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When social and punitive justice intersect

By Elizabeth OShea and Dave McDonald

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(0 Comments)



Sex discrimination Commissioner Elizabeth Broderick recently [called for tougher sentencing](#) of people convicted of intimate partner violence. She argues incidents of partner violence should not be treated as 'just a domestic' but should attract 'a premium penalty'. Broderick is not alone. Her more punitive approach parallels similar calls from [feminist writer Clementine Ford](#).

Sympathy for punitive justice is nothing new: tougher sentencing has broad appeal. But the rhetoric of law and order is usually the province of politicians and the tabloid media rather than feminists. Its use in the context of otherwise socially progressive causes risks reaffirming the injustices of criminal justice itself.

The call for tougher penalties for crimes on the basis that sentencing is too lenient is based on a misunderstanding of community expectations. Research indicates that the more people know about the facts established in a criminal trial, the more likely they are [to agree with the sentence given](#). This is not to say that the judiciary always gets it right or deals with such matters sensitively. But there's a reason why accusing judges of being soft on crime in a media cycle that rarely [goes beyond sound bites](#) is a speciality of tabloid journalists. Public dissatisfaction with sentencing tends to be abstract and superficial.

Calls for harsher penalties distract attention from the very significant problems presented by the legal processes dealing with intimate partner violence. Ford claims that '[incarceration] may do nothing to eradicate the pain caused to the victims – but I'd wager it wouldn't hurt.' This overlooks some pretty obvious flaws in the system. Actually, the inflexibility of the process can [deter victims](#) and often fails to accommodate their needs, which might include maintaining an ongoing relationship with the offender. This is to say nothing of how prison often acts as a gateway to further marginalisation and recidivism at the expense of rehabilitation of offenders.

Reforming criminal justice processes rather than increasing sentences per se should be part of a progressive and nuanced analysis of violence against women. On one level Ford accepts this, saying that 'perhaps a rehabilitation of the system itself is in order, one in which we remind legal practitioners of the rights of victims'. But this misconstrues the role of lawyers. The adversarial system requires that lawyers defend their clients' right to the presumption of innocence and a fair trial. And there are good reasons why they do: the rule of law (rather than vengeful violence) is a key foundation of liberal democracy.

Plenty of possible reforms to the adversarial criminal justice system are worth considering. [Restorative justice](#) initiatives that focus on processes like conferencing, where the victim and offender are both supported, are an important example. The motivation is to identify and redress harm through a process that is more attentive to the needs and experiences of both parties. This isn't right for every situation, but according to expert criminologist Professor John Braithwaite, a restorative justice approach tends to achieve much higher levels of satisfaction for all parties involved. It's in stark contrast to the adversarial system, in which alleged victims are pitched against alleged perpetrators in a battle for a binary, zero-sum-game verdict.

Unlike punitive justice, restorative processes accommodate interests beyond vengeance. While harm may have occurred and must be addressed, restorative justice approaches appreciate that this may not always have been intended or understood. As Professor Braithwaite notes, the process is 'exactly the opposite of that of a criminal trial'.

Taking a step back, it's clear that focusing on the criminal justice system to address gendered violence involves too narrow a perspective. The assumption, of course, is that if we treat these offenders with an iron fist, it will send a message to others that their conduct is unacceptable. Rigid approaches to deterrence or criminalisation have not worked in relation to drugs, prostitution or countless other behaviours. But when all you have is a hammer, everything starts to look like a nail.

In many ways, looking to legal processes to address intimate partner violence fails to recognise the law's historical role in reinforcing privilege and disempowerment. This has been the subject of feminist legal theory for decades. Placing too much emphasis on law and its ability to punish reinforces the very structures of power we should be seeking to challenge. It is at best unimaginative, at worst socially regressive. In this issue, social and punitive justice intersect and we should not confuse one with the other.

There are plenty of other ways to send a message that intimate partner violence is unacceptable.

A primary objective should be to empower the victims of violence. This means more funding for women's refuges, so they can escape abuse immediately. It also means better funding of legal aid. Recent reductions to eligibility guidelines in Victoria have meant, by Victoria Legal Aid's own admission, that people with family law disputes will be 'the most affected,' a result that disproportionately affects women. People with family disputes will no longer be represented at hearings, unless the other side has a lawyer. If there is a history of family violence, this can mean alleged perpetrators of domestic violence cross-examining the alleged victims (and vice versa).

Strategies to end intimate partner violence must also challenge the traditionally 'private' nature of the harm done. This means linking accessible and affordable childcare to the problem of domestic violence. Such assistance can help women to escape violence, seek employment or relocate. For example, over 300,000 workers are currently covered by workplace agreements with domestic violence entitlements. Similar protections should be available to all Australian workers. This recognition of the problem, without judgment, provides dignity for victims and practical support.

We need to talk about more systemic changes, such as equal pay for work of equal value, so when women try to build a new life separate from their partners, they are not economically disadvantaged purely because of their gender. Making the problem public contributes to breaking down the cultural norms and conditions that have historically helped entrench violence.

We should also question broader social values. VicHealth has identified 'a cultural ethos condoning violence as a means of settling disputes' as one key social or structural contributing factors to violence against women. Violence that is punitive or vengeful is not something that is just experienced on an individual level: it is often practiced in the highest political echelons of our society. If a collective message is sent that violence solves problems it is no surprise this is replicated on an individual level.

Importantly, however, VicHealth also found that the overwhelming majority of Australians do not condone violence against women, do not think it should be dealt with privately, and would intervene to stop it. This is an important social foundation for progressive, considered policy, one that is unafraid to tackle the complexity of the problem.

This not to suggest there is a simple guide to 'solve' these problems. The causes and effects of gendered violence are multiple and complex but the problem itself is a symptom of entrenched oppression. To that end, we should be looking to material strategies to relieve the poverty imposed on women.

The alternative is the politics of law and order: a high stakes, toxic political game, which is rarely focused on the needs of the victims and is indifferent to the effect on the offender. If we want to take the problem seriously, we need an equally serious approach to our calls for change.

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absence of justice.

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