
Chapter 10

After the Order is Made

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INTRODUCTION

10.1 In this chapter, we examine three matters which may arise after an order has been made. These are:

- variation or revocation of the order;
- extension of the order;
- the court's response to a breach of the order.

10.2 'Variation' of an intervention order refers to the court approving an application by one or all of the parties to change the terms of the order. A 'revocation' of an order means cancelling it. First we examine the conditions under which applicants may vary or revoke their order. We then go on to review the circumstances in which respondents may apply for a variation or revocation of an order made against them.

10.3 Secondly, we examine concerns about the extension of an intervention order. Applicants can currently apply for an extension of their order (before its expiry), however, there are problems with the process that may result in a gap in or removal of the applicant's protection. In this section, we recommend ways to address these deficiencies.

10.4 Finally, the chapter examines what happens when an order is breached. In Chapter 5 we discussed the police response to intervention order breaches. In this chapter, we focus on the court's response. The commission received many complaints about the current penalties imposed for this crime; in this section we make recommendations to counter this problem. We also discuss men's behavioural change programs and diversion programs as a possible alternative response, and recommend a quicker court response to breaches.

APPLICATIONS BY THE APPLICANT TO VARY OR REVOKE AN ORDER

10.5 In 2002–03, there were 903 applications to revoke an intervention order and 77% of these were granted.¹²⁵³ Interestingly, in 21% of these applications, the order ended up not being revoked but varied instead.¹²⁵⁴ In the same year, there were 835

1253 Department of Justice, *Statistics of the Magistrates' and Children's Courts of Victoria: Intervention Order Statistics 1998/99–2002/03* (2004) 116.

1254 *Ibid.*

applications to vary an intervention order. Almost all of these (97%) were granted.¹²⁵⁵ These figures represent family violence and stalking intervention orders because data specific to family violence is not included in the Department of Justice statistics. The statistics do not indicate the proportion of applications which were made by the protected person or those made by the respondent.

10.6 Section 16(2) of the Act states that people may apply to the court to vary or revoke an order. This requires them to attend the court in person. The matter must be heard by a magistrate before a variation or revocation can be made. The Act requires the applicant to ‘cause a copy of the applications to be served on each party to the original proceedings’.¹²⁵⁶ If this cannot be done the court can order that a copy of the application be served by any other appropriate means or by substituted service.¹²⁵⁷

10.7 The Act does not set out the matters a magistrate must take into account before granting either a variation or revocation of an order, except that in the case of an application by the defendant there must have been a change in the circumstances in which the order was made.

SIMPLIFYING THE VARIATION AND REVOCATION PROCESS?

10.8 Some submissions and consultation participants argued that the process of varying an order should be made simpler, particularly for the applicant. A problem can arise, for example, when the applicant wants to communicate with the respondent, but such communication would constitute a breach of the order. It was argued that a simpler process would reduce the number of breaches that occur because circumstances change. A simpler process could involve the application being made by an affidavit and dealt with on the papers and in chambers. Making the process of variation simpler could also give greater ‘flexibility’ to the intervention order system.

When a decision is based on written material, ie without the parties present or giving oral evidence, it is made **on the papers**. When a magistrate makes a decision out of the court, it is made **in chambers**.

10.9 However, some applicants are coerced into varying or revoking an order when it is not in their best interests. Our understanding of the dynamics of family violence indicates that applicants may apply for a variation against their wishes and welfare because of direct coercion by or fear of the perpetrator. This was identified as a

1255 Ibid 110.

1256 *Crimes (Family Violence) Act 1987* ss 16(5), (6). This can be done by serving it personally or leaving it at the person’s last or most usual residence or place of business.

1257 *Crimes (Family Violence) Act 1987* s 16(7).

particular concern in submissions. The following case study deals with an application for a variation related to firearms:

A protected person contacted a local CLC [community legal centre] as she had an intervention order against her husband. Both parties continued to reside under the same roof. The defendant continued intimidating the protected person through harassment and abusive behaviour. The protected person was so frightened and distressed by the defendant's continued behaviour that she felt that she could not contact the police to report the breaches. Furthermore, as the original application did not succeed in removing the defendant from the home, she had lost faith in the legal system.

The defendant made an application to recover his firearms. The local CLC advised the protected person that she needed to oppose the defendant's application. The protected person informed the local CLC that the defendant had advised her that if she opposed the firearms applications, then he would kill her and the young children. In the process of the firearms application, the local police came to the family home to interview the protected person in relation to her view of the firearms application. As the protected person was in fear of her life, she refused to directly oppose the firearms application and instead, answered 'no comment' to the police officer's queries about why the defendant should not have his firearms returned. The police informed the protected person that her 'no comment' answer would be problematic for the magistrate in determining the firearms application. The protected person informed us that she hoped that the police would 'pick up' that she was so frightened to give her real views opposing the firearms application due to potential repercussions from the defendant.¹²⁵⁸

10.10 Applicants may want to vary or revoke an order because they have reconciled with their partner. A variation or revocation may also be sought when the applicant is in the process of leaving a violent relationship but temporarily reconciles with the respondent. Because a variation may be sought in a number of different situations, making the variation process simpler could create a system that provides less safety for the applicant.

VIEWS FROM SUBMISSIONS

10.11 Submissions were mixed on the approach which should be taken to variations and revocations. Some submissions argued that the current process needed to be made simpler:

1258 Submission 64 (Federation of Community Legal Centres (Vic)), case study provided by Whittlesea Community Legal Centre.

Currently this process is seen as prohibitive and many applicants are intimidated by the court system.¹²⁵⁹

The ease with which IO's [intervention orders] can be obtained ... is not matched by the ease of obtaining variation or revocation.¹²⁶⁰

Many also stressed the importance of maintaining the safety of the applicant:

There should be a process of seeking a variation or revocation, to be made easier by the protected person having a safe environment to do so supported by an informed decision.¹²⁶¹

Any changes to the law must err on the side of safety and protection for the woman and children. An IO is a serious matter and any variations should be done with that in mind (if they are ever going to be taken seriously and enforced).¹²⁶²

10.12 On the other hand, there were submissions that argued that the process did not need to be simplified.¹²⁶³ Whether or not the process is simplified, many submissions argued that legal representation was particularly important in this situation to address safety concerns about variations or revocations being made under duress. For example:

[We] recommend legal advice must be sought prior to an application for a variation or revocation to ensure that these decisions are not made under duress.¹²⁶⁴

The Federation acknowledges that protected persons may want to make a variation of their order where their circumstances have changed. We are also aware of cases where the protected person may be requesting a variation to their order under duress. It is the Federation's view that the protected persons should have better access to legal advice and other support services to ensure that variation applications are not being made under duress. Courts should be able to make administrative variations to orders where [a] protected person has had legal advice.

