

## Chapter 3

# An Effective Legal Response

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## INTRODUCTION

3.1 In the last chapter we looked at the nature and dynamics of family violence. In this chapter we outline the State's international obligation to combat this violence and describe how violence against women has been treated as a human rights violation in international instruments.

**International instruments** include treaties, declarations adopted by the UN General Assembly, findings of UN special rapporteurs and other mechanisms.

3.2 We then discuss the extent to which the current legal response deals adequately with family violence. We argue that there is a need for both a criminal justice and civil response to family violence and that changes need to be made to both systems to meet the needs of victims. We recommend the introduction of a new Family Violence Act with clear aims and principles that articulate the philosophy underpinning the legal response.

3.3 In recommending reforms, we acknowledge that the justice system alone will never adequately prevent family violence or completely meet the needs of people who have experienced it.<sup>122</sup> An effective response to family violence must also include support for victims and attitudinal changes in the community.<sup>123</sup>

## FAMILY VIOLENCE AND HUMAN RIGHTS

3.4 Violence against women, including violence within the family, is a fundamental violation of human rights. In this section we outline how family violence has been considered at the international level and discuss the international obligation of all Australian governments, including the Victorian government, to work towards its eradication. We also describe the rights of children and young people (as both victims and perpetrators of violence) that the legal system must take into account when responding to violence. This understanding of the State's international obligations to combat violence against women informs our recommendations for change.

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122 Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (1990) 306–7; Carolyn Hoyle and Andrew Sanders, 'Police Response to Domestic Violence: From Victim Choice to Victim Empowerment' (2000) 40 *British Journal of Criminology* 14, 33.

123 We make recommendations to encourage attitudinal change and for better community support for victims in Chapter 12.

## INTERNATIONAL RESPONSIBILITY TO COMBAT VIOLENCE AGAINST WOMEN

3.5 Under international human rights law that is binding on Australia, there is an obligation on State agencies to combat violence against women. International human rights standards are the bare minimum of what every person should expect to enjoy in their daily lives.<sup>124</sup> Human rights principles recognise that all people are 'born free and equal in dignity and rights'.<sup>125</sup> Traditionally, international human rights law has focused on the obligation of the State to prevent and punish violations committed by its own agents. For example, the prohibition on torture has traditionally been understood as a prohibition on acts of torture carried out by agents of the State such as the police or military personnel. However, the international community has recently recognised the duty on States to take all necessary measures to prevent and punish human rights abuses committed by private individuals. This responsibility is sometimes referred to as an international legal obligation to exercise 'due diligence' to respect, protect and fulfil each individual's human rights.

3.6 Violence against women has been repeatedly recognised at the international level as a human rights issue that must be addressed by all countries. The UN Special Rapporteur on violence against women has noted:

The insidious nature of domestic violence has been documented across nations and cultures worldwide. It is a universal phenomenon ... At its most complex, domestic violence exists as a powerful tool of oppression. Violence against women in general, and domestic violence in particular, serve as essential components in societies which oppress women, since violence against women not only derives from but also sustains the dominant gender stereotypes and is used to control women.<sup>126</sup>

3.7 The Committee on the Elimination of all Forms of Discrimination Against Women has stated:

Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships, women of all ages are subjected

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124 Amnesty International, *Making Rights a Reality: The Duty of States to Address Violence Against Women* (2004) 1; United Nations Division for the Advancement of Women, 'Report of the Expert Group Meeting' (Paper presented at the Good Practices in Combating and Eliminating Violence Against Women conference, Austria, 17–20 May 2005) 13.

125 *Universal Declaration of Human Rights*, GA res 217A (III), UN GAOR, 3rd sess, UN Doc A/810 at 71 (1948), art 1.

126 Radhika Coomaraswamy, Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, UN Doc E/CN.4/1996/53 (1996) paras 22–7.

to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence and coercion ... The effect of such violence on the physical and mental integrity of women is to deprive them [of] the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms.<sup>127</sup>

3.8 In terms of binding treaty obligations, the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW)<sup>128</sup> was ratified by Australia in 1983. In 1992, the UN committee in charge of CEDAW's implementation identified violence against women as a form of discrimination and therefore prohibited under the convention. All States who are party to the convention, including Australia, must therefore take positive measures to eliminate all forms of violence against women.<sup>129</sup> In implementing this obligation, States should be guided by the UN General Assembly *Declaration on the Elimination of Violence Against Women*, which was unanimously adopted by all member States in 1993.<sup>130</sup> This declaration was adopted to strengthen and complement the convention, and provides guidance to States on measures they should take to eliminate violence against women.<sup>131</sup> The declaration also refers to other human rights that are impaired by acts of violence against women, such as the right to equality, the right to equal protection under the law, the right to the highest attainable standard of physical and mental health and the right not to be subjected to torture or other cruel, inhuman or degrading treatment.<sup>132</sup> A woman's right to be free from violence is inherently linked to the provision of other civil, political, economic and social rights, such as the right to life, the right to bodily and physical integrity, the right to education and the right to work.<sup>133</sup>

127 Committee on the Elimination of All Forms of Discrimination against Women, *General Recommendation 19* (11th session, 1992) UN Doc A/47/38 at 1 (1993).

128 *Convention on the Elimination of all Forms of Discrimination Against Women*, UN GAOR, 44th sess, UN Doc A/44/736 (1990) .

129 Committee on the Elimination of All Forms of Discrimination against Women, *General Recommendation 19* (11th session, 1992) UN Doc A/47/38 at 1 (1993).

130 *General Assembly Declaration on the Elimination of Violence Against Women*, GA res 48/104, UN Doc A/RES/48/104 (1993)

131 Ibid art 4.

132 Ibid art 3.

133 Statewide Steering Committee to Reduce Family Violence, *A Submission on the Human Rights Community Discussion Paper and a Human Rights Charter for Victoria* (2005) 1, 6; Committee on the Elimination of All Forms of Discrimination against Women, *General Recommendation 19* (11th session, 1992) UN Doc A/47/38 at 1 (1993) para 7.

3.9 Other international standards that are relevant to the elimination of violence against women, and will be referred to throughout this report, include the UN General Assembly *Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice*<sup>134</sup> (UN Model Strategies) and the General Assembly *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.<sup>135</sup> The Beijing Declaration and Platform for Action,<sup>136</sup> adopted at the fourth world conference on women, also provides important guidance and standards for the elimination of violence against women. The Platform for Action is one of the most detailed agreements setting out the rights of women and was signed by 189 governments, including Australia. It includes violence against women as one of 12 critical areas of concern and outlines three strategic objectives and strategies to work towards its eradication.

3.10 The UN Human Rights Commission appointed an independent Special Rapporteur on violence against women, its causes and consequences in 1994.<sup>137</sup> The Special Rapporteur is mandated to seek and receive information from governments and non-government organisations on violence against women and recommend measures for the elimination of violence against women.<sup>138</sup> In performing this mandate, the Special Rapporteur submits annual thematic reports to the Human Rights Commission which contain recommendations to all governments. She also conducts fact-finding country visits and transmits urgent appeals and communications to States about alleged cases of violence against women.<sup>139</sup> The Special Rapporteur's recommendations and findings are useful guides to all States' obligations in this area, and will therefore be referred to throughout this report.

3.11 The responsibility of the State to combat violence against women means that where States know or ought to know about violations and fail to take appropriate steps to prevent the violations, they can become responsible for the action. This does not

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134 Adopted as an annex in *General Assembly Resolution on Crime Prevention and Criminal Justice Measures to Eliminate Violence Against Women*, GA Res 52/86, UN Doc A/RES/52/86 (1998).

135 *General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UN Doc A/RES/40/34 (1985) adopted 29 November 1985.

136 United Nations, *Report of the Fourth World Conference on Women*, UN Doc A/CONF.177/20 (1995) Annex: Beijing Declaration and Platform for Action.

137 See Commission on Human Rights Resolution 1994/45, *Question of integrating the rights of women into the human rights mechanisms of the United Nations and the elimination of violence against women*, UN Doc E/CN.4/Sub.2/1994/56 (adopted 4 March 1994).

138 Ibid.

139 For more information, see 'Special Rapporteur on Violence Against Women its Causes and Consequences', <[www.ohchr.org/english/issues/women/rapporteur/index.htm](http://www.ohchr.org/english/issues/women/rapporteur/index.htm)> at 21 December 2005.

detract from the individual civil or criminal liability of the person who commits the violation.<sup>140</sup> The obligation to exercise ‘due diligence’ regarding the highest attainable standard of health has been outlined by the Committee on Economic, Social and Cultural Rights in the context of the right to health in the following way:

Human rights impose three types or levels of obligations on States parties: the obligations to *respect*, *protect* and *fulfil* ... The obligation to respect requires States to refrain from interfering directly or indirectly with the right to health. The obligation to protect requires states to take measures that prevent third parties from interfering with [the right]. Finally the obligation to fulfil requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right.<sup>141</sup>

3.12 The outlined international agreements contain detailed guidance to all States on fulfilling their responsibility to combat violence against women. Our report uses these guidelines and standards as a benchmark to demonstrate how the Victorian justice system can better fulfil its responsibility to combat violence against women by, for example:

- providing an adequate response to family violence that incorporates both civil and criminal remedies;<sup>142</sup>
- providing adequate training for people in the justice system, such as police, magistrates, judges and court staff, to respond effectively to women who have experienced family violence;<sup>143</sup>
- providing court mechanisms and procedures that are accessible and sensitive to the needs of women subjected to violence;<sup>144</sup>
- providing adequate support and assistance to victims of violence in the justice system;<sup>145</sup>
- ensuring that, if the woman wishes, the perpetrator is removed from the shared home and the woman and children are able to remain in the home;<sup>146</sup>

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140 Amnesty International (2004) above n 124, 8.

141 Committee on Economic Social and Cultural Rights, *General Comment 14, The Right to the Highest Attainable Standard of Health*, UN Doc E/C.12/2000/4 (2000) para 33.

