
Chapter 5

Police Response

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INTRODUCTION

5.1 In Victoria, the police are involved in investigating, laying charges and prosecuting family violence offences, as well as making applications for civil intervention orders on behalf of people in need of protection. The police response to family violence is crucial in holding perpetrators of violence accountable and ensuring safety for women and children. As discussed in Chapter 3, it is essential that a criminal response is used to promote non-violence and ensure accountability for violence. However, to ensure the safety of people experiencing violence, it is also essential that the law provides an effective civil remedy for family violence.

5.2 Historically, the police response to family violence has been inadequate, with violence in the home seen as not serious or worthy of police attention. However, in recent years Victoria Police has taken steps towards improving the police response to family violence. In August 2004, Victoria Police introduced a new Code of Practice for the Investigation of Family Violence. Over the past year, all police officers have received training in the code. The code provides for a proactive response to family violence that involves gathering evidence, making referrals to support services, implementing a pro-arrest policy and making intervention order applications on behalf of victims in some circumstances. The code contains supervision and accountability mechanisms. The code's provisions are discussed in detail throughout this chapter.

5.3 The commission commends the leadership that has been shown by Victoria Police through the adoption and implementation of the new Code of Practice. The code is leading to significant changes in the way police respond to family violence in Victoria.³⁸⁵ However, it is essential that Victoria Police continues to monitor its implementation; provide supervision and oversight of how the code is being applied; provide thorough and regular training on family violence;³⁸⁶ and continually review the various aspects of the code. The commission also recommends that an independent and external review of the code be undertaken after two to three years of its operation. This will be essential in ensuring the code is having the desired impact and ensuring accountability for the police in their response to family violence.

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

386 The commission has also recommended specific training in Indigenous, disability, same-sex and migrant issues at Recommendation 27.

! RECOMMENDATIONS

20. Victoria Police should continue with their efforts to oversee, monitor and evaluate the implementation and use of the Code of Practice for the Investigation of Family Violence by all police officers.
21. Victoria Police should make additional efforts to provide comprehensive and regular training on the dynamics of family violence, particularly from a victim's perspective, for all police officers.
22. An independent and external review of the impact of the Police Code of Practice for the Investigation of Family Violence should be conducted within two to three years of the code's full implementation.

5.4 The commission has conducted this review of the Crimes (Family Violence) Act during the introduction and implementation of the code. Therefore, most of the feedback we received on police during our consultations related to police activities before the code's introduction. Despite the introduction of the code, changing the culture of Victoria Police will continue to be a huge task. The commission has outlined some of the common problems experienced by women when seeking a police response to family violence in this chapter.

5.5 For example, 'Jane' has been dealing with a violent and obsessive ex-husband and has had many intervention orders out against him. He has breached the orders many times. The commission received the following diary entries from her social worker:

[3 January] ... Jane informed me that when she was interstate Jim called stating that he had been in her house when she was away. Upon Jane's return she found he had stolen everything. White goods, manchester, kitchen utensils and appliances, beds, clothes, personal papers etc ... Neighbours stated they [had] seen Jim removing all her mail through this period.

[25 February] Detectives ask Jane to drop case of break and entry allegation. Stating they spoke to him and he denied breaking in and stealing her belongings. No witnesses were contacted. [Police] [s]tated that it would be too hard to prove, probably wouldn't get a conviction and if he did, sentence would be minimal, this is because IO [intervention order] was not in place due to police error. I asked about the witnesses, they hadn't spoken

to any of them ... Once he knew what he could get away with his stalking behaviour increased, for example driving by and constant phone calls and attending the kids schools.³⁸⁷

5.6 However, the commission acknowledges that police can and often do play a positive role in assisting and supporting family violence victims. The commission also received the following submission from a woman who had experienced years of severe abuse:

When [the police] took a statement from me, they only wanted to know about the last time he had assaulted me, which had probably been the most minor assault he'd ever carried out. I wanted to tell them about the years of serious abuse, but they only wanted to know about the one instance. I lost it at this point. So I started to fight really hard and brought my complaints higher up. I started driving to the police station every single day and sitting there until someone would tell me what was happening with my case. Eventually I got a call from a member of the police who asked me to meet him. [He] was different from the other police. It was obvious that he had had proper training. He understood family violence and was very sympathetic. He was very careful with me the whole time he was dealing with me. For example, he would always ask me where I was comfortable to meet, and that I could bring along a third party if that made me feel more comfortable. He asked me could he redo my statement. He apologised to me for the way I had been treated and told me that if I wanted to make a new statement he would support me one hundred per cent. My first statement was one page long, whereas my second one took two to three weeks to do. It was 14 double sided pages long.³⁸⁸

5.7 In this chapter, we outline the need for a strong criminal and civil response to family violence from police. We cover the criminal response to family violence, the civil response to family violence and the police role in enforcing breaches of intervention orders.

IMPORTANCE OF A CRIMINAL RESPONSE

5.8 It is important that Victoria's justice system, including Victoria Police, is equipped to respond to family violence through the criminal justice system where there is evidence that a crime has been committed. As outlined in Chapter 3, family violence has effectively been decriminalised in Victoria since the introduction of the intervention order system. There was a strong response from the submissions received

387 Submission 9 (Cindy Smith, social worker).

388 Interview with Kate, 21 April 2005.

by the commission that this is not acceptable, and that the laying of criminal charges as well as an intervention order application is often the most appropriate police response to family violence.³⁸⁹ Robinson House, a women's refuge, told the commission:

Whatever changes occur in the judicial system—something *must occur* that will make offenders realise the police and courts mean business in upholding the right of other family members to live in safety and without fear (emphasis in original).

5.9 As noted in paragraph 3.37, It is also recognised at the international level that a response that incorporates both criminal charges and civil remedies, such as protection orders and compensation, is essential to combating family violence.³⁹⁰ We outline the benefits of a criminal response to family violence in paragraphs 3.22–3.24.

5.10 In considering the appropriate role for the criminal justice system in family violence, the commission has been guided by the principles we believe should underpin any new family violence legislation in Victoria.³⁹¹ In particular, a criminal response to family violence must demonstrate the unacceptable nature of violence and seek to hold perpetrators accountable for their actions. Ensuring safety for people experiencing family violence must come first, however, the criminal response must also have respect for the choices and views of people affected by violence.

IMPACT OF INCREASED CRIMINAL RESPONSE ON MARGINALISED GROUPS

5.11 Some groups within Victoria have traditionally had a negative relationship with the police. The commission does not want any increased use of the criminal justice system to further marginalise groups in the community who are already disadvantaged. The specific difficulties that Indigenous Australians; migrants,

389 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).

390 United Nations Division for the Advancement of Women, *Good Practices in Combating and Eliminating Violence against Women: Report of the Expert Group Meeting* (2005) 16; 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); Radhika Coomaraswamy, *Integration of the Human Rights of Women and the Gender Perspective: Violence against Women*, UN Doc E/CN.4/2003/75 (2003) para 29; Radhika Coomaraswamy, *Preliminary Report Submitted by the Special Rapporteur on Violence against Women, its Causes and Consequences*, UN Doc E/CN.4/1995/42 (1994) para 125; United Nations, *Report of the Fourth World Conference on Women*, UN Doc A/CONF.177/20 (1995) Annex: Beijing Declaration and Platform for Action, para 124(d).

391 See paras 3.92–3.93; Recommendations 3, 4.

particularly newly arrived migrants and refugees; people with disabilities; and people in same-sex relationships have with police responses are discussed in this section.

5.12 The Victorian Aboriginal Legal Service told the commission an increased use of the criminal justice system to respond to family violence in Indigenous communities will have a negative impact. Research in US states that have a much stronger criminal response to family violence than Victoria has suggested that these policies may impact disproportionately on black and migrant communities.³⁹² A study conducted in Milwaukee on the impact of arrest on family violence perpetrators showed that violence often increased after the arrest if the perpetrator was unemployed, unmarried, a high school drop-out or African-American.³⁹³ Penelope Andrews notes:

The much-heralded legislative inroads into family violence, after persistent deflation of the public/private distinction, are arguably an ominous sign to Aboriginal women that the state once more has the power to invade that private space only recently regained after the zealous pursuit of protectionism and assimilation. The public/private distinction for Aboriginal women has been ephemeral; the state has persistently been an invasive and intrusive presence.³⁹⁴

5.13 However, these findings cannot be used to justify a lesser level of protection for marginalised groups by the police. Cheryl Hanna states:

[I]n our efforts to be racially, culturally, and economically sensitive, we cannot allow violence to go unchecked under the rationale that state intervention is always racist, ethnocentric, or classist ... The underenforcement of domestic violence laws ... for certain groups ultimately denies women legitimate state protection and enforcement of the right to be free from violence in their homes and in their communities.³⁹⁵

392 Laureen Snider, 'Towards Safer Societies: Punishment, Masculinities and Violence Against Women' (1998) 38 (1) *British Journal of Criminology* 1, 3.

393 Linda Mills, 'Killing Her Softly: Intimate Abuse and the Violence of State Intervention' (1999) 113 *Harvard Law Review* 550, 566.

394 Penelope Andrews, 'Violence Against Aboriginal Women in Australia: Possibilities for Redress within the International Human Rights Framework' (1997) 60 *Albany Law Review* 917, 931.

395 Cheryl Hanna, 'No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions' (1996) 109 *Harvard Law Review* 1849, 1881–1882.

5.14 The Police Code of Practice recognises the need for police to be culturally sensitive in their response to particular communities.³⁹⁶

CRIMINAL POLICE RESPONSE TO FAMILY VIOLENCE INCIDENTS

5.15 The way police respond when they attend a family violence incident is crucial in ensuring that charges are laid, if appropriate, and that sufficient evidence is gathered to enable a prosecution to proceed. This section will outline recent changes made to police policy for the criminal justice response to family violence incidents, including the new pro-arrest policy and changes to evidence gathering procedures.³⁹⁷

5.16 In considering the police response, it is important to deal with the circumstances where accused people are charged and granted bail and where they are remanded in custody. In Victoria the granting of bail is regulated by the *Bail Act 1977*.³⁹⁸ The commission is undertaking a detailed review of the bail system in Victoria. In November 2005, a Consultation Paper was released asking questions about the Bail Act and the processes surrounding bail, including the conflict between bail conditions and family violence intervention orders.³⁹⁹ Recommendations for bail system reform will be made in the final report, which is due to be tabled in parliament in the second half of 2006.

PROACTIVE AND PRO-ARREST RESPONSE

5.17 It is essential that when police are called to a family violence incident they respond in a way that will support the laying of criminal charges if a crime has been committed.⁴⁰⁰ The Police Code of Practice has adopted a proactive, pro-arrest response

396 These provisions are discussed in more detail at paras 5.63–5.79. We make recommendations to improve police training, to ensure that the police response to marginalised communities is improved at Recommendation 27.

397 The civil police response when called to an incident is discussed at paras 5.60–5.62.

398 The Bail Act provides for a general presumption in favour of bail. However, in certain circumstances, the general presumption in favour of bail is displaced and it falls upon the accused to show why he or she should be released on bail. This occurs where the accused is charged with an offence that is deemed particularly serious. Examples of such offences include violent offences, stalking and breaching an intervention order: *Bail Act 1977* s 4. If accused people are released on bail they are often released with bail conditions. These conditions may or may not overlap with an intervention order that already exists.

