
Chapter 9

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INTRODUCTION

9.1 In this chapter we look at what happens once a magistrate has decided to make an intervention order. In particular, we will examine the conditions that can be included in intervention orders, as well as their length. Under the Crimes (Family Violence) Act an order can be made for a specific length of time or can be indefinite. This chapter outlines how guidance can be given to magistrates to determine an appropriate length for an order and what conditions should be considered for inclusion. In particular, we examine how two types of conditions—exclusion conditions and child contact conditions—can be made more frequently and in a way that offers better protection to victims. We also look at the current illustrative list of conditions included in the Act and make a recommendation for its expansion. We also recommend that a new Family Violence Act makes it clear that the list of possible conditions on an intervention order is illustrative only, and that a magistrate can impose any condition that will offer protection in the circumstances of the case.

DURATION OF INTERVENTION ORDERS

9.2 The Crimes (Family Violence) Act gives magistrates the discretion to decide whether to make an order for a specific or indefinite period. If no time is specified, the order will remain in force until it is revoked by the court, reversed or set aside on appeal.¹⁰⁸⁸ There are no criteria in the Act to guide the magistrate's discretion. Most other Australian jurisdictions have similar provisions regarding the duration of intervention orders. However, in the ACT and Queensland protection orders must be made for not longer than two years unless special circumstances exist.¹⁰⁸⁹ The commission's Consultation Paper asked whether the current approach to determining the duration of an intervention order is appropriate.

VIEWS FROM SUBMISSIONS

9.3 All submissions were concerned about the duration of intervention orders. Some submissions expressed concerns that the current system results in inconsistencies

1088 *Crimes (Family Violence) Act 1987* s 6.

1089 *Domestic Violence and Protection Orders Act 2001* (ACT) s 35; *Domestic and Family Violence Protection Act 1989* (Qld) s 34A.

between magistrates when determining the duration of an order.¹⁰⁹⁰ Violence Against Women Integrated Services and Victoria Police said orders are often not made for long enough, particularly where the parties still have family law issues to sort out and will have ongoing contact in some form when the order expires. Victoria Legal Aid said indefinite orders are often not appropriate because they may be based on an over-estimation of the risk posed to the applicant and therefore result in a significant infringement of the respondent's civil liberties. The Magistrates' Court informed the commission that the number of indefinite orders made has been falling every year from 1999. In the last financial year about 7% of orders were made for more than 10 years or an indefinite period.

9.4 Submissions suggested how the current approach to the duration of orders could be improved, including:

- setting a minimum¹⁰⁹¹ or a maximum¹⁰⁹² length for all intervention orders;
- providing criteria as guidance for magistrates when deciding on length;¹⁰⁹³
- using a pro forma risk assessment tool;¹⁰⁹⁴
- asking applicants how long they want an order for on the application form;¹⁰⁹⁵
- providing legal advice to applicants so they know what to ask for.¹⁰⁹⁶

The Federation of Community Legal Centres suggested that the intervention order application form should ask applicants how long they think they will need protection for and include options. The application form used by the Magistrates' Court Family Violence Division asks the applicant 'How long do you want the intervention order to last?', and provides options of less than 12 months, 12 months, or more than 12

1090 Submissions 28 (Murray Mallee Community Legal Service), 30 (Violence Against Women Integrated Services), 40 (Whittlesea Domestic Violence Network).

1091 Suggestions for an appropriate minimum ranged from six months to three years: submissions 27 (Robinson House BBWR), 28 (Murray Mallee Community Legal Service), 40 (Whittlesea Domestic Violence Network), 49 (Domestic Violence and Incest Resource Centre), 72 (Victoria Police).

1092 Submission 65 (Associate Professor John Willis, La Trobe University) suggested setting a maximum length of 12 months.

1093 Submissions 25 (Barbara Roberts), 28 (Murray Mallee Community Legal Service), 41 (Victoria Legal Aid), 63 (Darebin Family Violence Working Group), 64 (Federation of Community Legal Centres (Vic)), 74 (Women's Legal Service Victoria), 79 (Department of Human Services).

1094 Submission 54 (Andrew Compton).

1095 Submissions 49 (Domestic Violence and Incest Resource Centre), 61 (Broadmeadows Community Legal Service), 64 (Federation of Community Legal Centres), 86 (Magistrates' Court of Victoria).

1096 Submission 86 (Magistrates' Court of Victoria).

months.¹⁰⁹⁷ Submissions from the Domestic Violence and Incest Resource Centre and the Federation of Community Legal Centres thought that 12 month orders were often the most appropriate length and should be standard practice or the minimum length for an order.

9.5 Submissions proposed criteria for magistrates that may be relevant to the length of the order, including:

- the length of the relationship;¹⁰⁹⁸
- frequency, nature or level of violence;¹⁰⁹⁹
- existence of current family law matters;¹¹⁰⁰
- whether children were present or were victims;¹¹⁰¹
- whether parties have re-located;¹¹⁰²
- any previous criminal history of the respondent.¹¹⁰³

COMMISSION'S RECOMMENDATIONS

9.6 All intervention orders should be made for a period that is relevant to the circumstances of the parties. Due to the wide variety of relationships and forms of violence covered by the legislation, the commission does not believe it is appropriate to include a prescribed minimum or maximum length for an order.¹¹⁰⁴ Magistrates must retain their discretion to determine the appropriate length of an order. However, the commission acknowledges the current problem of a wide variation in approach between magistrates. The commission believes that this variation will be partly addressed by our recommendation for a specialist list for family violence matters and training of magistrates at recommendations 37 and 38. However, we also agree that

1097 The commission recommends that this application form be used in all Magistrates' Courts at Recommendation 43.

1098 Submissions 28 (Murray Mallee Community Legal Service) 64 (Federation of Community Legal Centres (Vic)).

1099 Submissions 28 (Murray Mallee Community Legal Service), 64 (Federation of Community Legal Centres (Vic)), 74 (Women's Legal Service Victoria), 79 (Department of Human Services).

1100 Submissions 28 (Murray Mallee Community Legal Service), 64 (Federation of Community Legal Centres (Vic)).

1101 Submission 28 (Murray Mallee Community Legal Service).

1102 Submission 28 (Murray Mallee Community Legal Service).

1103 Submission 79 (Department of Human Services).

1104 The commission has, however, recommended a maximum length of 12 months for orders against people who are aged under 18 years unless there are exceptional circumstances: see Recommendation 97.

other changes need to be made to ensure a more consistent approach to the duration of orders.

9.7 The commission supports the suggestion that applicants should be asked how long they believe they will need an intervention order. The commission recommends that the question that is included on the application form used in the Magistrates' Court Family Violence Division should be retained and used on all application forms.¹¹⁰⁵ Applicants are in the best position to predict the level and duration of risk involved, and it is therefore appropriate that the intervention order system takes their views into account. The commission agrees with the Magistrates' Court submission that legal advice is essential for applicants so they have an idea of what to ask for.¹¹⁰⁶

9.8 The commission also recommends that the new Family Violence Act should provide some guidance to magistrates on what to consider when determining the length of an order. However, the commission does not agree that a detailed list of criteria would necessarily assist in achieving consistency. The commission therefore recommends that when determining the length of an order, a magistrate should take into account:

- the views of the applicant (as expressed on the application form);
- the purposes and principles of the legislation.¹¹⁰⁷

9.9 This second point will be particularly relevant where the applicant is in a very dangerous situation but due to fear of the consequences of applying for a long order has requested a short period on the application form. In this situation, the magistrate can consider safety when determining the appropriate length of an order, and may therefore decide to make an order for a period that is significantly longer than the applicant requested.

1105 This question on the form is 'How long do you want the intervention order to last?' and provides options of: less than 12 months, 12 months, or more than 12 months.

1106 The commission recommends better access to legal advice at recommendations 39–41.

1107 The commission has recommended purposes and principles for a new Family Violence Act at recommendations 3, 4.

! RECOMMENDATIONS

105. The application form used in the Family Violence Court Division should continue to ask the question 'How long do you want the intervention order to last?' This form should be used in all Magistrates' Courts.

106. When determining the length of an intervention order, a magistrate should consider the:

- views of the applicant;
- purposes and principles of the legislation.

RESTRICTIONS AND CONDITIONS INCLUDED ON INTERVENTION ORDERS

9.10 When making an intervention order, the court may impose any restrictions or prohibitions on the respondent that appear necessary or desirable in the circumstances.¹¹⁰⁸ The Act lists conditions that can be included on orders. These conditions can:

- prohibit or restrict the respondent from approaching the protected person, including specifying a distance;
- prohibit or restrict the respondent from accessing premises where the protected person lives, works or frequents, whether or not the respondent has a legal or equitable interest in the premises;
- prohibit or restrict the respondent from being in a particular locality;
- prohibit the respondent from contacting, harassing, threatening or intimidating the protected person, or from damaging the protected person's property;
- prohibit the respondent from causing another person to engage in conduct that is prohibited by the order against the protected person;
- revoke any firearm licence or other authority to possess, carry or use a firearm.¹¹⁰⁹

1108 *Crimes (Family Violence) Act 1987* s 4(2).

1109 *Crimes (Family Violence) Act 1987* s 5(1).

9.11 We discuss the condition allowing a perpetrator to be excluded from the family home at 9.23–9.60 and conditions about contact with any children of the relationship at 9.61–9.98. The possible use of attendance at a men’s behaviour change program as a condition of an intervention order is discussed at paragraphs 10.80–10.89. This section therefore deals with how the existing conditions are used; whether any conditions should be added to the list; and how intervention orders can be made more appropriate to the parties in each case.

9.12 The commission’s consultations revealed that despite the broad discretion available to magistrates when determining conditions on orders, the court generally follows a ‘tick the box’ approach. It is rare for a magistrate to set a condition that is not included in the list.