142 See paras 3.37, 5.9.

143 See paras 5.78, 6.16, 6.27–6.28.

144 See paras 5.50, 6.99, 6.108, 6.116.

145 See para 5.50.

146 See paras 9.41–9.42.

- ensuring that any contact that perpetrators are allowed with their children is arranged to avoid forcing the woman to have contact with the perpetrator;<sup>147</sup>
- developing and implementing public awareness and education campaigns that prevent violence against women by promoting equality, cooperation, mutual respect and shared responsibilities between men and women;<sup>148</sup>
- providing support services to victims, including legal aid, counselling, shelters and rehabilitation services.<sup>149</sup>

3.13 The commission acknowledges the recent efforts of the Victorian Government to initiate community consultation about a Charter of Human Rights for Victoria.<sup>150</sup> The commission encourages the Victorian Government to consider the right of all women to live free from violence as an integral part of this process. The commission refers to the submissions of some groups to that consultation in this report.<sup>151</sup> However, as noted, guaranteeing women's right to live free from violence involves more than just legislative change.

### PROTECTING RIGHTS OF CHILDREN AND YOUNG PEOPLE

3.14 The State also has a responsibility under international human rights law to protect the rights of children and young people. These rights are comprehensively outlined in the *Convention on the Rights of the Child*, which is almost universally accepted and was ratified by Australia in 1990.<sup>152</sup> The convention relies on four general principles: upholding the best interests of the child; the prohibition against discrimination; the right to life, survival and development; and respect for the views of the child.<sup>153</sup> It is the only international convention to explicitly address violence within

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147 See para 9.86.

148 See Chapter 12 for discussion about public education in international standards.

149 See paras 6.68–6.69.

150 Attorney-General Rob Hulls, *Human Rights in Victoria: A Statement of Intent* (2005); Department of Justice, *New Directions for the Victorian Justice System 2004–2014: Attorney-General's Justice Statement* (2004) 53–8.

151 See, eg, Statewide Steering Committee to Reduce Family Violence, *A Submission on the Human Rights Community Discussion Paper and a Human Rights Charter for Victoria* (2005); Women's Health West, *Submission to the Victorian Government's Community Consultation on Human Rights* (2005).

152 Only two States, the US and Somalia, have not ratified the convention: *Convention on the Rights of the Child*, UN GAOR, 44th sess, UN Doc A/44/736 (1990).

153 *Economic and Social Council Resolution on the Administration of Juvenile Justice*, ECSOC Res 1997/30, UN Doc E/RES/1997/30 (1997) Annex: Guidelines for action on children in the criminal justice system.

the family.<sup>154</sup> Children's rights apply to children and young people who are victims of family violence, as well as children and young people who are perpetrators of violence.

### **CHILDREN AND YOUNG PEOPLE AS VICTIMS OF FAMILY VIOLENCE**

3.15 As direct and indirect victims of family violence, children and young people have specific rights under international human rights law. When we refer to child 'victims' of family violence, we are referring to children or young people who are victims of violence themselves or who are aware of violence within their family, usually by hearing or witnessing violence. National and international research has demonstrated the devastating effects of family violence on children and young people, especially its impact on their development. Children who have been exposed to violence between their parents often display similar reactions and developmental problems as children growing up in war zones.<sup>155</sup> The State has a responsibility to:

- Protect children from 'all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has care of the child'.<sup>156</sup>
- 'Promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse ... Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child'.<sup>157</sup>
- Protect and support child victims or witnesses through the justice system by, for example, providing advocacy services, modifying the way children can give evidence, training police and court staff to behave in a more child-friendly way and taking children's views and concerns into account in matters that affect them.<sup>158</sup>

154 International Save the Children Alliance, *Preventing Family Violence: A Manual for Action* (1999) 35.

155 Helene Berman, 'The Relevance of Narrative Research with Children who Witness War and Children who Witness Woman Abuse' in Robert Geffner et al (eds) *Children Exposed to Domestic Violence: Current Issues in Research, Intervention, Prevention and Policy Development* (2000). This is discussed further at paras 2.24, 2.29, 4.27.

156 *Convention on the Rights of the Child*, UN GAOR, 44th sess, UN Doc A/44/736 (1990), art 19.

157 Ibid art 39.

158 Detailed guidelines for supporting child victims and witnesses in the justice system are provided in *Economic and Social Council Resolution on the Administration of Juvenile Justice*, ECSOC Res 1997/30, UN Doc E/RES/1997/30 (1997). This resolution provides guidance to State parties of the *Convention on the Rights of the Child* on more specific ways that they can implement their obligations under the convention.

### **CHILDREN AND YOUNG PEOPLE AS PERPETRATORS OF FAMILY VIOLENCE**

3.16 Children and young people also have rights as perpetrators of criminal acts. International human rights law recognises the negative consequences of contact with the criminal justice system at a young age and therefore encourages the use of criminal sanctions, particularly imprisonment, only as a last resort.<sup>159</sup> International standards have recognised that a young person's contact with law enforcement agencies 'might profoundly influence the juvenile's attitude towards the State and society'.<sup>160</sup> Therefore, alternative interventions and support services are encouraged. The State has the following responsibilities for young perpetrators of family violence:

- Arrest, detention or imprisonment must only be used as a measure of last resort.<sup>161</sup>
- Where children have been accused of committing a crime there should be 'measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programs and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence'.<sup>162</sup>

3.17 While this report focuses predominantly on the civil response to family violence, through the intervention order system, these rights are still relevant to our consideration of how the State responds to violence perpetrated by young people within the civil system. As a breach of an intervention order is a criminal offence, we have made recommendations to limit the granting of an intervention order against a young person.<sup>163</sup> These recommendations should ensure that criminal penalties, as the result of breaches of intervention orders, are applied as a last resort to a young person's violent behaviour and that alternative services are initially provided.

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159 Similarly, the Children's Court may only impose a custodial sentence on a person aged under 18 years if it considers 'that no other sentence is appropriate': *Children, Youth and Families Act 2005* ss 410(1)(c), 412(1)(c).

160 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ("The Beijing Rules"), GA Res 40/33, UN Doc A/40/53 (1985), commentary to rule 10.

161 *Convention on the Rights of the Child*, UN GAOR, 44th sess, UN Doc A/44/736 (1990), art 37(b).

162 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 40(3)(b). See para 8.61.

163 See recommendations 95–98.

3.18 This understanding of the State's international obligations to combat violence against women and to uphold the rights of children and young people informs the recommendations made by the commission throughout this report. We now examine Victoria's current legal system and the changes that need to be made to ensure that it adopts the most effective approach possible in responding to family violence.

## CRIMINAL RESPONSE TO FAMILY VIOLENCE

3.19 The criminal law imposes standards of behaviour by prohibiting certain conduct. Some acts of family violence were not originally considered to be a crime. For example, the law condoned 'beating' as within the lawful rights of a husband,<sup>164</sup> and rape within marriage was only criminalised in Victoria in the late 1980s.

3.20 Even where acts of family violence are classified as criminal offences, the criminal law has rarely been applied to criminal behaviour in the home. Overall, the law has treated what happens in families as a 'private' matter, in which police and the courts have been reluctant to interfere:

Traditionally the law was reluctant to intervene in the area of family violence because it occurred in the private sphere and was considered to be beyond the realm of law.<sup>165</sup>

3.21 By the 1970s and 1980s, there was increased acknowledgment of this matter,<sup>166</sup> and calls for family violence to be recognised and treated as a crime were a central theme of early family violence advocacy. This has influenced policy and justice system reforms in countries such as the United Kingdom (UK), the United States (US) and Canada.

## BENEFITS OF THE CRIMINAL RESPONSE

3.22 The criminalisation of family violence responds to persistent 'critiques ... that the privacy of the family created a screen behind which some men [and others with power in families] brutalised women and children'.<sup>167</sup> Criminalisation has both symbolic and practical benefits.

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164 *Re Cochrane* (1840) 8 Dowl. 630; 4 Jur, cited in Jocelyne Scutt, *Women and the Law: Commentary and Materials* (1990).

165 John Tobin, 'Family Violence: Opening up the Silence' (1992) (18)4 *Melbourne University Law Review* 851.

166 See, eg, Women's Policy Co-ordination Unit, Department of Premier and Cabinet, *Criminal Assault in the Home: Social and Legal Responses to Domestic Violence*, Discussion Paper (1985); Law Reform Commission [Australia], *Domestic Violence*, Report No 30 (1986).

167 Robyn Holder, *Domestic and Family Violence: Criminal Justice Interventions* (2001) 1.

3.23 At a symbolic level, criminalising family violence sends a clear message to society that it is wrong and will not be tolerated.<sup>168</sup> It no longer treats family violence as a ‘private’ matter. It gives effect to the State’s responsibility to prosecute perpetrators of family violence<sup>169</sup> and responds to and takes seriously victims’ experience of harm, their need for assistance and redress, and their basic human right to have a life free from violence. Punishment of people who use violence enforces this right as a social norm and also locates responsibility for the violence in the hands of the perpetrator, rather than with the actions or behaviour of the victim.

3.24 The practical significance of the criminalisation of family violence is that it allows police to intervene in family violence incidents, which can stop victims suffering further harm. Criminal charges allow the police to arrest perpetrators and detain them in custody pending determination of the case. A criminal justice response may also deter perpetrators from committing offences again.

When the police arrest someone, they must **charge** them with a crime.

### LIMITATIONS OF THE CRIMINAL RESPONSE

3.25 There are some limitations in the criminal justice response. These include:

- lack of acceptance by police, courts and community that family violence is a serious crime and a consequent failure to enforce the criminal law;
- problems of proof;
- problems with the role of the victim in the criminal justice process;
- not all forms of family violence being criminal offences.

### ***FAILURE TO ENFORCE THE CRIMINAL LAW***

3.26 While some forms of family violence such as physical and sexual assault are criminal acts, in practice, these acts have not been and are sometimes still not treated as a crime by police, or regarded seriously by the courts and society.

168 Ibid 2; Robyn Holder and Nicole Munstermann, ‘What Do Women Want? Prosecuting Family Violence in the ACT’ (Paper presented at the Expanding our Horizons conference, Sydney, 18–22 February 2002) 1.