399 Victorian Law Reform Commission, *Review of the Bail Act: Consultation Paper* (2005).

400 A consistent criminal response has been recognised as essential at the international level. Eg, the UN Model Strategies provide that members of the UN are urged to ‘ensure that the applicable provisions of laws, codes and procedures related to violence against women are consistently enforced in such a way that *all criminal acts* of violence against women are recognized and *responded to accordingly* by the criminal justice system’:

when attending family violence incidents. The code states '[t]he primary response of police in reports of family violence is the pursuit of criminal charges where appropriate'.⁴⁰¹ Police must consider any reported incident to be a crime until they establish that no crime has been committed. This requires police to conduct a thorough investigation and gather evidence.⁴⁰² The code states that the decision to arrest is based on the evidence available, not the views of the victim.⁴⁰³ In 2004–2005, partial implementation of the code resulted in a 73.2% increase in the number of charges laid by police at family violence incidents.⁴⁰⁴

5.18 In all attendances, police must make a referral to a relevant family violence support agency.⁴⁰⁵ Support from external agencies is crucial to people experiencing family violence; the referral aspect of the code is therefore a significant step forward in the police response to family violence.⁴⁰⁶

5.19 Some submissions received by the commission noted their support for the new pro-arrest policy.⁴⁰⁷ A submission from a woman who has experienced family violence noted that a proactive approach by police at the crisis point is essential, as it is often too difficult for victims to take matters into their own hands at this stage.⁴⁰⁸ The Victorian Aboriginal Legal Service noted the importance of an effective criminal

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) Annex: Model Strategies and Practical Measures on the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice, para 8(a) (emphasis added).

401 Victoria Police, *Code of Practice: For the Investigation of Family Violence* (2004) para 4.1.1.

402 Ibid para 2.4.1, 2.4.5. See paras 5.25–5.28.

403 Ibid para 4.2.1.

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

405 A formal referral is made where a criminal offence is involved or the police are applying for an intervention order on behalf of the person affected. A formal referral means that the name and contact details of the person affected by violence are given to the external agency. An informal referral is made in all other circumstances and involves the police giving the people involved the contact details of an external agency and leaving it up to them to make contact: Victoria Police (2004) above n 401, paras 3.2–3.3.

406 See paras 3.63–3.66. The importance of a collaborative approach between law enforcement agencies and women's support organisations has been recognised as crucial at the international level: *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) Annex: Model Strategies and Practical Measures on the Elimination of Violence Against Women in the field of Crime Prevention and Criminal Justice, para 14(b); Coomaraswamy (2003) above n 390, para 33.

407 Submissions 30 (Violence Against Women Integrated Services), 33 (Women's Domestic Violence Crisis Service).

408 Submission 44 (Anonymous).

justice response to family violence, but stated that increased contact with the criminal justice system may have a negative impact on Indigenous men.

OTHER JURISDICTIONS—MANDATORY ARREST

5.20 In many states in the US and Canada the call for family violence to be treated as a crime has led to policies that encourage or mandate arrest as the primary intervention in family violence incidents. These policies vary in the amount of discretion left to the police and the approach taken to victims who do not want any action taken. For example, some US jurisdictions have a ‘mandatory arrest’ policy, meaning that wherever police attend a family violence incident someone must be arrested if there is ‘probable cause’ to establish that an offence has been committed.⁴⁰⁹ This has led to women being arrested for acts of violence carried out in self defence.⁴¹⁰ Some police officers have a limited understanding of the dynamics of family violence and therefore are unable to identify the ‘primary aggressor’, so either arrest both partners or arrest only the woman.⁴¹¹ In Los Angeles, the number of women arrested for domestic violence offences increased threefold once a mandated arrest policy was introduced.⁴¹²

5.21 Pro-arrest and mandatory arrest policies share the aim of removing responsibility and blame for criminal proceedings from the person who has experienced violence. They also aim to address criticisms of police inaction in family violence matters by reducing the discretion available to police.⁴¹³

5.22 In Australia, there has not been such a strong criminal response to family violence. The main focus of family violence law and policy has been on civil protection orders.⁴¹⁴ The ACT and Tasmania are two jurisdictions that have recently placed more emphasis on a criminal response, including implementation of pro-arrest and pro-

409 Holder (2001) above n 167, 4.

410 Coomaraswamy (1996) above n 126, para 124; United Nations Division for the Advancement of Women, *Good Practices in Combating and Eliminating Violence Against Women: Report of the Expert Group Meeting* (2005) 17.

411 Mills (1999) above n 393, 588.

412 Ibid 588–9.

413 Eve Buzawa and Carl Buzawa (eds) *Domestic Violence: The Changing Criminal Justice Response* (1992) xii–xiii.

414 Heather Douglas and Lee Godden, ‘Intimate Partner Violence: Transforming Harm into a Crime’ (2003) 10(2) *E Law Murdoch University Electronic Journal of Law*, para 3
<www.murdoch.edu.au/elaw/issues/v10n2/godden102nf.html> at 20 September 2004.

prosecution policies.⁴¹⁵ However, the ACT and Tasmanian systems do not involve mandatory arrest at every incident attended by police.

COMMISSION'S VIEW

5.23 The commission believes that a proactive police response when attending a family violence incident is essential. Those experiencing family violence should not feel abandoned by police and police should have the power and the policies to intervene effectively. The commission therefore commends Victoria Police on the adoption of a pro-arrest policy in the new Police Code of Practice. The commission believes the code strikes an appropriate balance by encouraging the laying of criminal charges where evidence exists, but not mandating an arrest. The commission believes that mandatory arrest policies are not necessarily effective. A pro-arrest policy accompanied by sufficient training and supervision of police officers is the appropriate strategy to achieve a more consistent response and an increased number of criminal charges in family violence matters.

5.24 The commission therefore encourages Victoria Police to continue to evaluate the effectiveness of the new code, provide resources for ongoing training and ensure the code is being adhered to through appropriate supervision.

IMPROVING EVIDENCE GATHERING

I said I wanted photos taken. I kept on about it, so they got an older sergeant to take them. I was escorted into a little interview room—it was tiny—and they left the door open. I had to take my bra off and he took the photos. It was really humiliating. They didn't even want to take the photos. I had to push for it. I got the feeling like they couldn't be bothered and it wasn't important. I felt angry ... It made me feel sick.⁴¹⁶

5.25 To successfully prosecute a family violence crime, it is essential that evidence is gathered, particularly at the scene of the incident. Police prosecutors sometimes state that cases cannot be brought due to a lack of sufficient evidence. This is particularly the case if the victim is reluctant to proceed with the case and may not testify once the case gets to court. Gathering of other types of evidence is therefore essential, not only for increasing the number of cases brought before the court, but also in reducing the reliance placed on the victim's testimony.⁴¹⁷ Improved evidence gathering techniques

415 Women Tasmania, *Safe at Home: Issue 1* (August 2004) 2; Keys Young, *Evaluation of ACT Interagency Family Violence Intervention Program: Final Report* (2000).

416 Young (2000) above n 415, 65.

417 Hanna (1996) above n 395, 1849, 1901; Holder (2001) above n 167, 14.

in the ACT have increased the rate of guilty pleas by perpetrators of violence, which has meant the victim often avoids the ordeal of attending court and giving evidence.⁴¹⁸ Improved evidence gathering techniques will also assist where an intervention order is applied for, therefore reducing the need for the victim to give evidence in civil proceedings.⁴¹⁹ Improved investigative and evidence gathering techniques have been recognised as essential in Australian, UK, US and Canadian jurisdictions seeking to implement a specialist approach to family violence cases.⁴²⁰

5.26 The Police Code of Practice has recognised the importance of improved evidence gathering at family violence incidents. The code states that police must consider all incidents to be a crime until they establish that no criminal offences have been committed. To do this, police must conduct a thorough investigation. The code states that police should talk to as many people as possible at the scene, take witness statements and:

police may photograph or video the scene or people involved in the family violence incident when offences have been identified. Other documents, such as telephone messages, letters or personal documents, may also be taken to assist in the investigation or to protect a person's safety and wellbeing ... [Police] will follow standard investigative techniques to preserve any physical evidence that the scene may contain, eg fingerprints, blood marks, weapons and items of clothing.⁴²¹

5.27 Once police have gathered evidence at the scene and obtained statements, they must prepare a brief of evidence where a criminal offence has been identified. Only a police prosecutor or supervisor has the authority to decide not to proceed with the prosecution of the offences involved.⁴²²

5.28 The commission supports these provisions in the code as essential to increase the charge and conviction rate of people who commit family violence. The commission encourages Victoria Police to continue with implementation of these provisions, through adequate training and supervision of police officers.

418 Holder (2001) above n 167, 14.

419 The commission discusses ways that giving evidence can be made less traumatic for victims of violence in Chapter 11.

420 Julie Stewart, *Specialist Domestic/Family Violence Courts within the Australian Context* (2005) 10.

421 Victoria Police (2004) above n 401, paras 2.4.3, 2.4.5.

422 Ibid paras 4.2.5.1–4.2.5.2.

IMPROVING CRIMINAL PROSECUTIONS OF FAMILY VIOLENCE OFFENCES

5.29 To ensure an effective response to family violence from the criminal justice system, it is also essential to improve the system for prosecuting these offences in court. This section will look at the support offered to victims before a case gets to court, the need for a specialist prosecution unit, and the need to reduce the cost of bringing such cases so the risk of an order for costs does not act as a barrier to legitimate cases being heard. Many family violence crimes, including breach of an intervention order, are summary offences and are prosecuted by police prosecutors in the Magistrates' Court. This section does not address indictable offences, which are tried by the Office of Public Prosecutions.

5.30 In its submission to the commission Victoria Police raised the rule about compellability of spouses to give evidence against each other. In Victoria a spouse or former spouse can be compelled to give evidence against a spouse, but the court has discretion to exempt wives, husbands, parents or children from testifying for the prosecution.⁴²³ The potential exemption does not apply to de facto spouses. The commission is undertaking a review of the Uniform Evidence Act with a view to implementing this Act in Victoria. The Uniform Evidence Act was the result of an Australian Law Reform Commission review of evidence law and is used in NSW, Tasmanian, ACT and federal courts. The issue of spouse compellability will be looked at in detail in this review.

CASE CONFERENCING FOR THE VICTIM UNDER THE POLICE CODE

5.31 Support for victims at the initial stages of laying charges, taking statements and gathering evidence is critical for the successful prosecution of a family violence offence.⁴²⁴ In cases of family violence where the parties have a close relationship, victims may feel ambivalent about the process and may decide they do not want to give evidence against the perpetrator. The Police Code of Practice deals with victim reluctance to participate in a criminal prosecution through a case conferencing system. A case conference may be requested by a police officer, police prosecutor, victim or

423 *Crimes Act 1958 s 400.*

424 The UN Division for the Advancement of Women has highlighted the importance of providing procedures to explore a woman's reasons for wanting to withdraw her complaint or not testify: United Nations Division for the Advancement of Women, *Good Practices in Combating and Eliminating Violence Against Women: Report of the Expert Group Meeting* (2005) 17. Douglas and Godden's study into the criminal response to family violence in Queensland also found that support is crucial during the stages of making a complaint, formulating the witness statement and preparing for the hearing: Douglas and Godden (2003) above n 414, para 34.

support worker.⁴²⁵ The purpose of the conference is to support and involve victims in the decision on whether to proceed with criminal charges where they are unsure or reluctant. The code states that a case conference should:

identify reasons for the victim's concerns, discuss the prosecution and court process and seek to relieve any concerns or fears the victim may have so the legal proceedings can continue.⁴²⁶

5.32 The result of a conference could be agreement by the victim to proceed and provide the required evidence, a decision by police to proceed with the charges without the victim's cooperation, or agreement by the police to withdraw the charges.⁴²⁷ The decision about whether to proceed with the charges does not rest with victims, however, their views are taken into account through the case conferencing system.⁴²⁸

OTHER JURISDICTIONS

5.33 Some jurisdictions, mainly in the US, deal with the possibility of victim ambivalence about the court process by forcing their participation at court. This is often described as a pro-prosecution or a 'no-drop' prosecution policy.⁴²⁹ For example, in San Diego, California and Duluth, Minnesota, a system of mandated victim participation exists, meaning that victims must participate in any criminal trial or face a subpoena from court. If they ignore this subpoena they may be arrested and held in custody.⁴³⁰

COMMISSION'S VIEW

5.34 The case conferencing system included in the Police Code of Practice is a welcome development. This system seeks to support women through the process of a

425 Victoria Police (2004) above n 401, para 4.3.4.2.

426 Victoria Police, *Code of Practice: For the Investigation of Family Violence* (2004) Ibid para 4.3.4.1.

427 Ibid para 4.3.4.4.

428 The UN Model Strategies recognise the importance of taking the decision about whether to prosecute out of the hands of the victim, by urging States to review, evaluate and revise their criminal procedure to ensure '[t]he primary responsibility for initiating prosecutions lies with prosecution authorities and *does not rest with women subjected to violence*' [emphasis added]: *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) Annex: Model Strategies and Practical Measures on the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice, para 7(b).