9.13 The commission’s Consultation Paper also outlined specific conditions that are listed in the legislation of other states and countries but are not included in the Victorian legislation. These include:

- directing respondents to return certain personal property to protected people or allowing people to recover or have access to personal property that they reasonably need, whether or not respondents have a legal or equitable interest in the property;¹¹¹⁰
- preventing the respondent from contacting or harassing the protected person’s family members or co-workers,¹¹¹¹ or any person at a place the protected person lives or works;¹¹¹²
- directing that the respondent dispose of weapons used in the violence other than firearms;¹¹¹³
- suspending the respondent’s driver’s licence if satisfied that a motor vehicle was used when committing the violence;¹¹¹⁴

1110 *Domestic Violence and Protection Orders Act 2001* (ACT) s 42(3); *Restraining Orders Act 1997* (WA) s 13(2)(e); *Domestic Violence Act 1994* (SA) s 5(2)(g); Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* Report (1999) Domestic Violence Legislation Working Group (1999) above n 351, 76. The *Domestic Violence Act 1995* (NZ) ss 62–69, provides for the court to make an ‘ancillary furniture order’ or a ‘furniture order’ that provides the protected person with the exclusive right to furniture and household items for the duration of the order.

1111 *Victims of Domestic Violence Act* (Canada) SS 1994, c V-6.02, s 7(1)(c).

1112 *Domestic Violence Act 1994* (SA) s 5(2)(e).

1113 Domestic Violence Legislation Working Group (1999) above n 351, 74. Confiscation of firearms and the revocation of a firearms licence can already be included on an intervention order: *Crimes (Family Violence) Act 1987* ss 5(1)(h), 18A.

- requiring the respondent to pay the protected person compensation for any monetary losses that occurred as a direct result of the violence;¹¹¹⁵
- making a ‘problem gambling order’, which bars the respondent from gambling.¹¹¹⁶

VIEWS FROM SUBMISSIONS

9.14 Submissions expressed concern that intervention orders are usually not tailored to the circumstances of the parties; include standard conditions without consideration of whether these conditions are relevant in the circumstances; and do not include enough detail to be useful for the parties, particularly in relation to child contact.¹¹¹⁷ Submissions were overwhelmingly supportive of better access to legal advice and representation in court to address these problems.¹¹¹⁸ Submissions noted that legal advice can help applicants know which conditions to ask for, any additional conditions that could be included, as well as changes to the standard conditions that may be useful. The Darebin Family Violence Working Group told the commission:

Applicants report that the more information and support they had in the application process, the more likely they were to proceed with an application and get an order that was suitable. Many unsupported applicants report leaving court without orders, with inappropriate orders, or with unenforceable undertakings.

The commission therefore recommends better access to legal advice at recommendations 39–41.

1114 *Domestic Violence and Stalking Prevention, Protection and Compensation Act* (Canada) CCSM 1999, c D93, s 15.

1115 *Victims of Domestic Violence Act* (Canada) SS 1994, c V-6.02, s 7(1)(f).

1116 *Domestic Violence Act 1994* (SA) s 10A. Under the *Problem Gambling Family Protection Orders Act 2004* (SA), the Independent Gambling Authority is empowered to make ‘problem gambling family protection orders’ that prevent a person from entering gambling premises or from gambling if there is a reasonable apprehension that the person may cause serious harm to family members because of problem gambling, and it is appropriate to make the order in the circumstances. South Australia is the only jurisdiction with such a scheme.

1117 Submissions 39 (Royal Women’s Hospital); 44 (Anonymous); 64 (Federation of Community Legal Centres (Vic)); 66 (Aboriginal Family Violence Prevention and Legal service (Victoria)); 74 (Women’s Legal Service Victoria). Child contact issues are discussed at paras 9.61–9.98.

1118 Submissions 27 (Robinson House BBWR); 38 (Emergency Accommodation Support Enterprise, EASE); 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). Better access to legal advice is recommended at recommendations 39–41.

9.15 The Federation of Community Legal Centres and the Women's Legal Service Victoria also expressed concern that the current provisions of the Act do not clearly explain that the list of possible conditions is illustrative only, and that magistrates have the power to make other conditions if they think they are appropriate or necessary. The Women's Legal Service Victoria noted the need to change some of the terms in the illustrative list into plain English so that it is clear what types of behaviours are covered.¹¹¹⁹

9.16 Submissions had mixed opinions on including some of the extra conditions that are available in other states and countries. There was general support for including the condition that the respondent return property to the victim or allow access to certain property.¹¹²⁰ The Department for Victorian Communities noted that this could be a particularly effective condition to address financial abuse of the elderly. The Women's Legal Service Victoria also supported this condition, but noted that care should be taken to ensure that this condition does not lead to intervention order applications becoming lengthy disputes about property rights.

9.17 There was also general support for a condition requiring disposal of other weapons used in the violence.¹¹²¹ The Department for Victorian Communities supported imposing a requirement on the respondent to pay compensation to the respondent, however, the Women's Legal Service Victoria felt this is already adequately covered by other legislation. Similarly, a woman who had experienced family violence supported a restriction on a respondent's driver's licence, while the Women's Legal Service Victoria felt it was adequately covered by other legislation.

9.18 Robinson House and the Women's Legal Service Victoria supported a condition that the respondent not harass or approach the applicant's family or friends. The commission addresses this issue at paragraphs 8.39–40. There was no support for including a 'problem gambling order' as a possible condition for an intervention order.

COMMISSION'S RECOMMENDATIONS

9.19 The commission agrees that some of the problems experienced by applicants in obtaining an intervention order with appropriate conditions can be addressed through increased availability of legal advice at courts. However, it is also necessary to make

1119 This is discussed at paras 6.82.

1120 Submissions 25 (Barbara Roberts); 74 (Women's Legal Service Victoria); 78 (Department for Victorian Communities); 86 (Magistrates' Court of Victoria).

1121 Submissions 25 (Barbara Roberts); 27 (Robinson House BBWR); 74 (Women's Legal Service Victoria).

other changes to ensure that appropriate conditions and restrictions are included on all intervention orders.

9.20 The commission agrees that the list of conditions currently included in the Act may be seen as prescriptive rather than illustrative. The commission therefore recommends a new Family Violence Act makes it clear that any list of possible conditions is illustrative, and that magistrates have a broad discretion to include other conditions and details that they think are necessary or appropriate.

9.21 The commission also agrees that it would be useful to include some examples of possible conditions used in other states in Victoria's family violence legislation. Specifically, the commission supports the inclusion of a condition that the respondent returns specific property to the victim, or allows access to certain property that the protected person reasonably needs. This condition is listed in the ACT, Western Australian and South Australian legislation and was included in the Model Domestic Violence Laws.¹¹²² Similar provisions also exist in New Zealand.¹¹²³ This is an important condition, particularly where the respondent is remaining in the family home, or where the protected person has been subjected to financial abuse that has included the removal of property.

9.22 On balance, the commission does not consider that the other conditions proposed in the Consultation Paper should be listed as examples in the Victorian legislation. The magistrate retains a broad discretion to consider such conditions if necessary, however, the commission does not believe these other conditions are broadly applicable or sufficiently relevant to be included in the illustrative list. In particular, suspending a respondent's driver's licence is already a penalty for dangerous driving, if dangerous driving was involved in an act of family violence. The commission also recommends that suspension of a driver's licence should be available as a penalty for breaching an intervention order where the breach involved using a car.¹¹²⁴ A victim can also take civil action to obtain compensation from the perpetrator or can apply for compensation from VOCAT. Considering the wide range of items used as weapons in family violence situations, the commission does not believe that an order to destroy other weapons will normally be practical or desirable. In addition, the

1122 *Domestic Violence and Protection Orders Act 2001* (ACT) s 42(3); *Restraining Orders Act 1997* (WA) s 13(2)(e); *Domestic Violence Act 1994* (SA) s 5(2)(g); Domestic Violence Legislation Working Group (1999) 76.

1123 The *Domestic Violence Act 1995* (NZ) ss 62–69, provides for the court to make an 'ancillary furniture order' or a 'furniture order' that provides the protected person with the exclusive right to furniture and household items for the duration of the order.

1124 See para 10.76.

commission does not believe a ‘problem gambling order’ is an appropriate remedy for family violence, because it focuses on an issue that may not be related to the violence. If gambling has been an issue in the family violence situation, such as in situations of economic abuse, magistrates can consider making a condition related to gambling in exercising their discretion.

! RECOMMENDATIONS

107. The new Family Violence Act should make it clear that the list of possible conditions that can be included on an intervention order are illustrative only and that the magistrate has discretion to ‘impose any restrictions or prohibitions on the person that appear necessary or desirable in the circumstances’.

108. The new Family Violence Act should provide a list of possible conditions for an intervention order that includes all the current examples, as well as a power to ‘direct the respondent to return certain personal property to the protected person or allow the protected person to recover or have access to personal property, whether or not the respondent has a legal or equitable interest in the property’.

EXCLUSION ORDERS

There should be some law that a man has to be taken out of the house ... it’s wrong for the women to have to leave their home ... some women, for safety reasons wouldn’t feel safe staying but ... [they would] if the laws were upheld by the Restraining Orders ... The woman has to change her whole life. It’s half the reason why you don’t want to leave ... why did I have to go, why? He’s the one that’s been violent, why can’t he be removed? You don’t like to disrupt your kid’s lives, you want to make their life as normal as possible while all this is being sorted out.¹¹²⁵

The following are some strategies that should be incorporated into national initiatives against domestic violence and considerations that States should contemplate when taking steps to address domestic violence: ...

1125 Participant in a Tasmanian family violence study: Patton (2003) above n 94, 77.

Provisions should provide for the removal of the abuser from the shared home and allow the victim-survivor to retain her present housing, at least until formal and final separation is achieved.¹¹²⁶

9.23 An ‘exclusion order’ or ‘ouster order’ is an order that requires the perpetrator to leave the family home, regardless of the perpetrator’s legal or equitable rights in the property. These orders allow the person seeking protection to remain in the family home. The Act currently enables the court to include this condition on an intervention order, but the Act does not include a specific term to describe it. Before making an exclusion condition, the court must consider the need to ensure protection from violence, the welfare of any children involved and the accommodation needs of all persons affected by the order, and must give paramount consideration to protection.¹¹²⁷

BENEFITS OF EXCLUSION ORDERS

9.24 There are a number of important benefits involved where the court includes an exclusion condition on an intervention order. First, it is fair for the violent party to be required to leave the family home, rather than the victim and the victim’s children. Ensuring that the person who has used violence is the one who is forced to leave the home reinforces the message that violence is wrong and that perpetrators will be held accountable in a range of ways.¹¹²⁸ As the Violence Against Women Specialist Unit in NSW states:

For over two decades government programs, community campaigns and the women’s movement have stated that the responsibility for the violence lies with the perpetrator. The victim is not the guilty party. This important principle needs translating into practice, whereby the innocent party is enabled to stay in her own home, and the violent partner is required to leave. Indeed if there was no overriding gender divide on domestic violence (with the perpetrator invariably a male and the victim female), it would probably be

1126 Coomaraswamy (1996) above n 126, para 142.

1127 *Crimes (Family Violence) Act 1987* s 5(2).