169 A criminal response to family violence has been recognised as essential in international human rights instruments. See, eg, Committee on the Elimination of All Forms of Discrimination against Women, *General Recommendation 19* (11th session, 1992) UN Doc A/47/38 at 1 (1993) para 24(r)(i); *Report of the Fourth World Conference on Women*, UN Doc A/CONF.177/20 (1995) Annex: Beijing Declaration and Platform for Action, para 125(d).

3.27 Police and prosecutors are responsible for enforcing the criminal law. They decide whether action will be initiated, what charges will be laid, whether bail will be opposed, whether the prosecution will proceed and what evidence will be used. Some police members' attitudes towards family violence are encapsulated in the phrase that a family violence incident is 'just a domestic'. This may prevent family violence matters from coming within the realm of the criminal justice system in the first place. There was a strong response from submissions that a criminal response to family violence should be more common in Victoria.<sup>170</sup> There are very low rates of arrest and prosecution for family violence offences. The percentage of family violence incidents reports submitted by Victoria Police that resulted in criminal charges decreased from 10.95% in 2002-03 to 9.49% in 2003-04.<sup>171</sup> This percentage increased to 17.7 % of reports submitted in 2004-05.<sup>172</sup> This represented a 73.2% increase in the rate of reports submitted resulting in criminal charges being laid. Victoria Police attributed this largely to the introduction of the Code of Practice.<sup>173</sup>

**Evidence** includes statements, objects or other things used to prove the facts in a legal hearing or trial.

The actions of police and judiciary are influenced by the legacy of non-intervention in the private sphere, such that they continue to perceive family violence as an individual and private issue, rather than the gender specific and social phenomenon that it is.<sup>174</sup>

3.28 In Victoria, aspects of the police response to family violence have recently improved. A new Code of Practice for the Investigation of Family Violence was launched in August 2004, which states that it takes a 'pro-arrest' stance to family violence.<sup>175</sup> From June 2004 to June 2005, the number of charges laid by police concerning 'family violence incidents'<sup>176</sup> increased by 73.2%, from 2994 the year before to 5185.<sup>177</sup>

3.29 Some women may receive a worse response from police and the courts than others. An Adelaide study by Beth Tinning found that women not conforming to traditional stereotypes of the 'good girl'—for example, ex-prisoners, women working

170 Submissions 8 (Werribee Legal Service), 22 (Kim Robinson, social worker), 27 (Robinson House BBWR), 30 (Violence Against Women Integrated Services), 33 (Women's Domestic Violence Crisis Service), 64 (Federation of Community Legal Centres (Vic)), 74 (Women's Legal Service Victoria).

171 Victoria Police, *Victoria Police Crime Statistics 2003/04* (2004) 128.

172 Victoria Police, *Victoria Police Crime Statistics 2004/05* (2005) 128.

173 Victoria Police, *Provisional Crime Statistics 2004/2005* (10 August 2005) 1.

174 John Tobin (1992) above n 165, 852–3.

175 We discuss this code in more detail in Chapter 5.

176 This includes charges for breach of an intervention order as well as for the original family violence offence.

177 Victoria Police, 'Victoria Police Responds to Domestic Violence' (Media Release, 2 August 2005).

in the sex industry and women who expressed anger vocally—believed they would never be considered a ‘good’ witness for the prosecution and found the criminal justice process an exercise in social control.<sup>178</sup> Other research has found that women with cognitive impairment may have great difficulty in having their concerns taken seriously by police when attempting to report a family violence offence.<sup>179</sup>

### **PROBLEMS OF PROOF**

3.30 Conviction for a criminal offence requires proof beyond reasonable doubt. This can be difficult to satisfy in family violence cases if the victim is the only witness to the offence, or if other witnesses are reluctant to report or become involved in what they perceive to be a ‘private family matter’. Difficulties with proof of family violence offences have also been historically used by police as an excuse for failing to enforce the criminal law. This means that evidence has not routinely been collected at family violence incidents. We endorse the Police Code of Practice which requires thorough evidence gathering.<sup>180</sup> Also, the criminal law has historically developed to deal with single incidents rather than a pattern of behaviour and is not always flexible enough to deal with the dynamics of family violence.

### **ROLE OF THE VICTIM**

3.31 When police attend an incident they sometimes leave it to the victim to decide what action should be taken against the offender, including criminal action. It is inappropriate to make the victim responsible for all decision making about the perpetrator at this point of crisis. The new Code of Practice for the Investigation of Family Violence provides that, when attending a family violence incident, police should take all measures to immediately ensure the victim’s safety, prevent further offences and hold the perpetrator accountable. We support this approach.<sup>181</sup>

3.32 Some police may also minimise family violence victims’ concerns about their own safety, and that of their children. This attitude can lead to an ineffective and

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178 Beth Tinning, ‘Lost in Distraction: The Impact of the Criminal Justice Response to Domestic Violence on Women from Marginalised Communities’ (Paper presented at the Refocusing Women’s Experience of Violence conference, Sydney, 14 September 2005).

179 Disability Discrimination Legal Service, *Beyond Belief, Beyond Justice: The Difficulties for Victim/Survivors with Disabilities when Reporting Sexual Assault and Seeking Justice*, Final Report of Stage One of the Sexual Offences Project (2003) 56; Kelly Johnson et al, *Silent Victims, a Study of People with Intellectual Disabilities as Victims of Crime* (1988) 48. We discuss the police response to victims with disabilities at para 5.74.

180 See paras 5.25–5.28.

181 See paras 5.94–5.100.

potentially dangerous police response to family violence. In this report, we support the Code of Practice's training and other measures to change some police attitudes towards family violence and its victims.<sup>182</sup>

3.33 If a criminal family violence matter reaches the courts, the role of victim is confined to witness for the prosecution and they are given very little if any say over the legal process. This problem is exacerbated when police officers and prosecutors do not ensure that people who have experienced family violence are supported and kept informed about the process and outcome of their case.<sup>183</sup> In this report we recommend witness support for family violence criminal cases.<sup>184</sup> We also propose that in the existing case conferencing system, a priority should be given to hearing the victim's perspectives and concerns.<sup>185</sup> If a victim receives adequate support at this point and participates in case conferencing, but still does not want to give evidence in court, we support the position stipulated in the code that the case should not proceed.

3.34 Some magistrates and judges presiding over courts dealing with family violence matters may minimise the effects of family violence and misunderstand its dynamics (see Chapter 2), which may be reflected in the decisions made. For example, they may misunderstand the potential fear and other consequences of a so-called technical breach of an intervention order (see Chapter 10). To counter this misunderstanding we recommend training initiatives to improve magistrates' knowledge of family violence and a specialist list for magistrates to encourage magistrates and court staff with expertise in family violence to work on the cases listed.

Magistrates and police sometimes use the term **technical breach** to refer to a breach that does not involve physical violence, eg a respondent coming within a prohibited distance.

3.35 Many victims are also distrustful of the criminal justice process. They may have had negative experiences with the police and courts in the past and may not be confident that the system will protect their interests. Some victims are reluctant to have family members charged because of the effect this may have on them. This reluctance to become involved in the criminal justice system is particularly apparent among victims who have little access to power and privilege in the community.<sup>186</sup>

182 See paras 5.3, 5.79.

183 Ruth Lewis et al, 'Protection, Prevention, Rehabilitation or Justice? Women's Use of the Law to Challenge Domestic Violence' in Edna Erez and Kathy Laster (eds) *Domestic Violence: Global Responses* (2000) 195–6. We outline the State's international obligations in relation to keeping victims and witnesses informed and supported throughout a criminal trial at para 5.50.

184 See paras 5.53–5.54.

185 See para 5.35.

186 Tinning (2005) above n 178.

Women from Indigenous communities, who have experienced law enforcement agencies as sources of discrimination and persecution rather than assistance, can be very reluctant to involve police.<sup>187</sup> Women from refugee backgrounds may also be reluctant to approach the police for support when they have had negative experiences with law enforcement agencies in the countries they have fled.<sup>188</sup>

### **NOT ALL FORMS OF FAMILY VIOLENCE ARE A CRIME**

3.36 A criminal justice response does not apply to all forms of family violence. Psychological and emotional abuse or forced social isolation are not currently criminal offences, despite the fact they can be some of the most damaging forms of family violence. In a recent South Australian study victims of family violence reported that ‘verbal, psychological and emotional abuse’ not only ‘occurred daily’ (compared to the physical assaults which for the majority occurred at least once or twice a week) but were also ‘far more devastating and long lasting in [their] effects’ than the physical assaults.<sup>189</sup>

3.37 These limitations in the criminal justice response mean that civil remedies that seek to restrain the violent behaviour of the perpetrator also need to be available. The need for both a criminal and civil justice response has been recognised at an international level. The committee in charge of the implementation of CEDAW has stated that ‘measures that are necessary to overcome family violence should include criminal penalties where necessary and civil remedies’.<sup>190</sup> Similarly, the UN Special Rapporteur on violence against women has said ‘the ideal legislation with regard to domestic violence would be one that combines both criminal and civil remedies’.<sup>191</sup>

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187 Submissions 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)), 75 (National Network of Indigenous Women’s Legal Services); Loretta Kelly, ‘Using Restorative Justice Principles to Address Family Violence in Aboriginal Communities’ in Heather Strang and John Braithwaite (eds) *Restorative Justice and Family Violence* (2002) 210; Elizabeth Hoffman House, *From Shame to Pride: Access to Sexual Assault Services for Indigenous People*, Consultation Outcomes, Reports and Recommendations (2004) 32.

188 Ruth Gordon and Munira Adam, *Family Harmony: Understanding Family Violence in Somali and Eritrean Communities in the Western Region of Melbourne* (2005) 7; submissions 2 (Vietnamese Community in Australia—Vic Chapter), 68 (Statewide Steering Committee to Reduce Family Violence), 70 (Asylum Seeker Resource Centre).

189 Bagshaw and Chung (April 2000) above n 29, 9.

190 Committee on the Elimination of All Forms of Discrimination against Women, *General Recommendation 19* (11th sess, 1992) UN Doc A/47/38 at 1 (1993) para 24(r)(i).