429 Hanna (1996) above n 395, 1862.

430 Ibid 1863.

criminal prosecution, provide information and consider the woman's views when deciding whether to continue with the charges. The commission believes that mandated participation for victims of violence is not appropriate and will not assist in ensuring an effective criminal response to family violence. This system is not consistent with the underlying principles that the commission believes are essential in any family violence legislation, particularly the principles of respect for and empowerment of those who have experienced violence.

5.35 The commission encourages Victoria Police to monitor the implementation of case conferencing, to ensure the victim's views are being adequately taken into account by police in their decisions over whether to prosecute a case. The commission recommends a case management approach for victims where a perpetrator has breached an intervention order many times.⁴³¹ We also recommend improvements to the system of support available to victims once a case gets to court, to ensure victims are supported throughout the criminal justice process.

SPECIALIST POLICE PROSECUTION UNIT WITH VICTIM SUPPORT

That made the world of difference to me to know that you don't have to put up with it.

It's not just me—there's hundreds and hundreds ... You think you're the only one. You're embarrassed, scared and fear for your life and wrap yourself up in your little cocoon. [The victim support program at court] made me feel like I wasn't alone. There were people there and it made a world of difference.⁴³²

5.36 To improve the role of police in prosecuting criminal acts of family violence, as well as applying for intervention orders, it is essential that police are given sufficient resources to conduct cases and support victims. Even though the Police Code of Practice includes a pro-arrest policy and an increased role for police in bringing intervention order applications, no increase in resources for prosecutions initially accompanied this change. Once a family violence case comes to court, police prosecutors do not usually have support workers to assist victims through the process, and victims must rely on Court Network or other local court support schemes that are voluntary and therefore not available in all courts at all times. These schemes are not always expert in dealing with people who have experienced family violence.⁴³³ This

431 See Recommendations 31, 32.

432 Young (2000) above n 415, 72.

433 The commission recommends the expansion of community support services, including legal advice, at recommendations 39–41, 46, 49, 53.

section will examine the need for specialist prosecutors and victim support in family violence cases.

VIEWS FROM SUBMISSIONS

5.37 Anecdotal evidence suggests that since the implementation of the Police Code of Practice, police prosecutors have been overloaded with family violence work due to the increasing rates of arrest and intervention order applications. The lack of extra resources to deal with this work is leading to inconsistent and ineffective practices in some areas. The Women's Legal Service Victoria told us:

We have also observed ourselves at court since the Code was introduced that most prosecutors seem to have just received multiple briefs on the morning of the hearings and frequently one or more of the 'parties'—the person in need of protection, the respondent and the informant—are not at court. It would be preferable for prosecutors to meet the person in need of protection prior to the return date of the application or at least earlier on that day to allow proper preparation.

5.38 The Werribee Legal Service and the Royal Children's Hospital both supported the provision of specialist police prosecutors to bring criminal charges and apply for intervention orders. The Royal Children's Hospital noted that witness assistants should be provided under a pro-arrest policy.

OTHER JURISDICTIONS

5.39 Other jurisdictions in Australia and overseas have used specialisation and victim support when responding to family violence, particularly in criminal cases.

Specialist Prosecutors

5.40 Specialist prosecutors have been recognised internationally as one of the essential features of an improved response to family violence in the courts.⁴³⁴ Specialist prosecutors ensure the brief of evidence is thorough; ensure appropriate charges have been laid; interview the victim to obtain further information and provide information about procedures; and make submissions on appropriate sentences with the safety of the victim in mind.⁴³⁵

5.41 In some US and Canadian jurisdictions, the establishment of specialised domestic violence courts has involved the provision of specialist police and prosecution

434 Stewart (2005) above n 420, 9.

435 Ibid 14.

staff.⁴³⁶ In the Winnipeg Family Violence Court, recognition of the important role of specialist prosecutors has been a key element in an improved response to family violence from the justice system. Prosecutors have redefined their concept of a successful prosecution, by focusing on the victim's needs and concerns rather than conviction as the only measure of success.⁴³⁷ Recognition within the prosecution unit that these cases are complex, high priority and require a high level of skill has helped to raise the profile and status of family violence work.⁴³⁸

5.42 The Spanish Government has recently announced its plan to appoint specialist domestic violence prosecutors in all regions and provide specialist courts.⁴³⁹

5.43 In Tasmania, the government's Safe at Home policy was launched in May 2004. Safe at Home involves a range of initiatives and new services designed to protect people experiencing family violence, and emphasises the criminal nature of family violence.⁴⁴⁰ The *Family Violence Act 2004*, which includes new family violence-specific offences, is part of this package of changes. To implement these changes, the government has funded six additional police prosecutor positions to deal only with family violence.⁴⁴¹

5.44 In the ACT, the Family Violence Intervention Program was adopted in 1998 and emphasises an integrated criminal response to family violence. Part of this program involves specialist family violence prosecutors who prosecute most family violence offences and maintain contact with victims until the case is finalised.⁴⁴² The new approach has resulted in an increase of 320% over four years in the number of cases prosecuted that involved a family violence offence, with 86% of cases brought

436 Specialist domestic violence courts are discussed at paras 6.29–6.35.

437 Jane Ursel, "His Sentence is My Freedom": Processing Domestic Violence Cases in the Winnipeg Family Court' in Leslie Tutty and Carolyn Goard (eds) *Reclaiming Self: Issues and Resources for Women Abused by Intimate Partners* (2002) 54; Jane Ursel, 'The Possibilities of Criminal Justice Intervention in Domestic Violence: A Canadian Case Study' (1997) 8 (3) *Current Issues in Criminal Justice* 263, 271–2.

438 Ursel (1997) above n 437, 272.

439 Stewart (2005) above n 420, 22; Amnesty International, *Spain: More than Words: Making Protection and Justice a Reality for Women Victims of Gender Based Violence in the Home*, Stop Violence against Women Report, ER 41/005/2005 (2005) 11.

440 See Department of Justice [Tasmania], *Safe at Home* <www.safeathome.tas.gov.au> at 18 November 2005.

441 Tasmania, *Parliamentary Debates*, House of Assembly, 18 November 2004, Part 2, 31–118 (Judy Jackson, Minister for Justice and Industrial Relations).

442 Office of the Status of Women, *Research into Good-practice Models to Facilitate Access to the Civil and Criminal Justice System by People Experiencing Domestic and Family Violence*, Final Report (2002) 32; Director of Public Prosecutions [ACT], *Annual Report 2004–2005* (2005) 18–19.

before the court resulting in a conviction in 2001–2002.⁴⁴³ The independent evaluation of the program found that the appointment of a specialist prosecutor had been a ‘major success’ in the management of family violence charges.⁴⁴⁴

Victim Support and Assistance

5.45 Another common feature of specialist family violence courts is the provision of support and advice to victims. The role of a support officer is usually to provide information about the legal process, possible outcomes of the process and to refer victims to other support agencies, such as emergency housing.⁴⁴⁵ Support officers also give practical assistance in court by looking after children, watching out for the perpetrator and friends in the waiting area, and sitting with the victim while she or he gives evidence.⁴⁴⁶ Some support schemes are run by non-government organisations, whereas others are part of the prosecution unit.⁴⁴⁷ Specialist courts in many US and Canadian jurisdictions provide support and assistance to victims and witnesses involved in family violence cases.⁴⁴⁸ In Winnipeg, the Women’s Advocacy Program has been described as ‘[t]he most integral and critical feature’ of the specialised family violence court.⁴⁴⁹

5.46 In Tasmania, the Safe at Home program provides three court support officers to assist family violence victims. The support officers are employed by the Victims Assistance Unit and their role is to assist victims, inform them of the court process and accompany them to court when appropriate. The support officers and their clients have an office and separate waiting area within the court.⁴⁵⁰

5.47 The ACT Family Violence Intervention Program also has two witness assistance programs to provide victims with support, information about the court process and referral to other services and agencies that specialise in trauma. Witness assistants employed by the Office of the Director of Public Prosecutions facilitate most

443 Robyn Holder and Nicole Mayo, ‘What Do Women Want? Prosecuting Family Violence in the ACT’ (2003) 15 (1) *Current Issues in Criminal Justice* 5, 10.

444 Keys Young, *Evaluation of the ACT Family Violence Intervention Program Phase II: Final Report* (2001) 63.

445 Stewart (2005) above n 420, 14.

446 Young (2000) above n 415, 71.

447 Holder (2001) above n 167, 16; Emily Sack, *Creating a Domestic Violence Court: Guidelines and Best Practices* (2002) 9.

448 Stewart (2005) above n 420, 20–1; Sack (2002) above n 447, 47–60.

449 Stewart (2005) above n 420, 21.

450 Magistrates’ Court of Tasmania, *Family Violence—General Information* <www.magistratescourt.tas.gov.au/divisions/family_violence> at 22 November 2005.

of the contact between the prosecutor and the victim.⁴⁵¹ The non-government Domestic Violence Crisis Service plays a complementary role in supporting victims and referring them to relevant services in the community.⁴⁵² A review of the first year of the program found that:

Victims and witnesses who have received support ... value this highly and say it has contributed to their feelings of safety, helped strengthen their resolve to see the case through and made giving evidence in court less difficult or traumatic. In a few cases, victims have said that, without the support, they do not believe they would have proceeded with the case.⁴⁵³

5.48 In a review of specialist domestic violence courts in Australia and internationally, Julie Stewart found that:

It appears that, if the position [of victim advocate] is based in a prosecution service, there is ideal unfettered access to information and a higher probability of collaboration and co-operation between the victim advocate/support role and the prosecution, leading to better-informed prosecution in relation to the victim's wishes and needs in relation to safety.⁴⁵⁴

5.49 The Australian Law Reform Commission's report on women's equality before the law found that court support schemes that exist for women who have experienced family violence have been very successful. The commission recommended expansion of existing court support schemes and creation of new schemes in courts where such support does not exist.⁴⁵⁵

PROVIDING ADEQUATE SUPPORT TO VICTIMS AS A STATE RESPONSIBILITY

5.50 International standards have also recognised the need for adequate support to be provided in court to family violence victims. The UN Model Strategies urge all countries to 'encourage and assist women subjected to violence in lodging and following through on formal complaints'.⁴⁵⁶ The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power state:

451 Holder and Munstermann (2002) above n 168, 7.

452 Holder (2001) above n 167, 17; Domestic Violence Crisis Service, *Welcome to the DVCS Website* <www.dvcs.org.au> at 19 December 2005.