1259 Submission 79 (Department of Human Services).

1260 Submission 65 (Associate Professor John Willis, La Trobe University).

1261 Submission 40 (Whittlesea Domestic Violence Network).

1262 Submission 27 (Robinson House BBWR).

1263 Submissions 30 (Violence Against Women Integrated Services), 74 (Women's Legal Service Victoria).

1264 Submission 61 (Broadmeadows Community Legal Service).

We do, however, think the process could be made easier for protected people by other recommendations we make in our submission: full and appropriate support, including legal advice, being available to protected people before, during and after attending court, consistent with the statewide model for responding to family violence.¹²⁶⁵

COMMISSION'S VIEW

10.13 The commission considered the possibility of removing the requirement to attend court to obtain a variation to the order and allowing a variation to be made from an affidavit provided by the applicant, who would be required to obtain legal advice before applying. We were not convinced that this would provide adequate protection for applicants or make the process more accessible, flexible and responsive.

10.14 As we have mentioned, variations that are applied for in the current court environment are almost always approved. Both court or affidavit procedures are open to coercion by the perpetrator and others. Requiring the applicants to attend court gives the magistrate a more effective means of assessing their safety. Furthermore, we believe it is the responsibility of the court, rather than individual lawyers, to attempt to ensure that the application request is not coerced and that the victim's choices and wishes are respected.

CONDITIONS FOR VARYING AND REVOKING AN ORDER

10.15 One way of improving the law would be to require the court to take account of specific grounds in deciding whether or not to vary or revoke an order. These could include:

- the applicant's reasons for the variation or revocation;
- the safety of the protected person;
- the wishes of the protected person.

10.16 These grounds would make it necessary for the court to consider whether applicants genuinely want the variation or revocation and would place greater emphasis on their safety.

1265 Submission 64 (Federation of Community Legal Centres (Vic)).

VIEWS FROM SUBMISSIONS

10.17 Most submissions were in favour of grounds such as these being included in a new Family Violence Act, for example:¹²⁶⁶

The Federation strongly supports such an amendment to the Act.¹²⁶⁷

DVIRC recommends that the Court must satisfy itself that any application to revoke or vary an order is made by the applicant without any pressure from the defendant, and that such revocation or variation will not jeopardise the safety of the applicant.¹²⁶⁸

The Court should be satisfied that: when a protected person is seeking a variation or revocation, the application does not result from pressure or coercion of the protected person, or family members.¹²⁶⁹

However, also take into account that pressure and coercion comes from various sources. Financial pressures, children wanting to return to their peer groups and schools ... Any variation must continue to always put the safety of the family first, despite pressures from financial areas, friends, peers, family or the respondent.¹²⁷⁰

10.18 However, some submissions disagreed with the grounds on the basis that they were 'paternalistic',¹²⁷¹ 'over-patronising',¹²⁷² and, for example:

Suggested a level of incompetence in protected people and does not allow for an appropriate level of agency of protected people ... magistrates should generally accept the statement of the protected person that varying or revoking the order will not compromise their safety. In our view, this represents an appropriate balance between the need to ensure safety and the applicant's right to agency. Ultimately if a protected person does not want an intervention order in place, the order will be ineffective because they will not seek to enforce it.¹²⁷³

1266 See, eg, submissions 61 (Broadmeadows Community Legal Service), 40 (Whittlesea Domestic Violence Network), 27 (Robinson House BBWR).

1267 Submission 64 (Federation of Community Legal Centres (Vic)).

1268 Submission 49 (Domestic Violence and Incest Resource Centre).

1269 Submission 40 (Whittlesea Domestic Violence Network).

1270 Submission 27 (Robinson House BBWR).

1271 Submission 65 (Associate Professor John Willis, La Trobe University).

1272 Submission 74 (Women's Legal Service Victoria).

1273 Ibid.

10.19 Overall, submissions agreed that all applications for variation and revocation should, in accordance with the primary purpose of the Act, be consistent with the safety of the applicant. For example:

The Act *should* require the court to be satisfied, where a protected person seeks a variation or revocation, that this will not compromise the safety of any protected family member. However ... we also believe that most magistrates effectively ask this question now before they vary or revoke an order or application by a protected person and we do not believe that any specific provision to this effect should actually alter the current balance and require magistrates to be any more interventionist than they already are in these circumstances.¹²⁷⁴

COMMISSION'S VIEW

10.20 Consistent with the principles to be included in the new Act, the commission believes that the court should have an obligation to consider whether a variation or revocation of an intervention order would expose the applicant to the risk of family violence. The grounds we recommend should ensure this result is achieved, without taking a patronising or paternalistic approach to the applicant.

10.21 Legal representation will be particularly important in ensuring that the applicant's interests are protected. We make recommendations about legal representation at recommendations 39–41.

10.22 In circumstances where victims do not have legal representation, or are fearful of respondents, it may be especially difficult for them to express their own wishes regarding their application for variation/revocation, particularly in the presence of respondents or their family or friends. In these circumstances, the magistrate should consider exercising his or her powers to hear the application in a closed courtroom, or allow the applicant to give evidence by closed circuit television (CCTV). Recommendations on this issue are made in Chapter 11.



RECOMMENDATIONS

123. When determining an application for variation or revocation of an intervention order, the court should take into account the following factors:

1274 Submission 74 (Women's Legal Service Victoria) (emphasis in original).



RECOMMENDATIONS

- the applicant's reasons for seeking the variation or revocation;
- the safety of the protected person;
- the wishes of the protected person;
- whether or not the applicant is legally represented.

124. On an application for revocation or variation of an order, the Magistrates' Court Protocols should draw the attention of magistrates to the need to consider whether the courtroom should be closed, or to facilitate the applicant's giving of evidence by CCTV, particularly if the applicant is not legally represented.

EXTENSIONS, VARIATIONS, REVOCATIONS AND GUARDIANS' AUTHORITY

10.23 Guardians of protected people may obtain an intervention order on their behalf. Sometimes, the protected person may then apply to vary or revoke this order.

10.24 The OPA is concerned about protected people being coerced into revoking or varying an intervention order obtained by their guardian. It provided an example of a recent case where it had obtained an intervention order on behalf of a person for whom it acted as guardian. This person maintained a relationship with the abusive partner. Later, the abusive partner assisted the protected person to apply to the Magistrates' Court for the order to be revoked. As the guardian of the protected person, the OPA received notice of the application for revocation and attended court. Due to an incident of abuse the previous day, the protected person withdrew the application, so the issues were not raised before the court. However, the OPA argued that only guardians should be able to apply for any change to an order if they obtained it. OPA submitted that this should be clarified in the Act.

10.25 In our Consultation Paper, we asked the question:

If the guardian of a person in need of protection obtains an intervention order, should the Crimes (Family Violence) Act stipulate that only the guardian has the authority to bring any application for variation, revocation or extension of the order?

We received a very mixed response to this, with strong opinions in both directions.

