dealt with summarily, unless the offender is charged with a circumstance of aggravation mentioned in section 359A(6)(a). 25

‘(2) The maximum sentence that may be imposed on a summary conviction for an indictable offence against section 359A is imprisonment for 18 months. 28

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- ‘(3) A proceeding for an indictable offence against section 359A may be dealt with summarily even though the proceeding was started more than 1 year after the offence was committed.
- ‘(4) A proceeding for an indictable offence against section 359A may be dealt with summarily at any place appointed for holding Magistrates Courts regardless of where the offence was committed.
- ‘(5) The summary jurisdiction conferred by this section must be exercised in the way, and subject to the conditions, prescribed by section 444 for the summary trial and punishment of offenders who may be summarily convicted of indictable offences under that section.’.

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### **Replacement of s 359A (Unlawful stalking)**

3. Section 359A—

*omit, insert*—

†

## **‘CHAPTER 33A—UNLAWFUL STALKING**

### **‘Definitions for ch 33A**

‘359A. In this chapter—

“**circumstances**” means the following circumstances—

- (a) the alleged stalker’s circumstances;
- (b) the circumstances of the stalked person known, foreseen or reasonably foreseeable by the alleged stalker;
- (c) the circumstances surrounding the unlawful stalking;
- (d) any other relevant circumstances.

“**detriment**” includes the following—

- (a) apprehension or fear of violence to, or against property of, the stalked person or another person;
- (b) serious mental, psychological or emotional harm;
- (c) prevention or hindrance from doing an act a person is lawfully entitled to do;
- (d) compulsion to do an act a person is lawfully entitled to abstain from doing.

*Examples of paragraph (c)*—

A person no longer walks outside the person’s place of residence or employment.

A person significantly changes the route or form of transport the person ordinarily use to travel to work or other places.

*Example of paragraph (d)*—

A person sells a property the person would not otherwise sell.

“**property**”, of a person, means—

- (a) property in which the person has an interest, whether or not the defendant also has an interest in the property; or
- (b) property that is otherwise—
  - (i) used and enjoyed by the person; or
  - (ii) available for the person’s use or enjoyment; or
  - (iii) in the person’s care or custody; or
  - (iv) at the premises at which the person is residing.

“**stalked person**” see section 359B.

“**unlawful stalking**” see section 359B.

1 The *Acts Interpretation Act 1954*, section 36 defines “interest”, in relation to land or other property, as meaning—

- ‘(a) a legal or equitable estate in the land or other property; or
- (b) a right, power or privilege over, or in relation to, the land or other property.’.

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**“violence”**— 1

(a) does not include any force or impact within the limits of what is 2 acceptable as incidental to social interaction or to life in the 3 community; and 4

(b) against a person includes an act depriving a person of liberty; and 5

(c) against property includes an act of damaging, destroying, 6 removing, using or interfering with the property. 7

**‘What is unlawful stalking** 8

**‘359B. “Unlawful stalking”** is conduct— 9

(a) intentionally directed at a person (the **“stalked person”**); and 10

(b) engaged in on any 1 occasion if the conduct is protracted or on 11 more than 1 occasion; and 12

(c) consisting of 1 or more acts of the following, or a similar, type— 13

(i) following, loitering near, watching or approaching a person; 14

(ii) contacting a person in any way, including, for example, by 15 telephone, mail, fax, e-mail or through the use of any 16 technology; 17

(iii) loitering near, watching, approaching or entering a place 18 where a person lives, works or visits; 19

(iv) leaving offensive material where it will be found by, given to 20 or brought to the attention of, a person; 21

(v) giving offensive material to a person, directly or indirectly; 22

(vi) an intimidating, harassing or threatening act against a person, 23 whether or not involving violence or a threat of violence; 24

(vii) an act of violence, or a threat of violence, against, or against 25 property of, anyone, including the defendant; and 26

(d) that— 27

(i) would cause the stalked person apprehension or fear, 28 reasonably arising in all the circumstances, of violence to, or 29 against property of, the stalked person or another person; or 30

(ii) causes detriment, reasonably arising in all the circumstances, 1 to the stalked person or another person. 2

**‘What is immaterial for unlawful stalking** 3

**‘359C.(1)** For section 359B(a), it is immaterial whether the person doing 4 the unlawful stalking— 5

(a) intends that the stalked person be aware the conduct is directed at 6 the stalked person; or 7

(b) has a mistaken belief about the identity of the person at whom the 8 conduct is intentionally directed. 9

**‘(2)** For section 359B(a) and (c), it is immaterial whether the conduct 10 directed at the stalked person consists of conduct carried out in relation to 11 another person or property of another person. 12

**‘(3)** For section 359B(b), it is immaterial whether the conduct throughout 13 the occasion on which the conduct is protracted, or the conduct on each of a 14 number of occasions, consists of the same or different acts. 15