191 Radhika Coomaraswamy (1996) above n 126, para 29.

## CIVIL RESPONSE TO FAMILY VIOLENCE

3.38 Intervention orders were introduced as a practical means of protecting victims in response to the limitations of the criminal justice system. Intervention orders were recommended in a Victorian Government report, *Criminal Assault in the Home*, released in July 1985,<sup>192</sup> which aimed ‘to assist women who have been subjected to domestic violence and to reduce the incidence of domestic violence in the community’.<sup>193</sup> These recommendations were implemented in the Crimes (Family Violence) Act. The intervention order system is in fact a hybrid system because it incorporates civil and criminal elements. Breaching a civil intervention order is a criminal offence.

## BENEFITS OF THE CIVIL SYSTEM

3.39 Intervention orders were recommended for four main reasons. First, it was believed they would be ‘accessible’ for women. An application for an intervention order was seen as a ‘simple procedure’, under which an order could be obtained in the Magistrates’ Court ‘on the balance of probabilities’, rather than the ‘beyond reasonable doubt’ standard of criminal proof. Secondly, intervention orders were seen as ‘flexible’ and able to curb a variety of threatening and assaulting behaviours, including those which are not criminal offences. Their flexibility would also allow a victim to seek a wide range of remedies, such as excluding the perpetrator from the home. Thirdly, the order could prevent the escalation of violence. Unlike a criminal charge, they provide the victim with protection before rather than after an attack. Finally, they are able to be used by women reluctant to involve the police (for reasons already mentioned).

**Balance of probabilities** is the standard of proof in civil cases, and requires the magistrate to determine if it is more likely that the applicant or the respondent is telling the truth.

3.40 The report conceived the intervention order process as complementary to rather than replacing the criminal justice response:

In light of both the public comments and research indicating the deterrent effect of criminal processes, it must be stressed that the intervention order *should not* be seen as an alternative to the criminal process. The commencement of proceedings for an intervention order (or the existence of an order) does not, and should not, preclude the possibility of

192 The report was written by the Legal Remedies Sub-committee of the Victorian Domestic Violence Committee, which was convened by the Department of Premier in 1981 to investigate problems associated with domestic violence.

193 Women’s Policy Co-ordination Unit, Department of Premier and Cabinet, *Criminal Assault in the Home: Social and Legal Responses to Domestic Violence*, Discussion Paper (1985) ii.

criminal proceedings being made at the same time for a domestic assault ... It is not designed to usurp the role of criminal law.

The police *should* continue to institute criminal action where an offence has occurred whether or not proceedings for an intervention order have also been commenced.<sup>194</sup>

3.41 The report went so far as to say the ‘most effective way’ of deterring family violence would be through pursuit of a ‘rigorous policy of mandatory arrest’. The report also recognised the importance of the police prosecuting perpetrators for breaches of intervention orders: ‘The effectiveness of intervention orders will be very much dependent upon the police effecting arrests when orders are breached’.<sup>195</sup>

### LIMITATIONS OF THE CIVIL SYSTEM

3.42 While the intervention order system was intended to deal with the limitations of the criminal law and provide greater protection for women and children, our consultations have shown that many improvements to the system are needed. The most significant criticism of intervention orders is that they do not necessarily provide protection from violence. Some studies show that intervention orders have minimal effect, especially where there is a history of prior, persistent abuse and where the parties have children, which results in some ongoing contact.<sup>196</sup> Other studies suggest that intervention orders do have a deterrent effect on many perpetrators.<sup>197</sup>

3.43 In the civil system, responsibility for tackling violence is divided between the person in need of protection and the State. Although an individual can apply for an order without involvement from the State, the enforcement of civil orders is dependent on the police, prosecutors and the courts. Enforcement of intervention orders can be hampered by many of the factors that prevent the criminal law from

194 Women's Policy Co-ordination Unit, Department of Premier and Cabinet, *Criminal Assault in the Home: Social and Legal Responses to Domestic Violence* Summary Paper (1985)123.

195 Ibid125.

196 See, eg, Adele Harrell and Barbara E Smith, ‘Effects of Restraining Orders on Domestic Violence Victims’ in Eve Buzawa and Carl Buzawa (eds) *Do Arrests and Restraining Orders Work?* (1996) 229–33, 240–1.

197 Julie Stubbs and Diane Powell, *Domestic Violence: Impact of Legal Reform in NSW* (1989) 142–3; New South Wales Bureau of Crime Statistics and Research, *An Evaluation of the NSW Apprehended Violence Order Scheme* (1997) 61; Margrette Young, et al, *The Effectiveness of Legal Protection in the Prevention of Domestic Violence in the Lives of Young Australians* (2000) 4–5; Cathy Humphreys and Ravi Thiara, ‘Neither Justice nor Protection: Women's Experiences of Post-Separation Violence’ (2003) 25 (3) *Journal of Social Welfare and Family Law* 195, 209; Andrew Klein, ‘Re-abuse in a Population of Court-restrained Male Batterers: Why Restraining Orders Don't Work’ in Buzawa and Buzawa (eds), above n 196, 200, 202.

being applied to family violence.<sup>198</sup> This reliance on agencies that sometimes respond inconsistently and inadequately to breaches, and to family violence in general, was probably the greatest concern raised during our consultations and in submissions. While anecdotal evidence suggests the police response to breaches has improved since the introduction of the Code of Practice, the commission believes that the concerns expressed in submissions and consultations are well founded.

3.44 The next section considers what might be the best justice approach to address family violence. Our recommendations are based on an understanding of the dynamics of family violence, as discussed in Chapter 2. The commission believes that understanding the nature of family violence leads to a recognition that different approaches are necessary at different stages of a violent relationship and for different victims. Acknowledging that there are different needs at different stages, we look at the reforms necessary to provide an effective response to family violence which can provide remedies to victims in a ‘crisis’ situation, and in the medium and long term.

### **BEST APPROACH TO FAMILY VIOLENCE**

3.45 In our Consultation Paper we asked people making submissions to consider the most appropriate justice system response to family violence. In this section we synthesise the themes that came through our consultations and submissions.

### **CRIMINAL AND CIVIL RESPONSE**

3.46 Submissions generally acknowledged the importance of both criminal and civil responses to family violence:

It is appropriate to have criminal and civil options for addressing family violence but [we] emphasise that criminal options should generally be taken where there has been criminal behaviour.<sup>199</sup>

[We] consider that the current system represents a reasonable balance between civil and criminal approaches.<sup>200</sup>

3.47 The commission agrees that both approaches are necessary, but believes that significant improvements must be made to the criminal justice and intervention order processes to ensure they provide realistic options for protecting victims and preventing

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198 We discuss concerns about enforcement of intervention orders at paras 5.114–5.118 and 10.67–10.98.

199 Submission 74 (Women’s Legal Service Victoria).

200 Submission 41 (Victoria Legal Aid).

family violence. The commission makes recommendations to strengthen the criminal response and intervention order process throughout this report.

3.48 Not all submissions favoured reliance on a criminal justice response. The Victorian Aboriginal Legal Service (VALS) argued that this should be seen as a last resort:

Greater reliance on the criminal justice system to intervene in family violence should be a last resort given the cost, the ineffectiveness and the threat to family and community safety that it represents.

3.49 VALS believes that restorative justice provides an appropriate alternative to criminal sanctions, especially in addressing family violence in Indigenous communities. The appropriateness of applying a restorative justice approach to family violence is considered at the end of this chapter.

**Restorative justice** refers to the process that brings together people who have a stake in a specific crime or wrongdoing to decide how to deal with the consequences of the wrongdoing.

### APPROACH THAT DOES NOT MINIMISE FAMILY VIOLENCE

3.50 Submissions said that an effective legal response to family violence should recognise its seriousness. Sometimes this was linked to the need to rely on the criminal justice system.

The justice system should acknowledge the gendered nature of violence, ensure that it does not reflect women's unequal treatment in society generally, and treat violence seriously.<sup>201</sup>

### FLEXIBLE APPROACH

3.51 Submissions suggested the need for an overall flexible approach, which provides victims with a number of options. Flexibility is necessary because family violence covers a range of behaviours, different in nature and severity, and can occur in a variety of relationships. The overall approach therefore needs to be sensitive to this diversity:

A wide-ranging response to family violence which provides options for victims/survivors is positive ... The situation for each victim is quite distinct requiring a response appropriate to that particular circumstance.<sup>202</sup>

The justice system should adopt a variety of processes to allow justice in all situations.

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201 Submission 63 (Darebin Family Violence Working Group).

202 Submission 66 (Aboriginal Family Violence Prevention and Legal Service).

A flexible system, that is better equipped to deal with a more complex and diverse range of behaviour, is required.<sup>203</sup>

3.52 A flexible response is also necessary because the needs of victims may be different, depending on when they seek a legal response and their individual situation.

### INTEGRATED APPROACH

3.53 Submissions also expressed the importance of an integrated approach, stressing that the justice system could only be part of a wider social response to family violence:

The Act must be more integrated with other services and systems that address family violence ... Ideally greater integration should actually occur Australia-wide ... we believe that the Attorney Generals of each state and territory should make it a priority to address this issue ... greater integration at either a state or federal level must promote the proposed aims of the statewide model for responding to family violence.<sup>204</sup>

VCCAV supports an integrated approach to prevention, protection, crisis response and system reform which is consistent with the recent developments such as the Police Code of Practice, the Domestic Violence Courts and the initiatives of the Statewide Steering Committee to Reduce Family Violence.<sup>205</sup>

3.54 There was also the recognition that the justice system is not a 'cure all'<sup>206</sup> and that each part of the family violence system [has] very different roles in addressing family violence.

3.55 The commission believes that an effective response to family violence involves a strengthened criminal response where necessary and a significantly improved civil process for obtaining protection orders. An effective response must also:

- acknowledge the seriousness of family violence and its effect on victims, who are predominantly women and children;
- be based on an understanding of the dynamics of family violence;
- be capable of responding flexibly to the needs and circumstances of victims;
- be integrated with other systems which are designed to prevent family violence and support those affected by it.

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203 Submission 64 (Federation of Community Legal Centres).

204 Submission 74 (Women's Legal Service Victoria).

205 Submission 69 (Victorian Community Council Against Violence).

206 Patton (2003) above n 94.

3.56 An effective response to family violence may also require a different approach at different stages of a violent relationship. The most effective response for a victim in a crisis situation may not be the same as an effective medium- and long-term response.