10.26 Some submissions considered that only the guardian should be able to apply for variation, revocation or extension of an order, particularly if the reason the

guardian was appointed in the first place was because of diminished capacity of the protected person. For example:

This issue may be particularly relevant to older people, particularly dementia sufferers. Where a guardian has been appointed because a person lacks capacity, DVC would support the Court to recognise the guardian as the only person capable of altering an order he/she has sought.¹²⁷⁵

Where a person is deemed to require a guardian and that guardian has obtained an IO on their behalf, only the guardian should have the authority to bring an application for variation.¹²⁷⁶

We support any person with the leave of the court having this ability.¹²⁷⁷

If a guardian (appointed under the Guardian and Administration Act) has successfully obtained an IO on behalf of a person [for] whom they are acting as guardian, then the order should stipulate that only the guardian has the authority to bring any application for variation, revocation or extension of that order.¹²⁷⁸

The protected person should at least be consulted where at all possible, however the guardian has the ultimate responsibility for the welfare of the protected person. That however should not exclude other professionals from being able to seek variations on what has been observed by them but it would be appropriate for it to be done in conjunction with the guardian (unless the guardian was part of the reason for the variation).¹²⁷⁹

10.27 This approach again raises the issue of how the legal system should balance the need to protect victims of violence against the need to empower them and respect their choices. Some submissions were concerned that preventing protected people from applying for a variation or revocation of an order obtained by their guardian would deprive them of any control over their own lives. The Villamanta Legal Service, a free statewide legal service that works on disability related legal issues, was strongly opposed to only the guardian having this authority:

Villamanta strongly believes that the *individual* [their emphasis] should also have the right to bring any application for variation, revocation or extension of the order. Stipulating that ‘only’ the guardian should have such authority would eliminate the individual’s right to

1275 Submission 78 (Department for Victorian Communities).

1276 Submission 46 (Royal Children’s Hospital).

1277 Submission 72 (Victoria Police).

1278 Submission 49 (Domestic Violence and Incest Resource Centre).

1279 Submission 27 (Robinson House BBWR).

seek protection/change of an order. Although we acknowledge the concerns expressed by the OPA, we note that the OPA also states that, as guardian, OPA would be informed of the relevant court proceedings and could thus present to the court its concerns at any further hearing. Villamanta also raises the concern that, if such a stipulation were to be made, this would eliminate the individual's right to obtain an order against his/her guardian, if this were ever necessary.

This view was also strongly supported by others, for instance:

The Federation strongly supports the position of Villamanta Legal Service in answer to this question, namely that the individual should also have the right to bring any application for variation, revocation or extension of the order. This right should not be restricted to the guardian only.¹²⁸⁰

No. A person under guardianship is able to make an application on their own behalf for an intervention order (provided the Magistrate's Court takes the view that they are competent) so they should not be excluded from seeking a variation, revocation or extension of an order obtained by their guardian. Other protected people are allowed to seek variations of orders obtained by others, eg the police, so there is no reason why people under guardianship should not have this right. It would be of particular concern to us that a person under guardianship should be excluded from seeking a variation, revocation or extension of an order obtained by a guardian, given our experience in one case where a client only discovered upon being advised of her 'guardian's' application for an intervention order on her behalf, that she was actually under a guardianship order. She had not been given notice of the Victorian Civil and Administrative Tribunal hearing at which she was placed under guardianship.¹²⁸¹

10.28 The commission's view is that protected people should have the right to vary, revoke or extend their own intervention order, whether or not it was applied for by a guardian. However, the commission also acknowledges that to have a guardian appointed, the person's capacity to make decisions about their own wellbeing must be in some way reduced. Because of this, the commission recommends that guardians must be informed by the court of an application for variation or revocation of an intervention order that has been taken out by a protected person for whom they are the guardian. The court should then hear the guardian's views on this issue.

1280 Submission 64 (Federation of Community Legal Centres (Vic)).

1281 Submission 74 (Women's Legal Service Victoria).

! RECOMMENDATION

125. If a protected person is subject to a Guardianship Order under the *Guardianship and Administration Act 1986* and applies to the court for a variation, revocation or extension of an intervention order obtained by their guardian, the guardian must be served with the application and has a right to be heard on the application.

10.29 The commission acknowledges that a potential gap in this system would exist if protected people with an appointed guardian do not disclose to the court that they have a guardian. In this situation, the court would be unable to comply with a requirement to notify the guardian. Because of this, we recommend that the court asks whether the person has a guardian on all applications for extension, variation or revocation.

10.30 As already recommended, the magistrate will also be required to take into account the reasons for the application, the safety of the protected person, and the wishes of the protected person, when hearing an application for a variation, revocation or extension of an order.

! RECOMMENDATION

126. When making an application for a variation, revocation and extension of an intervention order, protected people should disclose whether or not they have a guardian, and if possible, the name and address of the guardian.

10.31 In cases where guardians are the abuser, the protected person will be able to apply for an intervention order against them (see paragraphs 4.59–4.62 and Recommendation 17).

APPLICATIONS BY THE RESPONDENT TO VARY OR REVOKE AN ORDER

10.32 The commission's Consultation Paper referred to the use of variation and revocation applications by respondents to harass the protected person. Respondents can apply on multiple occasions for variations to the order or a revocation of the order, forcing the protected person to attend court repeatedly. This can cause extreme stress

as well as expense for protected people, who may be fearful that they will lose the protection of the order.

10.33 Since the commission's Consultation Paper, the Crimes (Family Violence) Act has been amended to provide that a respondent can only obtain a variation or revocation of an intervention order if 'there has been a change of circumstances in which the order was made'.¹²⁸² However, this provision does nothing to shield protected persons from the constant harassment of unsuccessful applications. Such applications still require them to attend court to defend their order. The new provision does not limit the circumstances where a respondent can *make* an application, only the circumstances in which an application will be *successful*.

OTHER JURISDICTIONS

10.34 In South Australia a respondent can only apply for a variation or revocation in very limited situations. The *Domestic Violence Act 1994* provides:

An application for variation or revocation of a domestic violence restraining order may only be made by the defendant with the leave of the Court and leave is only to be granted if the Court is satisfied there has been a substantial change in the relevant circumstances since the order was made or last varied.¹²⁸³

10.35 The ACT also requires the respondent to apply for leave of the court before making an application to vary or revoke a protection order.¹²⁸⁴ The court is not to grant leave to the respondent unless it is satisfied that 'there may have been a substantial change in the circumstances surrounding the making of the original order'.¹²⁸⁵ The court may only revoke the order if it is satisfied that it is no longer necessary for the protection of the applicant.¹²⁸⁶

10.36 In Western Australia the respondent is also required to apply for the leave of the court to make a variation or cancellation application. To allow the application to continue the court must be satisfied:

- there is evidence to support a claim that a person protected by the order has persistently invited or encouraged the applicant to breach the order; or

1282 *Crimes (Family Violence) Act 1987* s 16(2).

1283 *Domestic Violence Act 1994* (SA) s 12(1a).

1284 *Domestic Violence and Protection Orders Act 2001* (ACT) s 30A.

1285 *Domestic Violence and Protection Orders Act 2001* (ACT) s 30A(4).

1286 *Domestic Violence and Protection Orders Act 2001* (ACT) s 31(3).

- there has been a substantial change in the relevant circumstances since the order was made; or
- regarding an interim order, that the restraints imposed on the applicant are causing serious and unnecessary hardship and that it is appropriate that the application is heard as a matter of urgency.¹²⁸⁷

VIEWS FROM SUBMISSIONS

10.37 Submissions received by the commission did not want the variation and revocation process to be used by respondents to further harass and intimidate the protected person. The Women's Electoral Lobby Victoria told the commission:

Some controlling and manipulative perpetrators of various forms of violence keep returning to courts to get variations made as much to annoy the other party and disrupt their daily life as for the sake of what such changes may achieve. When paid lawyers are involved, it is often intentionally to put the other party out of pocket as well.