453 Young (2000) above n 415, 79.

454 Stewart (2005) above n 420, 15.

455 Law Reform Commission [Australia], *Equality Before the Law: Women's Equality*, Report 69, Part 2 (1994) ch 6.

456 *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) Annex: Model Strategies and Practical Measures on

The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

- (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases ...
- (c) Providing proper assistance to victims throughout the legal process;
- (d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation.⁴⁵⁷

COMMISSION'S RECOMMENDATIONS

Specialist Prosecutors

5.51 The commission believes that a specialist police prosecution unit is essential to ensure prosecutors have sufficient expertise and experience to conduct family violence cases and intervention order applications. As the experience in other jurisdictions indicates, there are many benefits in providing specialist prosecutors for family violence cases. Some of the most important benefits include:

- increased knowledge and skills of prosecutors, leading to better outcomes for victims;
- increased efficiency in processing of cases due to prosecutors' specialist knowledge;
- better quality of case preparation, leading to a higher rate of guilty pleas and convictions. This means that women are not called to testify in as many cases.

5.52 It is essential that staff working in a specialist unit receive adequate recognition and support in their work. As described above, the recognition that family violence work was complex and should be given a high priority was a key reason for the success of a specialised approach to prosecutions in Manitoba.

Assistance for Victims

5.53 Adequate support for victims in the court process is also essential for the successful prosecution of family violence offences. The process of giving evidence can

the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice, para 10(b).

457 *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) para 6.

be highly traumatic, therefore it is essential that the victim has adequate support throughout the court process.

5.54 The commission recommends that a specialist police prosecution unit incorporates support for victims. This may be through the provision of witness assistants or liaison officers, as currently occurs in some suburban courts. The commission also recommends further expansion of support offered in court by non-government organisations. The types of support provided by non-government organisations can be complementary to that offered by assistants from a specialist prosecution unit. Specialist assistants will have greater access to information about the prosecution or application and will provide an important link between the prosecutor and victim. The role of community advocates is distinct from this, and therefore resources should be provided for victim assistants from community organisations as well as within the police prosecution unit.⁴⁵⁸

! RECOMMENDATIONS
<p>23. Victoria Police should establish a specialist family violence prosecution unit to deal with intervention order applications, prosecutions of a breach of an intervention order and criminal charges arising in situations of family violence.</p>
<p>24. A specialist prosecution unit should include the provision of appropriate support and advice to victims and witnesses.</p>

REDUCING POLICE COSTS OF PROSECUTING FAMILY VIOLENCE OFFENCES

5.55 One obstacle facing the police in pursuing family violence charges, including breach of an intervention order, is the cost involved. This includes both the risk of having costs awarded against them in any unsuccessful prosecution, and the costs involved in gathering particular types of evidence to use in a prosecution. For example, police officers have informed the commission that many breaches are committed via telephone harassment, however, the cost of obtaining records from the telephone companies is high. This means that obtaining such records will not always be

458 See recommendations 39–41, 46, 49, 53.

authorised by police supervisors, particularly as a breach of an intervention order is a summary offence.

5.56 Another obstacle is the risk that police face of having a costs order made against them. The magistrate has a complete discretion in all criminal matters to decide whether costs should be made against the unsuccessful party, including the police.⁴⁵⁹ In the case of family violence prosecutions, the risk faced by prosecutors is significant. There is always a chance victims might change their minds about giving evidence. This would result not only in an acquittal, but also in the possibility of an order to pay costs. Given the difficulty in proving many family violence offences, this provision increases the reluctance of police to bring prosecutions, particularly for breaches of intervention orders.⁴⁶⁰

OTHER JURISDICTIONS

5.57 Other Australian states have limited the discretion of a magistrate to award costs against the police in an unsuccessful prosecution. These provisions recognise that police prosecutions are brought in the public interest and that an award of costs can act as a deterrent to bringing cases. In NSW, costs can only be awarded against a public informant if the court is satisfied:

- the investigation into the alleged offence was conducted in an unreasonable or improper manner;
- the proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecutor in an improper manner;
- the prosecutor unreasonably failed to investigate any relevant matter;
- because of other exceptional circumstances relating to the conduct of the proceedings by the prosecutor it is just and reasonable to award costs.⁴⁶¹

5.58 In Queensland, a judge must take into account similar factors to those listed above, as well as factors that relate to the behaviour of the defendant.⁴⁶²

459 *Magistrates' Court Act 1989* s 131. Section 131(2C) provides that any order made against a member of the police force must be made against the Chief Commissioner. Therefore police officers are not personally liable for costs orders.

460 Submission 72 (Victoria Police).

461 *Criminal Procedure Act 1986* (NSW) s 214(1).

462 *Justices Act 1886* (Qld) s 158A(2).

COMMISSION'S RECOMMENDATION

5.59 Given the uncertainty involved in prosecuting family violence offences, including a breach of an intervention order, the commission recommends that magistrates' discretion to award costs against police in these cases should be limited. Magistrates should only be able to award costs against police where the investigation was conducted in an unreasonable or improper manner or the proceedings were initiated without reasonable cause or in bad faith. The commission does not believe it is appropriate to include additional factors that relate to the behaviour of the defendant, as in the Queensland legislation.

! RECOMMENDATIONS

25. Magistrates' discretion to award costs against police for unsuccessful prosecutions for family violence offences, including breaches of an intervention order, should be limited. Magistrates should only be able to award costs against police where the court is satisfied that:
- the investigation into the alleged offence was conducted in an unreasonable or improper manner;
 - the proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecutor in an improper manner.

CIVIL POLICE RESPONSE TO FAMILY VIOLENCE INCIDENTS

5.60 The commission's Consultation Paper identified several barriers that can be created by police officers for women seeking the protection of an intervention order. The new Police Code of Practice has also made significant changes to police use of the intervention order system to provide safety to those experiencing family violence. Some of the problems the code seeks to respond to are:

- police not informing women of the possibility of obtaining an order outside business hours;
- police reluctance to apply for an order outside business hours due to the procedure involved;
- women and children being taken to the police station for their own protection as the police have no power to hold the perpetrator, leaving the perpetrator in the home where property can be destroyed;

- perpetrators leaving the area to avoid service of an intervention order.

5.61 In September 2005, the commission recommended that police should have the power to hold a perpetrator of family violence for a limited period to serve an intervention order.⁴⁶³ Most of the commission's recommendations for a police holding power have since been introduced into the parliament in the Crimes (Family Violence) (Holding Powers) Bill 2005. The Bill provides:

To **serve** an order means to physically handing over court documents, such as an intervention order, to the person named in the document.

- a police officer can direct a person to remain at a place or detain the person where the officer believes it is necessary to ensure the safety of the victim or to preserve any property of the victim;⁴⁶⁴
- the maximum time for a direction to remain or detention is six hours, unless it is extended by a magistrate in exceptional circumstances. The power ends when an interim order is served on the respondent or the officer decides to withdraw the application. If the officer believes that further measures are necessary for the victim's safety once an order has been served, the officer may continue to detain the respondent until the necessary measures are taken;⁴⁶⁵
- the police officer must have reasonable grounds for suspecting that the person is aged 18 years or older before exercising the holding power;⁴⁶⁶
- a person detained may communicate with a friend or relative other than the victim and with a lawyer;⁴⁶⁷
- if the person detained does not have a sufficient knowledge of English to understand the detention, the police officer must arrange access to an interpreter.⁴⁶⁸

An **interim order** is a temporary order, which is issued until a hearing can be conducted to decide whether a final intervention order is made.

5.62 The commission has also considered whether police should have the power to make short-term intervention orders rather than apply to the Magistrates' Court for orders after hours. On balance, the commission believes that it is more appropriate for

463 Victorian Law Reform Commission, *Family Violence Police Holding Powers: Interim Report* (2005).

464 Crimes (Family Violence)(Holding Powers) Bill 2005 s 4(8AB)(b).

465 Crimes (Family Violence)(Holding Powers) Bill 2005 s 4(8AF)–(8AG).

466 Crimes (Family Violence)(Holding Powers) Bill 2005 s 4(8AB)(a).

467 Crimes (Family Violence)(Holding Powers) Bill 2005 s 4(8AE)(2).

468 Crimes (Family Violence)(Holding Powers) Bill 2005 s 4(8AE)(6).

the Magistrates' Court to make intervention orders outside business hours than for police to do so. However, the commission recognises that the possibility of police making their own orders will need to be reconsidered if the Magistrates' Court does not implement an efficient system for making intervention orders after hours. The commission has therefore outlined conditions and procedures that may be appropriate for orders made by police at paragraph 7.20.⁴⁶⁹

POLICE RESPONSE TO PARTICULAR GROUPS

5.63 Despite problems with the police response across all Victorian communities, there are particular groups that face additional barriers to obtaining a satisfactory response from police. The commission has been requested in our terms of reference to pay particular attention to the accessibility of the current system for Indigenous communities; migrant women, particularly recent immigrants; and people with disabilities. The commission has also been informed of particular difficulties experienced by people in same-sex relationships, so this group is also discussed here.

POLICE RESPONSE TO INDIGENOUS AUSTRALIANS

There is a long history of fractured families in Indigenous Australian culture, wrought by the involvement of authorities, including police. The further intervention of authorities in Indigenous Australians' lives today may cause the relationship between Indigenous Australian people and the police to further deteriorate.⁴⁷⁰

5.64 The commission wants to ensure that any changes to police rules and procedures do not further worsen the relationship between Indigenous Australians and the police. During our consultations, the commission heard many problems experienced by Indigenous Australians in the police response to family violence. Many Indigenous victims of violence do not want to involve the police in family violence situations due to previous experiences of police racism.⁴⁷¹ Those who do call the police in a crisis situation sometimes experience long waiting times before the police attend

469 This issue is discussed in detail in Chapter 7.

470 Submission 57 (Victorian Aboriginal Legal Service).

471 Submissions 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)), 75 (National Network of Indigenous Women's Legal Services). Harry Blagg, 'Restorative Justice and Aboriginal Family Violence: Opening a Space for Healing' in Heather Strang and John Braithwaite (eds) *Restorative Justice and Family Violence* (2002) 191, 196; 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) 206, 210. Elizabeth Hoffman House, *From Shame to Pride: Access to Sexual Assault Services for Indigenous People*, Consultation Outcomes, Reports and Recommendations (2004) para 4.2.9.

the incident.⁴⁷² Police can downplay the severity of violence in Indigenous communities, believing it is a part of Indigenous culture and therefore not serious.⁴⁷³

5.65 Victoria Police has acknowledged some of these problems in the Police Code of Practice. The code recognises that family violence is not part of Indigenous cultures, but that the Indigenous population is significantly over-represented as victims and offenders.⁴⁷⁴ The code goes on to state:

Victoria Police acknowledges that the colonisation process, past government policies, the dispossession from land and the consequent loss of social structure and language has led to the breakdown of traditional culture and the displacement of Indigenous Victorians. This has contributed significantly to the over-representation of Indigenous victims and offenders of family violence ... The police response is mindful of these factors and provides to all Victorians a just service that is free from discrimination and culturally sensitive to the specific needs of Indigenous Victorians.⁴⁷⁵

5.66 The code encourages police officers to respond to Indigenous communities by gaining trust and respect through showing fairness and patience, involving respected Indigenous Australians and providing active and ongoing case management.⁴⁷⁶ However, initial training in the code does not deal with Indigenous issues in any detail. The Victoria Police Family Violence Unit has been conducting research on improving the police response to family violence in Indigenous communities, with the findings of extensive consultations to be completed soon.⁴⁷⁷

5.67 Although the Police Code of Practice goes some way to symbolically recognising the problems experienced by Indigenous communities experiencing family violence, much more is needed to significantly improve the police response to these communities. The Victorian Aboriginal Legal Service and the Aboriginal Family Violence Prevention and Legal Service have told the commission that vast improvement in police training on Indigenous issues is needed.