### BEST APPROACH IN A 'CRISIS' SITUATION

3.57 A crisis situation refers to incidents of family violence or threats of family violence that have occurred or are occurring and the victim contacts the police. Research has found that police contact usually occurs after victims have unsuccessfully tried every other strategy they have to stop the violence or threat of violence. Recent research shows that victims deploy a great range of innovative 'survival' strategies, which include contacting informal supports (friends, family) and formal support agencies.<sup>207</sup> 'Survivor theory' argues that such survival strategies do not always work because of the deficiencies of these informal and formal support services, rather than some sort of deficiency of the victim.

3.58 A UK study found that, on average, a woman has been assaulted 37 times before her first contact with the police.<sup>208</sup> If a victim does contact police, an effective response is crucial, as it can be a key factor in assisting the victim in leaving a violent relationship and can profoundly affect the medium- and long-term outcomes they experience.<sup>209</sup> In a recent Tasmanian study, women who identified police as a 'key enabler' in helping them leave a violent relationship were more likely to have permanently left the relationship shortly after this police contact.<sup>210</sup>

3.59 The following police actions have been found to be most effective in a crisis:

- believing the victim;
- responding to reports by victims of an alleged assault as a priority;
- taking a pro-arrest approach;
- initiating criminal action following an assault;
- initiating criminal action following a breach of an intervention order;
- carrying out their work with a non-judgmental and respectful attitude;
- processing and serving intervention orders efficiently;

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207 See, eg, Lewis (2000) above n 183.

208 A McGibbon, L Copper and L Kelly, *What Support? An Exploratory Study of Council Policy and Practice, and Local Support Services in the Area of Domestic Violence within Hammersmith and Fulham* (1989).

209 Patton (2003) above n 94.

210 *Ibid* 56.

- taking a position that condemns perpetrators' violence against their family members;
- removing the violent family member from the home;
- providing information on legal rights and support services, and facilitating provision of this support.<sup>211</sup>

3.60 By contrast, victims define an ineffective initial police response to family violence as including 'delays in the serving of intervention orders' and a 'failure to take any legal action following an assault or breach of an order'.<sup>212</sup> If victims of family violence contact the police following an alleged assault and there is a subsequent lack of legal action, they often remain in the violent relationship longer.<sup>213</sup> They may also have an increased sense of fear because the perpetrator has experienced no consequences or sanctions for the violence, and also because nothing has been done to prevent the perpetrator harming them again. Such inaction can confirm what perpetrators themselves tell victims as part of their violent and threatening behaviour—that the police will not respond to their calls for help, and if they do, they won't believe them or act on what the victims say. Our consultations also found that an ineffective first response by the police, such as not responding immediately<sup>214</sup> or requiring the victim rather than the perpetrator to leave the family house,<sup>215</sup> inhibits a victim from contacting the police again during a violent crisis situation. These issues are detailed more fully in Chapter 5.

3.61 The best approach in a crisis situation may involve balancing victims' safety with their apparent agency or empowerment. For example, if the police attending a violent situation decide that a criminal charge is the best response, yet the victim resists this action, a conflict between 'safety' and 'agency' exists. The commission believes that when a victim of family violence calls the police, she is asking for urgent and immediate assistance for her and potentially other family members' personal safety. The first priority in this situation should therefore be a response which ensures the victim's safety. Empowerment is crucial in any response to family violence, yet empowerment must be genuine and not simply an excuse to pass responsibility for action in a crisis directly onto the victim. Genuine empowerment includes responding effectively to a victim's immediate needs.

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211 Ibid 56.

212 Ibid 57.

213 Ibid.

214 Interview with Aid, 18 May 2005.

215 Interview with Kate, 21 April 2005.

3.62 In a crisis situation, it is therefore particularly important that family violence is taken seriously. The safety of the victim should be the first aim of any legal response to a crisis situation, taking priority over any other aim. We have made recommendations to improve the police and court response in a crisis situation later in this report.<sup>216</sup> The commission believes that a strengthened criminal response is particularly important in a crisis. Understanding the dynamics of family violence suggests that police and support workers need to be proactive to ensure the safety of victims.

### **BEST APPROACH IN THE MEDIUM AND LONG TERM**

3.63 An effective medium- and long-term legal response to family violence will pay particular attention to victims' perspectives and be informed by an understanding of the dynamics of family violence.<sup>217</sup> For example, leaving a violent family relationship can be a gradual process that may take several attempts. This means that even if victims have called the police many times before, their safety concerns must be given the same attention, and even if they are not prepared to support legal action against the perpetrator, they could be prepared to do so at a later stage. Victims need support from a justice system which is based on a genuine understanding and respect for their situation.

3.64 A flexible legal system is also necessary to provide a number of options and be responsive to the individual safety strategies family violence victims. For example, the process of obtaining, varying and renewing intervention orders needs to be flexible enough to be responsive to victims' different and potentially changing safety needs.<sup>218</sup>

3.65 For most victims, referral to support outside the justice system is also particularly important.<sup>219</sup>

3.66 The commission also believes that the values that should underpin the justice system's approach to family violence need to be articulated. To this end, we recommend purposes and principles to be included in any new Act in the next section.

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216 See paras 5.98–5.100 and Chapter 7.

217 See, eg, Recommendation 29.

218 See chapters 8 and 10.

219 We discuss the new police obligation to refer victims to support agencies when they attend a family violence incident at para 5.18.

## IMPACT OF STALKING PROVISIONS

3.67 In 1994 the *Crimes Act 1958* was amended to create the offence of stalking and to extend the application of the intervention order system to stalking, even when the stalker is not a family member.<sup>220</sup> Stalking-related intervention orders are commonly sought for situations which do not involve family violence, such as disputes between neighbours and schoolchildren. Once introduced, applications for intervention orders for stalking increased exponentially.<sup>221</sup>

3.68 While our terms of reference do not specifically require us to address stalking, the issue was repeatedly raised in consultations. In particular, concern was expressed that applications for intervention orders for stalking which are not family violence-related are diverting the limited resources of police and courts.<sup>222</sup> Consultations also revealed a perception by some individuals and groups that the increase in applications for intervention orders in such situations undermines the seriousness of family violence.

## RECENT INITIATIVES

3.69 There are limited avenues available for the resolution of non-violent disputes.<sup>223</sup> This is behaviour which may not be appropriate to criminalise. The provisions under the Crimes Act for intervention orders for stalking were not intended to cover non-violent interpersonal disputes, but rather to target predatory stalking which incites fear in the victim and causes ‘physical or mental harm or apprehension or fear for his or her safety, or that of another person’.<sup>224</sup> This highlights the question of whether the intervention order system, which prohibits behaviour rather than

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220 *Crimes Act 1958* s 21A(1)–(4A), as amended by the *Crimes (Amendment) Act 1994*. Under s 21A(2), stalking is defined as engaging in behaviour such as following the victim, loitering near the victim’s home or workplace, contacting the victim (by post, phone, fax, text message, email or other electronic communication) or keeping the victim under surveillance—with the intention of causing physical or mental harm or of arousing apprehension or fear for the victim’s safety, or the safety of other people. Similar provisions exist in all other Australian jurisdictions.

221 Between 1995–96 and 2000–01, the number of stalking intervention orders increased by 277%, while the number of intervention orders for family violence remained static.

222 See Victorian Law Reform Commission, *Review of Family Violence Laws: Consultation Paper* (2004) above n 8, paras 4.34–4.39.

223 One avenue available is the *Magistrates’ Court Act 1989* s 126A, which provides for ‘binding over to keep the peace’.

224 Victoria, Crimes (Amendment) Bill 1994, Second Reading Speech, Legislative Assembly, 20 October 1994, 1383 (Geoff Coleman, Minister for Natural Resources).

resolves disputes, is an appropriate mechanism for remedying conflicts which do not involve family violence.

3.70 Recent initiatives in Victoria intend to provide avenues for the diversion of intervention order applications which do not involve family violence.

3.71 Between July 2002 and June 2003, the Department of Justice implemented a pilot project to refer appropriate intervention order cases, principally neighbourhood disputes, from the Magistrates' Court to the Dispute Settlement Centre of Victoria (a mediation centre). A review of the project was conducted by the International Conflict Resolution Centre.<sup>225</sup>

3.72 The Attorney-General's recent Justice Statement announced the establishment of the Gateways to Justice project which 'provides an integrated approach to dispute resolution policy and services, and delivers a range of court-based and non-court based dispute resolution processes'.<sup>226</sup> In the 2005–06 Victorian Budget, an allocation of \$8.9 million was announced to improve access to civil justice, specifically targeting civil legal and consumer problems experienced by disadvantaged people, including the establishment of new community legal centres and two community-based mediation pilots for the resolution of neighbourhood disputes.

3.73 In August 2005 the Attorney-General announced the establishment of the state's first Neighbourhood Justice Centre, located in Collingwood, to begin operation in 2007.<sup>227</sup> The centre will incorporate a multi-jurisdictional court and a range of services for victims, offenders, civil litigants and the local community. It is proposed that the operation of the centre will be based on partnerships between the court and local and state governments, service providers, schools, the local retail trade and community groups, and will focus on the resolution of disputes and problems from the local area, employing a therapeutic and restorative approach, including diversionary programs.<sup>228</sup>

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225 Melissa Conley Tyler, Brock Bastian and Jackie Bornstein, *Review of the DSCV Magistrates' Court Mediation Diversion (Intervention Order) Project* (unpublished).

226 Department of Justice [Victoria] (May 2004) above n 150, 8.

227 The centre is to be located at the old Northern Metropolitan TAFE site and will begin operations in 2007. It is modelled on the Red Hook Community Justice Center in New York and a similar initiative, the North Liverpool Community Justice Centre, in the United Kingdom.

228 'Innovation brings justice back into the community' (September 2005) 2(4) *Justice Review* 1. Further information available from <[www.justice.vic.gov.au/neighbourhoodjusticecentre](http://www.justice.vic.gov.au/neighbourhoodjusticecentre)> at 21 December 2005.