10.38 Submissions from a family violence victim, the Werribee Legal Service, Robinson House, the Domestic Violence and Incest Resource Centre, Victoria Police and the Women's Legal Service Victoria supported a system where the respondent must seek leave from the court before making an application to vary or revoke an intervention order. This is the system operating in the ACT, South Australia and Western Australia. Victoria Police pointed out that a system where the respondent must seek leave before making an application to vary or revoke an order may encourage more victims to apply for intervention orders. This is because the provision would act as a way of preventing 'unending harassment through the court system' once an intervention order is made. The Women's Legal Service Victoria noted that it would reduce the number of times a protected person needs to attend court, as the respondent will have to show grounds for an application before the protected person is required to attend court.

10.39 The Federation of Community Legal Centres supported the prohibition of a variation or revocation unless the court is satisfied that the protected person would be safe. This provision applies in the ACT for revocations, where the respondent is the one who has applied for it.

10.40 The Department of Human Services was the only submission to support the suggestion in the commission's Consultation Paper that there be a limited number of times a respondent could apply for a variation or revocation. It suggested two

¹²⁸⁷ *Restraining Orders Act 1997* (WA) s 46(4).

applications may be an appropriate limit. Robinson House noted that such a provision would give respondents a 'right' to a certain number of applications and may prevent a respondent being seen as vexatious where it may be obvious that this is the case.

10.41 Victoria Legal Aid thought that the circumstances where a variation or revocation is available should not be limited to a change in circumstances. It noted that respondents who are unrepresented at the original hearing may not put relevant evidence before the court as they are unaware of what is relevant. Therefore, there should be an opportunity for respondents to apply for variations or revocations with evidence that was not presented at the original hearing, even though it was available.

COMMISSION'S RECOMMENDATION

10.42 The commission shares the concern of Victoria Police that under the current system protected persons are exposed to the possibility of constant harassment through variation and revocation applications from respondents. The commission therefore recommends that a respondent must be required to seek the leave of the court before being able to make an application for variation or revocation. The court must only grant leave where it is satisfied there has been a change of circumstances since the original order was made. The commission sees this requirement as a necessary safeguard against court processes being used as a form of further abuse. It will ensure that a protected person only needs to attend court to defend the application where the respondent has demonstrated to a magistrate that there may be grounds for granting the application.

10.43 The commission does not agree that a respondent should be able to apply for a variation or revocation based on evidence that was not presented at the original hearing. The recent changes to the legislation require there to be a change in circumstances to grant an application for variation or revocation. The commission believes that this requirement imposes a reasonable limit on the respondent's ability to obtain variations and revocations. The commission does, however, share Legal Aid's concern about the lack of legal advice and representation available to both applicants and respondents in intervention order matters, which sometimes leads to relevant evidence not being placed before the court. The commission makes recommendations to ensure better access to legal advice and representation at recommendations 39–41. We also make recommendations to prevent vexatious use of procedures at recommendations 89–94.

**RECOMMENDATION**

127. The respondent must seek leave of the court before proceeding with an application for a variation or revocation to an order. The court must only grant leave where it is satisfied that there has been a change in circumstances since the order was made that may justify a variation or revocation.

WHEN AN ORDER EXPIRES: EXTENSION

10.44 The time at which an intervention order expires can be a particularly important one for family violence victims. For some, it is a time that is feared, particularly if the order has been effective in restraining the violent behaviour of a family member. Some victims are aware that they will simply no longer be safe when the order expires:

I am expecting ... that once the [Order] passes that a [back-lash] may occur. Some inappropriate behaviour has already occurred and the 'limits' tested. I believe that he fears the jail factor, both for drink driving and domestic violence offences ... yet when these expire [that] fear no longer controls choices of how to behave.¹²⁸⁸

10.45 Some perpetrators are more than aware of the expiration date of an order and threaten and attempt to harm the victim as soon as it expires. For example:

He actually rang me from a country town and said 'Your order runs out tonight, I am on my way to get you'.¹²⁸⁹

In January 2005, after the first intervention order had run out, he broke the window in my house and came inside...¹²⁹⁰

As many submissions point out, this is not an uncommon occurrence, as the Magistrates' Court submission stated: 'Magistrates and registrars report that many women's own evidence is that the defendant says, when the IVO expires ... [I'll come and get you] etc'.

For victims in these circumstances, it is important that they are able to extend their intervention order.

1288 Submission 14 (Anonymous).

1289 Interview with Julie, 27 April 2005.

1290 Interview with Aid, 18 May 2005.

10.46 The Act enables a protected person to apply for an intervention order to be extended, provided the order has not yet expired.¹²⁹¹ It does not, however, guide magistrates' decisions about whether an extension should be made when the applicant applies for it.¹²⁹² Consultations, submissions and other research have found two major problems with these arrangements. The first relates to the provisions which deal with extension of an order. The second relates to the situation of applicants after an order has expired.

GROUNDS FOR EXTENDING AN ORDER

10.47 Most applications for extension of an intervention order are granted. In 2002–03, 97.6% of applications were granted—a total of 769 people.¹²⁹³ Unfortunately, this number does not differentiate between stalking and family violence matters—although we can tell from the published data that 154 applications were 'non-family members' and of the 769 people who got an extension, 39.4% were a domestic partner or former domestic partner of the respondent.

10.48 Consultations and submissions pointed out that sometimes extensions are refused because the respondent has not acted in a violent and threatening way for the period the order has been in force. It is therefore important to consider whether a change should be made to the grounds for extension of orders.

LEGITIMACY OF CONTINUING FEAR OF FAMILY VIOLENCE

10.49 In research conducted on the Victorian intervention order system in 1992, a majority of magistrates indicated that they would only grant an extension of an intervention order in certain circumstances, in particular if there was strong evidence to support an extension.¹²⁹⁴ This approach is problematic because the effectiveness of an order in keeping the protected person safe is interpreted as evidence that the order is not needed. As many submissions pointed out, this is simply not in tune with the reality of many family violence situations. Unfortunately, the fact that a perpetrator has not offended for the duration of the order does not guarantee that the victim no longer needs protection.

10.50 Submissions were particularly strong on this point, arguing that an order should be able to be based on a continuing fear of violence or apprehension of control,

1291 *Crimes (Family Violence) Act 1987* s 16(2).

1292 *Crimes (Family Violence) Act 1987* s 16(1).