1128 Violence Against Women Specialist Unit [NSW], *Violence Excluded: A Study into Exclusion Orders South East Sydney*, Key Findings of the Study (2004) 3; Robyn Edwards, *Staying Home Leaving Violence: Promoting Choices for Women Leaving Abusive Partners* (2004) 36; Domestic Violence and Incest Resource Centre, *Family Violence and Homelessness: Removing the Perpetrator from the Home*, Discussion Paper No 2 (2002) 6; Vanessa Kearney, ‘The Option of Staying at Home’ (Paper presented at the Home Truths: Stop Sexual Assault and Domestic Violence a National Challenge, Melbourne, 15–17 September 2004) 2.

accepted wisdom and common sense that the violent partner be required to leave the home. This is making the perpetrator accountable.¹¹²⁹

9.25 Secondly, it is much better and safer for any children of the relationship that they can remain in their own home and area, and do not need to change schools.¹¹³⁰ A recent study conducted by the Coburg Brunswick Community Legal and Financial Counselling Centre into financial abuse within relationships found that women ‘overwhelmingly agreed on the importance of maintaining residence in the family home following the relationship breakdown in order to ensure a level of stability and familiarity for their children’.¹¹³¹ The study stated:

The women interviewed repeatedly spoke of their homes as the source of their locations in the community, the focus of their children’s relationships with the social worlds of the schools and school friends and the sites of their family stability.¹¹³²

9.26 Thirdly, experiencing family violence creates a high risk for women and children of becoming homeless or experiencing other severe economic and social disadvantage.¹¹³³ Various Australian studies have found that women and children are severely economically, educationally and socially disadvantaged if they need to leave their homes due to family violence, and that there is a high risk they will become homeless.¹¹³⁴ One woman who participated in a NSW study gave the following advice to victims of violence:

Stay [in your home] if you can because you will lose too much if you walk off and you might never, never get it back again ... the only way for [victims of violence] to have a life is to stay in the house ... stay there if you can and carry on with your life.¹¹³⁵

9.27 An exclusion condition will not be appropriate in every case. It may be that the victim of violence does not feel safe remaining in the home and would prefer to

1129 Violence Against Women Specialist Unit (2004) above n 1128.

1130 Ibid 3; Edwards (2004) above n 1128, 36, 51; Partnerships Against Domestic Violence (2000) above n 661, 46.

1131 Elizabeth Branigan, *‘His Money or Our Money?’ Financial Abuse of Women in Intimate Partner Relationships* (2004) 31.

1132 Ibid 31.

1133 Ibid 3; Edwards (2004) above n 1128, 36, 51; Partnerships Against Domestic Violence (2000) above n 661, 46; Health Outcomes International, *Improving Women’s Safety* (2004) 12; Patton (2003) above n 94, 77; Domestic Violence and Incest Resource Centre (2002) above n 1128, 4. This is also the case internationally: Coomarasamy (1996) above n 126, para 59.

1134 Edwards (2004) above n 1128, 51; Coburg Brunswick Community Legal and Financial Counselling Centre (2004) above n 1131, 35.

1135 Edwards (2004) above n 1128, 51.

move to temporary accommodation out of the perpetrator's reach.¹¹³⁶ However, it is also true that victims should have the right to choose whether they remain in their own homes or leave.¹¹³⁷ Recent Australian studies have found that the majority of women who have experienced family violence would prefer to remain in their own homes.¹¹³⁸ An estimated 98% of participants in a national Australian study believed that women should and do have the right to remain in the family home if they wish.¹¹³⁹ In a small qualitative study in NSW, Edwards found that none of the women who remained in their own homes had experienced the man returning and being violent, while those who had left their homes were often found by the perpetrator anyway.¹¹⁴⁰

9.28 It also seems that applying for an exclusion condition does not necessarily increase the chances that the application will be contested by the respondent. A Melbourne family violence service providing support to victims who apply for exclusion conditions found that 42% of cases were contested on the return date in 2004.¹¹⁴¹ In the NSW study conducted by the Violence Against Women Specialist Unit, less than half the cases where an exclusion order was applied for were contested.¹¹⁴²

BARRIERS TO OBTAINING EXCLUSION ORDERS

9.29 The commission's Consultation Paper outlined some of the barriers that people face when seeking an order that would remove the perpetrator from the home. Anecdotal evidence, including submissions received by the commission, suggests that exclusion conditions are rarely made in Victoria.¹¹⁴³ The most important barriers identified are: the attitudes of magistrates to making such conditions, the lack of information available explaining how to apply for an exclusion condition, and the

1136 Partnerships Against Domestic Violence (2000) above n 661, 56; Health Outcomes International (2004) above n 1133, 245.

1137 Health Outcomes International (2004) above n 1133, 15.

1138 Partnerships Against Domestic Violence (2000) above n 661, 56; University of South Australia, *Reshaping Responses to Domestic Violence*, Final Report (2000) 41; Edwards (2004) above n 1128, 38.

1139 Health Outcomes International (2004) above n 1133, 153.

1140 Edwards (2004) above n 1128, 33, 54.

1141 Email from Vanessa Kearney, Eastern Domestic Violence Outreach Service, 17 November 2005.

1142 Violence Against Women Specialist Unit (2004) above n 1128, 11.

1143 Eg, submissions 3 (Eastern Domestic Violence Outreach Service), 30 (Violence Against Women Integrated Services), 38 (Emergency Accommodation Support Enterprise, EASE), 48 (Coburg Brunswick Community Legal and Financial Counselling Centre); Domestic Violence and Incest Resource Centre (2002) above n 1128, 23.

invisibility of exclusion conditions within the legislation. Each of these barriers is discussed below.

ATTITUDES OF MAGISTRATES

9.30 One of the main barriers to obtaining an exclusion condition is the attitude of some magistrates that such conditions should only be made in rare circumstances, if at all. Submissions mentioned a perception on the part of some Victorian magistrates that exclusion conditions:

- are a ‘back door’ method to determining a property settlement which should be dealt with under family law;¹¹⁴⁴
- unduly interfere with the property rights of the person who has used violence;¹¹⁴⁵
- conditions are unfair on men who have used violence because there is no alternative accommodation for them.¹¹⁴⁶

9.31 The Magistrates’ Court told the commission:

Despite the legislation being relatively clear, there seems to be a hesitation in removing a person from ‘his’ home with a related failure to acknowledge that this is exactly where the violence occurs.

9.32 A recent study in Sydney on applications for exclusion orders also found an overwhelming concern on behalf of magistrates for the accommodation needs of the male defendant.¹¹⁴⁷ None of the transcripts disclosed any concern for the accommodation needs or the safety of the victim or children.¹¹⁴⁸ Magistrates focused on the perpetrator’s wishes, as demonstrated in the following transcript where the magistrate addresses the perpetrator:

1144 Domestic Violence and Incest Resource Centre (2002) above n 1128, 31; submission 3 (Eastern Domestic Violence Outreach Service).

1145 Domestic Violence and Incest Resource Centre (2002) above n 1128, 26; submissions 22 (Kim Robinson, social worker), 48 (Coburg Brunswick Community Legal and Financial Counselling Centre), 64 (Federation of Community Legal Centres (Vic)), 74 (Women’s Legal Service Victoria), 78 (Department for Victorian Communities), 86 (Magistrates’ Court of Victoria).

1146 Submissions 30 (Violence Against Women Integrated Services), 38 (Emergency Accommodation Support Enterprise, EASE). See also Violence Against Women Specialist Unit (2004) above n 1128; Domestic Violence and Incest Resource Centre (2002) above n 1128.

1147 Violence Against Women Specialist Unit (2004) above n 1128, 8.

1148 Ibid.

are you wanting her to move out, or are you going to move out at some stage or what ... I take it that you oppose an order that puts you out of the house do you Mr X.¹¹⁴⁹

9.33 A Queensland study reached similar conclusions, finding a generally positive attitude to the possibility of making an exclusion order from magistrates, but that these orders were generally seen as an extreme response to physical violence.¹¹⁵⁰ The study also revealed 'an overriding preoccupation with the rights of the respondent'.¹¹⁵¹

9.34 Some magistrates also believe that it is much easier for women who have experienced family violence to access temporary shelters than it is for violent men to find emergency accommodation.¹¹⁵² This is often not the case and also ignores the need to hold perpetrators accountable for their actions.¹¹⁵³ The Australian Institute of Health and Welfare found that in 2002–03, over a two-week data collection period, it was estimated that the average daily refusal rate for agencies that were primarily targeted at women escaping family violence and seeking to obtain immediate accommodation was 48%.¹¹⁵⁴

9.35 It is important to emphasise that an exclusion condition does not affect who owns the home, or who has other legal rights to the home, and it does not affect either party's legal rights in any ongoing or contemplated family law property proceedings. An exclusion condition is a response to ensure safety of the victim and any children. The power to make an exclusion order is therefore a crucial part of the magistrates' power to protect family members from violence, and is not a punitive measure.¹¹⁵⁵

9.36 An exclusion condition only relates to a right of a party to occupy a property for a defined period. Where a property is occupied by the parties subject to a lease in

1149 Violence Against Women Specialist Unit, NSW, *Violence Excluded: A Study into Exclusion Orders South East Sydney* Key Finding of the Study (2004) 10.

1150 Rachael Field et al, 'Issues for Magistrates in the Making of Ouster Orders Under the Domestic Violence (Family Protection) Act, 1989 (Qld)' (Paper presented at the International Society Family Law Conference, Brisbane, 9–13 July 2000) 10.