## VIEWS FROM SUBMISSIONS

3.74 In the Consultation Paper we asked whether stalking intervention orders should be dealt with under separate legislation. In response to this question, a number of submissions reiterated the concerns raised in consultations.<sup>229</sup> Some pointed out that it was particularly difficult to prove stalking in court.<sup>230</sup> Many submissions made the distinction between stalking which occurs in the context of family violence and stalking which does not involve family violence, such as in neighbourhood disputes.<sup>231</sup>

3.75 The Murray Mallee Community Legal Centre argued that the current legislative provisions do not sufficiently differentiate between intervention order applications for violent behaviour in intimate and other family relationships and applications for behaviour outside a family relationship, for example, between neighbours or schoolchildren. The submission reported that in the experience of the centre:

very few applications for stalking orders are in respect of classic stalking scenarios. The vast majority of applications are in respect of neighbourhood disputes, problematic social relationships between young people and animosity between the new domestic partners and the old domestic partners of a non-applicant party. The dynamics in these relationships are considerably different to the dynamics in intimate family relationships—in the former both the applicants and respondents are more likely to be angry or bitter and less likely to be afraid, and the incidents alleged are more likely to constitute harassment than violence or threats. Stalking applications are also more likely to be contested, be heard in a context of cross applications between the parties and be conducted by unrepresented parties.

3.76 There was general support for the notion that intervention orders for stalking which do not occur in the context of family violence require a different response.<sup>232</sup> The Women’s Legal Service Victoria pointed to two reasons for dealing with stalking intervention orders separately:

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229 Submissions 27 (Robinson House), 28 (Murray Mallee Community Legal Service), 33 (Women’s Domestic Violence Crisis Service), 65 (John Willis, La Trobe University), 72 (Victoria Police).

230 Submissions 27 (Robinson House), 40 (Whittlesea Domestic Violence Network).

231 Submissions 25 (Barbara Roberts), 33 (Women’s Domestic Violence Crisis Service), 49 (Domestic Violence and Incest Resource Centre), 53 (Women’s Electoral Lobby, Victoria) 64 (Federation of Community Legal Centres), 72 (Victoria Police), 74 (Women’s Legal Service Victoria).

232 Submissions 8 (Werribee Legal Service), 25 (Barbara Roberts), 28 (Murray Mallee Community Legal Service), 33 (Women’s Domestic Violence Crisis Service), 49 (Domestic Violence and Incest Resource Centre), 53 (Women’s Electoral Lobby, Victoria), 64 (Federation of Community Legal Centres), 66 (Aboriginal Family Violence Prevention and Legal Service), 72 (Victoria Police), 74 (Women’s Legal Service Victoria), 78 (Department of Victorian Communities), 79 (Department of Human Services).

Whilst behaviour between non-family members may look the same as family violence—ie be of similar severity, the family context of family violence makes it different and changes the dynamic. It is therefore important practically and symbolically that it be dealt with separately.

It will enable the Act to properly fit in to the proposed statewide model for responding to family violence.

### **COMMISSION'S VIEW—A NEW ACT**

3.77 The commission believes that it is neither appropriate nor practical for the intervention order system available under the Crimes (Family Violence) Act to be used as a mechanism for addressing community-based interpersonal disputes. It is apparent that the multiple function of the legislation is having an adverse impact on the capacity of police, courts and legal service agencies to provide remedies for family violence victims. To address this issue, the commission recommends that the Crimes (Family Violence) Act be repealed and a new Family Violence Act be enacted which is confined to behaviour defined as 'family violence' and persons defined as 'family members'. To continue to provide a remedy for other forms of violence, legislation providing for intervention orders currently available under section 21A of the Crimes Act would need to be enacted.

### **! RECOMMENDATION**

1. The *Crimes (Family Violence) Act 1987* should be repealed and new legislation, entitled the Family Violence Act, should be enacted.

### **INCLUSION OF OBJECTS AND PRINCIPLES CLAUSES**

It is the view of Victoria Police that the current Act is not clear in its purpose.<sup>233</sup>

3.78 The current Crimes (Family Violence) Act has no aims, objectives or principles. Its sole purpose is to 'provide for intervention orders in cases of family violence'.<sup>234</sup> Submissions that directly addressed this point stated that they believed an objects clause was necessary.

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233 Submission 72 (Victoria Police).

234 *Crimes (Family Violence) Act 1987* s 1.

The Federation strongly believes that it is essential to identify the purpose behind the justice system's response to family violence before any real solutions can be properly tabled and addressed.<sup>235</sup>

3.79 Some went as far as to add that defining the purpose of the Act must be the first priority for family violence law reform:

[A]ny consideration of changes required to the justice system's response to family violence must take place within a clearly articulated vision for and understanding about the purpose of the Crimes (Family Violence) Act, within a broader systems and community response.<sup>236</sup>

3.80 Submissions suggested that principles and purposes would improve consistency in decision making by magistrates and the police: '[We] believe that a clear philosophy is necessary to underpin a consistent approach to family violence'.<sup>237</sup>

The Federation of Community Legal Centres stated that the current lack of guiding principles and aims 'allows for subjective decision-making based on opinions about family violence' which can be unfair and unjust, as well as inconsistent.

## OTHER JURISDICTIONS

3.81 Family violence legislation in other Australian jurisdictions include principles about the protection<sup>238</sup> and safety of victims.<sup>239</sup> For example, in the Australian Capital Territory's (ACT) *Domestic Violence and Protection Orders Act 2001*, the second object and principle is 'to facilitate the safety and protection of people who fear or experience violence',<sup>240</sup> while in the New South Wales (NSW) *Crimes Act 1900*, the first object is 'to ensure the safety and protection of all persons who experience domestic violence'.<sup>241</sup> In Queensland, legislation was amended in 2002 to include the main purpose 'to provide for the safety and protection of a person in the case of domestic violence'.<sup>242</sup> Similarly, in South Australia, in determining whether or not to make a restraining order the court must consider 'the need to ensure that family members are protected

235 Submission 64 (Federation of Community Legal Centres (Vic)).

236 Submission 49 (Domestic Violence and Incest Resource Centre).

237 Submission 57 (Victorian Aboriginal Legal Service).

238 *Domestic Violence and Protection Orders Act 2001* (ACT) s 6; *Crimes Act 1900* (NSW) s 562AC; *Domestic and Family Violence Protection Act 1989* (Qld) s 3A; *Restraining Orders Act 1997* (WA) s 12.

239 *Domestic Violence and Protection Orders Act 2001* (ACT) s 5; *Crimes Act 1900* (NSW) s 562AC; *Domestic and Family Violence Protection Act 1989* (Qld) s 3A; *Family Violence Act 2004* (Tas) s 3.

240 *Domestic Violence and Protection Orders Act 2001* (ACT) s 5.

241 *Crimes Act 1900* (NSW) s 562AC.

242 *Domestic and Family Violence Protection Act 1989* (Qld) s 3A.

from domestic violence'.<sup>243</sup> Finally, in Western Australia the court must consider 'the need to ensure that the person seeking to be protected is protected from acts of abuse' in deciding whether to make a restraining order.<sup>244</sup>

3.82 Tasmania is the only state that does not mention 'protection', instead its main focus is on 'safety'—its objects clause consists entirely of the statement that the 'safety, psychological wellbeing and interests of people affected by family violence are the paramount considerations'.<sup>245</sup>

3.83 Reference is made to prevention and reduction of family violence in the ACT, NSW and Western Australian legislation.<sup>246</sup> Western Australia requires the court to consider 'the need to prevent behaviour that could reasonably be expected to cause fear that the person seeking to be protected will have committed against him or her an act of abuse'.<sup>247</sup>

3.84 Some jurisdictions emphasise the effect of violence on children. For instance, in Western Australia the court must consider 'the need to ensure that children are not exposed to acts of family and domestic violence',<sup>248</sup> and in South Australia it must take account of 'the welfare of any children affected, or likely to be affected, by the defendant's conduct'.<sup>249</sup>

The **defendant** is the accused person in criminal proceedings.

## COMMISSION'S VIEW

3.85 The commission recommends that a new Family Violence Act include a statement of objects and principles. This will serve both symbolic and practical purposes. At a symbolic level, it will explain the aspirations of the legislation and provide the basis for changes in the attitudes of police, courts and the community. This is particularly important in the context of family violence, which the law has traditionally failed to treat seriously.

243 *Domestic Violence Act 1994* (SA) s 6.

244 *Restraining Orders Act 1997* (WA) s 12.

245 *Family Violence Act 2004* (Tas) s 3.

246 *Domestic Violence and Protection Orders Act 2001* (ACT) s 6; *Crimes Act 1900* (NSW) s 562AC; *Restraining Orders Act 1997* (WA) s 12.

247 *Restraining Orders Act 1997* (WA) s 12(1)(b).

248 *Restraining Orders Act 1997* (WA) s 12(1)(ba).

249 *Domestic Violence Act 1994* (SA) s 6(1)(b).

3.86 At a practical level, a principles clause will provide guidance to police, magistrates and family violence victims about how the Act should be interpreted<sup>250</sup> and applied<sup>251</sup> and contribute to greater consistency in decision making.

## ! RECOMMENDATION

2. The new Family Violence Act should contain clear purposes and guiding principles.

### PURPOSES AND PRINCIPLES FOR A NEW FAMILY VIOLENCE ACT

3.87 In our Consultation Paper we asked what the primary purpose of the Crimes (Family Violence) Act should be. Many submissions responded to this question. Protection of victims was seen as a primary goal but reference was also made to other matters:

(T)he Act should first and foremost aim to protect people from family violence ... (I)f offenders in family cases are rarely punished through the criminal justice system the effect is to limit the protection that an intervention order can offer an individual.<sup>252</sup>

I feel that the primary purpose of [the Act] should be protection, and hopefully rehabilitation.<sup>253</sup>

Protection comes first and that implies support and empowerment too.<sup>254</sup>

Protection should be the main focus, because to provide protection the law must be strong, definite and upheld; these laws and their strength must in turn encompass the aspects of rehabilitation and punishment that is required to protect.<sup>255</sup>

The primary purpose of the Act should be protection. The Act and criminal law system already adequately address punishment. However, including some rehabilitative strategies ... at early stages of the civil process may support protection goals.<sup>256</sup>

250 *Interpretation of Legislation Act 1984* s 35(a).