1293 Department of Justice (2004) above n 1253.

1294 Rosemary Wearing, *Monitoring the Impact of the Crimes (Family Violence) Act 1987* (1992).

without a requirement that more violence has occurred since the original order was made. For example:

There is a need to improve women's access to extending or varying an IO [intervention order] based on continuing fear of violence, rather than having to prove continuing violence. Many women report feeling safe because of the existence of the IO, and fear the violence will start again when the IO lapses.¹²⁹⁵

Extension of an intervention order should not be refused because the perpetrator has not carried out recent abusive behaviour. That shows simply that the intervention order was doing its job. It is unlikely that an aggrieved family member would apply to a court for extension of an order if they did not believe it was required for their protection.¹²⁹⁶

It may be appropriate to specify in the Act that the mere fact that conduct has not happened recently does not mean, in and of itself, that it is unlikely to happen again. There should possibly be an even more specific statement to this effect relating to extension applications to address the issue of applications for extension failing on the basis that the respondent has complied with the order—ie a provision to the effect that the lack of evidence of breaches of an intervention order is not evidence that an extension is not required.¹²⁹⁷

Given the statistics on Post Traumatic Stress Disorder as a long term effect of family violence, the Federation is firmly of the view that continued fear of violence should be included as grounds for an extension of an intervention order, without any further incident needing to have occurred.¹²⁹⁸

Consideration must be given to requests for an extension to allow for those situations where although no incidents have occurred, a real fear exists for the protected person. This can include situations where the defendant is being released from prison or is returning from overseas after being absent for the duration of the intervention order. Current practice is that unless there has been an incident an order cannot be extended. Protected persons have been told to come back and put in a new application when there has been an incident. Family violence training for all court staff and magistrates to extend their understanding of the long term effects of family violence and that continued fear of violence should be grounds for granting an extension.¹²⁹⁹

1295 Submission 49 (Domestic Violence and Incest Resource Centre).

1296 Submission 30 (Violence Against Women Integrated Services).

1297 Submission 74 (Women's Legal Service Victoria).

1298 Submission 64 (Federation of Community Legal Centres (Vic)).

1299 Submission 61 (Broadmeadows Community Legal Service).

10.51 Applicants should not have to prove additional violence has occurred to prove they need another order. Keeping the dynamics of family violence in mind, it is reasonable that victims may still have a legitimate fear for their safety after the original intervention order expires or needs renewing. Such a legitimate fear should be acknowledged in the legislation.

! RECOMMENDATION

128. Extension of an intervention order should not be refused only because no incident of family violence has occurred while the order was in force.

ORDER HAS EXPIRED AND APPLICANT WANTS EXTENSION

10.52 The other main problem with the current system is that extension cannot be granted when the order has already expired. For example:

Petra's IO [intervention order] expired on 10 March 2005. On 8 March 2005 she applied to have the order extended. Registry listed her application for March 17 2005. A full hearing occurred on that date and the Magistrate 'extended' her intervention order for a period of 1 year. The respondent, David, appealed this decision to the County Court, on the basis that the Magistrate could not extend an order that had expired. The County Court accepted David's submissions and Petra had to return to the Magistrates' Court and apply for a new intervention order.¹³⁰⁰

10.53 This is not an uncommon problem for protected people. Some people are not aware their order is due to expire and so do not seek an extension. As one consultation pointed out: 'It is not uncommon for protected persons to misplace their copy of an intervention order and forget the expiry date'.¹³⁰¹

10.54 This should be seen in the context of situations where there has been and may still be severe disruption in the victim's living arrangements.

10.55 If people want to extend an order after it has expired, they must make a new application, repeat the initial process, and show they have grounds for obtaining another order. Applicants have to return to court and make a case again to maintain the protection they have already been offered by the intervention order system. As

1300 Submission 74 (Women's Legal Service Victoria).

1301 Submission 61 (Broadmeadows Community Legal Service).

discussed already, most people find contact with the court and legal system intimidating and traumatic. Returning to court to obtain a new order may be difficult and distressing.

10.56 Furthermore, it may be more difficult to prove the grounds for a new order. A new order may not be granted if no new family violence has occurred for the duration of the old order. It may be reasonable for a victim to obtain a new order, even if acts of family violence did not occur while the old order was in force. Submissions supported this view.¹³⁰²

ENSURING THE RIGHT TO EXTENSION IS NOT MISSED

10.57 Many submissions suggested ways of attempting to ensure that the above situation—where the chance to extend an order is missed—is avoided, so that more protected people are ensured access to the right to extension. These include making it clear on the order that they can extend the order at any time, or making it clear on the order at which point they should extend the order. For example:

Must be able to renew or extend an order in the last two months of its currency, rather than waiting till the very end of its currency.¹³⁰³

An intervention order should have a clear statement on it or be accompanied by clear information that, if an applicant wishes to extend the order, they must apply on or before a certain date (in our view, the expiry date is appropriate).¹³⁰⁴

Intervention orders should be amended to include a statement that applicants should contact the court a month prior to their order's conclusion if they need to have their order extended.¹³⁰⁵

Intervention orders should include a statement which informs the applicants that if the order needs to be extended then the court must be notified two weeks prior to the expiry date.¹³⁰⁶

10.58 It is the commission's view that providing more notice and information about extension mechanisms, both at the time the intervention order is granted and on the order itself, is an important and also relatively easy way of ensuring that applicants have the information they need.

1302 Submission 74 (Women's Legal Service Victoria).

1303 Submission 25 (Barbara Roberts).

1304 Submission 74 (Women's Legal Service Victoria).

1305 Submission 64 (Federation of Community Legal Centres (Vic)).

1306 Submission 61 (Broadmeadows Community Legal Service).

**RECOMMENDATION**

129. Written information given to parties at the time an intervention order is made should include a statement informing them of the mechanism by which an extension can be granted and recommending a time before the order expires (eg one month) when an application should be made for an extension.

10.59 Many submissions also said that another helpful way to ensure applicants extend an order before it expires would be for the courts to send a reminder notice to them. This arose in consultations and was proposed as a possible solution in the Consultation Paper.

10.60 However, such a system would create a number of practical and administrative problems and would provide limited protection to applicants. For instance, applicants would be required to provide an address (which would need to be kept confidential) at the time of the court proceeding. For reminder notification to be effective, this address would need to be the same when the order is near to expiry—that is, 6–24 months later. Protected people may be in sheltered accommodation or may have had to move several times during the term of the order for safety reasons, particularly if they are in severe danger. Therefore, this approach would impose an onerous administrative burden on the Magistrates' Court without being particularly effective in serving its intended purpose. Furthermore, those in most need of protection when the order expires would be potentially least served by this recommendation. This view is supported by the Magistrates' Court:

Whilst it is possible the court could send written advice to the protected person that the order is going to expire at an appropriate (defined) period—prior to the order expiring, this is an impracticable suggestion and unlikely to be successful in meeting its intentions.

10.61 We recommend that magistrates should mention the option of extending the order in the initial court proceedings rather than the court sending reminder notices.

! RECOMMENDATION

130. Magistrates should explain the extension process when they explain the intervention order to the applicant and indicate when an application for extension should be made.

MAKING AN ORDER AFTER AN ORIGINAL ORDER HAS EXPIRED

10.62 Initial information and reminders may lower the numbers of applicants whose order expires before they apply to extend it, but such measures do not solve the problem of protecting people whose order has expired. As mentioned, it may be difficult for an applicant to make out the grounds for a new order, particularly if no acts of family violence have occurred in the intervening period.

10.63 The commission's view is that this problem could be overcome if the legislation contained a presumption that the grounds for granting an extension have been satisfied if an application is made within three months of the original order expiring. This will make it easier for applicants to obtain a new order if they apply within a relatively short time after the original order has expired.

