

Chapter 8

Getting a Final Order

Introduction	251
Place of Application	251
Allowing Flexibility in the Place of Application	252
Adult Applications Involving Children	255
Intervention Orders and Associates	260
Associates of the Perpetrator	260
Associates of Victims	264
Commission's Recommendations	266
Applications by Guardians	266
Views from Submissions	267
Commission's Recommendations	268
Serving Applications and Final Orders on Respondents	269
Views from Submissions	270
Other Jurisdictions	271
Commission's Recommendations	272
Defended Hearings	273
Other Jurisdictions	274
Views from Submissions	275
Commission's Recommendations	277
Mutual Orders and Cross Applications	279
Other Jurisdictions	280
Views from Submissions	281
Commission's Recommendations	282
Vexatious Applications	284
Other Jurisdictions	285
Views from Submissions	286
Commission's Recommendations	287
Orders against Young People	289
Other Jurisdictions	290
Penalties against Young People in International Standards	291

Views from Submissions	292
Commission's Recommendations	294
Undertakings	296
Views from Submissions	297
Commission's Recommendations	300
Costs	304
Costs Awarded against Police	305

INTRODUCTION

8.1 In the previous chapter we looked at how family violence victims can obtain an interim order in a crisis situation. In this chapter we look at how victims can obtain a final order. We will consider where applications for final orders can be made, who can apply for a final order and who a victim can obtain an order against (such as an associate of the perpetrator). We also look at how service of applications for final orders can be improved, how the process for defended hearings can be made fairer and less traumatic for the applicant and what should happen when there is a cross application for a mutual intervention order. We then examine how the court should deal with people who persistently apply for intervention orders, without valid reasons, as a form of harassment. We consider limits on when an order can be obtained against a person who is aged under 18 years, and limits on the circumstances where costs can be awarded against a police applicant. We also consider the current use of non-enforceable undertakings as an alternative to an intervention order and make recommendations to limit and regulate their use.

PLACE OF APPLICATION

8.2 During consultations, the commission was told that rules and practices about the court in which an application can be made have created additional barriers to accessing the intervention order system. Practices also appear to be inconsistent. For example, some applicants are required to attend a hearing for a final intervention order in the court closest to where they are living, even when they are in a refuge and want to keep their general location secret from the respondent. In other cases, magistrates have been much more flexible in hearing applications in a court that is not necessarily the closest to the applicant. Difficulties may also arise where an application involves a child. Some magistrates will separate the hearings of the parent and the child, therefore requiring the parent to also attend the Children's Court to get a separate order for the child. Other magistrates, however, will allow applications for adult and child orders to be determined in the one hearing.

8.3 This section will consider whether the rules and practices relating to place of application create additional barriers to accessing the intervention order system, and how changes that are fair to all parties involved could improve the process.

ALLOWING FLEXIBILITY IN THE PLACE OF APPLICATION

8.4 The *Magistrates' Court Act 1989* states that the 'proper venue' for interim intervention order applications is any civil court.⁸⁸⁸ However, for final intervention order hearings the proper venue is the court that is closest to:

- the place where the subject matter of the complaint arose;
- the place of residence of the defendant;
- the place of permanent or temporary residence of the aggrieved family member.⁸⁸⁹

8.5 The *Magistrates' Court (Family Violence) Act 2004* introduced the possibility of applicants applying to a court closest to their place of permanent or temporary residence. None of the above provisions are applied consistently in practice and the Magistrates' Court Family Violence and Stalking Protocols do not deal with the issue of proper venue.

VIEWS FROM SUBMISSIONS

8.6 The Federation of Community Legal Centres noted that the current approach of magistrates and registrars in determining the proper venue for intervention order applications is ad hoc. The Women's Legal Service Victoria said, in their experience, magistrates will generally allow an application to be made in a court that is not the closest to the applicant's residence if reasons are provided. However, the Broadmeadows Community Legal Service's experience is that magistrates will rarely allow this.

8.7 Submissions wanted courts to have flexibility about where an application for an intervention order can be made.⁸⁹⁰ The Magistrates' Court told the commission it would support 'maximum flexibility for applicants to lodge an application for an intervention order'. Submissions highlighted reasons why applicants may not want to apply at their closest court:

888 *Magistrates' Court Act 1989* s 3(1)(d).

889 *Magistrates' Court Act 1989* s 3(1)(b).

890 Submissions 49 (Domestic Violence and Incest Resource Centre), 61 (Broadmeadows Community Legal Service), 64 (Federation of Community Legal Centres (Vic)), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)), 74 (Women's Legal Service Victoria), 86 (Magistrates' Court of Victoria).

- wanting to keep their general location secret from the perpetrator, particularly when living in refuge accommodation;⁸⁹¹
- not wanting to apply at their local court if they live in a small community⁸⁹² — this applies particularly to Indigenous women⁸⁹³ and women living in rural communities;
- wanting to apply at a court that has better security facilities, such as the Melbourne Magistrates' Court;⁸⁹⁴
- wanting to apply at a court where support services are available.⁸⁹⁵

8.8 Magistrates should take these possible reasons into account when making any decision about the proper venue for a final intervention order application. Submissions were generally supportive of allowing applicants to make an application at any court they wish.⁸⁹⁶ Two submissions supported applications away from the applicants' place of residence where they could provide reasons for not applying at their local court.⁸⁹⁷

8.9 The Women's Legal Service Victoria noted that the recent changes to the definition of 'proper venue' to include the court closest to the permanent or temporary residence of the applicant may affect the discretion currently applied by magistrates in this area. The service stated that this change:

may impact on this practice [of exercising discretion] and have an undesirable, and presumably unintentional, impact on applications by women in refuge or who are otherwise in hiding. It would be very unfortunate if this led to such applications being required to be returnable at a venue closest to where the woman was residing. This would be likely to discourage women in refuge and in hiding elsewhere from applying for intervention orders because they would have to give away their general location to the respondent, which many view as the greatest protection they can have.

891 Submissions 27 (Robinson House BBWR), 61 (Broadmeadows Community Legal Service), 64 (Federation of Community Legal Centres (Vic)), 79 (Department of Human Services).

892 Submission 61 (Broadmeadows Community Legal Service).

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

894 Submission 61 (Broadmeadows Community Legal Service).

895 Ibid.

896 Submissions 27 (Robinson House BBWR), 40 (Whittlesea Domestic Violence Network), 54 (Andrew Compton), 61 (Broadmeadows Community Legal Service), 72 (Victoria Police).

897 Submissions 64 (Federation of Community Legal Centres (Vic)), 74 (Women's Legal Service Victoria).

COMMISSION'S RECOMMENDATIONS

8.10 The court must be flexible when deciding where an intervention order application can be made. The current legislative provisions provide an adequate list of possible venue options, however, practices in this area are inconsistent. Therefore, the commission recommends that any new family violence legislation should explicitly include a discretion for magistrates in deciding where an application may be made. When exercising this discretion, magistrates should take into account the reasons mentioned for making an application away from the applicant's usual residence.

8.11 As well as considering the reasons why people may want to apply at a location away from where they or the respondent live, the court should also consider the inconvenience to the respondent by allowing the application to proceed at a court far from the respondent's residence. This requirement will reduce the risk of people using the process of applying for an intervention order at a remote court as a form of harassment.⁸⁹⁸ For example, if a respondent to an intervention order application to be heard at the Sunshine Magistrates' Court then decides to make a cross application at the Bairnsdale Magistrates' Court, the court will consider the inconvenience caused to the original applicant in allowing the case to proceed in Bairnsdale, especially where the original applicant has been forced to move away from the family home or is in a refuge. Of course, the court will also take into account the second applicant's reason for applying in Bairnsdale, such as where the second applicant cannot easily get to the nominated court because of job commitments or lack of vehicle.

8.12 If an application is to be heard at a court that is far from the respondent, the respondent may be able to be heard by video link from a court that is more convenient. Information should be provided about this possibility when the respondent is served with the interim order or final order application.

8.13 Aside from the magistrate's discretion to decide on the proper venue for an application, the new Family Violence Act should also allow an application to be made at the Melbourne Magistrates' Court. This is because it is Victoria's central court and is the most accessible by public transport. It has security systems and support services that are not available at many other courts. This option should be available to applicants without the need for magistrates to exercise their discretion. It would safeguard people living in regional or rural areas who do not want to apply at their local court and do not want the magistrate at the local court to consider allowing the application to be transferred to another court.

⁸⁹⁸ The commission discusses vexatious applications at paras 8.97–8.108.

! RECOMMENDATION(S)

73. The new Family Violence Act should include a provision stating that the appropriate venue for a final intervention order application is either the court closest to the defendant's or the applicant's residence or to where the incident occurred. If the applicant wishes to apply in a different court, the magistrate should exercise a discretion. When exercising this discretion, the magistrate should consider:
- the safety of applicants and their need to keep their general location secret from the respondent;
 - any desire of the applicant to access security or support services at a particular court;
 - any inconvenience that may be caused to a party by allowing an application at a court which is a long distance from where he or she is living.
74. Recommendation 73 should not apply to the Family Violence Court Division during the pilot period.
75. The new Family Violence Act should state that in all cases an application for a final intervention order can be made at the Melbourne Magistrates' Court.

ADULT APPLICATIONS INVOLVING CHILDREN

[A mother] attended an outer suburban Magistrates' Court seeking an order to protect herself and her daughter ... The Magistrate told her that because the case involved a child it would have to be heard at the Children's Court in Melbourne and did not make an interim order to protect either [of them]. When [the mother] attended the Children's Court the next day she was told that they could not hear her application for an intervention order to protect herself. An order was ultimately made by the Children's Court protecting [her daughter], but [she] was directed back to the outer suburban Magistrates' Court to obtain an order for herself. As a result, she had no intervention order protection for over 48 hours.⁸⁹⁹

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

8.14 Under the Crimes (Family Violence) Act, if the respondent or person in need of protection is aged under 18 years when the application is made, the matter may be dealt with by either the Magistrates' Court or the Family Division of the Children's Court.⁹⁰⁰ The Magistrates' Court Family Violence and Stalking Protocols guide registrars and magistrates on how to decide where proceedings should be instituted. The protocols state:

- if an adult applicant is wanting to include a child in his or her application because the allegations arise out of the same or similar circumstances, the application should be initiated in the Magistrates' Court; but
- if an adult is making the application on behalf of a child or young person and there is no adult–adult application arising from the same circumstances, the application should be initiated in the Children's Court.⁹⁰¹

8.15 Reasons why the Children's Court may be considered more appropriate for the hearing of matters involving children include:

- the availability of specialist Children's Court duty lawyers;
- the capacity to involve the Child Protection Unit and access to the Department of Human Services Legal Unit on site;
- magistrates and registrars are experienced with children's matters;
- a higher likelihood that remote witness facilities will be available;
- the requirement that the Children's Court must conduct itself in an informal manner;
- a guarantee that children will be separately represented.⁹⁰²

8.16 If an application involves an adult and a child, it is not possible for the magistrate to transfer the entire application to the Children's Court because the Children's Court does not have the power to make orders for an adult who is seeking protection against an adult respondent.

8.17 The protocols note that 'splitting' an application involving both an adult and a child 'may not always be desirable given two courts could then be considering the same set of facts and circumstances'.⁹⁰³

900 *Crimes (Family Violence) Act 1987* s 3A.

901 Magistrates' Court of Victoria (2003) about n 575, para 21.2.3(a)(b).

902 Ibid para 21.3; Victorian Law Reform Commission (2004) above n 8, para 8.48.

903 Magistrates' Court of Victoria (2003) above n 575, para 21.6.

8.18 The commission's Consultation Paper outlined some of the problems that arise with 'split' applications. Consultation participants noted that some magistrates routinely 'split' applications, forcing parents to repeat the application process in the Children's Court after applying for an order for themselves in the Magistrates' Court. Many parents who have their application 'split' do not continue the application for the child in the Children's Court. This may be because they live far from the Children's Court or because they found the process in the Magistrates' Court too difficult or demanding and do not want to repeat it in another court. The result of the practice of splitting applications, therefore, is that some children do not obtain protection under the Act.

VIEWS FROM SUBMISSIONS

8.19 The submissions that addressed this issue were unanimous that an application involving both an adult and a child should be heard in the same court wherever possible.⁹⁰⁴ This avoids unnecessary and potentially harmful duplication, and is less distressing and confusing for the applicant.⁹⁰⁵ One woman who had experienced family violence told the commission that hearings in the one court would:

help to reduce the trauma associated with court hearings for the applicant. Not to mention the safety issues each time the applicant needs to face up to the courthouse and be in the vicinity of the respondent.⁹⁰⁶

8.20 The majority of submissions were of the view that applications should be heard in the one court and that this could be either the Magistrates' or the Children's Court.⁹⁰⁷ The Victorian Aboriginal Legal Service pointed out that the experience of court for Indigenous Australians is particularly distressing and culturally alienating and it is therefore important that the application is heard in the one court. However, other submissions were in favour of one or the other court hearing the application.