5.68 Another important aspect of improving the police response to family violence in Indigenous communities involves providing some kind of support to the victim of

472 Submission 57 (Victorian Aboriginal Legal Service); Victorian Indigenous Family Violence Taskforce, *Victorian Indigenous Family Violence Taskforce Final Report* (2003) 120.

473 Blagg (2002) above n 471, 191, 196; Victorian Law Reform Commission (2004) above n 8, 189.

474 Victoria Police (2004) above n 401, para 2.5.6.2.

475 Ibid.

476 Ibid.

477 Victoria Police, *Annual Report 2004–2005* (2005) 37.

violence. The Aboriginal Family Violence Prevention Service has suggested that a scheme similar to the Community Justice Panels would be useful, to provide support to Indigenous women who call the police about violence. The commission therefore recommends that the Indigenous Family Violence Partnerships Forum look into how such a scheme could be provided.

! RECOMMENDATION

26. The Indigenous Family Violence Partnerships Forum should consider the possibility of providing an Indigenous victim support scheme that is available to offer support when the police are called to a family violence incident.

POLICE RESPONSE TO MIGRANT COMMUNITIES

5.69 Another group who experience significant obstacles in accessing the legal system to stop family violence are migrant communities, particularly refugees, asylum seekers and others who are from newly arrived communities. Migrants may have problems communicating and accessing basic information on the Australian legal system. The Vietnamese Community in Australia told the commission:

Most [Vietnamese women] are not aware of how the legal system and related services work and how to access it. This is true especially of new brides of Vietnamese males who have settled in Australia. They also have limited knowledge of English and Australian society generally.

5.70 Refugees and asylum seekers have generally had negative experiences with authorities such as the police in their countries of origin.⁴⁷⁸ This may include being abused or tortured by police. These experiences make it even more difficult for these groups to consider calling the police in a crisis situation. Women may also be reliant, or think they are reliant, on their partner's claim to asylum or residency status to remain in Australia.⁴⁷⁹ Therefore, the rates of reporting family violence to the police are low among refugee and asylum seeker communities.

478 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).

479 Ibid 8, submission 70 (Asylum Seeker Resource Centre).

5.71 When migrant women overcome these barriers and contact the police, it is crucial the police response is supportive. Participants from the commission's consultations noted that the police response to family violence in migrant communities is sometimes based on inaccurate stereotypes, such as believing that family violence is part of the culture and does not require a police response. Police often do not understand the barriers that women face in reporting family violence, and the concerns they may have over their residency status as a consequence of reporting violence.

5.72 The Police Code of Practice seeks to address these issues. The code notes that women from CALD communities may see the police as agents for persecution or corruption.⁴⁸⁰ The code states that police should spend time establishing rapport, use interpreters at the earliest opportunity, make referrals to specific CALD services, and that the following issues may be relevant:

- emphasising that women and children have access to financial and other support, such as housing, through the government;
- assisting women to gather important documents, such as residential status papers, temporary protection visas or passports;
- reassuring victims residing on valid temporary protection visas or spousal visas that reporting family violence to police will not affect their current residency status.⁴⁸¹

5.73 While these provisions of the code are important in recognising the particular issues that face victims from migrant communities, sufficient and effective training is essential for these aspects of the code to be implemented. The first round of training on the code deals with these issues in a limited way. Submissions received by the commission emphasised that for women from migrant communities to be supported by the police, further and more in-depth training of police officers is required.⁴⁸² In particular, police need to be trained in the visa and residency implications of reporting family violence. In situations where victims have an asylum claim pending, police should not only refer them to specific support services, but should also refer them to immigration advice.⁴⁸³

480 Victoria Police (2004) above n 401, para 2.5.6.6.

481 Ibid.

482 Submissions 2 (Vietnamese Community in Australia), 64 (Federation of Community Legal Centres (Vic)), 70 (Asylum Seeker Resource Centre).

483 Submission 70 (Asylum Seeker Resource Centre).

POLICE RESPONSE TO PEOPLE WITH DISABILITIES

5.74 People with disabilities, particularly those with a cognitive impairment, face particular difficulties in accessing an effective police response to family violence. Access to information is a problem for people with disabilities.⁴⁸⁴ People with a cognitive impairment may face misconceptions about their credibility and their memory, and therefore not be taken seriously by police.⁴⁸⁵ They may have difficulty explaining what has happened to them to the police and understanding the language used by police and therefore may not receive an adequate response.⁴⁸⁶

5.75 The Police Code of Practice states:

Cases involving a disabled victim may take extra time to investigate because of communication difficulties and victims may experience frustration and distress caused by these difficulties, as well as the trauma of the incident. To ensure they meet the victim's needs, police should engage the services of a support person as soon as possible ... Police must remain patient during their investigation and not make assumptions when assessing evidence and/or weighing up the credibility of the parties involved. If the alleged offender is present, it is also important for police to be cautious of undue influence, power imbalances and/or possible manipulation by this person over the victim.⁴⁸⁷

POLICE RESPONSE TO PEOPLE IN SAME-SEX RELATIONSHIPS

My opinion of the police is the same as most other gay men. I'd never have gone to them in a million years. They treat gay violence as a huge joke.⁴⁸⁸

5.76 While not specifically mentioned for consideration by our terms of reference, it is clear that people in same-sex relationships face additional barriers when seeking a police response to family violence. Victims may be reluctant to involve the police due to not wanting to reveal their sexuality or a fear of being alienated by the gay and

484 Disability Discrimination Legal Service (2003) above n 179, 45–6. This is discussed by the commission at paras 6.106–6.113.

485 Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003) paras 3.29–3.43; Disability Discrimination Legal Service (2003) above n 179, 53, 59.

486 Disability Discrimination Legal Service (2003) above n 179, 56; Kelly Johnson, et al, *Silent Victims, A Study of People with Intellectual Disabilities as Victims of Crime* (1988) 48.

487 Victoria Police (2004) above n 401, para 2.5.6.3.

488 Lee Vickers, 'The Second Closet: Domestic Violence in Lesbian and Gay Relationships: a Western Australian Perspective' (1996) 3(4) *E Law—Murdoch University Electronic Journal of Law*, para 41, <www.murdoch.edu.au/elaw/issues/v3n4/vickers.html> at 31 August 2004.

lesbian community.⁴⁸⁹ They may also distrust police because of previous negative experiences. Those who report violence within a same-sex relationship can be met with scepticism or prejudice by the police.⁴⁹⁰ In Victoria, police have a historically negative relationship with the gay and lesbian community; before the decriminalisation of homosexuality in 1981 police were involved in arresting members of the community. This led to reluctance among gay and lesbian people to report crime committed against them.⁴⁹¹ Victoria Police has sought to address the negative relationship between police and the gay and lesbian community through the establishment of a Gay and Lesbian Liaison Mission and the appointment of 12 Gay and Lesbian Liaison Officers around Victoria.⁴⁹²

5.77 The Police Code of Practice outlines forms of abuse that are unique to same-sex relationships, such as threatening to ‘out’ the victim to family or friends, telling a partner that no-one will help because the police and the justice system are homophobic or relying on sexist stereotypes to portray the violence as mutual or consensual.⁴⁹³ Training in the code includes issues relevant to the gay and lesbian community.⁴⁹⁴

ADEQUATE TRAINING AS A STATE RESPONSIBILITY

5.78 International human rights instruments recognise the importance of adequate training and education of people working in the justice system as a part of every State’s obligation to combat violence against women. The committee in charge of monitoring the implementation of CEDAW has held that ‘gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the convention’.⁴⁹⁵ The Beijing Declaration and Platform for Action provides that governments should ‘take special measures to eliminate violence against women, particularly those in vulnerable situations, such as young women,

489 Lee Vickers, ‘The Second Closet: Domestic Violence in Lesbian and Gay Relationships: A Western Australian Perspective’ (1996) 3 (4) .

490 Ibid; Jude Irwin, ‘Lesbian Domestic Violence: Unseen, Unheard and Discounted’ (Paper presented at the Second Australian Women and Policing Conference, Queensland, 7–9 July 1999) 2.

491 Victoria Police, *Gay and Lesbian Liaison Officers* <www.police.vic.gov.au/content.asp?Document_ID=741> at 18 November 2005.

492 Ibid.

493 Victoria Police (2004) above n 401, para 2.5.6.5.

494 Submission 31 (Lisa Keyte, Senior Constable, Gay and Lesbian Liaison, Victoria Police).

495 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(b).

refugee, displaced and internally displaced women, women with disabilities and women migrant workers'.⁴⁹⁶

COMMISSION'S RECOMMENDATION

5.79 The commission believes it is essential that Victoria Police adopt adequate and ongoing training programs to address the issues outlined. Initial training in the code was not long enough to provide coverage of the issues faced by marginalised communities, and the commission therefore recommends that Victoria Police should offer further training on these issues. The commission also hopes that the work and consultations conducted by the Victoria Police Family Violence Unit on the response to family violence in Indigenous communities will lead to an improved police response in these communities.

! RECOMMENDATION
27. Victoria Police should improve and further develop training in cultural awareness and barriers experienced by particular groups, including Indigenous communities, migrant communities, people in same-sex relationships and people with disabilities.

IMPROVING POLICE INTERVENTION ORDER APPLICATIONS

5.80 We have discussed how the police role in prosecuting crimes of family violence can be improved. In this section we consider improvements to the police role in applying for civil intervention orders. The Crimes (Family Violence) Act provides that a complaint for an intervention order may be made by a member of the police force or aggrieved family members themselves.⁴⁹⁷ However, a constant theme of the commission's consultations and the submissions received was that police do not apply for orders often enough.

A **complaint** is a formal accusation of a crime.

5.81 The Consultation Paper outlined the problems that exist with the police role in court, such as:

496 United Nations, *Report of the Fourth World Conference on Women*, UN Doc A/CONF.177/20 (1995) Annex: Beijing Declaration and Platform for Action, para 127(d).

497 *Crimes (Family Violence) Act 1987* s 7(1).

- police not taking an active role in bringing intervention order applications to court;
- police being reluctant to apply for orders and suggesting to victims that it is easy for them to make an application on their own;
- police not attending court to give evidence when they attended the scene of a family violence incident;
- police not being able to apply for variations to an intervention order if they did not apply for the original order.