1151 Ibid.

1152 Submissions 30 (Violence Against Women Integrated Services), 38 (Emergency Accommodation Support Enterprise, EASE), 62 (Eastern Community Legal Service). See also Violence Against Women Specialist Unit (2004) above n 1128.

1153 Domestic Violence and Incest Resource Centre (2002) above n 1128, 69. For information on difficulties with women's access to emergency and temporary housing, see: Office for Women, Department of Family and Community Services, *Women's Refuges, Shelters, Outreach and Support Services in Australia: From Sydney Squat to Complex Services Challenging Domestic and Family Violence* (2004).

1154 S Marcolin, *Female SAAP Clients and Children Escaping Domestic and Family Violence 2003–04* (2005) 60.

1155 Mick Boyle, *Men, Male Family Violence and Homelessness*, Council to Homeless Persons <www.chp.org.au/parity/articles/results.html?filename_num=00132> at 22 September 2005.

joint names or the sole name of the respondent and an exclusion condition is made in favour of the applicant, consequent orders may be required to transfer the tenancy into the victim's name.

LACK OF INFORMATION

9.37 Another difficulty with accessing exclusion conditions is the lack of information available and misinformation given to applicants by police and court staff. As one submission stated: 'I was told by the policeman that it was as much my husband's right to stay in the house as mine'.¹¹⁵⁶

9.38 Court staff, police and legal representatives often try to dissuade applicants from applying for these types of conditions, and the information booklet 'Applying for an Intervention Order' does not provide any information on exclusion orders.¹¹⁵⁷ If victims are to seriously consider remaining in their home as an option, information needs to be provided, not only on how to achieve this legally, but also outlining the risks that may be involved in this choice.¹¹⁵⁸

INVISIBILITY IN LEGISLATION

9.39 A further barrier to obtaining an exclusion condition is their invisibility within the legislation.¹¹⁵⁹ As mentioned in paragraph 9.23, although the Crimes (Family Violence) Act allows such conditions to be made, they do not have a specific term to describe them in the Act. The Act states that an order may:

Prohibit or restrict access by the defendant to premises in which the aggrieved family member lives, works or frequents and such an order may be made whether or not the defendant has a legal or equitable interest in those premises.¹¹⁶⁰

A NSW study on the accessibility of exclusion orders has found that this invisibility in the relevant legislation leads to a procedural and administrative barrier in obtaining

1156 Submission 44 (Anonymous).

1157 Submissions 3 (Eastern Domestic Violence Outreach Service), 4 (Eastern Domestic Violence Outreach Service); Domestic Violence and Incest Resource Centre (2002) above n 1128, 37.

1158 Health Outcomes International (2004) above n 1133, 156; Domestic Violence and Incest Resource Centre (2002) above n 1128, 36. A recent NSW study exploring how women leaving a violent relationship could remain in their homes has also found that lack of information about the possibility of an exclusion order meant that many women did not think it was an option to remain in the home: Edwards (2004) above n 1128, 39.

1159 Domestic Violence and Incest Resource Centre (2002) above n 1128, 36–43.

1160 *Crimes (Family Violence) Act 1987* s 5(1)(b).

one.¹¹⁶¹ This was also seen as a key barrier to accessing exclusion orders by the Domestic Violence and Incest Resource Centre.¹¹⁶²

9.40 Despite evidence of these barriers, a metropolitan Melbourne family violence service, the Eastern Domestic Violence Outreach Service, has had success in supporting women to obtain this condition. The program run by the service demonstrates that access to information about exclusion conditions, support in obtaining an order and developing a safety plan greatly increase the chances of such a condition being made. In 2004 the service supported 58 women seeking an exclusion condition. Of these, 52 were granted on an interim basis and 49 were granted as part of an ongoing order. The applications were contested in 17 of the matters.¹¹⁶³

REMAINING IN THE HOME AS A HUMAN RIGHT

9.41 As highlighted at the beginning of this section, the UN Special Rapporteur on violence against women has recommended that all States should ‘provide for the removal of the abuser from the shared home and allow the victim-survivor to retain her present housing, at least until formal and final separation is achieved’.¹¹⁶⁴ The UN Model Strategies also provide that protection orders should include ‘removal of the perpetrator from the domicile’.¹¹⁶⁵

9.42 Women’s Health West has noted that ‘an approach to family and domestic violence focused on the social and economic rights of women would require, for example, that the perpetrator of violence instead be removed from the family home’.¹¹⁶⁶ The Women’s Rights Action Network Australia has also recommended that a woman’s right to stay in the home must be implemented through the conditions available in intervention orders.¹¹⁶⁷ The Eastern Domestic Violence Outreach Service

1161 Violence Against Women Specialist Unit (2004) above n 1128, 8.

1162 Domestic Violence and Incest Resource Centre (2002) above n 1128.

1163 Email from Vanessa Kearney, Eastern Domestic Violence Outreach Service, 17 November 2005.

1164 Coomarasamy (1996) above n 126, para 142.

1165 *General Assembly Resolution on Crime Prevention and Criminal Justice Measures to Eliminate Violence Against Women*, GA Res 52/86, UN Doc A/RES/52/86 (1998) Annex: Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice para 7(g).

1166 Women’s Health West, *Submission to the Victorian Government’s Community Consultation on Human Rights* (2005) 10.

1167 Women’s Rights Action Network, *Our Rights, Our Voices—The Victorian Community Report on Women* (2004) 8.

also ‘believe[s] strongly in the right of women who have experienced abuse to use the legal processes available to them to remain in their home—if that is their choice’.¹¹⁶⁸

VIEWS FROM SUBMISSIONS

9.43 The submissions received by the commission overwhelmingly supported exclusion conditions being made more frequently and contained many suggestions for changes to improve applicants’ access to them.¹¹⁶⁹ Submissions stated that an exclusion order should be made ‘as a matter of course’ if the applicant requests it. The Women’s Domestic Violence Crisis Service told us: ‘Women and children should be able to be safe in their own homes while the violent partner or ex-partner should be made to leave and to change his behaviour’.

9.44 Submissions noted that women and children are often made homeless due to family violence. Being forced to leave the family home can cause ‘long-term poverty and social dislocation’.¹¹⁷⁰ Robinson House and the Women’s Domestic Violence Crisis Service were concerned that it is inequitable that the person who uses violence is not the one to experience the disruption of leaving the home. An exclusion condition is one way of holding a perpetrator accountable for the use of violence.¹¹⁷¹ Submissions noted that exclusion orders are particularly important where children are involved because it can be very disruptive, particularly to their schooling, when they are forced into temporary shelters.¹¹⁷²

9.45 The Domestic Violence and Incest Resource Centre suggested that exclusion conditions should be clearly named and outlined within the Act so that the option is not invisible within the legislation. The Magistrates’ Court supported a change to legislation to incorporate an expectation that where violence has occurred the perpetrator will be removed from the home. The Magistrates’ Court also supported an

1168 Kearney (2004) above n 1128, 2.

1169 Submissions 3 (Eastern Domestic Violence Outreach Service), 4 (Eastern Domestic Violence Outreach Service), 25 (Barbara Roberts), 27 (Robinson House BBWR), 30 (Violence Against Women Integrated Services), 33 (Women’s Domestic Violence Crisis Service), 38 (Emergency Accommodation Support Enterprise, EASE), 46 (Royal Children’s Hospital), 48 (Coburg Brunswick Community Legal and Financial Counselling Centre), 61 (Broadmeadows Community Legal Service), 62 (Eastern Community Legal Centre), 63 (Darebin Family Violence Working Group), 64 (Federation of Community Legal Centres (Vic)), 74 (Women’s Legal Service Victoria), 78 (Department for Victorian Communities), 79 (Department of Human Services).

1170 Submission 48 (Coburg Brunswick Community Legal and Financial Counselling Centre).

1171 Submission 64 (Federation of Community Legal Centres (Vic)).

1172 Submissions 27 (Robinson House BBWR), 41 (Victoria Legal Aid), 45 (Rochelle Campbell, women’s health resource worker), 46 (Royal Children’s Hospital).

expectation or presumption that children remain in their own home. Some submissions also mentioned the need for the legislation to state the factors that the magistrate should consider when deciding whether to make an exclusion condition.¹¹⁷³

9.46 The Eastern Domestic Violence Outreach Service and the Women's Legal Service Victoria stated that information should be more readily available about the possibility of obtaining an exclusion condition, particularly at the interim stage. For example, the possibility of applying for an exclusion condition could be mentioned on the intervention order application form.¹¹⁷⁴ Police and court staff could be required by legislation to inform applicants that they can apply for an exclusion condition.¹¹⁷⁵ Applicants need assistance, information and support to investigate the option of remaining in the home.¹¹⁷⁶

9.47 Many submissions also mentioned the need for improved services to support the making of exclusion conditions. For example, the lack of temporary accommodation for men who use violence is seen as a barrier to the use of these conditions.¹¹⁷⁷ Temporary men's accommodation that provides behaviour change programs would assist in increasing the number of these orders made.¹¹⁷⁸ The Victorian Aboriginal Legal Service also said refuges must be made available for Indigenous respondents, along with support and rehabilitation, if exclusion conditions are made more frequently. The Eastern Community Legal Centre also noted that magistrates and registrars need to be educated about how hard it is for women to find refuge accommodation.

1173 Submissions 8 (Werribee Legal Service), 22 (Kim Robinson, social worker), 49 (Domestic Violence and Incest Resource Centre).

1174 Submissions 28 (Murray Mallee Community Legal Service), 30 (Violence Against Women Integrated Services).

1175 Submission 30 (Violence Against Women Integrated Services).

1176 Submissions 63 (Darebin Family Violence Working Group), 74 (Women's Legal Service Victoria), 78 (Department for Victorian Communities).

1177 Submissions 27 (Robinson House BBWR), 30 (Violence Against Women Integrated Services), 38 (Emergency Accommodation Support Enterprise, EASE), 40 (Whittlesea Domestic Violence Network), 45 (Rochelle Campbell, women's health resource worker), 54 (Andrew Compton), 61 (Broadmeadows Community Legal Service), 63 (Darebin Family Violence Working Group), 64 (Federation of Community Legal Centres (Vic)), 78 (Department for Victorian Communities). See also: Domestic Violence and Incest Resource Centre (2002) above n 1128; Edwards (2004) above n 1128, 42.