904 Submissions 27 (Robinson House BBWR), 40 (Whittlesea Domestic Violence Network), 41 (Victoria Legal Aid), 44 (Anonymous), 46 (Royal Children's Hospital), 49 (Domestic Violence and Incest Resource Centre), 57 (Victorian Aboriginal Legal Service), 63 (Darebin Family Violence Working Group), 64 (Federation of Community Legal Centres (Vic)), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)), 74 (Women's Legal Service Victoria), 75 (National Network of Indigenous Women's Legal Services), 77 (Anonymous), 86 (Magistrates' Court of Victoria).

905 Submission 27 (Robinson House BBWR).

906 Submission 44 (Anonymous).

907 Submissions 40 (Whittlesea Domestic Violence Network), 44 (Anonymous), 57 (Victorian Aboriginal Legal Service), 63 (Darebin Family Violence Working Group), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)), 75 (National Network of Indigenous Women's Legal Services), 77 (Anonymous).

8.21 Robinson House, Victoria Legal Aid and the Federation of Community Legal Centres were in favour of applications involving adult and child applicants being heard in the Children’s Court. Perceived advantages of hearing the case in the Children’s Court were:

- it has more appropriate facilities and is more child friendly;⁹⁰⁸
- it is specialised in considering the interests of children;⁹⁰⁹
- children are separately represented and if they have the capacity their opinion is taken into account.⁹¹⁰

8.22 For the Children’s Court to hear adult–adult applications where a child is involved, the jurisdiction of the Children’s Court would need to be expanded. Submissions from the Whittlesea Domestic Violence Network, Victoria Legal Aid, the Domestic Violence and Incest Resource Centre, the Darebin Family Violence Working Group and the Women’s Legal Service Victoria supported a change to the jurisdiction of the Children’s Court to allow this. There were no submissions opposed to this change.

8.23 Submissions from Robinson House, the Whittlesea Domestic Violence Network, a family violence victim and the Royal Children’s Hospital noted the need for the Magistrates’ Court to improve its practices and facilities to be more child friendly.⁹¹¹ The Royal Children’s Hospital was the only submission of the view that the Magistrates’ Court is the appropriate court to hear applications involving adults and children. The Magistrates’ Court submission supported the protocols on this issue, and noted that the Children’s Court does not have the power to make child contact orders under the Family Law Act.

8.24 The Domestic Violence and Incest Resource Centre and the Women’s Legal Service Victoria noted that the magistrates’ protocols are appropriate on this issue, however, they are not strictly applied. This is particularly the case where applications are routinely split, as this practice is not consistent with the protocols.

COMMISSION’S RECOMMENDATIONS

8.25 Where an application involves both an adult and a child it should be heard in the one court. The Magistrates’ Court Family Violence and Stalking Protocols provide

908 Submission 27 (Robinson House BBWR).

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

910 Ibid.

911 This is discussed at paras 6.158–6.159.

guidance on this issue and the commission agrees that magistrates should retain discretion to decide which court is appropriate to hear an application. The protocols outline the important advantages of hearing a case involving a child in the Children's Court, as noted in paragraph 8.15. Therefore, the commission recommends the jurisdiction of the Children's Court be expanded to include adult–adult applications for intervention orders that also involve a child. This would ensure that cases involving children can be heard in the appropriate court and will not result in a duplication of court hearings.

8.26 It may be the case that the Children's Court decides that grounds for an intervention order are present for the adult, but not for the child. In this case, it may be necessary for the court to make an order about any child contact arrangements that may occur between the applicant and respondent. Alternatively, if the court makes an order on behalf of a child, it may be necessary to suspend a Family Court contact order if one already exists. The Children's Court does not have the powers that the Magistrates' Court has to make, vary, alter or suspend a Family Court contact order under the *Family Law Act 1975*.⁹¹² The commission therefore recommends that the Child, Youth and Families Bill 2005 be amended to declare the Children's Court a summary jurisdiction. The Victorian Government should also raise this issue with the Commonwealth Government to ensure that any necessary amendments to the Family Law Act are made.⁹¹³ The Children's Court is specialised in dealing with children's issues and it is therefore appropriate that it has the same powers as the Magistrates' Court in relation to child contact orders.

912 This is because s 69J(1) gives jurisdiction to state courts of summary jurisdiction. It is not clear that the Children's Court is a court of summary jurisdiction. For a detailed analysis of the legislation on this issue, see: Children's Court of Victoria, *Family Division—General* <[www.childrenscourt.vic.gov.au/CA256902000FE154/Lookup/Research_Materials_Chapters/\\$file/Research_Materials_4_Family_Division_General.pdf](http://www.childrenscourt.vic.gov.au/CA256902000FE154/Lookup/Research_Materials_Chapters/$file/Research_Materials_4_Family_Division_General.pdf)> at 22 November 2005, 4.4.

913 The research of the Children's Court indicates that amendments to both the *Family Law Act 1975* (Cth) and the *Children and Young Persons Act 1989* would be necessary to vest the Children's Court with federal jurisdiction under Part VII of the Family Law Act: *Ibid.*

! RECOMMENDATION(S)

76. The Children’s Court should have jurisdiction over any intervention order application where a person aged under 18 years is involved, including jurisdiction over an adult–adult application that includes a child on the application.
77. The Child, Youth and Families Bill 2005 should be amended to declare the Children’s Court a court of summary jurisdiction, so the court can exercise powers under the *Family Law Act 1975* to make, vary, discharge or alter a family law child contact order.

INTERVENTION ORDERS AND ASSOCIATES

8.27 Associates are people who have a relationship with either a victim or perpetrator of family violence, but are not related to them as a ‘family member’ (according to either the definition of ‘family member’ in the current Act or the definition of ‘family member’ in Recommendation 17). For example, they might be a friend or work colleague, or the perpetrator’s new partner.

8.28 Intervention orders for associates need to be considered in two separate contexts:

- First, where a perpetrator encourages another person (the associate) to be violent or harass or threaten the victim.
- Secondly, where a perpetrator is violent towards, harasses or threatens an associate of the family violence victim, such as a victim’s friend, work colleague, or new partner.

8.29 In each of these cases, if associates are not covered by definitions of a ‘family member’ in the Act, they are unable to be either directly prevented from behaving abusively, or directly protected from the perpetrator’s abusive behaviour.

ASSOCIATES OF THE PERPETRATOR

8.30 It is not uncommon for a perpetrator to encourage another person (the associate) to be violent or harass or threaten the victim:

[H]e came back with his girlfriend, who's an alcoholic, and he got her to bash me up. The publican hid me in the kitchen and they were trying to get through to the kitchen to kill me. He was going off his head, and saying to let his girlfriend through to finish me off.⁹¹⁴

Other women describe situations where they feel trapped because they are afraid to leave their homes as the perpetrator's family and friends verbally abuse her in an attempt to intimidate her. This is especially relevant for women who belong to small ethnic and rural communities.⁹¹⁵

Our experience is that even when the original perpetrator is in jail he often enlists his associates to make threats on his behalf. Associates may or may not be his relatives, but the threats they make to women create as much fear as if they are from the original offender.⁹¹⁶

8.31 In these situations, the victim is unable to seek protection under the Act against the associate unless the associate comes within the definition of a 'family member'. The only option available to the victim is to seek an order against the violent family member that prohibits him or her from causing another person to engage in conduct restrained by the court.

[Encouraging an associate to be violent to the victim] is often a tactic used by the offender to continue intimidation at 'arms length' and avoid the 'letter of the law' by not actually committing the incidents or harassment.⁹¹⁷

8.32 Other jurisdictions enable people in need of protection from an associate to obtain an order against the family member and any of the family member's associates who have engaged in violent or abusive behaviour towards them; for example, the New Zealand legislation provides:

[W]here the Court makes a protection order against the respondent, the Court may also direct that the order apply against a person whom the respondent is encouraging, or has encouraged, to engage in behaviour against a protected person, where that behaviour, if engaged in by the respondent, would amount to domestic violence.⁹¹⁸

There are various conditions attached to this provision, including that the direction is necessary for the protection of the victim.

914 Parkinson (2004) above n 800, 48.

915 Submission 79 (Department of Human Services).

916 Submission 33 (Women's Domestic Violence Crisis Service).

917 Submission 27 (Robinson House BBWR).

918 *Domestic Violence Act 1995* (NZ) s 17.

VIEWS FROM SUBMISSIONS

8.33 Submissions had mixed views on how victims should be protected from the violent behaviour of associates of the perpetrator, though they all agreed that protection was necessary. For example, ‘These incidents are quite common for operational police and specific capacity to [take] action may be helpful in some circumstances’.⁹¹⁹ However, there was some disagreement about how this should occur.

8.34 Some submissions supported adopting the New Zealand model outlined at 8.32: for example, ‘Allow for associates of defendant to be named on orders’.⁹²⁰

However, one submission argued strongly that the New Zealand model was too complicated:

In our view, the New Zealand model is overly complicated and there would be significant problems of proof in demonstrating that the associates’ behaviour was encouraged by the respondent.⁹²¹

8.35 Many submissions supported broadening the existing arrangements to let associates be included as people against whom an applicant could obtain an order.⁹²² For example:

The Federation is of the view that the Act should allow an applicant to obtain an order against an associate (under the direction, encouragement or on behalf of a family member) who is engaging in violent behaviour toward the protected person.⁹²³

[T]he Crimes Family Violence Act should enable Intervention Orders to be made if associates of respondents have threatened or engaged in violent behaviour towards the protected person and should be charged if [a] 3rd party is harassing family and friends, an ‘associate’ to be defined in the [A]ct.⁹²⁴

8.36 Opposition to broadening the current basis for an order was based on concerns that it would ‘dilute’ the family violence focus of the Act. It was considered preferable

919 Submission 72 (Victoria Police).

920 Submission 39 (Royal Women’s Hospital).

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

922 Submissions 30 (Violence Against Women Integrated Services), 40 (Whittlesea Domestic Violence Network), 49 (Domestic Violence and Incest Resource Centre), 51 (Villamanta Legal Service), 64 (Federation of Community Legal Centres (Vic)).

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

924 Submission 40 (Whittlesea Domestic Violence Network).

for applicants to use the stalking provisions to apply for an intervention order against non-family members.⁹²⁵

COMMISSION'S RECOMMENDATIONS

8.37 The commission has considered three options to protect victims from associates of the perpetrator:

- adopt the New Zealand model, which enables associates to be included in the order made against the perpetrator;
- allow intervention orders to be taken out against associates of the respondent if the protected person has obtained an intervention order against the respondent and the associate has engaged in behaviour towards the protected person that constitutes family violence;
- retain the current situation, where perpetrators can be prohibited from 'causing another person to engage in conduct restrained by the court' (under section 5(1)(f) of the Crimes (Family Violence) Act) if the associate has engaged in a course of conduct with the intention of causing physical or emotional harm to the victim or arousing the victim's fear.

8.38 The commission believes that the second option is likely to provide the most effective protection to victims. In circumstances where a victim has obtained an intervention order against a respondent and an associate of the respondent commits an act of family violence (as defined in a new Act) against the victim, then the victim should be able to seek an intervention order directly against the respondent's associate.

! RECOMMENDATION(S)

78. An intervention order should be able to be made against an associate of a respondent, if the applicant has an intervention order against the respondent, and the behaviour of the associate would constitute an act of family violence if it were committed by the respondent.

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

ASSOCIATES OF VICTIMS

8.39 Associates of victims can play an important role in assisting victims to leave a violent relationship. For example, research states overwhelmingly that the main action women take after experiencing an assault by a male partner is to talk to other people, particularly family and friends.⁹²⁶ Reform is also needed to cover the situation where a perpetrator behaves in a violent manner towards an associate of the victim. This can be an effective way of controlling the victim by proxy.

[T]hreats toward other people eg parents, siblings, children, friends can often be more threatening and intimidating than actual threats to themselves, as they are made to feel responsible for that threatened person's welfare.⁹²⁷

8.40 Although there is no Victorian data on how often this occurs, a NSW study found that the only form of negative behaviour to increase after an order had been made involved approaches by perpetrators to the family, social and work networks of the protected person.⁹²⁸

At first, when I tried to go out with other men, he would try to run them over ... So now I keep to myself.⁹²⁹

We know of mothers, friends, sisters and other associates of the protected person who have been threatened in the same way as she has and they fear similarly for their safety.⁹³⁰

8.41 Violence Against Women Integrated Services said court staff and police regard the abuse as 'secondary' and the associate is unlikely to succeed in getting an order.

VIEWS FROM SUBMISSIONS

8.42 Submissions were in favour of associates of victims having some sort of protection under the legislation:

926 The Australian Bureau of Statistics women's safety survey suggests that four in five women in Australia who had been physically assaulted by a man since the age of 15, and three-quarters who had been sexually assaulted, had discussed these experiences with family, friends or others: Australian Bureau of Statistics, *Women's Safety Australia*, Catalogue No 4128.0 (1996). In Tasmania almost one-fifth of women who had been assaulted by a male family member identified a member of the community, sometimes a neighbour, providing support during the process: Patton (2003) above n 94, 81.

927 Submission 27 (Robinson House BBWR).

928 New South Wales Bureau of Crime Statistics and Research, *An Evaluation of the NSW Apprehended Violence Order Scheme* (1997) vii, 64.