251 Submission 64 (Federation of Community Legal Centres (Vic)).

252 Submission 8 (Werribee Legal Service).

253 Submission 20 (Mrs EF Belsten).

254 Submission 25 (Barbara Roberts).

255 Submission 27 (Robinson House BBWR).

256 Submission 41 (Victoria Legal Aid).

[I]f the primary purpose of the Act is restricted to protection, then the purpose of the Act is clear and unambiguous to those interpreting and applying it. However, [we] also note that if the purposes of the Act were expanded, then it may meet a range of aims which are meaningful within the context of the Act and its ultimate purpose, to prevent family violence. An Act with a number of purposes allows for a comprehensive, un-fragmented approach to family violence prevention, protection and crisis response. Punishment and rehabilitation may be necessary to ensure protection is achieved.<sup>257</sup>

[We] support the Act having multiple purposes, including protection, punishment and rehabilitation. The Women's Safety Strategy, reinforced by the work of the SSCRFV, identifies ensuring the safety of women and children as the primary purpose. Multiple purposes also provide recognition that a range of responses is required.<sup>258</sup>

3.88 Some submissions articulated additional purposes. These included holding perpetrators accountable and making them responsible, empowering victims and recognising the gendered nature of violence. For example:

Making men accountable for their own behaviour is paramount to changes in the legal system.<sup>259</sup>

This Act should rest in a legal approach that encourages those who perpetrate violence to take responsibility for their violent actions and the impact of their violent behaviour on others. There should also be explicit encouragement for those who perpetrate violence to make lasting changes in their behaviour. The re-victimization of victims should be avoided. Addressing issues such as gender disparity, disempowerment and the invalidation of self and experience need to be a priority.<sup>260</sup>

The primary purpose of [the Act] is supporting and empowering women subjected to family violence, fairness and consistency regarding action.<sup>261</sup>

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257 Submission 69 (Victorian Community Council Against Violence).

258 Submission 78 (Department for Victorian Communities).

259 Submission 40 (Whittlesea Domestic Violence Network).

260 Submission 46 (Royal Children's Hospital, Melbourne).

261 Submission 40 (Whittlesea Domestic Violence Network).

The importance of ensuring that the system supports the agency of victims in planning for their own safety cannot be stressed too strongly. Because of the nature of domestic violence, and the systematic disempowerment of victims at the hands of the perpetrator, a system response that does not respect the wishes of the person seeking safety and support can further disempower the victim.<sup>262</sup>

3.89 The Statewide Steering Committee to Reduce Family Violence formulated the following principles to guide systems reform in its report *Reforming the Family Violence System in Victoria*:

- Family violence is a fundamental violation of human rights and unacceptable in any form.
- Physical or sexual violence within the family is a crime which warrants a strong and effective justice response.
- Responses to family violence must recognise and address the power imbalance and gender inequality between those using violence (predominantly men) and those experiencing violence (predominantly women and children).
- The safety of women and children who have experienced, or are experiencing family violence, is of paramount consideration in any response.
- The voices of women and children who have experienced violence must be heard and represented at all levels of decision making, to help assist in reform.
- Men who use violence should be held accountable and challenged to take responsibility for their actions.
- Family violence affects the entire community and occurs in all areas of society regardless of location, socioeconomic and health status, age, culture, gender, sexual identity, ability, ethnicity or religion. Responses to family violence must take into account the needs and experiences of people from these diverse backgrounds and communities. Family violence is not acceptable in any community or culture.
- Responses to family violence can be improved through the development of a multifaceted approach in which responses are integrated and specifically designed to protect women and children.
- Preventing family violence is the responsibility of the whole community and requires a shared understanding that family violence is unacceptable.

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262 Submission 49 (Domestic Violence and Incest Resource Centre).

- The prevention of family violence requires changing community attitudes and behaviour, responding to people at risk at the earliest possible stage and improving responses to women and children who experience violence and the men who perpetrate it.
- Responses to family violence can be improved through increased recognition and greater coordination of services in responding to the independent rights and needs of the child.<sup>263</sup>

3.90 Several submissions supported these purposes:

[W]e believe the primary purposes of the [Act] should be increased safety for women and children; improved accountability for those who use violence; recognising and encouraging women's right to have control and agency over their own lives and future (and participate in decisions about their safety).<sup>264</sup>

The primary purpose of the Act should be in line with the proposed statewide model for responding to family violence, namely to: ensure the safety of people who have experienced family violence (primary aim); hold people who use or have used violence accountable; and support the agency of people who have experienced family violence.<sup>265</sup>

## COMMISSION'S RECOMMENDATIONS

3.91 Having considered legislation in other jurisdictions, the work of the Statewide Steering Committee and the suggestions in submissions, the commission believes that a new Family Violence Act should include an objects clause and a statement of principles to guide courts in their application of the Act.

### **PURPOSES**

3.92 The commission recommends that the paramount purpose of the legislation should be to ensure the safety of all people who experience family violence. The commission believes the Act should also aim to prevent family violence and provide victims with effective and accessible remedies. The Act should also reflect the aspiration to promote non-violence as a fundamental social value.

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263 Statewide Steering Committee to Reduce Family Violence, *Reforming the Family Violence System in Victoria: Report of the Statewide Steering Committee to Reduce Family Violence* (2005) 8.

264 Submission 49 (Domestic Violence and Incest Resource Centre).

265 Submission 74 (Women's Legal Service Victoria).

**! RECOMMENDATION**

3. The purposes of a new Family Violence Act should be:
- to ensure the safety of all people who experience family violence;
  - to prevent family violence between people to the greatest extent possible;
  - to provide victims of family violence with effective and accessible remedies;
  - to promote non-violence as a fundamental social value.

**PRINCIPLES**

3.93 The commission agrees with submissions that the Act should also set out principles to guide the way that courts apply family violence legislation. In Chapter 1, the commission outlined the values that have guided our work on family violence and provided the framework for our recommendations. The commission believes that some of these principles are appropriate to guide decision making under the new Act. The commission recommends that the following principles be enshrined in a new Family Violence Act.

**! RECOMMENDATION**

4. In making decisions, courts should treat the safety of victims of family violence as paramount and should also have regard to the following matters:
- the particular characteristics and dynamics of family violence, including that family violence is predominantly perpetrated by men against women and children;
  - the promotion of non-violence as a fundamental social value between family members, within the legal system and in the wider community;
  - the need to ensure that victims of family violence are treated with dignity and respect; and



## RECOMMENDATION

- the need to ensure that perpetrators of family violence are held properly accountable for their actions.

## ALTERNATIVES TO THE JUSTICE SYSTEM—RESTORATIVE JUSTICE?

3.94 In formulating the most effective legal response to family violence, the commission considered a range of options and possibilities. Restorative justice was an option discussed in consultations and advocated by the Victorian Aboriginal Legal Service as offering an appropriate alternative to traditional justice responses to family violence. The commission believes that it is particularly important to examine restorative justice options, as some people suggested this could be an appropriate means of dealing with family violence in Indigenous communities.

### WHAT IS RESTORATIVE JUSTICE?

3.95 Restorative justice refers to diverse practices and models developed as alternatives to dealing with criminal offences through the mainstream justice system.

These ‘restorative justice’ practices have no single agreed definition, however, we use the expression to describe a process that brings together people who have a stake in a specific crime or wrongdoing to resolve how to deal with its consequences.<sup>266</sup> Instead of focusing on punishment, restorative justice has a focus on ‘healing rather than hurting, respectful dialogue, making amends, caring and participatory community, taking responsibility, remorse, apology and forgiveness’.<sup>267</sup>

Common models of restorative justice are family conferencing,<sup>268</sup> victim–offender mediation and circle sentencing.

**Family conferencing** involves family members who have used or experienced violence using a mediator to discuss their experiences and coming up with solutions to stop the violence.

**Circle sentencing** involves the defendant’s community and the victim making recommendations to the judge for sentencing.

**Victim–offender mediation** involves the victim, perpetrator and mediator coming up with solutions to stop the violence.

266 Kathleen Daly and Hennessey Hayes, *Restorative Justice and Conferencing in Australia* (2001) 2; Home Office, Research Development and Statistics Directorate, *Restorative Justice: An Overview* (1999) 5; Heather Strang and John Braithwaite, ‘Restorative Justice and Family Violence’ in Heather Strang and John Braithwaite (eds) *Restorative Justice and Family Violence* (2002) 1, 4.

267 John Braithwaite, ‘Shame and Criminal Justice’ (2000) *Canadian Journal of Criminology* 281, 293.

268 Rob White and Fiona Haines, *Crime and Criminology* (2nd ed, 2000) 180.

3.96 There is some experience in Australia in using restorative justice practices for property offences, substance abuse and some violent crimes committed against strangers.<sup>269</sup> Restorative justice practices are less frequently applied to civil matters. Broad philosophical and theoretical approaches are adopted by different models and programs which have been embraced in a process which attempts to:

(r)emedy the adverse effects of crime in a manner that addresses the needs of all parties involved. This is accomplished, in part, through rehabilitation of the offender, reparations to the victim and to the community, and the promotion of a sense of responsibility in the offender and acknowledgement of the harm done to victims and the community.<sup>270</sup>

### INDIGENOUS COMMUNITIES, RESTORATIVE JUSTICE AND FAMILY VIOLENCE

3.97 Traditional Indigenous methods of dealing with conflict are cited as providing possible alternatives to the criminal or civil justice system. This is based on the understanding that there are longstanding problems experienced by Indigenous Australians in using the criminal justice system, which are compounded by the complexities of extended family and other family links. As a result, it is argued that there needs to be an effective criminal justice response to family violence as well as effective diversion and prevention strategies.<sup>271</sup> ‘Ownership’ over family violence issues and the importance of a community-led approach is a consistent theme throughout the *Victorian Indigenous Family Violence Taskforce Final Report*.<sup>272</sup>

3.98 Although formal involvement of Indigenous communities in sentencing occurs in some courts, such as Victoria’s Koori Courts, family violence offences are usually excluded. A variation of the Canadian model of circle sentencing is being piloted in NSW for family violence, as well as other offences. It has been operating for three years in Nowra and for two years in Dubbo, and is soon to be implemented in Sydney, Lismore, Kempsey, Walgett, Armidale and Bourke. The defendant is sentenced by a small selected group of Indigenous elders, following a detailed group discussion of the case with a magistrate, police prosecutor, defence lawyer, victim and defendant.<sup>273</sup>

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269 For a discussion of alternative resolution approaches, see Victorian Law Reform Commission, *Review of Family Violence Laws: Consultation Paper* (2004) above n 8, 45–59.