1178 Submissions 27 (Robinson House BBWR) and 72 (Victoria Police). See also Domestic Violence and Incest Resource Centre (2002) above n 1128.

9.48 The need for general and drug and alcohol counselling for both men and women was also mentioned.¹¹⁷⁹ Financial support is also often necessary for the applicant to be able to meet rental or mortgage payments or to install security devices in the home.¹¹⁸⁰ Victoria Police noted that more use could be made of crime compensation for victims for these purposes. It is also possible if a tenancy is in the respondent's name for the respondent to terminate the tenancy agreement while the applicant is living there. Changes could therefore be made to tenancy law to prevent this.¹¹⁸¹

OTHER JURISDICTIONS

9.49 Some of the issues raised have been addressed in the legislation of other jurisdictions. For example, Queensland legislation refers specifically to 'orders that include [an] ouster condition', and outlines the conditions that should be included on such an order to allow the respondent temporary access to the home to remove property.¹¹⁸² The Queensland *Residential Tenancies Act 1994* allows a tribunal to make an order giving sole tenancy of a residential property to a person who has experienced family violence, including those who were occupants of the property and not co-tenants.¹¹⁸³ The lessor of the property has the right to be heard on the application.¹¹⁸⁴ A Magistrates' Court can also deal with an application for sole tenancy when considering a restraining order application.¹¹⁸⁵

9.50 Tasmanian legislation also permits the court to alter a residential tenancy agreement where the person against whom an order is made is a tenant of a property where the affected person lives.¹¹⁸⁶ This provision means that the person who has used

1179 Submissions 40 (Whittlesea Domestic Violence Network), 45 (Rochelle Campbell, women's health resource worker).

1180 Submissions 40 (Whittlesea Domestic Violence Network); 48 (Coburg Brunswick Community Legal and Financial Counselling Centre); 63 (Darebin Family Violence Working Group). The Eastern Domestic Violence Outreach Service assists women to change the locks on the house, install sensor lights and security doors. Women can apply for the costs of these security measures through VOCAT. The service also notes that where rental or mortgage repayments are too expensive, an exclusion order may serve as a temporary measure while the home is sold or alternative accommodation is located. This means the woman only needs to move once rather than twice: Kearney (2004) above n 1128, 4, 6.

1181 Domestic Violence and Incest Resource Centre (2002) above n 1128, 86.

1182 *Domestic and Family Violence Protection Act 1989* (Qld) s 25A.

1183 *Residential Tenancies Act 1994* (Qld) s 150.

1184 *Residential Tenancies Act 1994* (Qld) s 150(8).

1185 *Domestic and Family Violence Protection Act 1989* (Qld) s 62A(1).

1186 *Family Violence Act 2004* (Tas) s 17.

violence cannot terminate the tenancy and is no longer a tenant of the property. Affected people can be given sole tenancy of the property even if they were previously only an occupant of the premises.¹¹⁸⁷ Any person who has an interest in the premises is entitled to appear and be heard in relation to the application.¹¹⁸⁸ Proposed amendments will also mean that if a tenancy is transferred to a victim of violence, any security deposit previously paid is not refundable to the previous tenant and no further security deposit can be requested by the landlord.¹¹⁸⁹

9.51 One of the most comprehensive pieces of legislation regarding exclusion orders is the New Zealand *Domestic Violence Act 1995*. This Act provides for occupation orders that give the applicant sole use of the property¹¹⁹⁰ and tenancy orders that grant the applicant tenancy of a property where the other party was previously either a sole or joint tenant.¹¹⁹¹ The legislation also provides for ancillary furniture orders which prevent the person who has used violence from removing furniture, household appliances and household effects from the premises.¹¹⁹² These orders can be granted if they are necessary for the protection of the applicant or it is in the best interests of the applicant's children.¹¹⁹³

COMMISSION'S RECOMMENDATIONS

9.52 The commission agrees that exclusion conditions should be made much more frequently than is currently the case. If the applicant feels safe remaining in the property, then the presumption should be that the person who has used violence is the one who must leave. For exclusion conditions to be more accessible to applicants, the commission makes the following recommendations.

INCLUDING EXCLUSION ORDERS IN LEGISLATION

9.53 The possibility of making an 'exclusion order' needs to be specifically named and outlined in the Act. This will make this type of order more visible, and will help to show magistrates and registrars that this type of order is within the jurisdiction of the court. There is evidence from Victoria that the lack of a defined term and type of

1187 *Family Violence Act 2004* (Tas) s 17(1).

1188 *Family Violence Act 2004* (Tas) s 17(4).

1189 Residential Tenancy Amendment Bill 2005 (Tas) s 16.

1190 *Domestic Violence Act 1995* (NZ) s 52.

1191 *Domestic Violence Act 1995* (NZ) s 56.

1192 *Domestic Violence Act 1995* (NZ) s 62.

1193 *Domestic Violence Act 1995* (NZ) ss 53(2), 57(2).

order in the Act leads to applicants being given incorrect information and being unable to apply for the type of order they want.¹¹⁹⁴ Therefore the Act should explicitly state, as in the Queensland legislation, that an ‘exclusion order’ may be made as part of an intervention order.

9.54 The Act should also state that where an applicant requests that the violent party be excluded from the family home, there is a presumption that this type of order will be made.¹¹⁹⁵ This presumption will ensure that where a victim feels safe remaining in the home, the perpetrator will be held accountable and made to leave, rather than the victim. It will also minimise disruption to the lives of any children involved, and will reduce the risks of homelessness and poverty to people who have experienced family violence. This presumption would override the previous prevailing notion that the perpetrator’s accommodation needs must be considered as the main priority.¹¹⁹⁶

9.55 A new Family Violence Act should also include factors that a magistrate must consider when deciding whether to make an exclusion order. The commission recommends that these factors should include the safety of the applicant, the safety and the welfare of any children involved, and the disruption that would occur to the applicant and any children if they have to leave the family home.

9.56 The commission also recommends that a new Family Violence Act should contain provisions similar to those in Queensland and Tasmania regarding residential tenancies. Where the parties are living in a rental property and the lease is in the perpetrator’s name only, it is currently possible for the perpetrator to cancel the lease despite an exclusion order being made by the court. This means that the victim and any children must leave the property. Therefore, where a tenancy for the family home

1194 Domestic Violence and Incest Resource Centre (2002) above n 1128, 40.

1195 The Australian national study *Improving Women’s Safety* found that the majority of participants thought there should be a presumption in family violence legislation that women and children can remain in their homes if they want to: Health Outcomes International (2004) above n 1133, 104. Participants in a national study on family violence and homelessness suggested ‘the removal of magistrates’ discretion such that orders which provide for sole occupancy of the woman in the family home are assumed unless there are exceptional reasons why this is not possible’: Partnerships Against Domestic Violence (2000) above n 661, 58.

1196 The two NSW studies on the use of exclusion orders also recommended that magistrates must give priority to the safety needs of women and children, as opposed to the accommodation needs of the perpetrators when considering whether to make an exclusion order: Edwards (2004) above n 1128, 57; Violence Against Women Specialist Unit [NSW] *Violence Excluded: A Study into Exclusion Orders: South East Sydney*, Final Report (2004) 16.

is in joint names or is in the perpetrator's name only, there should be provision enabling the tenancy to be transferred into the victim's name only.¹¹⁹⁷

PROVIDING INFORMATION AND SUPPORT

9.57 The commission also recommends that information on the possibility of excluding the perpetrator from the family home should be more readily available to applicants.¹¹⁹⁸ Information should be provided to potential applicants that outlines how to apply for an exclusion order, as well as the possible risks involved in applying for such an order. The information should refer applicants to support services and legal advice so they have the opportunity to fully consider the implications of their decision.¹¹⁹⁹ Information pamphlets must be available in a range of languages, because lack of information about the option of an exclusion order is a major barrier for victims from non-English speaking backgrounds in applying for such an order.¹²⁰⁰

9.58 The intervention order application form should also be amended to include a question asking whether the applicant wants to live in the family home and have the violent person removed.¹²⁰¹

9.59 The provision of information must be accompanied by legal advice and other support, as outlined in recommendations 24, 39–41, 46, 49 and 53, to ensure that victims can make an informed decision about what type of order they want to apply for and steps they may need to take to improve their safety if they do decide to stay in their homes.

9.60 The commission also recommends that magistrates and police prosecutors are provided with comprehensive information about the temporary accommodation

1197 The *Residential Tenancies Act 1997* contains a power for the tribunal to create a tenancy on behalf of a person living in rented premises who is not a tenant in specified circumstances. However, these circumstances do not specifically relate to the situation of a violent relationship: ss 232–233.

1198 Two NSW studies on the use of exclusion orders found that a lack of information about the availability of these orders was a barrier for women, and recommended that women should be routinely informed about exclusion orders, including through the provision of information pamphlets: Edwards (2004) above n 1128, 57; Violence Against Women Specialist Unit (2004) above n 1196, 15.

1199 Health Outcomes International (2004) above n 1133, 57.

1200 Ibid 168.

1201 One of the NSW studies referred to above also recommended that a discrete category be created for exclusion orders on the relevant form: Violence Against Women Specialist Unit (2004) above n 1196, 15. The commission has recommended at Recommendation 43 that the court adopt the application form used in the Family Violence Court Division across all courts. This form currently includes the possibility of a condition prohibiting the defendant from 'coming within ... metres of my home, workplace or school'. The form does not specify that this can include excluding the respondent from the family home.

options that already exist for men.¹²⁰² This will ensure that magistrates are aware that some emergency or temporary accommodation options are available to men, and that a lack of other options should not be used as a reason to deny women and children the right to live in their own homes.

! RECOMMENDATIONS

109. The new Family Violence Act should explicitly include an 'exclusion order' as a possible condition on an intervention order. The list of conditions should include a condition such as 'exclude the respondent from occupying the home previously shared, whether or not the home is rented or owned jointly by either of the parties'.

110. If the grounds for an intervention order are made out and the applicant seeks an exclusion order, there should be a presumption in favour of an exclusion order being granted.

111. In addition to a presumption in favour of exclusion orders, the magistrate should take the following factors into account when considering whether an exclusion order should be made:

- the wishes of the applicant;
- the welfare of any children involved;
- the disruption that would occur to the applicant and any children if the applicant leaves the family home.