929 Parkinson (2004) above n 800, 48.

930 Submission 33 (Women's Domestic Violence Crisis Service).

The impact of intimidation and threats through associates of the perpetrator on the safety of [the] victim and victim's associates should be recognised by the justice system by allowing those victim's associates to seek intervention orders.⁹³¹

Third party intimidation indicates that the threat to the safety of the protected family member is on going and needs to be addressed by the courts. This should also include intimidation of work colleagues. Associates should be covered by the Act both as possible perpetrators and victims of violent, abusive and threatening behaviour. Women have described instances where friends have been afraid to help. They believed that the perpetrator would turn on them for helping her.⁹³²

8.43 Although submissions were mixed on how protection for associates should be provided, almost all submissions stated that there should be additional protection.

The Federation acknowledges the ripple effect that family violence can have on associates of victims of family violence, such as friends, family and workmates. The Federation believes that courts should be given the flexibility to provide protection to associates without having to resort to the stalking provisions. This may take the form of permitting applicants to seek orders or variations of existing orders to cover named associates that are being targeted by a defendant or places they regularly attend such as places of employment. The court should be required to make a finding that an associate is being targeted because of their relationship to the primary victim, so as not to allow such a provision to be misused and the definition of family violence to be made too broad.⁹³³

In our view, that approach of including associates of the applicant on the applicant's intervention order is preferable to allowing separate intervention orders to be made for the protection of a protected person's associates.⁹³⁴

Associates could take out the order themselves, and there could be legal process put into place that adds the 'associate' under the one Intervention Order. The onus should not be on the woman to provide evidence that her associates are being damaged. Women should only have to look after their own safety and not the safety of her associates. Women are compromised when dealing with safety issues and emotionally dealing with her issues is enough.⁹³⁵

931 Submission 78 (Department for Victorian Communities).

932 Submission 79 (Department of Human Services).

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

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

935 Submission 40 (Whittlesea Domestic Violence Network).

COMMISSION'S RECOMMENDATIONS

8.44 Family members of the applicant may directly seek intervention orders against the respondent because they meet the definition of 'family member'. However, associates of victims who do not fall into this definition, for example friends or neighbours, can only access protection if they meet the higher standard in the Crimes Act⁹³⁶ and only the applicant's children can be included on the applicant's intervention order. The commission believes that associates of victims should be protected under a new Family Violence Act and be able to apply for an order in their own right if:

- the applicant has an intervention order against the perpetrator;
- the perpetrator's abuse of the associate of the applicant constitutes family violence.

If they meet these conditions then associates of the applicant should be able to apply for a separate intervention order.

! RECOMMENDATION(S)
79. An associate of the applicant should be able to obtain a separate intervention order against the respondent if the respondent's behaviour would constitute an act of family violence if committed against the applicant and if the original applicant has an intervention order against the respondent.

APPLICATIONS BY GUARDIANS

8.45 The Crimes (Family Violence) Act allows an intervention order application to be made by the person seeking protection, a police officer or any other person provided that person has the written consent of the person in need of protection.⁹³⁷ Where children need protection, a parent can apply on their behalf or they can apply themselves if they are aged over 14 years.⁹³⁸ Where the person in need of protection is

936 *Crimes Act 1958* s 21A. This section provides remedy for a victim if an offender engages in conduct which has the intention of causing physical or mental harm or arouses apprehension or fear in the victim for his or her own safety and if the offender knew or ought to have known that engaging in conduct of that kind would be likely to cause such harm or arouse such apprehension or fear and it actually did have that result.

937 *Crimes (Family Violence) Act 1987* ss 7(1)(a),(b),(d).

938 *Crimes (Family Violence) Act 1987* ss 7(1)(c)(iv), 7(4).

subject to a guardianship order under the *Guardianship and Administration Act 1986*, the appointed guardian may make an application, or any other person may apply with the court's permission.⁹³⁹

A **guardian** is a person who is legally appointed to protect the rights of another person.

8.46 This report deals with applications by police in paragraphs 5.82–5.93. This section therefore relates to applications by guardians only.

8.47 A guardian is appointed where people with a disability are found to be unable, by reason of their disability, to make reasonable judgments regarding their person and circumstances.⁹⁴⁰ However, section 13 of the Act provides that if a person other than the victim or a police officer applies for an intervention order, the court must not hear the matter if the victim objects. This section may cause difficulties for guardians who are attempting to apply for an intervention order on behalf of a victim against their will. This provision seems contradictory, as the person in need of protection has been found unable to make reasonable judgments on their own behalf and therefore should not be able to veto their guardian's decision about what measures are necessary for their safety.

VIEWS FROM SUBMISSIONS

8.48 This issue was initially raised by the Office of the Public Advocate (OPA). The OPA proposed an amendment to section 13 of the Act to include an exception for an appointed guardian, meaning that a guardian could apply for an intervention order against the wishes of the person in need of protection.

8.49 The majority of submissions that addressed this issue agreed with the OPA. These submissions included Robinson House, Victoria Legal Aid, the Domestic Violence and Incest Resource Centre and the Department of Human Services. Robinson House stated that '[w]here a client does not have a capacity to make a reasonable decision—the guardian must have the capacity to protect their client—otherwise they are not a guardian'. The Domestic Violence and Incest Resource Centre also recommended that appointed guardians receive family violence training to enable them to handle these cases in an appropriate way.

8.50 Submissions from three community legal services agreed that an application by a guardian should not be prevented. However, they suggested that people with appointed guardians should have a right to object to an application made by their

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

940 *Guardianship and Administration Act 1986* s 22(1).

guardian through a lawyer who has experience in working with people with disabilities.⁹⁴¹

COMMISSION'S RECOMMENDATIONS

8.51 The commission agrees with the OPA that an appointed guardian should be able to apply for an order against the wishes of the person in need of protection. The legislation should provide that a guardian appointed under the Guardianship and Administration Act is an exception to the rule that applications cannot be made against the will of the protected person. This should only be the case where the

A **plenary guardian** has the powers and duties that a parent of the person subject to the guardianship order would have if the person was a child. A **limited guardian** has powers and duties over specific areas only.

guardian is a plenary guardian or a limited guardian who has relevant powers. It is important that courts do not allow applications against the will of the protected person by guardians who have only been appointed for a limited and unrelated purpose.⁹⁴²

8.52 The commission also agrees that people with an appointed guardian should be able to object to an intervention order application through separate representation. Even though people have been declared unable to make decisions about their own circumstances, the court should be able to hear their views if they disagree with their guardian. This accords with the principle of respect for people who use the court system and have experienced family violence. Legal services for people with a disability, such as the Villamanta Legal Service, should be more widely available to ensure that people with guardians are able to have their views heard by the court.

!	RECOMMENDATION(S)
	80. A guardian should be able to make an application for an intervention order against the wishes of the person with an appointed guardian, in the same way that police can make applications without consent.

941 Submissions 51 (Villamanta Legal Service), 64 (Federation of Community Legal Centres (Vic)), 74 (Women's Legal Service Victoria).

942 Submission 39 (Royal Women's Hospital).

**RECOMMENDATION(S)**

81. People with an appointed guardian who object to an intervention order application being made on their behalf should have their views heard separately from their guardian. This should occur through an independent legal representative.

SERVING APPLICATIONS AND FINAL ORDERS ON RESPONDENTS

8.53 Prompt service of documents is crucial to the effective functioning of the intervention order system. Police are required to serve all documentation under the intervention order system. Police must serve:

- applications for final intervention orders where no interim order exists—the application states when to attend court if the respondent wishes to contest an intervention order being made;
- interim intervention orders that come with applications for final orders;
- final intervention orders, where the respondent did not attend court for the hearing and therefore was not served with the order in court.

8.54 Intervention orders are not enforceable, and therefore offer no protection, until they are served on the respondent. Similarly, if the respondent is not served with an application for an order the case cannot proceed in court. An applicant may attend court only to discover that the hearing cannot proceed because the respondent has not been served before the hearing.

8.55 In some jurisdictions, intervention orders are served on respondents by private process servers or court bailiffs. A recent New Zealand study found that approximately 45% of intervention orders were served by court bailiffs and around 28% were served by process servers who were employed by the victim's solicitors.⁹⁴³ This study found that a significant proportion of respondents did not understand the order being served on them and the primary response was often 'anger, confusion, denial and a sense of outrage and injustice'.⁹⁴⁴ The commission believes it is inappropriate for private process servers to take over service of intervention orders and intervention order applications as respondents will often be violent and angry. The commission believes that service by a police officer is important as an educative role because, at the time of

943 Ministry of Justice and Department for Courts, *Domestic Violence Act 1995: Process Evaluation* (2000) 11.

944 Ibid 63.

service, the police officer must clearly explain the conditions of the order and the serious consequences of breaching it.

8.56 The commission's Consultation Paper outlined many problems with the procedure for serving documents on respondents. Many participants in consultations, including police officers, expressed frustration at how long it takes police to serve orders. This leaves victims without protection and they become anxious about not knowing whether the order has been served or how long it will take. Many participants mentioned that police often do not inform victims once an order has been served, or of the attempts they are making to serve documents. Victims are not informed when an application has not been served before the hearing date and so attend court only to have the matter postponed. The commission notes that the new police code of practice includes an obligation on police officers to inform the aggrieved family member when an intervention order has been served.⁹⁴⁵ The Victoria Police submission stated that the 'monitoring and supervision component of the Code of Practice should assist in strengthening these obligations'.

8.57 Some consultation participants also felt that orders for substituted service are not made often enough. Police sometimes find it difficult to convince magistrates that they have made all possible attempts to locate and serve the respondent and therefore orders for substituted service are not made very often.

VIEWS FROM SUBMISSIONS

8.58 Many submissions supported the position under the Code of Practice of a police officer calling the victim once the intervention order has been served.⁹⁴⁶ One submission stated:

945 Victoria Police (2004) above n 171, para 5.7.2.3.

946 Submissions 28 (Murray Mallee Community Legal Service), 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), 61 (Broadmeadows Community Legal Service), 64 (Federation of Community Legal Centres (Vic)), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)), 77 (Anonymous).

It was particularly important to me to get a phone call from the police officer who served the interim and final intervention order papers on my husband. I felt a little safer knowing that he had been made aware of the consequences of breaching such an order, and knowing his dislike of the police anyway due to his violent background and knowledge of offences he has [committed], I feel better knowing he would be worried about the police having more reason to pursue his previous offences in light of the current ones.⁹⁴⁷

8.59 Where police have been unable to serve documents, some submissions suggested they should have access to other types of information to locate the respondent. For example, the Women's Legal Service Victoria suggested a procedure where government departments and agencies are required to release information for the purpose of service. An example of this is the Commonwealth Information Order procedure under the Family Law Act,⁹⁴⁸ which is used to obtain current addresses from federal government agencies such as Centrelink or the Department of Foreign Affairs. Police could also be authorised to obtain information from state government agencies, such as VicRoads, the Department of Health or the Victorian Electoral Commission.

8.60 There was no support for an automatic increase in the use of substituted service as an alternative for personal service of intervention orders. Victoria Legal Aid expressed concerns that respondents often do not receive orders made by substituted service, and the Women's Legal Service Victoria pointed out that police and magistrates often view orders that have been made by substituted service as unenforceable. However, some community legal centres noted that orders for substituted service can be particularly important where it appears that a respondent is avoiding personal service.⁹⁴⁹

OTHER JURISDICTIONS

8.61 The Family Court has the power to make location orders to a Commonwealth Government department or instrumentality. The order requires a person authorised under the legislation to provide the court with information about the possible whereabouts of a respondent to assist in the recovery of children.⁹⁵⁰ The department or instrumentality is required to provide the court with information that is contained in

947 Submission 44 (Anonymous).

948 *Family Law Act 1975* (Cth) s 67N.

949 Submissions 28 (Murray Mallee Community Legal Service), 61 (Broadmeadows Community Legal Service), 64 (Federation of Community Legal Centres (Vic)).

950 *Family Law Act 1975* (Cth) ss 67H, 67J.

or comes into its records.⁹⁵¹ In practice, orders are generally issued to Centrelink. Safeguards are provided in the legislation by prescribing who may apply for the order and who may be provided with the information.⁹⁵² Protection is provided to the authority providing the information by requiring it to comply with the court's order 'in spite of anything in any other law'.⁹⁵³

COMMISSION'S RECOMMENDATIONS

8.62 The commission believes that a system that allows police to obtain information from state government departments and agencies for the purpose of service of intervention orders could significantly improve the timeliness of service. Where police are unable to locate a respondent and they believe that a state government department or agency may have information that could help locate the person, they should be able to apply to a Magistrate's Court for an order allowing them to obtain this information. A magistrate will then be able to assess whether a court order for production of any relevant information by the government department is appropriate. The commission believes it is important to place limits on this power because there may be a tendency for police to expand its use. We therefore think it is appropriate that the decision about whether to allow the release of information be made by a magistrate.