POLICE APPLICATIONS FOR INTERVENTION ORDERS

5.82 The Act leaves a wide discretion to police in deciding whether to apply for an order, however, police have an obligation to apply in some situations under the Police Code. Under the Code, police must apply for an intervention order wherever the safety, welfare or property of a family member appears to be endangered by another, or a criminal offence is involved.⁴⁹⁸ If a police officer decides not to apply for an order, he or she must record the reasons why.⁴⁹⁹

5.83 The code has led to a significant increase in police applications for orders. In the financial year 2004–05, when the code had been partially implemented, the proportion of applications made by police was 35% of all orders made to the court.⁵⁰⁰ In the financial year 2000–01 only 10% of applications were brought by police.⁵⁰¹

OTHER JURISDICTIONS

5.84 A legislative obligation to apply for an intervention order on behalf of a family member affected by violence exists in NSW and Queensland. In NSW, police must apply for an order where they suspect or believe that a family violence, stalking or intimidation, or child abuse offence has recently been committed, is imminent or is likely to be committed against a family member.⁵⁰² If officers do not make an

498 Victoria Police (2004) above n 401, para 5.3.2.

499 Ibid para 5.3.3.

500 Submission 86 (Magistrates' Court of Victoria).

501 Ibid.

502 *Crimes Act 1900* (NSW) s 562C(3). A police officer need not make the application if the person in need of protection is aged over 16 years and intends to make an application and if the officer believes there is good reason not to make the complaint.

application they must record their reasons in writing.⁵⁰³ Over 70% of intervention order applications are brought by police in NSW.⁵⁰⁴

5.85 In Western Australia, police must investigate when they reasonably suspect that a person is committing or has committed an act of family violence which is a criminal offence, or has put another person's safety at risk. Where police have conducted such an investigation they must apply for an order, make a police order or record their reasons for failing to do so.⁵⁰⁵

VIEWS FROM SUBMISSIONS

5.86 Most submissions received by the commission supported a more active role for police in applying for intervention orders. Some supported the provisions of the new code and others made further suggestions to strengthen the police role.⁵⁰⁶ One submission from a woman who has experienced family violence stated:

I believe the police need to be more proactive in assessing family violence situations and applying for intervention orders where applicable. Amidst the turmoil surrounding the need to ask for help, persons in the justice system need to take the initiative and ask the right questions, take a little more control over the judicial process where appropriate and show tangible support for the abused and traumatized person.⁵⁰⁷

5.87 Submissions in favour of a more active police role noted that a police application:

- increases the likelihood of an order being made;⁵⁰⁸
- lessens the burden on the victim, especially in relation to questioning the perpetrator;⁵⁰⁹

503 *Crimes Act 1900* (NSW) s 562C(3A).

504 New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report 103 (2003) 128.

505 *Restraining Orders Act 1997* (WA) ss 62A–62C.

506 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), 40 (Whittlesea Domestic Violence Network), 44 (Anonymous), 46 (Royal Children's Hospital), 49 (Domestic Violence and Incest Resource Centre), 64 (Federation of Community Legal Centres), 74 (Women's Legal Service Victoria).

507 Submission 44 (Anonymous).

508 The Federation of Community Legal Centres pointed out that the chances of an order being made are only increased when the aggrieved family member turns up to court and wants the order. The Magistrates' Court informed the commission that approximately 61% of police applications are successful in obtaining an intervention order compared to approximately 49% of applications brought by non-police.

509 Submission 14 (Anonymous), 64 (Federation of Community Legal Centres).

- sends a message to the community and the perpetrator that family violence is unacceptable;⁵¹⁰
- provides protection through the physical presence of police in court;⁵¹¹
- can deflect blame from the victim where the application is seen as a police matter and out of the victim's hands;⁵¹²
- increases the likelihood that a woman will pursue an application when supported by the police.⁵¹³

5.88 Some submissions noted that the Police Code of Practice will not be enough to ensure a more active role for police in intervention order applications. The Women's Legal Service Victoria noted a lack of resources available for police prosecutions, which is leading to problems in implementing the new code. The Werribee Legal Service suggested that funding needs to be made available for specialist police prosecutors to bring family violence matters and pointed out the lack of recognition within the police force for prosecuting intervention order complaints.⁵¹⁴

5.89 Some submissions did not support a more active role for police in bringing intervention order applications, or saw disadvantages to a more active police role.⁵¹⁵ These submissions noted:

- If most applications are brought by police then magistrates may think that those brought by individuals are not serious, as the police have decided not to bring an application. It is important that women can apply without needing to contact police.⁵¹⁶
- Police may be reluctant to address what they see as family law issues in an application, such as child contact. If child contact is not addressed in the

510 Submissions 8 (Werribee Legal Service), 33 (Women's Domestic Violence Crisis Service), 40 (Whittlesea Domestic Violence Network).

511 Submission 8 (Werribee Legal Service).

512 Submission 27 (Robinson House BBWR).

513 Submissions 14 (Anonymous), 22 (Kim Robinson, social worker).

514 The need for a specialist police prosecution unit with adequate recognition for prosecutors involved is addressed at paras 5.51–5.54; Recommendations 23, 24.

515 Submissions 41 (Victoria Legal Aid), 57 (Victorian Aboriginal Legal Service), 64 (Federation of Community Legal Centres (Vic)), 72 (Victoria Police), 74 (Women's Legal Service Victoria).

516 Submission 64 (Federation of Community Legal Centres (Vic)). Submissions in favour of a more active police role also mentioned the need to ensure that individuals can still access the system without police: 8 (Werribee Legal Service), 49 (Domestic Violence and Incest Resource Centre), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)).

application, the intervention order may be incomplete and expose the woman to violence.⁵¹⁷

- Indigenous Australians may be reluctant to seek assistance for family violence if most applications are brought by police. They may feel the process is out of their control.⁵¹⁸
- The current obligation under the code places an unrealistic workload on police. Inconsistent practices are therefore emerging, which lessens the impact of the code.⁵¹⁹

5.90 The Victoria Police submission supported the obligation contained in the code but was opposed to entrenching this in legislation. Victoria Police believes that legislating to increase police-initiated intervention would reduce the ability of police to continually improve best practice. The submission noted that family violence involves diverse circumstances and a legislative obligation may not be able to accommodate all of these situations. Victoria Police also believes:

legislation that details specific circumstances for when police should apply for an intervention order has the risk that police members will then only apply for an order in those prescribed circumstances while other circumstances not detailed in the legislation but worthy of concern are overlooked.

COMMISSION'S VIEW

5.91 The commission believes that the above concerns with police applications need to be addressed. If the system is going to be flexible and responsive to victims' needs, it is essential that victims can apply for an intervention order without involving the police. This needs to be supported by the provision of independent legal advice and representation to people affected by family violence.⁵²⁰ Legal advice and representation for victims will also allow their legal representative to deal with child contact and other matters that police see as family law issues if an application is brought by police. Where the application is contested, the application can be brought by the police prosecutor and the victim's lawyer can negotiate the conditions of the order about child contact.

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

518 Submissions 57 (Victorian Aboriginal Legal Service), 72 (Victoria Police).

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

520 See paras 6.42–6.70.

5.92 The commission agrees that a system where police apply for more intervention orders must not increase the obstacles already faced by Indigenous Australians in accessing the legal system. The commission recommends that the Indigenous Family Violence Partnerships Forum investigate the possibility of establishing a support service for Indigenous victims of violence which would respond when the police are called to family violence incidents.⁵²¹ The commission also recommends increased provision of Indigenous-specific support services in court to enable Indigenous Australians to apply for an intervention order without police involvement.

5.93 The commission believes that a police obligation to apply for an order wherever the safety, welfare or property of a family member may be at risk is a standard that is broad enough to include a range of circumstances. The commission therefore supports this obligation being included in the Police Code of Practice. The commission encourages Victoria Police to continue with the implementation and monitoring of this aspect of the code. The commission believes that with effective implementation of the code, the addition of a legislative obligation is not yet appropriate.

POLICE APPLICATIONS WITHOUT THE VICTIM'S CONSENT

The police officer was excellent. [He said] 'I'm going to take a [restraint order] out for you, whether you want one or not.' He didn't give me any choice, which was good because I probably would have said no ... Sometimes you are so stressed out and upset that you can't make decisions for yourself ... if he'd said to me, it's up to you, I probably would have said no, because he'll come and bash me again.⁵²²

5.94 While most submissions supported a more active role for police in intervention order applications, there were mixed views on the appropriate role of police where the victim does not want an application to be made. The code states that the provisions on police making applications 'may mean making an application without the agreement of the aggrieved family member who may be fearful of the consequences of initiating such action'.⁵²³ We have discussed a crisis response at paras 3.57–3.62.

521 See Recommendation 26.

522 Patton (2003) above n 94, 56.

523 Victoria Police (2004) above n 401, para 5.3.2.

VIEWS FROM SUBMISSIONS

5.95 Most submissions that addressed this issue supported police applying for an intervention order without the consent of victims.⁵²⁴ In an emergency situation, submissions supported the position in the code that the safety of victims must take priority.⁵²⁵ Submissions noted that victims in a crisis situation may find it difficult to objectively judge how dangerous the situation is. They may also be fearful of the consequences of applying for an intervention order against their partner. If the decision is taken out of their hands through a police application, this may relieve some of the guilt or pressure placed on them to withdraw by the perpetrator. Police should have an obligation to take action as it is in the community's interest to prevent violence.⁵²⁶ One submission from a woman who had experienced family violence stated:

I was glad the police put on a protection order for me in Queensland. I was in a state of confusion and suffering. I wanted to do the same but was unable to find the courage, being frozen by fear of retaliation if I did take out an order myself ... Somehow I held hope that things could be turned around and would work out. I know now that was not so. I am grateful for the action taken by the police as I might not be here today and my children would have witnessed more stressful and abusive situations.⁵²⁷

5.96 Submissions in favour of police applications without the consent of the victim proposed various changes to the current system. Robinson House and the Aboriginal Family Violence Prevention and Legal Service suggested that a police application without consent should only be allowed at the interim stage. In this case, victims will have up to two weeks after the time of crisis to consider the situation and decide whether they wish to proceed with a final order. Most police applications are only made at the interim stage, however, under the code the police may make an application for a final order without the consent of the victim. Other submissions suggested that the police should give more weight to the safety of any children involved when deciding whether to make an application without consent.⁵²⁸

524 Submissions 22 (Kim Robinson, social worker), 27 (Robinson House BBWR), 33 (Women's Domestic Violence Crisis Service), 49 (Domestic Violence and Incest Resource Centre), 55 (Crime and Misconduct Commission Queensland), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)).

525 Submissions 49 (Domestic Violence and Incest Resource Centre), 54 (Andrew Compton), 63 (Darebin Family Violence Working Group).

526 Submission 22 (Kim Robinson, Social Worker), 54 (Andrew Compton).

527 Submission 14 (Anonymous).

528 Submission 22 (Kim Robinson, social worker), 46 (Royal Children's Hospital).

5.97 Submissions opposed to applications without victims' consent noted that adults should be able to make their own decisions about what is right for them⁵²⁹ and that a legal response is not the only avenue for addressing family violence.⁵³⁰ Victims may want police to defuse the situation without taking further action.⁵³¹ Victoria Legal Aid noted that orders without the victim's consent increase the likelihood of consensual breaches of the order, creating problems of enforcement for police. Others noted that police applications for intervention orders without the victim's consent may increase people's reluctance to involve the police in a family violence situation at all.⁵³²

COMMISSION'S RECOMMENDATIONS

5.98 The commission believes these concerns can be addressed by limiting the police power to apply against the victim's wishes to interim intervention orders only. These orders last for a limited time, thereby providing short-term protection to those at risk of family violence. Once the police have been involved in a family violence incident, they have an obligation to refer victims to appropriate support services.⁵³³ These services will be able to assist the victim with the final application process. However, the commission believes it is appropriate for the police to take the immediate decision of whether to apply for an order out of the victim's hands in a crisis situation. This is consistent with our view on the appropriate response to family violence in a crisis situation compared to the medium- and long-term response.⁵³⁴

5.99 A woman may call the police hoping they will only intervene to defuse the crisis and may not expect or understand that they may apply for an intervention order on her behalf. However, as agents of the State, the police have a responsibility to protect the safety of individuals. It is therefore appropriate that they can take action in a crisis to protect people at risk of family violence. In the case of Indigenous victims of violence, police have the same responsibility to protect people at risk. With the provision of culturally sensitive support to the victims, the police can take appropriate action to ensure safety and protection for those involved.⁵³⁵ The commission does not believe that the ability of police to apply for interim orders without the victim's consent will increase reluctance to involve the police in a family violence situation.