! RECOMMENDATION

131. If an application is made for an intervention order within three months of an earlier order expiring, there should be a presumption that the grounds for seeking an order have been satisfied.

EX-PARTE INTERIM INTERVENTION ORDERS AS A STOP-GAP

10.64 When the above recommendations are in place, we are also aware that a gap in protection of an applicant may exist between the expiration of an intervention order and the application for a new order being heard in court. The commission recommends an applicant should be able to obtain an ex parte interim order to provide temporary protection during this time. As the Magistrates' Court suggests:

Ex parte is a Latin term meaning 'from one side'. Ex parte applications are heard in the absence of the defendant.

Many in the Court consider there should be introduced a presumption of short-term extension or legislative amendment to provide ongoing intervention order protection pending service of an application where the application is made on the day the order expires. This is a very common scenario across the state.

! RECOMMENDATION

132. The grounds for obtaining an ex parte interim order should be expanded to include the making of an ex parte interim order to protect an applicant between the expiration of an existing order and the making of a new order.

CLARITY OF PROCEDURE

10.65 Overall, there needs to be greater clarity of procedure in the extension of intervention orders. One submission pointed out that inconsistency exists for extensions between different magistrates and between different court staff.

There is currently considerable inconsistency between Magistrates' Courts and even between different magistrates and court staff within the same court as to [extension procedures]... We are even aware of registry staff telling applicants that they just need to write a letter to get their intervention order extended. This inconsistency and misinformation puts people in need of protection at risk.¹³⁰⁷

10.66 The Act should include greater detail on how an extension is applied for, when it can be applied for, and what the grounds are for granting an extension.

! RECOMMENDATION

133. The new Family Violence Act should include a section that clearly describes the procedure for extension of intervention orders.

WHEN AN ORDER IS BREACHED: THE COURT'S RESPONSE

10.67 In Chapter 5 we discussed the police response to breaches of intervention orders. In this section we discuss the court response. The response to a breach of an

1307 Submission 74 (Women's Legal Service Victoria).

intervention order is crucial to ensuring the intervention order system is effective in protecting family violence victims. If police or the courts do not respond adequately to breaches of intervention orders, they will be perceived as ineffectual—‘not worth the paper they are written on’—by victims and perpetrators alike. They may also give victims a false sense of safety and security, heightening their danger if a perpetrator behaves violently. This makes it important for breaches of intervention orders to be prosecuted by police and dealt with effectively by the courts.

10.68 This was a view strongly supported in a range of submissions:

Clearly the police and courts must take breaches very seriously. No more ‘wait until he does something’. A breach is a breach is a breach.¹³⁰⁸

Criminal prosecutions, including timely prosecutions of breaches, are a vital component to ensuring an effective IO system in family violence cases.¹³⁰⁹

CURRENT COURT RESPONSE TO BREACHES

10.69 In 2002–03, there were 4617 charges for the offence of breach of an intervention order finalised in the Magistrates’ Court. Of these charges, 78% were found proven. Of those charges proven, the most common outcome was a sentence with no conviction recorded (75%).¹³¹⁰ Between 1998–99 and 2002–03, the proportion of charges proven that attracted a sentence with no conviction increased from 70% to 73%, while the proportion of total charges that attracted a sentence with a conviction recorded decreased from 25% to 23%.¹³¹¹

10.70 Between 1998–99 and 2002–03, most charges found proven that attracted a sentence resulted in a non-custodial sentence (81%) and the most common non-custodial sentence was a fine (30%). Of the charges proven that attracted a custodial sentence (19%) the most common was imprisonment (10%), followed by partially suspended sentence (8%).¹³¹² In the same period, the number of charges proven for breach of an intervention order that resulted in a sentence of imprisonment being handed down increased by 50.4%. This may indicate that courts are now regarding breaches more seriously than they did in the past.

1308 Submission 53 (Women’s Electoral Lobby, Victoria).

1309 Submission 8 (Werribee Legal Service).

1310 This means that the charge of breach has been proven and the defendant has received some sort of penalty/sentence, but not a criminal record regarding the offence: see *Sentencing Act 1991* ss 7, 8.

1311 Department of Justice (2004) above n 1253, ch 7.

1312 Ibid.

10.71 The maximum penalty courts can impose for a first offence of breach of an intervention order is a fine not exceeding 240 penalty unit points or imprisonment for no longer than two years. For a subsequent offence the maximum penalty is imprisonment for no more than five years. The majority of sentences (60%) in the period 1998–99 and 2002–03 were for less than three months. The second most common length of imprisonment was between three and six months (20%). The proportion of charges that attracted a sentence of imprisonment of less than three months decreased from 68% to 56%; the proportion of charges that attracted a sentence of imprisonment of between three and six months increased from 17% to 19%; the proportion of charges that attracted a sentence of imprisonment of between six and nine months increased from 8% to 20%. There were very few sentences of more than nine months, with just six sentences of more than two years imposed during the entire 1998–99 and 2002–03 period.¹³¹³

PROBLEMS WITH THE CURRENT RESPONSE: SENTENCING

10.72 Throughout consultations and in submissions many people expressed the view that insufficient penalties were imposed for breaches of orders.

The magistrate should be ordering penalties that reflect the level of seriousness of breach in the same way that magistrates do on a daily basis with other criminal matters.¹³¹⁴

10.73 It was also suggested that the courts do not take ‘technical breaches’ sufficiently seriously. While a technical breach may appear minor to an outsider, it can cause acute fear and distress to a victim and have severe negative consequences, for example:

I worked with a woman who had an IO [intervention order] against her husband. She told me that her husband had sat outside the front of her house in his car, and eventually drove off. Some may describe this as merely a ‘technical breach’. Yet this devastated and terrified her (and consequently the children) to such an extent that she could no longer stay in her home. She moved to her parent’s house and it was almost 6 months before she had the courage to move back.¹³¹⁵

10.74 Many consultations and submissions also said that penalties for breaches were applied inconsistently.

1313 Ibid.

1314 Submission 30 (Violence Against Women Integrated Services).

1315 Submission 22 (Kim Robinson, social worker).

IMPROVING THE CURRENT RESPONSE

10.75 The commission believes information on the potential seriousness of supposedly ‘technical’ breaches needs to be included in magistrate education and training, including victims’ accounts of how breaches have affected their lives. This view was supported in a number of submissions:

Better education for magistrates about the effects of family violence is a step towards achieving more consistent sentencing across all courts ... [We] support the court being required to consider the breach in light of all the circumstances, including the original behaviour that led to the intervention order being taken out, as a factor in considering the seriousness of the breach.¹³¹⁶

10.76 Other suggestions included:

- Greater use of the power to impose a higher penalty for second or subsequent breach.¹³¹⁷
- Provision for different maximum penalties to apply for different types of breaches depending on their seriousness.¹³¹⁸ Most submissions argued strongly against this suggestion,¹³¹⁹ because it could lead to some breaches being minimised, although they may have had a serious effect on the victim.
- Imposition of a minimum penalty for breaches.
- Addition of other penalties tailored to the offence. Specific reference was made to seizure of weapons other than a firearm, and suspension of the perpetrator’s driver’s licence if an order was breached using a motor vehicle.¹³²⁰
- Establishment of sentencing guidelines for breaches of intervention orders.¹³²¹

1316 Submission 64 (Federation of Community Legal Centres (Vic)).

1317 See, eg submission 27 (Robinson House BBWR); Interview with Julie, 27 April 2005.

1318 In Western Australia, there are increased penalties for breaches that are witnessed by a child.

1319 See, eg submissions 30 (Violence Against Women Integrated Services), 74 (Women’s Legal Service Victoria), 65 (Associate Professor John Willis, La Trobe University), 69 (Victorian Community Council Against Violence), 64 (Federation of Community Legal Centres (Vic)), 41 (Victoria Legal Aid).