**‘(4)** For section 359B(d), it is immaterial whether the person doing the 16 unlawful stalking intended to cause the apprehension or fear, or the 17 detriment, mentioned in the section. 18

**‘(5)** For section 359B(d)(i), it is immaterial whether the apprehension or 19 fear, or the violence, mentioned in the section is actually caused. 20

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**‘Particular conduct that is not unlawful stalking 21**

**‘359D. “Unlawful stalking”** does not include the following acts— 22  
(a) acts done in the execution of a law or administration of an Act or 23  
for a purpose authorised by an Act; 24  
(b) acts done for the purposes of a genuine industrial dispute; 25  
(c) acts done for the purposes of a genuine political or other genuine 26  
public dispute or issue carried on in the public interest; 27  
(d) reasonable conduct engaged in by a person for the person’s 28  
lawful trade, business or occupation; 29  
(e) reasonable conduct engaged in by a person to obtain or give 1  
information that the person has a legitimate interest in obtaining 2  
or giving. 3

**‘Punishment of unlawful stalking 4**

**‘359E.(1)** A person who unlawfully stalks another person is guilty of a 5  
crime. 6  
**‘(2)** A person who commits the crime of unlawful stalking is liable to a 7  
maximum penalty of imprisonment for 5 years. 8  
**‘(3)** However, a person is liable to a maximum penalty of imprisonment 9  
for 7 years if, for any of the acts constituting the unlawful stalking, the 10  
person— 11  
(a) uses or intentionally threatens to use, violence against anyone or 12  
anyone’s property; or 13  
(b) possesses a weapon within the meaning of the *Weapons Act* 14  
*1990*; or 15  
(c) contravenes or intentionally threatens to contravene an injunction 16  
or order imposed or made by a court or tribunal under a law of 17  
the Commonwealth or a State. 18

**‘Court may restrain unlawful stalking 19**

**‘359F.(1)** This section applies on the hearing before a court of a charge 20  
against a person of unlawful stalking. 21  
**‘(2)** Whether the person is found guilty or not guilty or the prosecution 22  
ends in another way, if the presiding judge or magistrate considers it 23  
desirable, the judge or magistrate may constitute the court to consider 24  
whether a restraining order should be made against the person. 25  
**‘(3)** The judge or magistrate may act under subsection (2) on application 26  
by the Crown or an interested person or on the judge’s or magistrate’s own 27  
initiative. 28  
**‘(4)** Also, if the restraining order proceeding is started before the 29  
Supreme Court or the District Court, the court may order the proceeding to 30  
be transferred to a Magistrates Court. 31  
**‘(5)** If a court makes an order under subsection (4), the registrar of the 1  
court must send to the clerk of the relevant Magistrates Court a copy of the 2  
order and the record of proceedings of the hearing of the charge and any 3  
application mentioned in subsection (3). 4  
**‘(6)** The court hearing the restraining order proceeding may make a 5  
restraining order against the person in relation to any person or any property 6  
if it considers it desirable to do so having regard to the evidence given at the 7  
hearing of the charge and any application under subsection (3) and any 8  
further evidence the court may admit. 9  
**‘(7)** A restraining order may be varied or revoked at any time by the 10  
court, and, if the order provides, by another court. 11  
**‘(8)** A person who knowingly contravenes a restraining order commits 12  
an offence. 13  
Maximum penalty—40 penalty units or 1 year’s imprisonment. 14

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‘(9) A restraining order may be made against a person whether or not 15  
another order is made against the person in the proceeding for the charge. 16  
‘(10) A restraining order proceeding is not a criminal proceeding. 17  
‘(11) A question of fact for a decision under subsection (2) and in a 18  
restraining order proceeding must be decided on the balance of probabilities. 19  
‘(12) In this section— 20  
“charge” means the charge of unlawful stalking mentioned in 21  
subsection (1). 22  
“restraining order” against a person means any order considered 23  
appropriate for the purpose of prohibiting particular conduct, including, 24  
for example, contact for a stated period by the person with a stated 25  
person or the property of a stated person. 26  
“restraining order proceeding” means a proceeding started under 27  
subsection (2).’ 28

<sup>iv</sup> As expressed in the Explanatory Notes, the problem with the previous provisions related to the requirements that the accused had to engage in a ‘course of conduct’; that they had to intend that the victim be aware of their behaviour; that victims had to be aware that the course of conduct was directed at them; and to the fact that unless the victim had an actual belief that a violent act was likely to happen the offence could not be proved.

<sup>v</sup> J Hickey and S Cumines, “Apprehended Violence Orders: A Survey of Magistrates”, Monograph Series Number 20, August 1999, Judicial Commission of New South Wales.

<sup>vi</sup> Australian Law Reform Commission, (1994) Report (No 67) on Equality Before the Law: Women’s Access to the Legal System, AGPS, Canberra.

<sup>vii</sup> Id at 62.

<sup>viii</sup> Explanatory notes, Domestic Violence (Family Protection) Amendment Bill 1999 at 1.