1202 Providing information to magistrates about the existence of temporary men's accommodation was also recommend by Violence Against Women Specialist Unit, NSW Attorney General's Department, *Violence Excluded: A Study into Exclusion Orders: South East Sydney* Final Report (2004)16, and Health Outcomes International (2004) above n 1133, 104.



RECOMMENDATIONS

112. Where a court is making an exclusion order and there is a tenancy agreement for the family home in joint names or solely in the perpetrator's name, the court should be able to require the applicant to indemnify the respondent in relation to the tenancy agreement. The *Residential Tenancies Act 1997* should be amended to make it clear that in cases involving family violence VCAT should have the power to order the tenancy to be transferred into the victim's name.
113. The court should provide information on the possibility of obtaining an exclusion order and outline the risks involved and matters an applicant may want to consider when making this decision.
114. The application form for an intervention order should include a question asking whether the applicant seeks to remain in the family home and have the respondent removed.
115. A resource for magistrates, prosecutors and police should be developed that outlines the types of temporary housing available for male respondents.

INTERVENTION ORDERS AND CHILD CONTACT

There were times when Josh didn't want to go with his father, but he knew he didn't have a choice. Paul on one occasion had told Josh, 'Wave to your mother because you won't see her again.' Josh looked back at me and I could see him screaming ... I was crying and begging Paul not to force him to go and to let him stay home this time. Josh was screaming 'Mummy I don't want to go.' This was unbearable. Paul took off and returned the children Sunday evening.¹²⁰³

For the last year he has been manipulating the [children] and forcing them to do things they don't want to do, like call his wife Mummy, and making fun of me, and

1203 Parkinson (2004) above n 800, 37.

really seriously hurting them. ... My children were so afraid of what was going to happen to me. They weren't dealing with it. They weren't sleeping, they were bed-wetting, my son was always sick. My ex wasn't thinking of them, this was all about him hurting me. He knew the only way he could hurt me was through them because he knows the love I have for them. He has been calling my son a different name since he was born. He didn't like the name I chose and so he just calls him by a different name.¹²⁰⁴

9.61 It is essential that applicants and children are not exposed to further violence and abuse through child contact arrangements. As we have previously discussed in paragraphs 4.27–4.29, the commission believes that the circumstances where an intervention order is available to protect a child living with a violent relationship should be expanded. This section therefore discusses changes that need to be made to the intervention order system to prevent child contact arrangements being used as a way to further abuse applicants and children.

9.62 Where a parent applies for an intervention order in the Magistrates' Court, the parties and the court have to consider three possible legal situations regarding child contact:

- There is already a child contact order or a parenting plan registered by a court.¹²⁰⁵ The conditions of the child contact order or parenting plan may be inconsistent with conditions on any intervention order made.
- There is no child contact order or registered parenting plan, but one of the parties has applied for a child contact order and a decision is to be made by a court.
- There is no child contact order or parenting plan in place.

9.63 This section will outline changes that need to be made in all three scenarios to ensure that children are protected from family violence.

IMPACT OF CHILD CONTACT

9.64 Research in Australia and internationally has demonstrated that the period immediately following separation from a violent relationship is the time of greatest risk of an escalation of violence, including murder. In an analysis of all intimate partner homicides committed in Australia over 14 years, the Australian Institute of

1204 Interview with Lucy, 4 May 2005.

1205 In Victoria, contact orders may be made and parenting plans registered by the Family Court of Australia, the Federal Magistrates Court or a Magistrates' Court.

Criminology found that one-quarter of the homicides were committed between couples who had separated or divorced.¹²⁰⁶

9.65 Once parties have separated, violence often continues through child contact arrangements, although the nature of the violence may change. A recent Queensland study found that all participants had experienced post-separation violence from their partners, and most of this had occurred around child contact. Further abuse included verbal harassment and physical violence at contact handover, using telephone contact to harass the mother, and using children to pass on abusive messages and threats.¹²⁰⁷ The study found:

All of the participants who were sending children on contact visits indicated that the children were in a constant state of emotional upheaval because of the contact parent asking questions about the residential parent and denigrating that parent.¹²⁰⁸

9.66 A recent NSW study reached similar conclusions, with all but one of the female participants experiencing post-separation violence or abuse from their ex-partner at some stage. The participants were mothers who had children living with them and had been the targets of violence before separation. A significant proportion of the post-separation abuse was linked to child contact, particularly where the contact or negotiations for contact gave some level of access to the mother.¹²⁰⁹ Research from England and Denmark has also demonstrated that most post-separation violence committed against mothers is linked in some way to child contact.¹²¹⁰

9.67 In addition to exposing victims to violence, child contact arrangements can also place children at an increased risk of violence and abuse. In situations where the father has not previously directly abused the children, after separation his access to the children may be used as a way to further abuse the mother.¹²¹¹ Where his access to the mother has been limited, the violent man may start abusing the children as a way to continue exercising power and control over her.¹²¹² Women who participated in the

1206 Jenny Mouzos and Catherine Rushforth, *Family Homicide in Australia* (2003) 2.

1207 Women's Legal Service, *An Unacceptable Risk: A Report on Child Contact Arrangements where there is Violence in the Family* (2002) 46–50.

1208 Ibid 47.

1209 Miranda Kaye et al, *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence* (2003) 35–7.

1210 Marianne Hester and Lorraine Radford, *Domestic Violence and Child Contact Arrangements in England and Denmark* (1996) 3.

1211 Women's Legal Service (2002) above n 1207, 39; Submissions 46 (Royal Children's Hospital), 58 (Family Court of Australia).

1212 Kaye et al (2003) above n 1209, 13.

NSW study described a variety of abuse committed against their children on contact visits aimed partly at abusing the mother:

threatening to kill the child(ren) or their mother; killing children's pets; destroying or removing children's favourite toys; interrogating the children to discover their address or phone number or details of their mother's life; and name calling and abuse, including in one case screaming outside the door of the house 'I pay for you so you have to see me'.¹²¹³

9.68 One woman who participated in the Queensland study noted:

You're still being abused because your children are being abused and they're a part of you and they're in pain and they're unhappy and they're suffering then you're unhappy. So basically they're just an extension of you and that abuse is still inflicted on you through them.¹²¹⁴

HOW THE COURT DEALS WITH CHILD CONTACT

9.69 Given the high levels of violence committed against both women and children on separation from a violent relationship, it is important to challenge the assumption that it is in the best interests of the child for the court to maintain contact with both parents, when an intervention order is made to protect the mother. Although long-term decisions about child contact are properly determined in the Family Court or the Federal Magistrates Court, Victorian magistrates hearing family violence matters have a responsibility to protect children from violence, including making appropriate arrangements for child contact prior to a Family Court or Federal Magistrates Court hearing. Applications for intervention orders are often made in moments of crisis in a violent relationship, well before any family law proceedings are contemplated. An application for an intervention order may be the first step in leaving the relationship. Therefore, it is crucial that magistrates understand the risks involved in allowing child contact immediately after the couple has separated, and that they make safe arrangements for contact handover where they determine that contact between the child and the perpetrator is not a risk to the child.

9.70 Magistrates have the power under section 68T of the Family Law Act to make, vary, revoke or suspend a Family Court contact order when hearing a family violence matter. Where there is no previous order or agreement about child contact, magistrates have the power to make a contact order and include the contact terms in any intervention order made. These powers were introduced in legislation in recognition

1213 Ibid 32.

1214 Women's Legal Service (2002) above n 1207, 50.

of the need to protect children from family violence before a case can be heard in the Family Court. Although some magistrates use these powers to protect children from violence, others do not, and their use is inconsistent across the state.¹²¹⁵ This exposes women and children to further violence.

VIEWS FROM SUBMISSIONS

9.71 The commission has consistently heard that magistrates are reluctant to deal with child contact issues when making intervention orders, or that they allow contact with children as an exception to any protection offered to the applicant.¹²¹⁶ This exposes applicants and children to further violence. One woman the commission spoke to said:

When I got my intervention order the judge asked whether there were any family orders in place. When I said no, he said that my ex needed access to the children. I just thought no way. He had threatened to kill the kids. His biggest threat was that he was going to kill himself and the kids because a bitch like me didn't deserve them. Why would I allow them to see him?¹²¹⁷

9.72 Submissions also outlined examples where magistrates had refused to deal with child contact issues, believing that it is a matter for the Family Court only. The Violence Against Women Integrated Services noted that 'magistrates who hold these beliefs seem to fail to understand the nature of family violence and the effect it has on children both long and short term'. The Federation of Community Legal Centres said 'it is important that magistrates understand that a violent parent is not better than no parent at all'. The Women's Legal Service Victoria told us:

Currently we find that many magistrates refuse to deal with issues relating to child contact on the basis that it is 'outside their jurisdiction'—but this reluctance seems to us to stem more from a view that it is outside their experience.

1215 See, eg, Domestic Violence and Incest Resource Centre (2002) above n 1128, 30–33; Submission 86 (Magistrates' Court of Victoria).

1216 Submissions 8 (Werribee Legal Service), 25 (Barbara Roberts), 27 (Robinson House BBWR), 28 (Murray Mallee Community Legal Service), 30 (Violence Against Women Integrated Services), 33 (Women's Domestic Violence Crisis Service), 61 (Broadmeadows Community Legal Service), 63 (Darebin Family Violence Working Group), 64 (Federation of Community Legal Centres (Vic)), 74 (Women's Legal Service Victoria), 79 (Department of Human Services).

1217 Interview with Julie, 27 April 2005.

The Magistrates' Court acknowledged that 'these orders are not now consistently made'.¹²¹⁸

9.73 Submissions also outlined the need for thorough training and education about child contact for magistrates. The Family Court of Australia noted that the recent changes to the Crimes (Family Violence) Act, giving magistrates powers under s 68T of the Family Law Act, will not lead to more consistent protection from family violence. What is needed is 'an ongoing education program that recognises the prevalence of family violence in our community, and a commitment to protect those who suffer as a result'. Two recent Australian studies into child contact and family violence have also recommended that magistrates should undergo thorough training on the dynamics of family violence and their powers under the Family Law Act to deal with child contact issues.¹²¹⁹

COMMISSION'S RECOMMENDATIONS

9.74 Due to the problems experienced by many people with inappropriate or no orders being made for child contact, the commission recommends that magistrates undergo thorough training about child contact, to ensure that their existing powers are utilised more often and in a more effective way. The commission also recommends ways that these powers should be changed. However, a basic understanding by magistrates of their role in child contact is essential before any other changes to their powers will have any impact.