529 Submission 41 (Victoria Legal Aid).

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

531 Submission 65 (Associate Professor John Willis, La Trobe University).

532 Ibid.

533 Victoria Police (2004) above n 401, para 3.1.

534 See paras 3.57–3.66.

535 See recommendations 46, 49, 53

Most victims of family violence call the police because they are in crisis and need protection, and are not necessarily considering the legal consequences of their actions.⁵³⁶

5.100 The commission recommends that the current position in the Police Code of Practice be included in the Act so that the police role in applications without consent is clarified.

! RECOMMENDATIONS
<p>28. Police should be able to apply for an interim intervention order regardless of the protected person's wishes.</p> <p>29. Police should not be able to apply for a final order without the consent of the protected person unless the person is a child or has a cognitive impairment.</p>

POLICE PROVISION OF EVIDENCE IN INTERVENTION ORDER PROCEEDINGS

5.101 The commission's Consultation Paper discussed problems experienced with police evidence in intervention order proceedings. Police officers who attend family violence incidents often do not provide sufficient information on the application form for an order to be granted and do not attend court to give evidence in person. Consultation participants said that in their experience this reduces the chance of an order being made. The Police Code of Practice states that the police officer initiating the application should attend court 'only if required by the court or prosecutor'.⁵³⁷

VIEWS FROM SUBMISSIONS

5.102 Submissions received by the commission noted that the standard in the code is a reduction in the police obligation to attend court, and has led to fewer attending to give evidence.⁵³⁸ If the police informant does not attend court, relevant information may not be put before the

A **police informant** is the police officer in charge of the investigation.

⁵³⁶ Hanna (1996) above n 395, 1897.

⁵³⁷ Victoria Police (2004) above n 401, para 5.5.1.

⁵³⁸ Submissions 64 (Federation of Community Legal Centres (Vic)), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)), 74 (Women's Legal Service Victoria).

court as written police statements are often incomplete or inaccurate.⁵³⁹

COMMISSION'S VIEW

5.103 The commission understands that it is difficult for police officers to attend every hearing for an intervention order where they attended the incident. For example, officers will generally have worked the night shift before the court case is heard and it is difficult to re-arrange staffing to cover frequent court appearances. However, if an application is contested and the police officer has important evidence to give orally, then he or she should attend court. The commission understands that amendments are being made to the code to outline the obligations of police to provide sufficient evidence to the prosecutor and to attend court where necessary. The commission recommends a specialist family violence prosecution unit which will assist in ensuring that all relevant evidence is before the court, including oral evidence of attending officers where necessary.⁵⁴⁰

POLICE APPLICATIONS FOR VARIATIONS/REVOCATIONS OF ORDERS

5.104 Under the Crimes (Family Violence) Act, the respondent or the applicant can apply to have an intervention order varied or revoked.⁵⁴¹ If the police did not apply for the original order, they cannot apply to vary or revoke the order. If police could apply for variations to an intervention order the victim would not need to return to court.

A **revocation** of an intervention order is its cancellation and a **variation** occurs when the court approves an application by one or all of the parties to change the terms of the order.

OTHER JURISDICTIONS

5.105 In South Australia and Tasmania police can apply for a variation or revocation of an intervention order where they were not the original applicant.⁵⁴² In Queensland, police can apply for a variation or revocation if they 'reasonably believe that it is for the benefit of the aggrieved [person] and there is sufficient reason for taking the action'.⁵⁴³ In NSW police can only apply for a variation where they were the original

539 Submissions 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)), 74 (Women's Legal Service Victoria).

540 See Recommendations 23, 24.

541 *Crimes (Family Violence) Act 1987* s 16. If the protected person is a child, the child's parent who provided consent to the initial application can also apply for the order to be revoked or varied.

542 *Domestic Violence Act 1994* (SA) s 12(1); *Family Violence Act 2004* (Tas) s 20.

543 *Domestic and Family Violence Protection Act 1989* (Qld) s 51(2)(d).

applicant.⁵⁴⁴ However, the New South Wales Law Reform Commission has recommended that this provision be changed to allow police to apply for a variation or revocation in any case.⁵⁴⁵

VIEWS FROM SUBMISSIONS

5.106 All the submissions received by the commission that addressed this issue supported allowing police to apply for variations to an intervention order where they were not the original applicant, except for the Magistrates' Court.⁵⁴⁶ The Whittlesea Domestic Violence Network noted:

women should not have to feel more threatened in a bullying environment and there should be an environment of minimising the violence or pressure put on them by the perpetrator.

5.107 Victoria Police noted this power would be particularly useful where police have been called to premises where there is an intervention order and they have identified that a change may be required to offer appropriate protection. In this situation, neither party may be willing or able to make the application themselves. The Magistrates' Court thought that allowing police to apply for variations 'appears to be placing generalist police in the role of family violence legal adviser or family violence worker'.

5.108 Most submissions supported police applications for variations only where the protected person has consented to the change.⁵⁴⁷

COMMISSION'S RECOMMENDATION

5.109 The commission also believes that it is not appropriate for police to apply for variations to an intervention order where the protected person does not want the change made. Once an intervention order has been made, the system must show respect for the choices of people who are protected by it.

544 *Crimes Act 1900* (NSW) s 562F(1)(b).

545 New South Wales Law Reform Commission (2003) above n 504, 188.

546 Submissions 14 (Anonymous), 27 (Robinson House BBWR), 30 (Violence Against Women Integrated Services), 40 (Whittlesea Domestic Violence Network), 41 (Victoria Legal Aid), 44 (Anonymous), 46 (Royal Children's Hospital), 49 (Domestic Violence and Incest Resource Centre), 51 (Villamanta Legal Service), 54 (Andrew Compton), 63 (Darebin Family Violence Working Group), 64 (Federation of Community Legal Centres (Vic)), 72 (Victoria Police), 74 (Women's Legal Service Victoria).

547 Submissions 41 (Victoria Legal Aid), 46 (Royal Children's Hospital), 49 (Domestic Violence and Incest Resource Centre), 51 (Villamanta Legal Service), 63 (Darebin Family Violence Working Group), 64 (Federation of Community Legal Centres (Vic)), 74 (Women's Legal Service Victoria), 86 (Magistrates' Court of Victoria).

5.110 However, where victims want a change to be made to an order, a police application may take the responsibility away from them and reduce the chance of them being threatened or harassed as a result of the application. If police apply for variations, it may increase the chances of victims making changes to an order to make it more suitable for new circumstances, and therefore offer more appropriate protection.

5.111 For example, a woman may have an intervention order that allows her husband to have contact with the children. If the details of this arrangement are exposing the woman to further acts of violence, it would be useful for the police to be able to apply for a change in the contact arrangements on the order. For example, the police could apply to have the handover point for contact changed from the woman's home to a public place.

5.112 The commission therefore recommends that police be allowed to apply for variations or revocations, with the victim's consent. It is important that police clearly explain the consequences of any variation or revocation to victims, so they can make an informed decision about whether they want a change to be made.



RECOMMENDATION

30. Police should be able to apply for a variation or revocation of an order, including where the police were not the original applicants. Police should obtain the consent of the protected person before making such an application, and in doing so, should clearly explain the consequences of any variation or revocation.

5.113 In this section, we have outlined changes needed to improve the civil police response to family violence. In the next section, we address the police role when an order is breached. An intervention order is a civil order, however, the consequences of breaching an order are criminal. Therefore, it is up to the police to enforce the conditions of intervention orders and respond when they are breached.

POLICE ROLE IN ENFORCING BREACHES OF INTERVENTION ORDERS

When I finally got a permanent intervention order, my ex-partner broke it within two months, but absolutely nothing was done about this. I even had a witness to the fact that he breached the order ... Still nothing was done about it, and it just made me feel like the process was empowering him again and that I would have to look over my shoulder for the rest of my life ... Basically the intervention order meant nothing, and it showed me he could do anything he liked, and no one would do anything about it. I think that if breaches of an order were prosecuted, then an intervention order would be a good thing. [The lack of police response to] his breach of an intervention order only served to empower him at the very start of the process, and condone his behaviour.⁵⁴⁸

He [breached the intervention order] four or five times. Police said to him if you come again you'll end up in jail. That's all that stopped his fun and games.⁵⁴⁹

5.114 A breach of an intervention order must be responded to adequately by police, otherwise the intervention order system is worthless.⁵⁵⁰ The Consultation Paper outlined many problems with the police response to breaches of intervention orders. The only avenue for enforcing an intervention order is through the police, and therefore the police response to breaches of orders is critical to the level of protection experienced by victims. When police do not respond appropriately to breaches of intervention orders it undermines the whole intervention order system. An intervention order is an order of the court and not, as it is sometimes treated, a contract between private individuals. A submission from Robinson House, a woman's refuge, stated:

The law is only as good as the enforcers, and ultimately the offenders and protected person's ability to keep the IO. However it starts with the police. Somehow IO's have to become more than a piece of paper to ignore—it has to *become acknowledged as law, and be enforced*. [emphasis in original]

5.115 The Consultation Paper noted that many of the people consulted by the commission had negative experiences with the police response when a breach of an order occurred. For example, police can be particularly reluctant to take action on breaches against Indigenous or migrant women, due to a mistaken belief that violence is part of their culture. Police may not take action on a breach because the perpetrator

548 Interview with Kate, 21 April 2005.

549 Women's Health Goulburn North East, *A Powerful Journey: A Research Report: Women Reflect on What Helped Them Leave* (2004) 17.

550 The commission discusses the court's response to breaches at paras 10.67–10.98.

claims the victim consented to it. They also may not take action due to a fear of having costs awarded against them if the prosecution is unsuccessful.⁵⁵¹ A police perception that a breach not involving physical violence is not serious also appears to be widespread. The Women's Electoral Lobby of Victoria commented on the effects of these police attitudes:

Clearly the police and courts must take breaches very seriously. No more 'wait until he does something'. A breach is a breach is a breach. It breaks the law, whether or not the applicant condones it. The only way intervention orders can act as any kind of deterrent to further violence is if it [sic] is adhered to. The person in breach must at the very least be prosecuted in court and be put in fear of this happening again ... The reactions of some police to breaches seem also not to have changed much since 1992.

5.116 During the commission's consultations, the variation in police response to breaches was raised as a common problem. If a victim had been severely assaulted, was articulate, was not affected by alcohol or drugs, was not a repeat complainant and showed 'appropriate' emotions such as fear and distress as opposed to anger, then the police response was more likely to have been positive. If, however, the victim was known to the police and had made repeat complaints, and particularly if complaints had been withdrawn in the past, police were less likely to respond, provide any assistance, or charge the alleged perpetrator.

A **complainant** is the person who applies for an intervention order on their own behalf or on behalf of another person.

5.117 The Police Code of Practice has introduced significant changes to the way police must respond to breaches of intervention orders. In particular, it states:

- there is no such lawful term as 'technical' or 'minor' breach and any breach will be treated the same;⁵⁵²
- decisions to prosecute are based on the evidence gathered and not a subjective assessment by the responding police about the seriousness of the breach—a police supervisor will decide if there is enough evidence to justify prosecution;⁵⁵³

551 The commission recommends that the circumstances where costs can be awarded against police in family violence prosecutions should be limited: see Recommendation 25.

552 Victoria Police (2004) above n 401, para 4.6.1.

553 Ibid para 4.6.3.1.

- consent is never a defence to a breach of an intervention order—police should be cautious in pursuing any offence of aid and abet in relation to breaches.⁵⁵⁴

5.118 Submissions received by the commission were supportive of these new provisions in the code for dealing with breaches.⁵⁵⁵ Anecdotal evidence suggests that charges of breach of an intervention order are being brought more often since the implementation of the code. Submissions noted the need for monitoring the implementation of the code, to ensure it continues to improve the police response to breaches in practice.⁵⁵⁶ Some submissions also had further suggestions for improvements to the system, as outlined below.