8.63 Disclosure of personal information held by Victorian government departments and agencies is regulated by the *Information Privacy Act 2000*. This Act would not restrict the disclosure of information as recommended by the commission, as the Act contains an exemption for information that is collected by a court and is obtained by law enforcement agencies.⁹⁵⁴

8.64 The commission makes recommendations elsewhere in this report that will partly address some of the other problems with service. In particular, the commission recommends a notice system at recommendations 83–87. This system will mean that registrars will need to inform applicants before the listed hearing date whether the order has been served and whether the respondent intends to defend the final hearing. Applicants will not be required to attend court only to discover that the case will not proceed because the respondent has not been served.

8.65 The commission also recommends automatic extension of interim intervention orders where the order has not been served at Recommendation 70.

951 *Family Law Act 1975* (Cth) s 67N.

952 *Family Law Act 1975* (Cth) ss 67K, 67P.

953 *Family Law Act 1975* (Cth) s 67M(6).

954 *Information Privacy Act 2000* ss 10, 13.

**RECOMMENDATION(S)**

82. Where police have been unable to locate a respondent for service of an intervention order or an application for an intervention order, they should apply to a Magistrate's Court for a court order requiring a state government department or agency to supply information that could assist in locating the respondent.

DEFENDED HEARINGS

Not knowing if the respondent will turn up to court and contest an intervention order application is a nightmare. In light of the minimal legal assistance [available], and the huge safety implications of being in the same room, not to mention the emotional and psychological trauma associated with being in close physical proximity to the respondent, to be left waiting in agony and unable to prepare for the situation is terribly painful. Had I known that my husband intended to contest the order, I may have been able to prepare mentally and emotionally for this. I would have taken my father along to the proceedings in addition to my best friend who had witnessed his violent behaviour. I would have enquired about a secure room before the day, when I was left to feel imprisoned in my corner of the room because he sat near the stairs where I could not move without passing in front of him ... This may have also changed the legal advice I received by many who openly assumed that my husband would not turn up to contest the order, an assumption I felt, and was proven to be wrong and dangerous.⁹⁵⁵

8.66 When people apply for an intervention order, they are given a date on which they must return to court for their application for a final order to be heard. Respondents are also advised about this date—'the return date'—when served with the application. Respondents are also given information about going to court and opposing the order or contesting the terms of the order. The information sheet that is given to respondents advises them that they should tell the court if they oppose the orders sought in the application as soon as possible.⁹⁵⁶ Respondents are also given a 'Notice of Intention to Defend', which can be completed and returned to the court if they intend to defend the application.⁹⁵⁷

955 Submission 44 (Anonymous).

956 Magistrates' Court of Victoria (2003) above n 575, 34.

957 Ibid 37.

8.67 However, respondents are not required to advise the court if they intend to defend an intervention order application. As a result, when people seeking protection attend court for the return date, they do not know whether the respondent will be in court, whether he or she will have legal representation or will be planning to contest the application. This makes the experience of attending court more distressing. Also, when applicants apply for an order in person, they cannot access representation from Victoria Legal Aid until they can establish that the application will be defended.⁹⁵⁸ Most applicants attend court on the return date without legal representation.

8.68 The Consultation Paper suggested that respondents could be required to provide the Notice of Intention to Defend prior to the hearing date, so applicants are aware that the order will be contested and will be able to obtain legal advice, witnesses and any necessary support prior to the hearing date.

OTHER JURISDICTIONS

8.69 In the ACT, interim orders must be given a return date that is at least 21 days after the interim order is issued.⁹⁵⁹ Respondents must complete an endorsement copy of the order informing the court if they intend to defend the application. This must be returned to the court at least seven days before the hearing date. If the endorsement copy is not returned, the interim order will automatically become a final order. A final order will also be made where the endorsement copy is returned stating that the respondent consents to a final order being made.⁹⁶⁰

8.70 Similarly, in Western Australia the respondent must complete an endorsement copy of the interim order and return it to court within 21 days of being served with it.⁹⁶¹ An order becomes a final order where respondents fail to return the endorsement copy, or where they return the endorsement copy stating that they consent to the final order being made.⁹⁶² If respondents return the endorsement copy stating their intention to defend the application, a hearing date is set and all parties are informed. If the interim order restricts respondents from living where they normally live, contacting their children, going to a place where they work or holding a firearm that is

958 Victoria Legal Aid, *Victoria Legal Aid Handbook* (12th ed, 2001) ch 2, para 6.1.

959 *Domestic Violence and Protection Orders Act 2001* (ACT) s 48(4).

960 *Domestic Violence and Protection Orders Act 2001* (ACT) s 51A.

961 *Restraining Orders Act 1997* (WA) s 31.

962 *Restraining Orders Act 1997* (WA) s 32.

required for work purposes, then the registrar must set a date for a hearing as soon as possible.⁹⁶³

VIEWS FROM SUBMISSIONS

8.71 The overwhelming majority of submissions were in favour of a system where respondents must inform the court if they intend to defend the application.⁹⁶⁴ Submissions outlined many problems with the current system that occur because the applicant does not know whether the respondent will attend court and contest the order. These problems include:

- fear, stress and uncertainty;⁹⁶⁵
- the difficulty for the applicant in deciding whether to spend money on legal advice or representation before the hearing;⁹⁶⁶
- the difficulty for the applicant in deciding whether to bring witnesses to the hearing;⁹⁶⁷
- applicants not getting legal aid if they cannot show that the application will be contested;⁹⁶⁸
- the difficulty for the court in organising interpreters where they do not know the matter will be contested;⁹⁶⁹
- applicants not knowing whether to put in place other measures such as bringing support persons or extra security.⁹⁷⁰

963 *Restraining Orders Act 1997* (WA) s 33.

964 Submissions 8 (Werribee Legal Service), 20 (Mrs EF Belsten), 25 (Barbara Roberts), 27 (Robinson House BBWR), 28 (Murray Mallee Community Legal Service), 30 (Violence Against Women Integrated Services), 40 (Whittlesea Domestic Violence Network), 44 (Anonymous), 49 (Domestic Violence and Incest Resource Centre), 50 (Barry Johnstone, Senior Registrar, Magistrates' Court of Victoria), 61 (Broadmeadows Community Legal Service), 64 (Federation of Community Legal Centres (Vic)), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)), 70 (Asylum Seeker Resource Centre), 72 (Victoria Police), 74 (Women's Legal Service Victoria).

965 Submissions 27 (Robinson House BBWR), 44 (Anonymous), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)).

966 Submissions 27 (Robinson House BBWR), 61 (Broadmeadows Community Legal Service), 74 (Women's Legal Service Victoria).

967 Submissions 44 (Anonymous), 61 (Broadmeadows Community Legal Service).

968 Submissions 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)), 70 (Asylum Seeker Resource Centre), 74 (Women's Legal Service Victoria).

969 Submissions 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)), 70 (Asylum Seeker Resource Centre).

8.72 Submissions also noted that the respondent may not have been served with the application and that may be the reason he or she has not attended court. If this is the case, the hearing cannot proceed and must be adjourned to another date while the police make further attempts at service. In one case mentioned by the Murray Mallee Community Legal Service:

The respondent lived next door to our client, and had made threats to kill her ... Our clients had fled their homes and were living with friends until they felt safe to return ... The respondent, despite being a retiree with limited mobility, had not been served 2 weeks after the application had been made. Our clients had travelled for 1.5 hours to be at Court ... for the hearing, one taking unpaid leave from their casual employment. The matter was adjourned for a further 4 weeks over Christmas until the next ... circuit sitting [because the respondent had not been served].

8.73 Victoria Legal Aid was the only submission opposed to a notice system, stating that it would disadvantage young respondents, those with literacy problems, intellectual impairment or drug and alcohol addiction. Victoria Legal Aid was also concerned about a system where the respondent returns an endorsement copy of the order to court consenting to the order being made, as in the ACT and Western Australia. It was concerned that children and those with guardians 'should not be permitted to sign away their right to a hearing'.

8.74 Submissions in favour of a notice system provided suggestions on how such a system should work in practice:

- a notice should be provided to the court a set number of days before the final hearing date;⁹⁷¹
- where no notice is provided and the respondent attends court on the hearing date, the matter should be automatically adjourned and any interim order should be automatically extended to the new hearing date;⁹⁷²
- all matters should be listed for a mention only on the first return date, so that the court can set a later hearing date if the matter is contested;⁹⁷³

A **mention hearing** involves the parties outlining the evidence they will provide at a later hearing.

970 Submissions 40 (Whittlesea Domestic Violence Network), 44 (Anonymous).

971 Submissions 8 (Werribee Legal Service), 20 (Mrs EF Belsten).

972 Submissions 30 (Violence Against Women Integrated Services), 50 (Barry Johnstone, Senior Registrar, Magistrates' Court of Victoria), 61 (Broadmeadows Community Legal Service). The Women's Legal Service Victoria supported an extension of an interim intervention order where the respondent attends court without giving prior notice, unless the respondent can show compelling reasons why this should not occur.

- respondents should also complete a Notice of Grounds for Contest which sets out the grounds on which they will be opposing the order or seeking variations to conditions on the order—where the grounds have merit, the magistrate can set a hearing date for a contest at the mention hearing;⁹⁷⁴
- respondents should be able to ask for a different hearing date once if they are unable to attend on the date given.⁹⁷⁵

COMMISSION'S RECOMMENDATIONS

8.75 The commission agrees that respondents should be required to complete a notice before the hearing date if they intend to defend an application. A notice should be returned to the court at least five working days before the hearing date. If a notice is returned, the registrar must inform the applicant so he or she can prepare for a contested hearing on the listed date. If it is not returned because the order has not been served, the registrar must inform the applicant, extend any existing interim order and set a new hearing date.⁹⁷⁶ This is similar to the system operating in the ACT and Western Australia. This will mean that interim orders will need to be made for a period of at least 21 days to allow the police seven days to serve the order, seven days for the respondent to consult with a lawyer and decide whether to defend the application, and seven days for the applicant to prepare if the respondent intends to contest the application.

8.76 However, the commission agrees with Victoria Legal Aid that respondents should not be able to return an endorsement copy of the order stating that they consent to the order being made. As respondents may not have received legal advice or other support at this stage, it is possible that they may agree to an order without understanding the legal consequences. Respondents can indicate that they consent to the order either at court or by not attending court on the hearing date.

8.77 If a respondent attends court on the hearing date to contest the application without providing notice, the court should consider the sanction of a costs order. This will help to ensure that respondents return the notice where they intend to contest an application and that their legal representatives advise them to do so. The case should be automatically adjourned to a new hearing date so that the applicant has time to

973 Submissions 28 (Murray Mallee Community Legal Service), 64 (Federation of Community Legal Centres (Vic)), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)).

974 Submission 28 (Murray Mallee Community Legal Service).

975 Submission 40 (Whittlesea Domestic Violence Network).

976 We have recommended automatic extension of interim orders at Recommendation 70.

prepare for a contested hearing. Applicants should not be forced to proceed on the day if they have not received notice that the respondent will attend. If the court allows an adjournment for a contested hearing, any interim order must be automatically extended to the new hearing date and no costs should be awarded against the applicant.

8.78 The commission recommends that the magistrate should hear evidence from the applicant to establish grounds for the order—this is currently the case in Victoria. This is to ensure that grounds must be shown to obtain an intervention order, particularly where respondents may not have attended court because they did not understand the process. The commission does not believe it is appropriate for final orders to be made automatically without the need for evidence to show an order is necessary.

8.79 The commission also believes respondents should be provided with as much information as possible to assist them to understand the application when they are served. Respondents should be provided with a plain English brochure explaining what the application means and outlining other information to help them decide whether to contest the order. It should also clearly outline where respondents can go to seek legal advice. The commission recommends that the current information sheet be revised to provide for this new information. This information should be translated into other languages and police should have these brochures readily available.

8.80 The commission does not agree with the suggestion that the first time the parties go to court should be a mention hearing. This increases the number of times an applicant must attend court. If respondents are required to provide notice of their intention to defend at least five days before the listed date, it should give applicants and courts sufficient time to prepare for a contested hearing on the original hearing date on the application.

!	RECOMMENDATION(S)
	<p>83. Where respondents intend to defend an intervention order application, they should be required to lodge a notice with the court at least five working days before the final hearing is listed.</p> <p>84. To facilitate a notice system, the court should make interim orders for a minimum of 21 days.</p>

! RECOMMENDATION(S)

85. Where a notice is received by the court, a registrar should inform the applicant of this within one working day of receipt. Where no notice has been received five days before the hearing, the registrar should inform the applicant if this is because of a failure to serve the applicant and the application will therefore not proceed.
86. A plain English brochure should be provided to respondents at the time of service that gives information to help them decide whether to contest an application or order. This brochure should be available in languages other than English.
87. Where a respondent fails to return the notice but attends court on the hearing date and wants to contest the order, the court should automatically give an adjournment for a new hearing. Any interim intervention order should be automatically extended until the new hearing date. The court should also consider imposing a sanction against the respondent, in the form of a costs order.