1320 Submission 86 (Magistrates’ Court of Victoria).

1321 Submission 74 (Women’s Legal Service Victoria). It should be noted that sentencing guidelines could also come through the Court of Appeal publishing a guideline judgment. Since 1998, the NSW Court of Criminal Appeal has been delivering guideline judgments for some categories of cases. Freiberg considered whether this should be done in Victoria, as was recommended by the 1988 Sentencing Committee chaired by Sir John Starke: Victorian Attorney-General’s Department, *Sentencing: Report of the Victorian Sentencing*

10.77 The commission notes that the *Sentencing Act 1991* already gives magistrates a number of sentencing options, and requires them to consider the following purposes when imposing a sentence for an offence, such as breach of an intervention order:

- To punish the offender to an extent and in a manner which is just, in all of the circumstances.
- To deter the offender or other people from committing offences of the same or a similar character.
- To establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated.
- To manifest the denunciation by the court of the type of conduct in which the offender engaged.
- To protect the community from the offender.¹³²²

10.78 The commission recommends that information about the full range of existing sentencing options is included in magistrates' training, and also considered for inclusion in the magistrates' protocols.

! RECOMMENDATIONS

134. The training of magistrates should include discussion of the full range of sentencing options which may be appropriate for breach of intervention orders.

135. Training should also include information about the potential effects on victims of apparently 'minor' breaches of intervention orders.

136. The Magistrates' Court protocols should include information on the factors to take into account, and the full range of options available, when imposing sentences for breaches of intervention orders.

Committee (1988). Freiberg concluded that despite the strong arguments in favour of this approach, guideline judgments should not be introduced until there was broad judicial and professional support for them: Arie Freiberg, *Pathways to Justice: Sentencing Review 2002* (2002) 214.

1322 *Sentencing Act 1991* ss 5(1)(a)–(f). See also s 6.

10.79 The commission believes that sentencing for breaches of intervention orders should be reviewed by the Sentencing Advisory Council. Such a review could include in its considerations the factors raised in the submissions discussed.

! RECOMMENDATION

137. The Sentencing Advisory Council should review the sentencing of defendants and penalties imposed for breaching intervention orders.

ALTERNATIVE WAYS OF DEALING WITH BREACHES

MEN'S BEHAVIOUR CHANGE PROGRAMS

10.80 The commission's Consultation Paper raised the possibility of requiring attendance at a men's behaviour change program as part of a sentence for a breach of an order, or imposing attendance as a condition of an intervention order. These programs aim to assist violent men to take responsibility for their actions and to develop skills to stop using violence.¹³²³ A study of a Victorian behaviour change program described these programs in the following way:

Men's Behaviour Change Program[s] typically include instruction around power and control issues, gender role attitude restructuring and anger management. That is, the focus is on the abuser assuming responsibility for his abusive behaviours, developing non-oppressive attitudes to women, and learning ways to manage and reduce angry and violent behaviours.¹³²⁴

10.81 Most jurisdictions that provide behaviour change programs do so as part of a criminal response to family violence, either as a penalty for breaching a restraining order or as a penalty for other criminal offences involving family violence.¹³²⁵ New

1323 Partnerships Against Domestic Violence, *Taking Responsibility: A Framework for Developing Best Practice in Programs for Men who Use Violence Toward Family Members* (2001) 12; Partnerships Against Domestic Violence, *A Comparative Assessment of Good Practice in Programs for Men who Use Violence Against Female Partners* (2003) 24–5.

1324 Jeffrey Richards et al, *Understanding Male Domestic Partner Abusers* (2004) 2.

1325 In the ACT the court can refer family violence offenders to a treatment program as part of their sentence: Holder and Mayo (2003) above n 443, 9. In South Australia men who have been charged with family violence related offences can have their bail extended to attend a 12 week 'stopping violence' program: Courts Administration Authority South Australia, *Magistrates' Court Violence Intervention Program* <www.courts.sa.gov.au/courts/magistrates/index.html> at 14 December 2005. In the US and Canada

Zealand is an exception, where a magistrate making a civil protection order must direct the respondent to attend a program.¹³²⁶

10.82 In Victoria, the Crimes (Family Violence) Act was recently amended to include the provision of ‘counselling orders’ for people who have an intervention order made against them in the Magistrates’ Court Family Violence Division.¹³²⁷ Where respondents live in a specified postcode¹³²⁸ and are assessed as eligible for a counselling order (considering their ability and capacity to participate) the magistrate must make a counselling order.¹³²⁹ This is a separate court order and is not made as a condition of the intervention order. This means that if the intervention order is revoked, the counselling order continues in place.¹³³⁰

10.83 The counselling order usually requires attendance at a 20 week men’s behaviour change program.¹³³¹ Failure to attend the assessment interview or the program is an offence and can attract a fine.¹³³² A voluntary counsellor is provided to partners and children of people attending the program.¹³³³ The objective of these orders is to increase the accountability of people who use violence against family members and to encourage them to change their behaviour.¹³³⁴ A comprehensive evaluation of the pilot will be conducted by the Department of Justice.

Views from Submissions

10.84 Submissions expressed mixed views on the benefit of behaviour change programs, either as a condition of an intervention order or as a penalty for breaching an order or another criminal offence. Some submissions were in favour of mandated programs for all perpetrators;¹³³⁵ however, others expressed concern about forcing men

behaviour change programs are sometimes used as a form of diversion from the criminal justice system: Victorian Law Reform Commission (2004) above n 8, paras 3.47–3.49.

1326 *Domestic Violence Act 1995* (NZ) s 32.

1327 *Crimes (Family Violence) Act 1987* pt 2A. The Family Violence Division operates only from Heidelberg and Ballarat Magistrates’ Courts as a pilot program until 30 June 2007.

1328 This limit applies because the specialist courts operate in only two locations.

1329 *Crimes (Family Violence) Act 1987* ss 8B, 8C(3), 8D(1).

1330 Department of Justice [Victoria], Family Violence Court Division Magistrates’ Court of Victoria: *Counselling Orders for Women* (2005)4.

1331 *Ibid* 5.

1332 *Crimes (Family Violence) Act 1987* ss 8C(5), 8D(4).

1333 Department of Justice (2005) above n 1330.

1334 *Crimes (Family Violence) Act 1987* s 8A(b).