270 *R v Proulx* (2000) SCC 5.

271 Submission 57 (Victorian Aboriginal Legal Service).

272 Victorian Indigenous Family Violence Taskforce, *Victorian Indigenous Family Violence Taskforce Final Report* (2003).

273 ABC Television, ‘Inside the Circle’, *Four Corners*, 10 October 2005 <[www.abc.net.au/4corners/content/2005/51479031.htm](http://www.abc.net.au/4corners/content/2005/51479031.htm)> at 12 January 2006.

3.99 In Victoria there is qualified support in Indigenous communities for the introduction of alternative responses to deal with family violence incidents. The Victorian Aboriginal Legal Service<sup>274</sup> strongly supports the use of restorative justice practices as appropriate intervention for Indigenous Australians involved in family violence matters. The Aboriginal Family Violence Prevention and Legal Service (Victoria) urges caution in its use.<sup>275</sup>

3.100 Indigenous communities need significant continuing support for existing and new Indigenous-specific justice system programs for victims and perpetrators of family violence. These programs include Indigenous-specific men's behaviour change programs; court support services; community workers to support victims and perpetrators when police are involved, Indigenous women's accommodation and refuge services, and healing services specific to family violence.<sup>276</sup> Specific resources directed towards capacity building within Indigenous communities is required if restorative justice alternatives are to be developed by these communities.

3.101 There is more emphasis on community mediation among Indigenous than non-Indigenous communities. Use of the formal criminal or civil justice system to punish a violent intimate partner may result in an Indigenous woman being isolated within her community. Research into using restorative justice practices to deal with family violence produced opposing views between Indigenous women and non-Indigenous women in Queensland, with Indigenous women favouring its use and ambivalence being expressed by the non-Indigenous women. However, both groups believed that the criminal justice system fails to deliver identified key justice objectives and that restorative justice practices offer some hope in addressing shortfalls in the traditional justice system.<sup>277</sup>

### APPLICATION OF RESTORATIVE JUSTICE PRACTICES TO FAMILY VIOLENCE

3.102 It remains highly contested whether restorative justice practices should be applied to family violence matters.<sup>278</sup> Concerns about its use focus on the possibility of

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274 Submission 57 (Victorian Aboriginal Legal Service).

275 Submission 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)).

276 See paras 5.64–5.68.

277 Heather Nancarrow, *In Search of Justice in Domestic and Family Violence* (Unpublished MA Thesis, Griffith University, 2003).

278 Ruth Busch, 'Domestic Violence and Restorative Justice Initiatives: Who Pays if We Get it Wrong?' in Strang and Braithwaite (2002) above n 266, 223, 236–7; Sarah Curtis-Fawley and Kathleen Daly, *Gendered Violence and Restorative Justice: The Views of Victim Advocates* 20; Julie Stubbs, 'Domestic

failure to sufficiently address the power imbalance between the victim and perpetrator. There is also concern that restorative justice may be contrary to efforts to make family violence a public matter and to focus on the serious, unacceptable nature of violence against women and children.<sup>279</sup> There are also concerns that restorative justice may not be able to respond to various characteristics and dynamics of family violence, such as the fact that it usually occurs between people in intimate relationships and typically involves multiple incidents over an extended period.<sup>280</sup>

3.103 At the centre of this debate is an understanding of power dynamics in family violence matters. Power imbalances present formidable challenges in developing appropriate models and ensuring that re-victimisation does not occur. Restorative justice models which can be appropriately applied to family violence matters have not yet been resourced or established in Victoria.

### **VIEWS FROM SUBMISSIONS**

3.104 The contested and contentious views apparent in the research about the appropriateness of using restorative justice practices as an alternative to the criminal or civil justice system for family violence were also reflected in the submissions received by the commission. Submissions referred to different concepts and practices which could or should be used as alternatives, including diversion, holistic centres, cooling-off periods, time-out centres and healing services, particularly for first offences.<sup>281</sup> It was also stated that a modern view of punishment is the encouragement of reformed behaviour and a return to the family unit.<sup>282</sup>

3.105 However, none of the submissions gave unqualified support for alternative responses. Most submissions commented on the importance of alternatives not being seen as a 'soft option' for offenders and said that there ought to be a focus on developing the existing criminal and civil justice system responses.<sup>283</sup> While support was given to further consideration of this issue, it was recognised that alternatives are 'in their infancy' and that appropriate diversion programs would need to be developed,

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Violence and Women's Safety: Feminist Challenges to Restorative Justice' in Strang and Braithwaite (2002) above n 266, 42.

279 Busch (2002) above n 278, 232; Donna Coker, 'Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence' in Strang and Braithwaite (2002) above n 266, 128–9.

280 Stubbs (2002) above n 278, 43–4.

281 Submissions 20 (Mrs EF Belsten), 64 (Federation of Community Legal Centres (Vic)).

282 Submission 23 (Zonta Club of Frankston).

283 Eg, submission 64 (Federation of Community Legal Centres (Vic)).

particularly in rural and regional areas.<sup>284</sup> The power imbalance between the parties in family violence matters means that, as one submission put it, it is difficult to ‘envisage a fair and equal mediation without extensive supports and monitoring’.<sup>285</sup>

3.106 Prerequisites for any development of restorative justice and/or diversionary programs were identified as:

- a focus on the effect upon the victim;<sup>286</sup>
- a clear consent to participation by the protected person;<sup>287</sup>
- improved accountability for those who use violence;<sup>288</sup>
- recognition and encouragement of women’s right to have control and agency over their own lives.<sup>289</sup>

3.107 Diversion was viewed as a possible approach for breaches of intervention orders,<sup>290</sup> but not in circumstances where the police would be the gatekeepers for access to diversion programs. Rather, a court should retain this role.<sup>291</sup> We discuss diversion for breaches in more detail in Chapter 10.

3.108 Caution in the introduction and use of restorative justice or diversionary programs was urged for cases where families are marginalised and isolated because the children are especially vulnerable.<sup>292</sup> Diversionary programs were seen to be appropriate where the defendant is a child or where the aggrieved family member is a child. These children may find the traditional criminal law process difficult in these cases because they perceive they ‘caused’ a family member to be punished.<sup>293</sup> Less punitive alternatives to jail were considered to be possibly useful in preventing a recurrence of violence but not at the expense of condemning violent actions.<sup>294</sup>

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284 Ibid.

285 Submission 69 (Victorian Community Council Against Violence).

286 Submission 30 (Violence Against Women Integrated Services).

287 Ibid.

288 Submission 69 (Victorian Community Council Against Violence).

289 Submission 49 (Domestic Violence and Incest Resource Centre).

290 Submissions 30 (Violence Against Women Integrated Services), 49 (Domestic Violence and Incest Resource Centre).

291 Submission 64 (Federation of Community Legal Centres (Vic)).

292 Submissions 36 (Paediatric Division, Royal Australasian College of Physicians), 46 (Royal Children’s Hospital).

293 Submission 41 (Victorian Legal Aid).

294 Submission 53 (Women’s Electoral Lobby, Victoria).

3.109 In contrast to this position, there were negative responses in some submissions to the question ‘is diversion ever an appropriate way to deal with breaches?’<sup>295</sup>

### **COMMISSION’S VIEW**

3.110 Establishing any restorative justice model for family violence matters depends on the development of appropriate models based on rigorous research. The commission’s position is that there is insufficient clarity in the research to support the adoption of restorative justice practices for use in family violence matters and little experience in using such practices. Common standards of practice have not been developed and it would be necessary to train practitioners to use these practices in family violence matters.<sup>296</sup>

3.111 However, among some Indigenous communities there are calls for the establishment of restorative justice models in family violence matters in place of or as a supplement to the criminal or civil justice system. The development of these models, standards of practice and training of practitioners is properly placed in the hands of Victoria’s Indigenous communities and Indigenous non-government organisations.<sup>297</sup>

3.112 Alternative models such as family group conferencing, Koori family violence courts, victim–offender mediation and circle sentencing may be able to be adapted by Victorian Indigenous communities to deal with some family violence incidents. In 2004 principles underpinning the development of Indigenous Dispute Resolution models were canvassed by the National Alternative Dispute Resolution Advisory Council with Indigenous community representatives.<sup>298</sup> These practices could be used as interventions in, alternatives to, or a diversion from the criminal and civil justice systems.

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295 Eg, submission 62 (Eastern Community Legal Centre).

296 The Victorian Association for Restorative Justice was launched on 22 June 2005 and seeks to address some of these issues by exploring and disseminating the principles of restorative justice and practices within the Victorian community: Australian Lawyers for Human Rights, *Newsletter–June 2005*, <[www.alhr.asn.au/html/main/NewsletterJune2005.htm](http://www.alhr.asn.au/html/main/NewsletterJune2005.htm)> at 6 December 2005.

297 Victorian Indigenous Family Violence Taskforce, above n 13, 233. These structures include but are not limited to: the Indigenous Family Violence Partnership Forum, Indigenous Family Violence Policy Workers (DHS), Indigenous Family Violence Working Group, Regional Action Plans; nine Regional Indigenous Family Violence Action Groups, as well as key non-government organisations such as the Aboriginal Family Violence Prevention Legal Service and the Victorian Aboriginal Legal Service.

298 The council conducted a Forum on Indigenous Dispute Resolution in March 2004. The council is an independent expert body that was established in 1995 and provides policy advice to the Commonwealth Attorney-General on alternative dispute resolution, including suitability of these processes for particular client groups and the development of standards for dispute resolution processes.



## RECOMMENDATIONS

5. Further research should be conducted before restorative justice practices are considered for use in family violence matters in Victoria.
6. If restorative justice practices are introduced, standards should be established for particular processes, practitioners should be trained and programs should be monitored and evaluated.