MUTUAL ORDERS AND CROSS APPLICATIONS

8.81 Under the current system, it is possible for a respondent to an intervention order application to make a 'cross application' for an intervention order against the original applicant. Respondents may do this to gain what is seen as some kind of strategic advantage, for example, in any upcoming family law matters.⁹⁷⁷ If a person consents to an intervention order, including in the case of a cross application, the court may grant the order, even if it is not satisfied that the grounds for making it have been proven.⁹⁷⁸

8.82 If a cross application is made, the person who originally sought protection must either defend the cross application or consent to an intervention order being made against him or her. Original applicants are often pressured to accept an intervention order against them by consent, in exchange for respondents consenting to

977 Victorian Law Reform Commission (2004) above n 8, 227.

978 *Crimes (Family Violence) Act 1987* s 14(1).

the intervention order against them. According to the commission's consultations, pressure to consent to having an intervention order made against the original applicant comes from magistrates, respondents' advocates and sometimes the applicant's own advocates.⁹⁷⁹ Cross applications are often made to intimidate women and to exercise power and control over them as a further form of abuse.⁹⁸⁰

OTHER JURISDICTIONS

8.83 In New Zealand, the court cannot make a protection order by consent where the other party has made a cross application. The *Domestic Violence Act 1995* contains a presumption against mutual orders: **A mutual order exists where both parties are granted an intervention order against the other.**

Where the Court grants an application for a protection order, it must not also make a protection order in favour of the respondent unless the respondent has made an application for a protection order and the Court has determined that application in accordance with this Act.⁹⁸¹

8.84 Cross applications were recently considered by the New South Wales Law Reform Commission's report into apprehended violence orders.⁹⁸² It found that cross applications are sometimes made by a defendant who is intent on intimidating the victim or for other tactical reasons.⁹⁸³ Those consulted for the report said mutual orders may reinforce myths about domestic violence (eg that it is a relationship issue or mutual violence), fail to place responsibility on the perpetrator and create difficulties in enforcement where both parties allege a breach of a protection order against the other.⁹⁸⁴ The report acknowledged the important role of more education for court staff and police on this issue, and recommended that court forms be amended to make it clearer whether the application is a cross application.⁹⁸⁵

979 Victorian Law Reform Commission (2004) above n 8, 227.

980 Rosemary Hunter, 'Having Her Day in Court? Violence, Legal Remedies and Consent' in Jan Breckenridge and Lesley Laing (ed) *Challenging Silence: Innovative Responses to Sexual and Domestic Violence* (1999) 65.

981 *Domestic Violence Act 1995* (NZ) s 18.

982 New South Wales Law Reform Commission (2003) above n 504, 214–219.

983 Ibid 214.

984 Ibid 217.

985 Ibid 217–218.

VIEWS FROM SUBMISSIONS

8.85 The majority of submissions believed that cross applications and mutual orders are a problem in the current system.⁹⁸⁶ Submissions noted:

- cross applications are a strategy used by respondents or their solicitors to force an applicant into accepting a mutual order;⁹⁸⁷
- cross applications are often used by respondents as ‘a tool for intimidation and distress’;⁹⁸⁸
- cross applications are often made in court immediately before the hearing of the original application, giving the applicant no time to prepare to defend such an application;⁹⁸⁹
- using mutual orders as a settlement tool is undesirable and does not help to maintain the relevance and effectiveness of intervention orders in the community;⁹⁹⁰
- mutual orders mean that abusive behaviour is not condemned, violent people are not forced to take responsibility for their actions and ‘denial and minimisation of violence is echoed by the State’.⁹⁹¹

8.86 Most submissions supported a change so that where a cross application is made, the magistrate must be satisfied that grounds exist for both orders before making mutual orders. This is the system operating in New Zealand and was supported by submissions.⁹⁹²

986 Submissions 28 (Murray Mallee Community Legal Service), 49 (Domestic Violence and Incest Resource Centre), 61 (Broadmeadows Community Legal Service), 62 (Eastern Community Legal Centre), 64 (Federation of Community Legal Centres (Vic)), 67 (Rosemary Hunter, Professor, Griffith University), 79 (Department of Human Services), 86 (Magistrates’ Court of Victoria).

987 Submission 61 (Broadmeadows Community Legal Service).

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

989 Submissions 61 (Broadmeadows Community Legal Service), 64 (Federation of Community Legal Centres (Vic)).

990 Submission 86 (Magistrates’ Court of Victoria).

991 Submission 67 (Professor Rosemary Hunter, Griffith University).

992 Submissions 28 (Murray Mallee Community Legal Service), 49 (Domestic Violence and Incest Resource Centre), 61 (Broadmeadows Community Legal Service), 62 (Eastern Community Legal Centre), 64 (Federation of Community Legal Centres (Vic)), 86 (Magistrates’ Court of Victoria).

8.87 Two submissions disagreed with such a change.⁹⁹³ The Women’s Legal Service Victoria stated that as an application for an intervention order is a civil matter, the parties should be able to resolve the case in any way they think fit. However, the service noted the importance of receiving legal advice so that parties can make an informed decision. It also pointed out that the cross application may be the ‘real’ application, where the perpetrator of violence has come to court first and applied for an intervention order. Therefore, the burden of proving the grounds for the order may fall on the real victim.

8.88 Submissions also included other suggestions for improving the way the court handles cross applications. These included:

- improved training to better understand the dynamics of family violence for magistrates and other court staff, to help them assess the motivations for cross applications;⁹⁹⁴
- greater availability of legal advice at courts;⁹⁹⁵
- postponing the consideration of the cross application to a different day.⁹⁹⁶

8.89 The suggestions about further training of magistrates and court staff and better access to legal advice have been adopted by the commission in recommendations 38–41.

COMMISSION’S RECOMMENDATIONS

8.90 The commission agrees with the majority of submissions received that a mutual order should not be made unless the grounds for an intervention order have been made out by both parties. This requirement would introduce a presumption against mutual orders. The current use of cross applications can be inappropriate and often leads to pressure and coercion being placed on people who have experienced family violence. Mutual orders do not promote responsibility and accountability for the perpetrator of violence and reinforce the view that family violence is mutual and related to ‘relationship problems’ rather than an exercise of systematic power and control by one person over another. Mutual orders also create enforcement problems for police, therefore undermining the goal of safety for people experiencing family

993 Submissions 65 (Associate Professor John Willis, La Trobe University), 74 (Women’s Legal Service Victoria).

994 Submissions 49 (Domestic Violence and Incest Resource Centre), 79 (Department of Human Services).

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

996 Submissions 61 (Broadmeadows Community Legal Service), 64 (Federation of Community Legal Centres (Vic)).

violence. Family violence victims should not have an intervention order imposed on them where there is no evidence that they have committed any acts of family violence.

8.91 The commission agrees that a cross application may be appropriate in situations where violence has been committed by both parties. The commission is not seeking to limit the access to intervention orders. However, where a cross application is made, both applicants must be able to demonstrate grounds to justify the order.

8.92 The commission also wants to ensure that victims who make a cross application are not disadvantaged by any changes to the current system. The Women's Legal Service Victoria notes that these applicants may be disadvantaged by a requirement to prove that grounds exist for an intervention order against the respondent (who was the first applicant). The commission does not agree that this creates an additional disadvantage because if they had applied first, or if a mutual order was not consented to, they would still be required to show grounds for the order.

8.93 The commission does not agree with the view that it should be up to the parties how they decide to resolve the matter. The principles that we believe should underpin the intervention order system include recognising violence as unacceptable, empowering people who have experienced family violence, and promoting responsibility and accountability for perpetrators. A system where a mutual order can be made with no evidence that the victim has committed any acts of family violence undermines all of these principles.

8.94 The application for an intervention order form being used in the Magistrates' Court Family Violence Division includes two questions to alert the court to cross-applications. However, the standard application form does not include this type of question. The commission has recommended that the application form used in the family violence courts be reviewed and used in all Magistrates' Courts at Recommendation 43.

8.95 If both parties are applying for interim orders then the applications will be heard on the same day. Where the parties are applying for final orders, the application will need to be served on the respondent and the respondent given time to return a notice, according to recommendations 83–87. It will therefore not be possible for a respondent to attend court on the hearing date, apply for an order against the applicant and have the matter heard on the same day (unless the respondent applies for an interim order).

8.96 An order can still be made by consent without the applicant needing to prove grounds for the order where there is no cross application. The following

recommendation only seeks to limit orders by consent to situations where the respondent has also applied for an order against the applicant.

! RECOMMENDATION(S)

88. A mutual order should not be made unless the magistrate is satisfied that there are sufficient grounds for making orders against each party on the basis that each party has committed family violence.

VEXATIOUS APPLICATIONS

[E]fforts should be made to detect patterns of behavior which, over time, demonstrate abuse of the legal system. In my own experience, intervention orders have repeatedly been sought against me or other members of my family by a single individual—at least 11 applications under two different surnames in two separate magistrates courts over a three year period—and, having no foundation, have been either denied, or interim orders granted only to be rescinded on the occasion of a full hearing or appeal. However, it appears that such applications—even if persistently found insufficient to warrant the granting of orders—may be made with relative impunity and continue indefinitely.⁹⁹⁷

8.97 During the commission's consultations, concerns were raised about various forms of misuse of the Crimes (Family Violence) Act. Misuse of the Act by respondents who continually make applications for variations or revocations of an intervention order are discussed at paragraphs 10.37–10.43. Cross applications that are made without any grounds to justify them are discussed at 8.81–8.96. In this section we will discuss people who repeatedly make applications for intervention orders based on the same or similar allegations to harass the respondent.

8.98 The Magistrates' Court has no power to prevent a person who makes multiple and frequent applications to harass a family member from continuing to do so. The registrar must continue to issue a summons for the respondent to attend court and defend the application whenever an application for an intervention order is made. All the court can do in this situation is refuse to make the order once the application is heard. The court may also award costs against the applicant if the magistrate finds the

997 Submission 80 (Anonymous).

application was ‘vexatious, frivolous or in bad faith’.⁹⁹⁸ This means that the respondent must repeatedly attend court to defend an application that may have no merit.

8.99 In most jurisdictions courts have the power to declare a person a vexatious litigant. This stops the person instituting new legal proceedings without the leave of the court. These provisions prevent individuals from using court processes as a form of harassment, as they must demonstrate some grounds for an application before the other party is required to attend court and respond. In Victoria, only the Supreme Court has the power to declare a person a vexatious litigant and only the Attorney-General may make an application for a declaration. The Supreme Court may make a vexatious litigant order if it is satisfied that a person has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings.⁹⁹⁹ These legal proceedings may include proceedings in the Magistrates’ Court, such as intervention order applications.

Vexatious litigants are people who persistently institute legal proceedings without any reasonable grounds.

OTHER JURISDICTIONS

8.100 In most other states an application to have a person declared a vexatious litigant can be made by a wider range of people than in Victoria. In Queensland and Western Australia an application may be made by the Attorney-General, the Crown Solicitor, the registrar of the court, a person against whom another person has instituted or conducted a vexatious proceeding or any other person who has a sufficient interest in the matter.¹⁰⁰⁰ In the ACT and New South Wales an application can be made by the Attorney-General or by a person aggrieved by the institution of vexatious proceedings.¹⁰⁰¹ In South Australia and Tasmania an application can be made by any interested person.¹⁰⁰² Courts can also make a declaration on their own motion (without an application from a person) in Western Australia, Queensland and in the Federal Magistrates Court.¹⁰⁰³ In Western Australia a hearing to determine whether a

998 *Crimes (Family Violence) Act 1987* s 21C(2).

999 *Supreme Court Act 1986* s 21.

1000 *Vexatious Proceedings Act 2005* (Qld) s 5(1); *Vexatious Proceedings Restriction Act 2002* (WA) s 4(2).

1001 *Supreme Court Act 1933* (ACT) s 67A(2); *Supreme Court Act 1970* (NSW) ss 84(1), (2).

1002 *Supreme Court Act 1935* (SA) s 39(1); *Supreme Court Civil Procedure Act 1932* (Tas) s 194G(3).

1003 *Vexatious Proceedings Restriction Act 2002* (WA) s 4(2); *Vexatious Proceedings Act 2005* (Qld) s 6(3); *Federal Magistrates Court Rules 2001* (Cth) pt 13.11.

person is a vexatious litigant can be held in the District Court as well as the Supreme Court.¹⁰⁰⁴

VIEWS FROM SUBMISSIONS

8.101 Submissions overwhelmingly wanted to ensure that the intervention order system cannot be used by applicants as a form of harassment and abuse of other family members.¹⁰⁰⁵ Submissions supported a power for magistrates to stay or dismiss an application that is vexatious.¹⁰⁰⁶

When a magistrate **stays** an application it means the application is suspended.

8.102 The Women’s Legal Service Victoria also supported a power for the Magistrates’ Court to declare a person a vexatious litigant and therefore require him or her to apply for the leave of the court to make an intervention order application. However, submissions recognised that such a provision would be a significant obstacle to use of the intervention order system for those declared vexatious. Submissions suggested safeguards for any system that deals with vexatious litigants, such as:

- parties in danger of being declared vexatious should receive sufficient warning;¹⁰⁰⁷
- the potentially vexatious party must have a right to appear, be heard and present evidence before a decision is made¹⁰⁰⁸ and should be given access to legal advice and representation to defend the hearing;¹⁰⁰⁹
- people should not be declared vexatious simply because they have made and withdrawn previous applications, as this is common for victims of family violence.¹⁰¹⁰

1004 *Vexatious Proceedings Restriction Act 2002* (WA) ss 3, 4(1).