CASE COORDINATION AND SUPPORT FOR VICTIMS OF MULTIPLE BREACHES

5.119 An important issue that has been raised with the commission is the police response where a perpetrator has breached an intervention order on many occasions. The Domestic Violence and Incest Resource Centre and the Department of Human Services have suggested that a case coordination role could involve the police in monitoring these situations. The centre told the commission:

The Statewide Steering Committee to Reduce Family Violence proposal for system reform and the development of an integrated response will allow for better case coordination by family violence services if the applicant requests it. This support for applicants can be considered as a way of monitoring the respondent's compliance with the IO, without unnecessary state intervention. It is also a way of acknowledgement and respecting the woman's right to agency in the process.

5.120 The Department of Human Services noted:

in instances of repeated attendances by the police it would be appropriate for the Police Family Violence Liaison Officer to have periodic contact with the protected person to ensure that compliance with the intervention order was occurring.

5.121 The commission therefore recommends a system whereby victims are given periodic contact with a Family Violence Liaison Officer or other 'case coordination', to check on their safety and any further breaches. Such case coordination fits with the

554 Ibid para 4.6.3.4. The way that police deal with breaches that have occurred with the consent of the protected person is discussed at paras 5.125–5.129.

555 Submissions 17 (Police Association), 30 (Violence Against Women Integrated Services), 49 (Domestic Violence and Incest Resource Centre), 64 (Federation of Community Legal Centres (Vic)), 72 (Victoria Police), 74 (Women's Legal Service Victoria).

556 Submission 27 (Robinson House BBWR), 30 (Violence Against Women Integrated Services), 64 (Federation of Community Legal Centres (Vic)).

Statewide Steering Committee's suggestion for an integrated response to family violence.⁵⁵⁷

5.122 A more attentive response to breaches, particularly situations of multiple breaches, would be welcomed by many victims. However, the commission also believes that it should be at the victims' discretion whether they want such assistance and support.

! RECOMMENDATIONS

31. A case management program for victims of multiple breaches should be established by Victoria Police to monitor the safety of the victim and behaviour of the offender.

32. A victim of multiple breaches should be given a choice whether or not to accept support through a case management program and may choose to terminate participation in the program at any time.

ACTION ON BREACHES WITHOUT VICTIMS' CONSENT

5.123 The Police Code of Practice states:

where a criminal offence is involved [including breach of an order], police will pursue criminal options and prepare a brief of evidence, even if the victim is reluctant for charges to be pursued.⁵⁵⁸

If the victim is reluctant to participate, a case conference will be initiated to provide support and involvement in the decision making.⁵⁵⁹

5.124 Submissions generally supported the approach of the code where the victim is reluctant for charges to be brought.⁵⁶⁰ Submissions emphasised the need to place the

557 See 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).

558 Victoria Police (2004) above n 401, para 4.3.2.

559 The case conferencing system is outlined at paras 5.31–5.32.

560 Submissions 49 (Domestic Violence and Incest Resource Centre), 64 (Federation of Community Legal Centres (Vic)), 72 (Victoria Police), 74 (Women's Legal Service Victoria).

onus for prosecuting breaches on the police rather than the victim.⁵⁶¹ A similar case conferencing system introduced in the ACT has significantly increased the number of prosecutions that proceed with the victim's cooperation.⁵⁶² As mentioned above, the commission supports the Police Code of Practice system for dealing with situations where the victim is reluctant to lay breach charges, and urges police supervisors to strictly follow these provisions in the code.

BREACHES WITH THE VICTIM'S CONSENT

5.125 The Consultation Paper outlined inconsistent police responses to breaches of intervention orders where the protected person encouraged or consented to the perpetrator's behaviour, such as inviting the perpetrator to the home. Police may take no action in this situation, or they may charge both people—the perpetrator with breaching the order and the protected person with aiding and abetting the breach. In the past, police have often treated the perpetrator's claim that the victim invited or somehow encouraged the breach as a sufficient reason for not pursuing a charge.

5.126 The Police Code of Practice addresses the issue of consent in the following way:

Consent is never a defence to a breach of an intervention order. However defendants often raise this to counter their alleged actions in breaching the order. No person protected by an order can authorise a breach of the Magistrate's order. Any claim the defendant makes of having consent from the aggrieved family member to breach the order is not a valid reason by itself to authorise non-prosecution. Where a breach of an intervention order appears to be with agreement of the protected person, police must advise the protected person of the procedures to vary or revoke the order.⁵⁶³

OTHER JURISDICTIONS

5.127 No Australian jurisdiction allows for a defence of consent to a breach of an intervention order charge. Western Australia did allow this defence until 2004, when the *Restraining Orders Act 1997* was amended to abolish it.⁵⁶⁴ This change was made in recognition that an intervention order is an order of the court—not a contract

561 Submissions 54 (Andrew Compton), 55 (Crime and Misconduct Commission Queensland), 72 (Victoria Police).

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

563 Victoria Police (2004) above n 401, para 4.6.3.4.

564 *Restraining Orders Act 1997* (WA). Section 62 previously contained a defence of consent to breach of a restraining order.

between the parties that they can amend themselves. It also recognised the potential for consent to be obtained by coercion and that a defence of consent is therefore inappropriate.⁵⁶⁵

COMMISSION'S VIEW

5.128 The commission supports the position contained in the Police Code of Practice, including the need to inform protected people about the way to vary or revoke an order if necessary. The commission believes breaches with genuine consent will occur less frequently through the provision of adequate legal advice and information to both parties, support in court, tailored conditions on intervention orders, and changes to the procedure for varying and revoking orders.⁵⁶⁶ According to Recommendation 30, police should be able to make an application to vary any conditions on the order that are no longer appropriate, with the protected person's consent.

5.129 Police have an important role to play in giving protected people and perpetrators clear instructions about their obligations. Police must make it clear to perpetrators, both when they serve the order and in any subsequent contact, that the order is an order of the court; a protected person cannot authorise any breaches of the order; and all breaches by the perpetrator will be treated as a criminal offence. Magistrates must also make it clear to both perpetrators and protected people that a breach cannot be authorised by the protected person.⁵⁶⁷

AIDING AND ABETTING BREACH OF AN INTERVENTION ORDER

5.130 If the police believe that a breach of an intervention order has occurred with the protected person's consent, they may threaten to, or actually, charge the protected person with aiding and abetting the breach. The Police Code of Practice contains some guidance on the appropriateness of police laying charges in this situation:

565 Department of Justice [Western Australia] *Report on a Review of Legislation Relating to Domestic Violence*, Final Report (2004) 31.

566 See recommendations 30, 39–47, 49–53, 107, 123–124.

567 This was also the view of submissions 25 (Barbara Roberts), 30 (Violence Against Women Integrated Services), 54 (Andrew Compton).

The aim of this Code of Practice is to ensure that the victim is not re-victimised through the justice system. To this end, police should be cautious in pursuing any offence of aid and abet in relation to breaches and not alienating the aggrieved family member. Any charge of aid and abet of a breach of an intervention order must be authorised by the FVLO [Family Violence Liaison Officer] in consultation with the Victoria Police Family Violence Unit.⁵⁶⁸

VIEWS FROM SUBMISSIONS

5.131 Submissions that addressed the issue of aiding and abetting were mixed. Two submissions supported charges of aiding and abetting against the protected person, because an order is an order of the court and must be respected by all parties.⁵⁶⁹ Other submissions believed that charges of aiding and abetting against the protected person are inappropriate, as the order is made against the perpetrator, not the protected person.⁵⁷⁰ The Magistrates' Court noted it may be of benefit to specifically exclude charges of aiding and abetting a breach of an intervention order under the Act, to ensure that these provisions are not misused. The submission from Violence Against Women Integrated Services stated that:

Police and magistrates should be reminded of the purpose of the intervention order. The restriction is placed on the perpetrator of violence in order to protect the protected person. It is the perpetrator's behaviour that has given rise to the order resulting in his behaviour being restricted by a court order, not the behaviour of the protected person. Charging protected persons with aiding and abetting a breach of an intervention order shifts the responsibility for the perpetrator's behaviour (the breach) to the protected person ... It is his responsibility to comply with the order against him, not the responsibility of the protected person (the victim).

5.132 The Darebin Family Violence Workers Group also pointed out that 'the threat of being charged with breaching one's own intervention order is a technique often used by perpetrators of family violence to stop the protected person from reporting the breach of the order'. This tactic would not work if the police could not charge with aiding and abetting, and information was distributed to protected persons to inform them of this. The Women's Legal Service Victoria also told us that 'in our experience,

568 Victoria Police (2004) above n 401, para 4.6.3.4.

569 Submissions 12 (Sergeant Paul Evans, Victoria Police), 27 (Robinson House BBWR).

570 Submissions 30 (Violence Against Women Integrated Services), 64 (Federation of Community Legal Centres (Vic)), 72 (Victoria Police), 74 (Women's Legal Service Victoria), 86 (Magistrate's Court of Victoria).

threatening to charge and actually charging protected people ... is generally an expression of frustration on the part of police that does not properly account for the dynamics of family violence and gives insufficient weight to the police's role as protectors and not just law enforcers⁷.

OTHER JURISDICTIONS

5.133 The New South Wales Law Reform Commission has recently recommended that the offence of aiding and abetting should not apply to the person for whose benefit an intervention order is made.⁵⁷¹ A charge of aid and abet may be applicable to people other than the protected person, but this option should not be available against protected people.

COMMISSION'S RECOMMENDATION

5.134 The commission also believes that charges of aiding and abetting against the protected person are inappropriate, for the reasons outlined. An intervention order is made to restrain the behaviour of the perpetrator, and the perpetrator must be made aware that the protected person cannot authorise a breach of the order. The commission recommends that the crime of aid and abet under the Crimes Act should not be applicable to a person protected by a family violence intervention order. If police believe a protected person has consented to the breach, they must explain to that person the procedure for varying or revoking an order. Police could also offer to apply for a variation or revocation on behalf of the protected person, to assist with future compliance and to stop the victim having to attend court again.⁵⁷²

! RECOMMENDATION

33. The new Family Violence Act should provide that a person protected by an intervention order cannot be prosecuted for aiding and abetting an intervention order breach under the *Crimes Act 1958*. If police believe a protected person has consented to a breach, they should explain to that person the procedure for varying or revoking an order. If necessary police should apply for a variation and revocation on behalf of the protected person with their consent.

571 New South Wales Law Reform Commission (2003) above n 504, Recommendation 45, 212.

572 See paras 5.104–5.112; Recommendation 30.

FALSE CLAIMS OF CONSENT

5.135 Some police officers have an insufficient appreciation of the dynamics of family violence and take the perpetrator's claim that the victim consented to the breach at face value. One woman who had experienced family violence over a long period told the commission:

Once he rocked up to my house at 5.30 in the morning. I rang the police and they came to take him away. I went down to make a statement and they came in to tell me that they had released him because again I had invited him around for a cup of tea. That's what he keeps telling them and they keep believing him and they let him go. They never checked his story with me or asked me about it. This is all despite the fact I have an intervention order against him, that it was proven in court that such an order is necessary.⁵⁷³

As mentioned at paragraph 5.126, the police Code of Practice acknowledges that a defendant's claim that the victim consented to a breach may not be accurate. The commission encourages Victoria Police to address this issue in all training of police officers on family violence.

573 Interview with Julie, 27 April 2005.