! RECOMMENDATION

116. Any training of magistrates in the area of family violence should include:

- the impact of family violence on children and that therefore contact is not always in the best interests of the child;
- the risk of violence and abuse for children during contact visits and during contact handover where the mother must attend;

1218 The Magistrates' Court also noted that it would support re-drafting of s 68T of the Family Law Act to be clearer and easier for magistrates to use.

1219 Kearney McKenzie and Associates, *Review of Division 11: Review of the Operation of Division 11 of the Family Law Reform Act to Resolve Inconsistencies between State Family Violence Orders and Contact Orders made under Family Law* (1998) 28; Kaye et al (2003) above n 1209, 151.



RECOMMENDATION

- ways that contact handover can be made safer in those cases where contact is desirable;
- how section 68T of the Family Law Act operates and how it may be used.

NO CONTACT WHERE AN INTERVENTION ORDER IS MADE FOR A CHILD

9.75 As discussed in paragraphs 4.27–4.29, the commission recommends that intervention orders should be made on behalf of children wherever they have heard, witnessed or otherwise been exposed to family violence or are at risk of being exposed to family violence. If a magistrate makes an intervention order to protect a child from the respondent, it must be made clear to the parties that this means there should be no contact between the perpetrator and the child. This means:

- If a Family Court contact order already exists, the magistrate must suspend the contact order.¹²²⁰ The magistrate must inform perpetrators that if they want to resume contact with the child, then they will need to apply to the Family Court or the Federal Magistrates Court for a decision.
- If there is no previous Family Court contact order, then the magistrate should make it clear to the parties that there can be no contact between the respondent and any children.

9.76 The interaction between intervention orders and child contact orders is currently unclear to applicants and respondents, as well as to the police who need to enforce the orders.¹²²¹ It is therefore essential that magistrates make it clear to the parties, and on the intervention order, that no contact is allowed between the perpetrator and the child unless the Family Court or the Federal Magistrates Court later decides otherwise.

9.77 It is also essential that magistrates have easy access to any Family Court contact orders. There are protocols in place between the Magistrates' Court and the Family Court to ensure orders are faxed to the magistrate where requested. However, it would be more efficient if the Magistrates' Court had access to child contact orders through

1220 This is possible under s 68T of the *Family Law Act 1975* (Cth). The Werribee Legal Service noted that pre-existing Family Court orders should be suspended as a matter of course where an intervention order is made for a child.

1221 Kearney McKenzie and Associates (1998) above n 1219, 6; Kaye et al (2003) above n 1209, 151; submissions 28 (Murray Mallee Community Legal Service), 46 (Royal Children's Hospital), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)).

an electronic database. Therefore, the commission recommends the development of a database for this purpose.

! RECOMMENDATIONS

117. When magistrates make an intervention order for a child or including a child, the magistrate should make it clear to the respondent that there must be no contact between the child and the respondent unless the Family Court or the Federal Magistrates Court later decide otherwise. If there is a contact order in place, such orders should be suspended pursuant to section 68T of the *Family Law Act 1975*. This should be clearly stated on the intervention order.

118. Magistrates' Courts should be able to access Family Court contact orders through a national database.

CONTACT WHERE NO INTERVENTION ORDER IS MADE FOR THE CHILD

The intervention order I had stated that the husband could contact me to organize child contact ... As there were no family court orders in place and the intervention order did not cover my son, this was the only provision for contact to occur, and there were no stipulations about the sort of contact. The husband interpreted this as coming over to the house was OK as long as he said it was for child contact. And that he could do whatever he liked in this regard, and take [my child] away from me. This was not adequate for either of our safety.¹²²²

9.78 Where a magistrate is satisfied that a child has not heard, witnessed or otherwise been exposed to family violence, or is not at risk of being exposed, then the court may make an intervention order that applies to the parent only. In this situation, conditions for any contact between the child and the perpetrator must be clearly outlined to protect the non-violent parent from further violence perpetrated through child contact arrangements.

9.79 Women are sometimes exposed to further violence through inadequate intervention orders. This is because magistrates sometimes:

1222 Submission 44 (Anonymous).

- include an ‘except for child contact’ clause in the order without further conditions or explanation;
- do not include any arrangements for safe handover of children in the order;
- do not exercise their powers under the Family Law Act to vary or suspend any pre-existing child contact orders where it would be in the best interests of the child to do so.

INCLUDING A STANDARD ‘EXCEPT FOR CHILD CONTACT’ CONDITION

9.80 It is common practice for magistrates to include a standard ‘except for child contact’ condition on intervention orders.¹²²³ This is the case even where there has been no prior agreement about any child contact. The condition usually states that the perpetrator cannot approach or contact the protected person ‘except ... to exercise child contact by agreement with the aggrieved family member or pursuant to a court order’. This standard exception leads to the following problems:

- Perpetrators have free rein to contact and harass the victim on the pretext of exercising or arranging child contact, especially where there is no previous agreement.¹²²⁴
- Intervention orders are made very difficult to enforce by police, as the perpetrator can always claim they contacted or approached the victim for the purposes of child contact.¹²²⁵ Police may therefore be reluctant to charge the perpetrator with a breach of the intervention order.
- It is unclear for both protected people and perpetrators what type of contact is allowed.¹²²⁶

9.81 One Family Court judge has described the use of standard ‘except for child contact’ provisions in intervention orders as a ‘cop-out’ which ‘avoids the real problem of women’s safety’.¹²²⁷ A family violence outreach worker interviewed for a Victorian study on family violence and homelessness commented:

1223 See Victorian Law Reform Commission (2004) above n 8, para 8.30.

1224 Submissions 22 (Kim Robinson, social worker), 28 (Murray Mallee Community Legal Service), 44 (Anonymous), 61 (Broadmeadows Community Legal Service), 74 (Women’s Legal Service Victoria).

1225 Kearney McKenzie and Associates (1998) above n 1219, 6; Kaye et al (2003) above n 1209, 151; Submission 28 (Murray Mallee Community Legal Service).

1226 Submissions 46 (Royal Children’s Hospital), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)).

1227 Helen Rhoades, et al, *The Family Law Reform Act 1995: Can Changing Legislation Change Legal Culture, Legal Practice and Community Expectations? Interim Report* (1999) 53.

In my experience, an intervention order which allows the perpetrator to telephone and approach under the circumstances of child access is a completely redundant order. In most cases it just doesn't work. He can telephone her when he wants and it is very difficult to prove whether he is talking about child access or he is threatening her.¹²²⁸

NO ARRANGEMENTS FOR HANDOVER

9.82 Where magistrates include the 'except for child contact' condition or where they make an intervention order that is silent about child contact, there is sometimes no provision made about how contact handover will occur. Altering or creating ways for contact handover to occur that does not expose victims to violence is crucial to protecting victims and children from violence. As noted in paragraph 9.67, child contact handover is a high risk time for violence and can lead to children being exposed to violence where they had not been previously. Therefore, all magistrates need to ensure that safeguards are in place for handover.

NOT MAKING CHANGES TO EXISTING ORDERS

9.83 Magistrates do not consistently exercise their powers under the Family Law Act to suspend or vary an existing child contact order where it would be in the best interests of the child to do so.¹²²⁹ Where magistrates make an intervention order that does not cover the child, they need to consider how any existing Family Court contact order could be amended to protect the applicant, particularly at contact handover times.

VIEWS FROM SUBMISSIONS

9.84 The submissions received by the commission were almost unanimous that the current system does not provide adequate protection when it comes to child contact.¹²³⁰ Many of these submissions highlighted problems with the current system similar to those outlined, including:

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- 1228 Domestic Violence and Incest Resource Centre (2002) above n 1128, 29.
 - 1229 Kaye et al (2003) above n1209, 151; Kearney McKenzie and Associates (1998) above n 1219, 19; submissions 28 (Murray Mallee Community Legal Service), 30 (Violence Against Women Integrated Services), 64 (Federation of Community Legal Centres (Vic)).
 - 1230 Submissions 14 (Anonymous), 22 (Kim Robinson, social worker), 25 (Barbara Roberts), 27 (Robinson House BBWR), 28 (Murray Mallee Community Legal Service), 30 (Violence Against Women Integrated Services), 38 (Emergency Accommodation Support Enterprise, EASE), 40 (Whittlesea Domestic Violence Network), 44 (Anonymous), 46 (Royal Children's Hospital), 49 (Domestic Violence and Incest Resource Centre), 58 (Family Court of Australia), 61 (Broadmeadows Community Legal Service), 63 (Darebin

- perpetrators using the ‘except for child contact’ condition to continue to harass and abuse their ex-partner;¹²³¹
- magistrates not varying or suspending existing child contact orders, which exposes applicants to violence through the conditions on that order;¹²³²
- the current system not taking into account significant research demonstrating the high risk of violence against applicants and children at contact handover;¹²³³
- parents not understanding the ‘except for child contact’ condition, and therefore not knowing what type of contact is allowed.¹²³⁴

9.85 Submissions also included suggestions for how the system could be changed to provide better protection:

- the ‘except for child contact’ condition should only be included where there is a written agreement about how and when contact will occur;¹²³⁵
- careful consideration should be given to contact and handover arrangements. Handover should be supervised or occur in a safe location¹²³⁶ or be arranged through a third person nominated by the applicant;¹²³⁷
- suggestions for safe contact arrangements could be made by a liaison worker or court staff after consulting with the applicant and respondent;¹²³⁸
- Victoria should examine the New Zealand legislation as a possible model for change.¹²³⁹ This model provides that there should be no unsupervised

Family Violence Working Group), 64 (Federation of Community Legal Centres (Vic)), 74 (Women’s Legal Service Victoria), 79 (Department of Human Services).