1005 Submissions 20 (Mrs EF Belsten), 25 (Barbara Roberts), 27 (Robinson House BBWR), 40 (Whittlesea Domestic Violence Network), 41 (Victoria Legal Aid), 62 (Eastern Community Legal Centre), 64 (Federation of Community Legal Centres (Vic)), 74 (Women’s Legal Service Victoria), 79 (Department of Human Services), 80 (Anonymous).

1006 Submissions 20 (Mrs EF Belsten), 25 (Barbara Roberts), 27 (Robinson House BBWR), 40 (Whittlesea Domestic Violence Network), 41 (Victoria Legal Aid), 62 (Eastern Community Legal Centre), 64 (Federation of Community Legal Centres (Vic)), 74 (Women’s Legal Service Victoria), 79 (Department of Human Services), 86 (Magistrates’ Court of Victoria).

1007 Submission 64 (Federation of Community Legal Centres (Vic)).

1008 Submissions 41 (Victoria Legal Aid), 74 (Women’s Legal Service Victoria), 86 (Magistrates’ Court of Victoria).

1009 Submissions 64 (Federation of Community Legal Centres (Vic)), 74 (Women’s Legal Service Victoria), 86 (Magistrates’ Court of Victoria).

8.103 The Eastern Community Legal Centre emphasised that any procedure to deal with vexatious litigants should not require the respondent to the potentially vexatious application to attend court.

COMMISSION'S RECOMMENDATIONS

8.104 The commission is concerned that applications for intervention orders are being used by some people as a way of harassing and intimidating family members. New family violence legislation must ensure there is a fair and accessible procedure to ensure this cannot occur. The commission therefore recommends that the power to declare a person a vexatious litigant be expanded in two ways in family violence cases.

8.105 First, the power to declare a person a vexatious litigant should be available to the Magistrates' Court in family violence matters. The Magistrates' Court is much more accessible than the Supreme Court and it deals with intervention order applications. It will therefore often be the most appropriate venue for a hearing to decide if a person is vexatious. The commission recommends that the Chief Magistrate and delegates of the Chief Magistrate have the power to declare a person a vexatious litigant in family violence matters. In this way, the power will be limited to a few magistrates and could be made available in regional areas where the Chief Magistrate appoints delegates. The power should be limited to requiring a person to seek leave to make an application for an intervention order and should not apply to all types of legal proceedings.

8.106 Secondly, it should be open to other people apart from the Attorney-General to apply for a declaration that a person is a vexatious litigant. At a minimum, this should include the person being subjected to the legal proceedings. People subjected to vexatious proceedings are directly affected by the harassing behaviour and therefore should be able to apply directly to the court. The court should also be able to hold a hearing on its own motion to determine whether a person is a vexatious litigant, based on the evidence before the court regarding previous applications. The court should have this power because the respondent who is being harassed may not be aware of the possibility of applying for a declaration.

8.107 Any system for declaring people vexatious litigants must have sufficient safeguards to ensure that it does not unfairly prevent people from accessing an intervention order. The commission recommends that when the court is deciding

whether a person should be declared a vexatious litigant, the following safeguards should apply:

- the person should be warned that the court is considering making a vexatious litigant declaration and should be provided with an opportunity to prepare to defend this finding and obtain legal representation before the hearing;
- the court may refer the potentially vexatious litigant to Victoria Legal Aid for an assessment of eligibility for legal aid to defend the finding;
- the grounds for making a vexatious litigant declaration should be the same as those that apply in the Supreme Court—that the person has instituted vexatious legal proceedings habitually and persistently and without any reasonable ground;¹⁰¹¹
- if a person is declared vexatious then that person can appeal to the Supreme Court on a point of law.

8.108 Once people are declared vexatious they will not be able to make an intervention order application without the leave of the Magistrates' Court. The commission recommends that any magistrate should have the power to hear an application from a vexatious litigant to determine whether the application should be allowed. This power should not be limited to the Chief Magistrate, as this may create a time delay for a person who has been declared vexatious but is genuinely seeking protection from family violence. An application for leave to apply for an intervention order should be easily accessible.

! RECOMMENDATION(S)
<p>89. The Chief Magistrate and delegates of the Chief Magistrate should have the power to declare a person involved in family violence proceedings a vexatious litigant and therefore require that the person seek leave of the court before making any further intervention order applications.</p>
<p>90. The Chief Magistrate or a delegate should be able to declare a person a vexatious litigant if the litigant has habitually, persistently and without any reasonable ground instituted applications under the Act.</p>

1011 *Supreme Court Act 1986* s 21(2).

! RECOMMENDATION(S)

91. The power to declare a person a vexatious litigant should be exercised on application from the person subject to the potentially vexatious proceedings, or the Attorney-General or on the court's own motion.
92. Before making a declaration that a litigant is vexatious, the court should provide the person with an opportunity to be heard. The court should also provide the person with an opportunity to obtain legal representation for the hearing.
93. A declaration that a person is a vexatious litigant may be reviewed by the Supreme Court on a point of law.
94. A vexatious litigant may apply to any Magistrates' Court for leave to issue an intervention order application. An application for leave to apply should be heard as soon as possible.

ORDERS AGAINST YOUNG PEOPLE

Things had got really bad. There were holes in the walls, lots of things were broken and I kept a set of crockery and cutlery in my bedroom so that I would have something to use when I couldn't get in to the kitchen. I started living in my bedroom because I was frightened of the violence [from my teenage daughters] ... Before I felt that mothers should be able to fix things up but I couldn't ... One time after some abuse I said to [my daughter] 'I have rights too' and she just laughed and said 'oh you reckon?', and I said 'Well if you don't believe I have rights then you know the police can tell you otherwise'. She didn't have any response to that. She just turned around and walked off and that's a sure sign that she actually heard what I said. So it actually stopped the situation. I think having the intervention order and having a plan of action in my head has helped. Recently [my daughter] said to me 'you know [you] taking out that intervention order [against me] helped me.' That was very validating.¹⁰¹²

8.109 Under the current Act, there is no restriction on obtaining an intervention order against someone who is aged under 18 years. The Consultation Paper asked

1012 Paterson (2001) above n 19, 41–42, 44, 49.

whether there should be limits on the court's ability to make an order against a young person, due to the criminal law consequences that may result from breaching an intervention order. Intervention orders against young people may also increase their risk of homelessness if the applicant is someone the young person normally lives with. However, violence by young people within the family, particularly against their mothers, is a serious problem. The extent of young people's violence within the family is being increasingly recognised in family violence literature and policy.¹⁰¹³ There are, however, no Australian studies on the prevalence of adolescent violence against parents.¹⁰¹⁴ In 2002–03, 371 finalised applications for an intervention order were made against a child respondent under 18 years of age in Victoria.¹⁰¹⁵ From 1994 until 2005, the proportion of intervention orders made against a person aged under 18 has risen from 1.5% to 3%. However, these figures also include stalking intervention orders.¹⁰¹⁶

OTHER JURISDICTIONS

8.110 Other jurisdictions have imposed limits on allowing orders against people aged under 18 years. In New Zealand a protection order cannot be made against someone who is aged under 17 years, unless the young person is married or has been married.¹⁰¹⁷

8.111 In Western Australia, a restraining order cannot be made against a child aged under ten years.¹⁰¹⁸ A restraining order against a child who is 10–17 years old has a maximum duration of six months unless the child has also been convicted of a violent offence.¹⁰¹⁹ The six-month limit was introduced in recognition that children 'have a vastly different concept of time to adults ... Two years in the life of a child is a particularly long time, especially where the applicant is a parent of the child'.¹⁰²⁰ Before a court makes a restraining order against a child who is aged under 16 years and the order is for the benefit of the child's parent or guardian, then the court must inform the CEO of the government department in charge of child welfare. If an order is made, child welfare must conduct an inquiry into whether measures need to be taken

1013 Natasha Bobic, *Adolescent Violence Towards Parents* (2004); Natasha Bobic, *Adolescent Violence Towards Parents: Myths and Realities* (2002); Paterson (2001) above n 19.

1014 Bobic (2004) above n 1013, 3.

1015 Victorian Law Reform Commission (2004) above n 8, 94.

1016 Submission 86 (Magistrates' Court of Victoria).

1017 *Domestic Violence Act 1995* (NZ) s 10.

1018 *Restraining Orders Act 1997* (WA) s 50.

1019 *Restraining Orders Act 1997* (WA) s 50A.

1020 Department of Justice [Western Australian], *Report on a Review of Legislation Relating to Domestic Violence, Final Report* (2004) 26.

to ensure the child's wellbeing.¹⁰²¹ These measures seek to provide some level of protection for children against homelessness as the result of a restraining order that restricts them from living in the family home.¹⁰²²

8.112 Queensland's family violence legislation was amended in 2002 to apply to a wider range of family relationships than the previous legislation, which only applied to spouses.¹⁰²³ The legislation was expanded to include intimate personal relationships, family relationships and informal care relationships.¹⁰²⁴ At the same time, the legislation limited access to a domestic violence order against a child to cases where the child is in a spousal, intimate or informal care relationship with the applicant.¹⁰²⁵ This restriction means that a domestic violence order cannot be sought against a child by a relative or any other person in a family relationship with the child, including a parent.

8.113 In the ACT, the Domestic Violence and Protection Orders Act contains a much more limited restriction on orders against young people. The legislation provides that an interim order may only prohibit a respondent child from being on premises where the child normally receives care (including education) and protection if the court is satisfied that adequate arrangements have been made for the child's care and safety.¹⁰²⁶ An example of where the court may be satisfied is where a government agency responsible for the care and protection of children has found alternative accommodation for the child.¹⁰²⁷

PENALTIES AGAINST YOUNG PEOPLE IN INTERNATIONAL STANDARDS

8.114 Various international standards about children and young people have recognised the negative impact of contact with the justice system for young people. Many of these standards refer to criminal charges. As the breach of an intervention order can result in criminal charges, these standards are relevant to the availability of intervention orders against young people. The *Convention on the Rights of the Child* states that arrest, detention or imprisonment must only be used as a measure of last

1021 *Restraining Orders Act 1997* (WA) s 50C.

1022 Department of Justice [Western Australia] (2004) above n 1020, 24.

1023 *Domestic Violence Legislation Amendment Act 2002* (Qld).

1024 *Domestic Violence Legislation Amendment Act 2002* (Qld) ss 9, 11.

1025 *Domestic Violence Legislation Amendment Act 2002* (Qld) s 11 inserting s 12D into the *Domestic and Family Violence Protection Act 1989* (Qld).

1026 *Domestic Violence and Protection Orders Act 2001* (ACT) s 51(2).

1027 *Domestic Violence and Protection Orders Act 2001* (ACT) note to s 51(2).

resort in cases involving children.¹⁰²⁸ The convention also provides that where a child has been accused of committing a crime there should be:

measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programs and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.¹⁰²⁹

VIEWS FROM SUBMISSIONS

8.115 The commission did not receive any submissions in favour of a complete ban on orders against young people, as in the New Zealand system. Submissions wanted violence by young people to be taken seriously by the legal system, and people who experience violence by young people to have recourse to some form of protection.¹⁰³⁰ Victims of particular concern were girlfriends, siblings and mothers of adolescent boys.¹⁰³¹ Victoria Police noted that parents are usually reluctant to proceed with criminal charges of assault when violence has been perpetrated against them. The possibility of obtaining an intervention order in this circumstance therefore provides some level of accountability and safety. The Women's Domestic Violence Crisis Service told us:

It has been our experience that some women have experienced extreme violence at the hands of their sons—some as young as 12 years of age—and they feel just as violated and powerless as if the violence had been committed by an adult.

8.116 However, most submissions wanted to ensure that an intervention order against a young person does not lead to homelessness, early school leaving, or entry into the criminal justice system.¹⁰³² Submissions emphasised the need to address the

1028 *Convention on the Rights of the Child*, UN GAOR, 44th sess, UN Doc A/44/736 (1990) art 37(b).

1029 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 40(3)(b).

1030 Submissions 27 (Robinson House BBWR), 30 (Violence Against Women Integrated Services), 33 (Women's Domestic Violence Crisis Service), 54 (Andrew Compton), 63 (Darebin Family Violence Working Group), 72 (Victoria Police), 74 (Women's Legal Service Victoria), 86 (Magistrates' Court of Victoria).

1031 Submissions 27 (Robinson House BBWR), 30 (Violence Against Women Integrated Services), 74 (Women's Legal Service Victoria).

1032 Submissions 14 (Anonymous), 28 (Murray Mallee Community Legal Service), 64 (Federation of Community Legal Centres (Vic)).

behavioural problems of young people through counselling or behaviour change programs and support for the parents or carers.¹⁰³³ The Magistrates' Court told us it is developing a Male Adolescent Family Violence Project that seeks to address the behavioural issues involved. The importance of other support services such as accommodation and rehabilitation were also highlighted.¹⁰³⁴

8.117 Suggestions regarding the availability, content and process for intervention orders against young people were made in submissions:

- the case should be heard in the Children's Court¹⁰³⁵ and the magistrate should be able to refer the case to the Children's Court Clinic for a psychological or psychiatric assessment;¹⁰³⁶
- the Children's Court should be empowered to refer a case to the Department of Human Services for a report on alternative care arrangements and other relevant strategies;¹⁰³⁷
- counselling¹⁰³⁸ or therapeutic conditions such as behaviour change programs or drug and alcohol treatment should be available as conditions for the order;¹⁰³⁹
- the age of the respondent should be taken into account when deciding on the length¹⁰⁴⁰ and the conditions¹⁰⁴¹ of any order made;
- the order should last for a maximum of six months, and no indefinite orders should be allowed;¹⁰⁴²
- the magistrate should be satisfied that arrangements have been made for the accommodation and schooling of the young person before making an order;¹⁰⁴³
- an intervention order should only be used in 'exceptional circumstances'¹⁰⁴⁴ or as a 'last resort';¹⁰⁴⁵

1033 Submissions 41 (Victoria Legal Aid), 46 (Royal Children's Hospital), 49 (Domestic Violence and Incest Resource Centre), 64 (Federation of Community Legal Centres (Vic)), 72 (Victoria Police).

1034 Submissions 64 (Federation of Community Legal Centres (Vic)), 74 (Women's Legal Service Victoria).

1035 Submissions 41 (Victoria Legal Aid), 72 (Victoria Police).

1036 Submission 41 (Victoria Legal Aid).

1037 Submission 41 (Victoria Legal Aid).

1038 Submission 72 (Victoria Police).

1039 Submission 86 (Magistrates' Court of Victoria).

1040 Submissions 28 (Murray Mallee Community Legal Service), 74 (Women's Legal Service Victoria).

1041 Submission 74 (Women's Legal Service Victoria).

1042 Submission 64 (Federation of Community Legal Centres (Vic)).

1043 Submission 28 (Murray Mallee Community Legal Service).

- where the young person has consented to the order, the magistrate should still be satisfied that grounds exist for the making of the order.¹⁰⁴⁶

8.118 The Murray Mallee Legal Service provided the following case study about orders made by consent:

An application brought by a mother against her 15 year old son was heard by a Magistrate in Mildura. The mother was not represented, nor was the son. The Magistrate asked the respondent if he consented to the order, the respondent did not understand the question. The Magistrate rephrased it and the respondent's response was "Yes". The Magistrate asked if the respondent had received legal advice, he had not. The Magistrate then asked him if he was living at the address he was to be prohibited from, the respondent replied that this was true, but he was "staying with a friend now". The Magistrate then made the order for a period of 12 months without hearing any evidence from the [applicant].

COMMISSION'S RECOMMENDATIONS

8.119 The commission agrees that it is appropriate in some circumstances for intervention orders to be made against young people. An intervention order may be seen as an alternative to criminal charges and provides some form of accountability for the perpetrator of violence. However, it is essential that safeguards are in place to ensure that an intervention order against a young person does not lead to homelessness, early school leaving or unnecessary disruption to the young person's family life.

8.120 The commission agrees with Victoria Legal Aid and the Victoria Police that an intervention order application against a person aged under 18 should always be heard in the Children's Court. The advantages of a hearing in the Children's Court are:

- magistrates and court staff who are specialised in dealing with children's issues, including criminal and violent behaviour;
- increased access to legal representation for the young person;
- access to the Children's Court Clinic, so that a psychological or psychiatric report can be provided to the magistrate.

1044 Submissions 33 (Women's Domestic Violence Crisis Service), 46 (Royal Children's Hospital), 64 (Federation of Community Legal Centres (Vic)).

1045 Submission 41 (Victoria Legal Aid).

1046 Submission 28 (Murray Mallee Community Legal Service), 64 (Federation of Community Legal Centres (Vic)).

8.121 The commission also agrees with Victoria Legal Aid that where an order seeks to exclude young people from their place of residence, the court should be empowered to refer the case to the Department of Human Services for a report on alternative care arrangements. This is the system operating in Western Australia for orders against people aged under 16 years, and also applies at the interim order stage in the ACT. It is an important safeguard against the risk of homelessness for young people who have an intervention order made against them. The Children's Court can currently inform the Department of Human Services that it is planning to make an intervention order against a young person and request the department to take measures to protect the child. However, there is no clear legislative obligation on the department to act. This should be the case wherever an order would exclude young people from their home, usually where the order is sought by their parent, guardian or other care giver.

8.122 The commission also agrees that there should be a legislative time limit on any intervention order made against a young person. However, the commission also wants to ensure the safety of people who are subjected to violence from young people. Therefore, the commission recommends that an intervention order against a young person should not last for longer than 12 months, unless exceptional circumstances are present.

8.123 The commission also agrees with the suggestion of the Murray Mallee Community Legal Service and the Federation of Community Legal Centres that a court should be satisfied that there are grounds for making orders against young people, even if they have consented to the making of the order. This is similar to the commission's recommendation about mutual orders at Recommendation 88. This requirement would provide extra protection for young people who may consent so they do not need to appear in court, are intimidated by the process, or have not received legal advice and do not understand the consequences of consenting to an order. This requirement will ensure that intervention orders are only made against young people where there are grounds to justify making an order.

8.124 The commission also considers that where an application is made against a young person, the person's age may be a relevant consideration for the court when considering whether to allow an undertaking rather than an intervention order. Undertakings are discussed at paragraphs 8.126–8.144.

8.125 The commission supports the development of the Male Adolescent Family Violence Project currently being undertaken by the Magistrates' Court and the Department of Justice, as a step towards providing comprehensive programs for young men who use violence in the family.

! RECOMMENDATION(S)

95. Applications for intervention orders against people who are aged under 18 years should only be heard in a Children’s Court.
96. A new Family Violence Act should provide that before the Children’s Court makes an intervention order against a young person that would exclude him or her from his or her ordinary place of residence, the court should inform the Department of Human Services. Once the department has been informed, it must conduct an inquiry into measures that need to be taken to ensure the young person’s wellbeing.
97. The new Family Violence Act should provide that an intervention order made against a young person should not last for longer than 12 months unless there are exceptional circumstances.
98. Where young people consent to an intervention order being made against them, the court must satisfy itself that grounds exist before making the order.

UNDERTAKINGS

Whilst we waited in the Court foyer for our time in Court, my Husband made a point of ensuring that I could see him socialising and laughing with [the] Police. I could overhear him denigrating me and saying that I’ve made up ‘some story’ about an assault—they laughed with him. I felt extremely intimidated and scared. I was worried about what would happen if I sought the Intervention Order. All things considered, I agreed to accept the Undertaking to the Court, which was given in front of a Magistrate. Hindsight is a wonderful thing and accepting the Undertaking was one of the worst decisions of my life. I immediately learnt that Undertakings are worthless. They are easily manipulated and can be circumvented with confidence by the person who has made the Undertaking as there is no risk of criminal sanctions if they are breached. In my case, the Undertaking was

breached immediately, even before I left the Court building. This was followed by numerous breaches over the course of several months. I reported these breaches to the Police who said that they were powerless to act as it was only an Undertaking.¹⁰⁴⁷

8.126 Under the current intervention order system, applicants for intervention orders are sometimes persuaded by the magistrate, the respondent's lawyer or their own lawyer to accept an undertaking from the perpetrator rather than go ahead with an application for an intervention order. When respondents make an undertaking to the court, they agree to refrain from behaving in a certain way, such as assaulting, harassing, or threatening the protected person. The Act does not provide for the respondent to give an undertaking as an alternative to the court making an intervention order. If respondents breach an undertaking, they have not committed an offence and the police cannot take any action unless another criminal offence has been committed.

8.127 Under the Magistrates' Court Family Violence and Stalking Protocols, the giving of an undertaking results in the applicant withdrawing the intervention order application.¹⁰⁴⁸ If the respondent fails to adhere to the undertaking, the applicant can complete a 'Notice of Reinstatement' which reinstates the application.¹⁰⁴⁹ The protocols also state:

It is preferable that any undertaking document used NOT look like a Court order to avoid confusion. It should also have a statement on it 'This is not an intervention order'.¹⁰⁵⁰

8.128 In 2004–05, approximately 1000 applications for intervention orders were withdrawn, with the respondent accepting an undertaking rather than an intervention order. This represents 5% of all applications for family violence intervention orders.¹⁰⁵¹

VIEWS FROM SUBMISSIONS

8.129 Submissions were divided on the appropriateness of undertakings. However, all submissions wanted to ensure that undertakings are not made frequently, or in circumstances where an intervention order is the appropriate outcome.

8.130 Various submissions outlined the negative aspects of undertakings. Women are often intimidated into accepting an undertaking as a further act of control and

1047 Submission 81 (Anonymous).

1048 Magistrates' Court of Victoria (2003) above n 575, para 19.1.

1049 Ibid.

1050 Magistrates' Court of Victoria, *Family Violence and Stalking Protocols* (2003) (emphasis in original).

1051 Submission 86 (Magistrates' Court of Victoria).

punishment.¹⁰⁵² The Murray Mallee Community Legal Service noted that '[n]ot only does this play out the violence again, it makes lawyers and the Court complicit'. One woman who had experienced family violence told the commission:

Pressure from legal representatives to accept an undertaking can be quite relentless and demeaning. I was asked to seriously consider the undertaking of my husband when waiting for the matter to be dealt with in the courtroom. I was told that an undertaking was simply a promise and had no legal binding or enforcement. From a man who had broken every promise he ever made and more, I was amazed that I was being pressured to accept this promise in place of an intervention order.¹⁰⁵³

8.131 The Whittlesea Domestic Violence Network believed that undertakings rarely work to restrain the perpetrator's behaviour. Undertakings also create problems as they are unenforceable by the police¹⁰⁵⁴ and victims may not understand that this is the case, giving them false hope.¹⁰⁵⁵ Magistrates also make contradictory statements about the legal effect of undertakings—some saying they are unenforceable and others informing applicants that a respondent can be charged with contempt of court for breaching the undertaking.¹⁰⁵⁶

8.132 The Department of Human Services observed that 'few women inform the court that the undertaking has been breached, as the original process left them feeling disempowered and not believed'. Submissions from Robinson House, the Darebin Family Violence Working Group and Victoria Police said the use of an undertaking is never appropriate.

8.133 Other submissions mentioned positive aspects about undertakings. The Broadmeadows Community Legal Service noted that for some women an undertaking is a first step in taking action against a violent partner. Where an undertaking is breached, these women are often more likely to then apply for an intervention order. An undertaking ensures that these women leave the court with something, albeit not the best alternative. The Women's Legal Service Victoria also noted that an undertaking may be better than nothing where the applicant does not have enough evidence to obtain an intervention order. Victoria Legal Aid pointed out that undertakings may be an appropriate outcome where the respondent is under 18 years

1052 Submissions 28 (Murray Mallee Community Legal Service), 79 (Department of Human Services), 81 (Anonymous).

1053 Submission 44 (Anonymous).

1054 Submission 61 (Broadmeadows Community Legal Service), submission 81 (Anonymous).

1055 Submission 79 (Department of Human Services).

1056 Submission 74 (Women's Legal Service Victoria).

of age. Victoria Police also noted that undertakings may be used in the Children's Court to reduce the chances of juveniles becoming involved in the criminal justice system, however, their use does nothing to protect the victim. A breach of an undertaking may make it easier for a victim to obtain an intervention order.¹⁰⁵⁷

8.134 Submissions included suggestions on how the system could limit the use of undertakings and improve the outcomes where they are used:

- The use of undertakings should be regulated by legislation and the legislation should define when an undertaking is appropriate.¹⁰⁵⁸
- The decision to accept an undertaking should be made by the court, not by the applicant. The court should hold a hearing to determine this and hear evidence from the applicant about the information included in the application.¹⁰⁵⁹ The court should consider making an intervention order with only one condition—to not assault, harass, molest or threaten—where the parties have suggested an undertaking.¹⁰⁶⁰ This is appropriate where the applicant does not have legal representation.¹⁰⁶¹
- Where an undertaking is made, the application should not be withdrawn. The application should be adjourned for a reasonable period (eg six months) so that if there is a breach during this time the application can be reinstated on short notice.¹⁰⁶²
- Where applicants are unrepresented, the magistrate should direct them to seek legal advice before accepting an undertaking.¹⁰⁶³ Legal advice and other supports, such as disability-specific support, are essential so that the applicant can make an informed decision.¹⁰⁶⁴

1057 Submission 65 (Associate Professor John Willis, La Trobe University).

1058 Submissions 30 (Violence Against Women Integrated Services), 49 (Domestic Violence and Incest Resource Centre).

1059 Submissions 28 (Murray Mallee Community Legal Service), 40 (Whittlesea Domestic Violence Network), 61 (Broadmeadows Community Legal Service).

1060 Submission 28 (Murray Mallee Community Legal Service).

1061 Submissions 64 (Federation of Community Legal Centres (Vic)), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)).