- 1231 Submission 22 (Kim Robinson, social worker), 28 (Murray Mallee Community Legal Service), 61 (Broadmeadows Community Legal Service), 74 (Women’s Legal Service Victoria).
- 1232 Submissions 28 (Murray Mallee Community Legal Service), 30 (Violence Against Women Integrated Services), 61 (Broadmeadows Community Legal Service), 79 (Department of Human Services).
- 1233 Submission 46 (Royal Children’s Hospital).
- 1234 Submissions 46 (Royal Children’s Hospital), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)).
- 1235 Submissions 28 (Murray Mallee Community Legal Service), 74 (Women’s Legal Service Victoria).
- 1236 Submissions 45 (Rochelle Campbell, women’s health resource worker), 69 (Victorian Community Council Against Violence).
- 1237 Submission 22 (Kim Robinson, social worker).
- 1238 Submissions 5 (Sam Iliadis, Acting Sergeant, Victoria Police), 63 (Darebin Family Violence Working Group).
- 1239 Submissions 28 (Murray Mallee Community Legal Service), 49 (Domestic Violence and Incest Resource Centre), 64 (Federation of Community Legal Centres (Vic)), 74 (Women’s Legal Service Victoria). Recent

contact between children and the perpetrator of family violence unless the child's safety can be assured.

- Supervised contact centres where handover can occur should be more readily available.¹²⁴⁰

CHILD CONTACT WITH VIOLENT PARENTS IN INTERNATIONAL STANDARDS

9.86 The UN Special Rapporteur on violence against women has acknowledged the difficulties involved where the perpetrator of violence seeks to maintain contact with children from the violent relationship. She has recommended that batterers should not be given access to their children, to protect the children from abuse and prevent them being used as leverage.¹²⁴¹ However, she also states:

In cases where visitation rights are granted, visitation should be supervised and arranged in a way so as not to cause the woman any contact with the batterer. Details such as transportation [and] the site of the visitations ... should be included on the court decree.¹²⁴²

OTHER JURISDICTIONS

9.87 In New Zealand, the approach to child contact in situations of family violence is different to that in Australia. Family violence and family law matters are heard in the same jurisdiction in New Zealand. Where there is family violence, significant evidence must be provided to show that contact would be in the best interests of the child. If a family violence protection order is made, then it automatically includes any children of the applicant's family.¹²⁴³ If violent parents want to have contact with the children, they must make an application for a parenting order.¹²⁴⁴ Where there is violence between the parents, the court can only grant violent parties supervised access, and cannot give them an order for the day-to-day care of the child unless the court is

studies have also recommended that all Australian jurisdictions should consider law reform in this area based on the New Zealand provisions: Kaye et al (2003) above n 1209, 151; Women's Legal Service (2002) above n 1207, 122.

1240 Submissions 27 (Robinson House BBWR), 61 (Broadmeadows Community Legal Service), 64 (Federation of Community Legal Centres (Vic)). This is also a recommendation of the Women's Rights Action Network Australia's recent report on women's rights in Victoria: Women's Rights Action Network, *Our Rights, Our Voices—The Victorian Community Report on Women* (2004) 8.

1241 Coomarasamy (1996) above n 126, para 142(k).

1242 Ibid.

1243 *Domestic Violence Act 1995* (NZ) s 16(1).

1244 Parenting orders are dealt with under the *Care of Children Act 2004* (NZ).

satisfied the child would be safe.¹²⁴⁵ When deciding whether the child will be safe in the care of the violent party, the court must consider a range of factors, including:¹²⁴⁶

- the nature and seriousness of the violence;
- the physical or emotional harm caused to the child by the violence;
- whether the other party to the proceedings considers the child will be safe and consents to the contact;
- any views expressed by the child;
- any steps taken by the violent party to prevent further violence from occurring. This could include successful completion of a behaviour change program.

9.88 Another important aspect of the New Zealand legislation is that where the court makes a parenting order and there has been violence between the parents, then the court must consider whether the parenting order should be subject to conditions designed to protect the safety of the non-violent parent while contact takes place.¹²⁴⁷ This includes arrangements for where and how the child is being collected from, or returned to, the non-violent parent.¹²⁴⁸

COMMISSION'S RECOMMENDATIONS

9.89 The commission agrees that the current intervention order system does not provide consistent protection for children or their non-violent parents due to inadequate provisions for child contact. This must be urgently addressed if the intervention order system is to fulfil the aim of preventing future acts of family violence. The commission has recommended at Recommendation 10 that intervention orders should be made to protect children more frequently, including wherever a child has heard, witnessed or otherwise been or may be exposed to family violence. Where a child has not been exposed to family violence, and is not at risk of being exposed to such violence, the court should consistently make much more detailed, clear and safe instructions about how child contact may occur.

1245 *Care of Children Act 2004* (NZ) ss 60(3), (4).

1246 *Care of Children Act 2004* (NZ) s 61.

1247 *Care of Children Act 2004* (NZ) s 51(2).

1248 *Care of Children Act 2004* (NZ).

Where a Family Court Contact Order Already Exists

9.90 Where a Family Court contact order already exists and a magistrate is making an intervention order that protects the parent only, the magistrate must consider how the existing contact order can be varied to provide greater protection to the non-violent parent. All magistrates need to consider altering handover arrangements that are unsafe, such as arrangements that involve the violent parent picking the children up from the other parent's home. The New Zealand legislation seeks to take account of the need to ensure safe handover of children. The Victorian legislation should include a similar provision that requires magistrates to consider how to make safe handover arrangements.

9.91 Possibilities for safer handover methods that are used by the Family Court and may be considered by magistrates include:

- handover occurring in a public place;
- handover occurring away from the victim's home;¹²⁴⁹
- handover occurring at a police station;¹²⁵⁰
- handover being arranged and occurring at a child contact centre;
- a court-appointed third party arranging and conducting child handover.

9.92 When considering the option of using a third party for contact arrangements, all magistrates should consider the potential impact on any person chosen. NSW research has shown that in many cases such arrangements have led to the nominated third person experiencing physical violence, abuse and intimidation at contact handover.¹²⁵¹

9.93 Research has also shown that handover arrangements where parents do not have direct contact with each other, such as at a supervised child contact centre, is often the safest way for handover to occur.¹²⁵² The commission supports the use of child contact centres for handover arrangements. Provision of more child contact centres by the federal government would make this option more accessible and greatly increase the safety of victims and children. In areas where child contact centres are

1249 A recent report on ways that women experiencing family violence can remain in their homes found that an important aspect to ensure the woman's safety in this situation is that any child contact occurs away from the home: Edwards (2004) above n 1128, 58.

1250 This requires the consent of the officer in charge.

1251 Kaye et al (2003) above n 1209, 125–6.

1252 Ibid 146; Jenny Mouzos, *Homicidal Encounters: A Study of Homicide in Australia 1989–1999* (2000) 176.

available, magistrates should be made aware of their availability and requirements through training and professional development.

! RECOMMENDATIONS

119. The new Family Violence Act should include a requirement that magistrates must consider altering any pre-existing Family Court child contact order pursuant to section 68T of the *Family Law Act 1975* when making an intervention order on behalf of one of the parents.

120. When magistrates are amending a child contact order pursuant to section 68T of the Family Law Act, magistrates should consider changing handover arrangements so they are as safe as possible. This could include:

- handover occurring in a public place;
- handover occurring at a police station;
- handover being arranged and occurring at a child contact centre;
- a court-appointed third party arranging and conducting child handover.

Where no Family Court Contact Order Exists

9.94 The commission agrees with the suggestion that where there is no previous Family Court contact order, the ‘except for child contact’ condition should only be included on an intervention order where there is a written agreement about when and how contact will occur. The child contact conditions must be included on the order made, so it is easily accessible and understandable for the parties and for the police. This will make it easier for the parents to know what types of behaviour are acceptable under the order. It will also make it easier for police and magistrates to determine whether an alleged breach was actually a breach of the terms of the order or was permitted child contact.

9.95 All magistrates should include how and when child contact is to occur as a condition of the intervention order. The child contact conditions could be made as part of the intervention order, or preferably by exercising jurisdiction under s 68T of the Family Law Act and making a precise order about contact. Reference to the contact order would then be included as a condition of the intervention order which would include the words ‘to give better effect to paragraph x of this order it is a

condition that contact takes place as follows: ...'. This would enable greater clarity for the parties and the police if the intervention order needs to be enforced.

9.96 To decide on the terms for the contact, the magistrate should consider the views of both parties, as well as the views of the children if they are old enough to express them. If parties have come to an agreement before the hearing, then this agreement can be provided to the magistrate, however, the magistrate should not be bound to follow this agreement if the magistrate believes it may expose the children or non-violent parent to violence. For example, an agreement reached by the parties may provide that the violent parent will pick the children up from the protected person's home, but the magistrate may decide that it would be safer for handover to occur at a child contact centre where the parents do not need to see each other.

9.97 The magistrate must ensure that adequate provisions are included to ensure safe handover in any order or condition relating to child contact. Factors for the magistrate to take into account when deciding on a contact handover arrangement that is as safe as possible are included in Recommendation 120.

9.98 If the respondent is not in court and the applicant does not want any contact to occur, then the magistrate should not be able to make an 'except for child contact' condition on any order made. This includes interim intervention order applications, where the respondent is usually not present. The order should not allow the respondent to breach the terms of the order (such as not contacting or approaching the protected person) to contact any children. The intervention order should clearly state that if respondents want to make arrangements for contact with any children in the care of the protected person, they will need to make an application to the Federal Magistrates Court or the Family Court. In the meantime, there should be no contact between the violent parent and the children. If, however, applicants think that contact is appropriate and safe, then the magistrate must consider their views when deciding on any possible contact condition. It must be made clear to respondents that if they do not appear in court on the final hearing date, an order may be made that restricts their contact with their children. This should be included in the accompanying information that respondents receive when served with an application.



RECOMMENDATIONS

121. An 'except for child contact' condition should only be included on an intervention order where a condition about how and when contact will occur is also included in the order.



RECOMMENDATIONS

122. Where a respondent has not appeared in court, including during an interim intervention order application, then an 'except for child contact' condition (with an accompanying condition explaining how and when contact will occur) can only be made where the applicant requests such a condition. Otherwise, the order should make it clear that the respondent must not breach the conditions of the order, including for the purposes of contacting children.