1062 Submission 41 (Victoria Legal Aid).

1063 Submissions 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)), 74 (Women's Legal Service Victoria).

1064 Submissions 51 (Villamanta Legal Service), 61 (Broadmeadows Community Legal Service), 64 (Federation of Community Legal Centres (Vic)), 74 (Women's Legal Service Victoria), 86 (Magistrates' Court of Victoria).

- Training of magistrates to increase their awareness of family violence would help to ensure that victims are not coerced into accepting an undertaking.¹⁰⁶⁵
- 8.135 Submissions also suggested how parties could be made more aware of the consequences of accepting an undertaking:
- Magistrates should be required to explain to applicants the difference between an intervention order and an undertaking.¹⁰⁶⁶ Magistrates and other court staff should receive training to ensure that people with disabilities understand the information that is given to them.¹⁰⁶⁷
 - Magistrates should make it clear that if the undertaking is breached the applicant should come back to court to have the original application reinstated.¹⁰⁶⁸
 - The actual undertaking should not look like a court form.¹⁰⁶⁹ It should clearly set out information and include a statement such as ‘I understand the police cannot enforce this agreement’.¹⁰⁷⁰

COMMISSION’S RECOMMENDATIONS

8.136 The commission agrees that the current system for accepting undertakings leads to them being made in inappropriate circumstances. However, the commission does not believe that the option of an undertaking should be removed altogether. The use of undertakings provides some flexibility in the intervention order system. An

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- 1065 Submissions 30 (Violence Against Women Integrated Services), 49 (Domestic Violence and Incest Resource Centre). The commission recommends regular and thorough training for magistrates in family violence matters at Recommendation 38.
- 1066 Submissions 30 (Violence Against Women Integrated Services), 61 (Broadmeadows Community Legal Service), 64 (Federation of Community Legal Centres (Vic)), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria), 74 (Women’s Legal Service Victoria), 79 (Department of Human Services). The Magistrates’ Protocols do not include a requirement that magistrates explain the difference between an undertaking and an intervention order, but state, ‘A copy of the extract, undertaking and information form must be given to the parties. This is to avoid the current confusion about the difference between an order and an undertaking to the Court’: Magistrates’ Court of Victoria (2003) above n 575, para 19.1.
- 1067 Submission 51 (Villamanta Legal Service).
- 1068 Submissions 61 (Broadmeadows Community Legal Service), 64 (Federation of Community Legal Centres (Vic)).
- 1069 Submission 28 (Murray Mallee Community Legal Service), 74 (Women’s Legal Service Victoria). This requirement is already contained in the Magistrates’ Court Protocols, but is rarely complied with in practice: submission 74 (Women’s Legal Service Victoria).
- 1070 Submissions 27 (Robinson House BBWR), 28 (Murray Mallee Community Legal Service), 61 (Broadmeadows Community Legal Service), 64 (Federation of Community Legal Centres (Vic)).

undertaking may allow some victims to obtain something from the court in circumstances where they are reluctant to proceed with an intervention order application, or do not yet have enough evidence to do so. Therefore, the commission recommends that undertakings are only made in limited circumstances and the procedure is improved to ensure all parties understand it.

8.137 As an essential first step, the commission recommends that the Magistrates' Court Protocols be amended to clearly set out the circumstances where an undertaking might be considered appropriate. The commission has considered the suggestion that the use of undertakings be regulated by legislation. However, the commission is concerned that regulation in legislation may lead to a further entrenchment of the use of undertakings as a common alternative to an intervention order. The commission believes the court protocols are the appropriate place to provide criteria to limit the use of undertakings.

8.138 Revised protocols should provide that the court must be satisfied that the applicant fully understands the consequences of accepting an undertaking. The commission agrees that legal advice is essential for an applicant to make an informed decision about whether to accept an undertaking. The commission has recommended increased availability of legal advice at recommendations 39–41. However, the court cannot require a person to seek legal advice. Therefore, the commission recommends that the protocols should state that the court 'must be satisfied that the applicant fully understands the consequences of accepting an undertaking (this would normally be the case if the applicant has received legal advice or is legally represented)'.

8.139 Secondly, the revised protocols should state that the court must consider the circumstances of the case and whether it is more appropriate to accept an undertaking rather than make an intervention order. The protocols should specify that circumstances that may be relevant to this decision include the age of the respondent and the nature of the violence perpetrated by the respondent. The age of the respondent is relevant where he or she is under 18 years old.¹⁰⁷¹ The court should also consider the nature of the violence perpetrated by the respondent, to ensure that cases of serious violence are not dealt with by undertakings.

8.140 The court should also be required to consider the possibility of making an intervention order with the only condition that the respondent not assault or harass the applicant, rather than accepting an undertaking.¹⁰⁷² This requirement would ensure

1071 The commission recommends limiting the circumstances where an intervention order is made against a young person who is under 18 at recommendations 95–98.

1072 Submission 28 (Murray Mallee Community Legal Service).

a greater level of safety where the application involves serious acts of violence. The order would be clearly enforceable by the police and the consequence of breaching the order would be a criminal charge. This provision should also alert respondents and respondents' lawyers that the court will not allow an undertaking where the circumstances involve serious acts of violence and will therefore decrease the opportunity for victims to be pressured into accepting an undertaking where it is inappropriate.

8.141 The revised protocols should also clearly outline the legal consequences of accepting an undertaking. The protocols should provide that where an undertaking is made, the original application for an intervention order is suspended for the period of the undertaking. If the undertaking is breached, the applicant has an automatic right of reinstatement of the original application.¹⁰⁷³ However, applicants must also have the right to apply for a new interim intervention order, so they do not need to wait for their original application to be re-issued. Immediate protection for a person who has experienced a breach of an undertaking is essential, and a right of re-instatement should not limit access to the protection of an interim order.

8.142 Magistrates should not inform parties that a breach may result in a charge of contempt of court. This sets up a parallel system to the intervention order system and is difficult to enforce because the police will not act on breach of an undertaking. The appropriate response to a breach of an undertaking should be the reinstatement of the original application for an intervention order or a new application for an interim intervention order.

8.143 The commission is also concerned that some courts have inconsistent practices about the physical appearance of an undertaking. Although the protocols clearly state that it is 'preferable' that an undertaking not look like a court order,¹⁰⁷⁴ in practice this standard is apparently not always followed.¹⁰⁷⁵ The commission understands that the Magistrates' Court is developing a standard form for undertakings. The commission supports this and it should be used by all magistrates. The standard form should not look like a court order and should clearly set out the effects of an undertaking. The form could include a statement such as, 'This agreement cannot be enforced by the police. However, if the agreement is broken, you can return to court immediately to seek an intervention order'. This should help to alleviate the confusion experienced by many applicants about the legal nature of undertakings.

1073 Submission 41 (Victoria Legal Aid).

1074 Magistrates' Court of Victoria (2003) above n 575, para 19.1.

1075 Submission 74 (Women's Legal Service Victoria).

8.144 Magistrates should also be required to provide written information that outlines the legal effect of an undertaking. The Magistrates' Court should develop a standard form to use for this.

! RECOMMENDATION(S)

99. The Magistrates' Court Protocols should state that an undertaking should only be accepted by the court where the court is satisfied that:

- the applicant fully understands the consequences of accepting an undertaking (eg if the applicant has received legal advice or is legally represented);
- in all the circumstances of the case, it is more appropriate to accept an undertaking rather than make an intervention order.

100. The Magistrates' Court Protocols should state that when deciding whether it is appropriate to accept an undertaking, the court should have regard to:

- the respondent's age (ie that an undertaking may be more appropriate where the respondent is aged under 18 years);
- the nature of the violence perpetrated by the respondent, as disclosed in the application; and
- whether making an intervention order with a condition that the respondent not assault or harass the applicant as the only condition is more appropriate in all the circumstances of the case, rather than accepting an undertaking.

101. The Magistrates' Court Protocols should make it clear that an undertaking has the legal effect of suspending the intervention order application for the period of the undertaking. If an undertaking is breached, the applicant has a right of reinstatement of the original application or may make a new application for an interim order.

! RECOMMENDATION(S)

102. The Magistrates' Court should develop a standard form to be used as an undertaking in all courts. This form should be able to be easily distinguished from the form of an intervention order and should clearly outline the effects of an undertaking. For example 'This agreement cannot be enforced by the police. However, if the agreement is broken, you may return to court immediately to seek an intervention order'.

103. The court should provide the parties with written information explaining the nature of an undertaking at the time an undertaking is made.

COSTS

8.145 The Crimes (Family Violence) Act provides that parties must bear their own costs for an intervention order application unless there are 'exceptional circumstances'.¹⁰⁷⁶ The court may award costs where an application was vexatious, frivolous or in bad faith.¹⁰⁷⁷

8.146 Submissions received by the commission generally thought that costs orders were used appropriately by magistrates.¹⁰⁷⁸ The main problem identified was the threatened use of costs orders against applicants by respondents or their lawyers to pressure applicants into withdrawing their application, agreeing to an undertaking or agreeing to a mutual order.¹⁰⁷⁹ These threats are unlikely to succeed given the narrow range of circumstances in which costs are awarded. However, in a system where there is such limited access to legal advice, most applicants do not have adequate information to know that this is usually a hollow threat.

8.147 The commission agrees with submissions that the threatened use of costs orders creates a barrier to accessing the intervention order system. However, the commission views the current legislative requirements for costs orders as appropriate.

1076 *Crimes (Family Violence) Act 1987* s 21C(1).

1077 *Crimes (Family Violence) Act 1987* s 21C(2).

1078 Submissions 30 (Violence Against Women Integrated Services), 53 (Women's Electoral Lobby, Victoria), 74 (Women's Legal Service Victoria).

1079 Submissions 40 (Whittlesea Domestic Violence Network), 41 (Victoria Legal Aid), 64 (Federation of Community Legal Centres (Vic)), 74 (Women's Legal Service Victoria), 79 (Department of Human Services).

The potential for threats of costs orders will be reduced by other recommendations made by the commission, such as:

- increased access to legal advice;¹⁰⁸⁰
- the introduction of a notice system, so that the respondent cannot turn up to court without notifying the applicant;¹⁰⁸¹
- the introduction of a requirement that a mutual order cannot be made unless there are grounds for both orders;¹⁰⁸²
- greater regulation of the use of undertakings.¹⁰⁸³

8.148 One area where the use of costs orders was seen as problematic was where the police act as the applicant for the order. Therefore, the following section proposes changes for the availability of costs orders against police applicants.

COSTS AWARDED AGAINST POLICE

8.149 Anecdotal evidence suggests that since the introduction of the Police Code of Practice, costs are being awarded against the police more often than in the past in intervention order matters.¹⁰⁸⁴ Costs are being awarded against police in circumstances where they have brought an application in accordance with their obligations under the code. This is a serious concern, as it creates a disincentive for police to act according to their duty to bring an application where a person's safety, welfare or property appears to be endangered, or a criminal offence has been committed.

OTHER JURISDICTIONS

8.150 Other jurisdictions in Australia either do not allow costs against police applications for intervention orders, or limit the circumstances in which costs can be awarded. In Tasmania, costs cannot be awarded against police in an application for an intervention order in any circumstance.¹⁰⁸⁵ In New South Wales a costs order can only be made against a police applicant where the court is satisfied that the application was

1080 Recommendations 39–41.

1081 Recommendations 83–87.

1082 Recommendation 88.

1083 Recommendations 99–103.

1084 Submission 72 (Victoria Police).

1085 *Family Violence Act 2004* (Tas) s 34. Section 34 states, 'The court hearing an application under this Act made by a person other than a police officer may, if the court thinks fit, order either party to pay such costs as the court considers reasonable'.

made knowing it contained information that was false or misleading in a material way.¹⁰⁸⁶ In Western Australia costs cannot be awarded against a police applicant where the police officer acts in good faith and in the normal course of duty.¹⁰⁸⁷

VIEWS FROM SUBMISSIONS

8.151 The submission from Victoria Police mentioned this issue as a serious obstacle to increased police applications for intervention orders. The submission stated there is:

anecdotal evidence to suggest that since the introduction of [the] Code of Practice there has been an increase in the instances of costs being awarded against Victoria Police even in circumstances where there is no application by the defence and on the own motion of a Magistrate ... The issues of costs being awarded has the capacity to influence local police responses and can be a deterrent in police taking responsibility for the initiation of orders. We would therefore suggest that the act should be specific in relation to costs and only be awarded in circumstances where the application is vexatious, malicious or similar.

COMMISSION'S RECOMMENDATION

8.152 The commission recommends that a new Family Violence Act makes it clear that it is not appropriate to award costs against police when they are acting according to their obligations under the code. Costs should only be awarded against police where the application was made knowing it contained information that was false or misleading in a material way. Police applicants should be distinguished from other applicants, as they have a professional duty to apply for an intervention order in particular circumstances.

!	RECOMMENDATION
<p>104.A new Family Violence Act should provide that costs should only be awarded against a police applicant where the court is satisfied that the application was made knowing it contained information that was false or misleading in a material way.</p>	

1086 *Crimes Act 1900 (NSW)* s 562N(3).

1087 *Restraining Orders Act 1997 (WA)* s 69(3)(b).