1335 Submissions 14 (Anonymous), 62 (Eastern Community Legal Centre).

into programs when they have no intention or capacity to change their behaviour.¹³³⁶ Concerns expressed about mandated behaviour change programs were similar to those discussed in research about these programs and included:

- a lack of information or evidence regarding whether programs are effective at changing behaviour;¹³³⁷
- programs offering ‘false hope’ to partners of those attending,¹³³⁸ making them more willing to stay in the relationship even though no change in behaviour may result from attendance at the program;
- men attending programs with the wrong motivations and therefore not taking the program seriously.¹³³⁹ For example, men may attend to get their partner back and then drop out when this occurs;
- programs becoming a weak substitute for a criminal penalty;¹³⁴⁰
- men’s programs diverting resources from services and programs for women and children who have experienced violence;¹³⁴¹
- if the requirement to attend a program is a condition of an intervention order perpetrators may be less willing to consent to the making of an order.¹³⁴²

1336 Submissions 27 (Robinson House BBWR), 30 (Violence Against Women Integrated Services), 44 (Anonymous), 54 (Andrew Compton), 74 (Women’s Legal Service Victoria).

1337 Submissions 36 (Royal College of Physicians), 41 (Victoria Legal Aid), 46 (Royal Children’s Hospital), 64 (Federation of Community Legal Centres (Vic)), 74 (Women’s Legal Service Victoria); Partnerships Against Domestic Violence, *Taking Responsibility: A Framework for Developing Best Practice in Programs for Men who Use Violence Toward Family Members* (2001) above n 1323, 16. For further information on problems that have existed with evaluations of behaviour change programs and variations in results from such studies, see: Eve Buzawa and Carl Buzawa, *Domestic Violence: The Criminal Justice Response* (2nd ed, 1996) 219–20; Michael Flood, ‘Changing Men: Best Practice in Violence Prevention Work with Men’ (Paper presented at the Home Truths Conference: Stop Sexual Assault and Domestic Violence: A National Challenge, Melbourne, 15–17 September 2004) 2; Lesley Laing, *Responding to Men Who Perpetrate Domestic Violence: Controversies, Interventions and Challenges* (2002) 9.

1338 Submission 54 (Andrew Compton); Partnerships Against Domestic Violence, *Taking Responsibility: A Framework for Developing Best Practice in Programs for Men who Use Violence Toward Family Members* (2001) above n 1323, 23.

1339 Submission 53 (Women’s Electoral Lobby); Buzawa and Buzawa (1996) above n 1337, 214–15; Lynette Feder and Laura Dugan, ‘A Test of the Efficacy of Court-Mandated Counseling for Domestic Violence Offenders: The Broward Experiment’ (2002) 19 (2) *Justice Quarterly* 343, 345.

1340 Submission 27 (Robinson House BBWR); Partnerships Against Domestic Violence (2001) above n 1323, 16.

1341 Submission 74 (Women’s Legal Service Victoria); Partnerships Against Domestic Violence (2001) above n 1323, 89; Laing (2002) above n 1337, 1.

10.85 Submissions expressed some concern that the Family Violence Division pilot program does not provide sufficient resources for contact with and support services for partners of people enrolled in the program.¹³⁴³ Regular and consistent contact with partners that focuses on the woman's safety has been found to be a crucial element of these programs.¹³⁴⁴

10.86 Submissions also raised the following points:

- the need for consistent and rigorous monitoring and evaluation of the work of programs, based on the safety of women and children;¹³⁴⁵
- programs should work in parallel with services that work with women and children;¹³⁴⁶
- programs for Indigenous Australians should be tailored to their needs and be culturally appropriate;¹³⁴⁷
- programs should be culturally appropriate for immigrants;¹³⁴⁸
- there should be more consistency in content across men's programs;¹³⁴⁹
- participation in programs should be adequately monitored¹³⁵⁰ and penalties should apply if attendance or participation is not satisfactory.¹³⁵¹

10.87 Submissions also expressed views about whether a behaviour change program is appropriate as a condition of an order and/or as a penalty for breaching an order. The Victorian Aboriginal Legal Service noted that a behaviour change program may be an appropriate penalty as an alternative to imprisonment for Indigenous Australians.

1342 Submission 30 (Violence Against Women Integrated Services). The Magistrates' Court told the commission that there has been an increase in the use of undertakings in the specialist division of the court where counselling orders are available. However, the court mentioned that the figures do not yet suggest that the increase in the use of undertakings is at the 'expense' of the making of intervention orders.

1343 Submissions 22 (Kim Robinson, social worker), 54 (Andrew Compton).

1344 Partnerships Against Domestic Violence (2001) above n 1323, 24.

1345 Submissions 49 (Domestic Violence and Incest Resource Centre), 69 (Victorian Community Council Against Violence), 74 (Women's Legal Service Victoria), 78 (Department of Victorian Communities), 79 (Department of Human Services).

1346 Submission 40 (Whittlesea Domestic Violence Network).

1347 Submission 57 (Victorian Aboriginal Legal Service).

1348 Submissions 64 (Federation of Community Legal Centres (Vic)), 78 (Department of Victorian Communities); Laing (2002) above n 1337, 20–1.

1349 Submission 63 (Darebin Family Violence Working Group).

1350 Submission 46 (Royal Children's Hospital).

1351 Laing (2002) above n 1337, 13, 17.

Commission's View

10.88 The commission agrees that the provision of men's behaviour change programs raises important ethical issues that need to be considered in depth before these programs are provided as a response to family violence. We welcome the pilot approach and encourage the Department of Justice to undertake a thorough evaluation of the programs, taking into account the concerns and issues expressed by community groups and individuals.

10.89 We also encourage the department in its evaluation to consider the appropriate role for behaviour change programs in the justice system. This could include considering whether programs should be provided as part of the making of an intervention order or whether it would be preferable for programs to be used as a sentencing option for people convicted of an offence. Preliminary observations of the Family Violence Court Division suggest that the provision of behaviour change programs along with civil orders may make it more difficult for women to obtain the protection of an intervention order, as there is an increased use of undertakings in the division. Alternative approaches would be for magistrates to impose a requirement to participate in a behaviour change program as part of a sentence for breaching an order, as a penalty for criminal offence involving acts of family violence or as a form of diversion from the criminal justice system.

DIVERSION PROGRAMS

10.90 Consultations and submissions have also pointed out that not all applicants want a person to be subjected to criminal penalties for breach of an intervention order. Indeed, such an approach might deter some protected people from contacting the police when they are in danger. This may be particularly the case for groups in the community who are over-represented in the criminal justice system, such as Indigenous Australians and people from lower socio-economic groups.

10.91 In Victoria, the Criminal Justice Diversion Program provides first-time offenders with the opportunity to avoid a criminal record by undertaking conditions that will benefit them, victims and the community as a whole.¹³⁵²

10.92 Diversion programs are available at all Magistrates' Courts throughout Victoria. The court seeks the victims' views by way of letter or in person on the day. To be eligible, diversion must be appropriate in the circumstances and the following criteria must be met:

1352 Magistrates' Court of Victoria, *Court Support and Diversion Services—Diversion Program* <www.magistratescourt.vic.gov.au> at 22 December 2005.

- it concerns a summary offence;
- the defendant admits the facts;
- there is sufficient evidence to gain a conviction;
- a diversion is appropriate in the circumstances.

10.93 Some submissions thought that greater use of diversion programs might be an effective way of dealing with some breaches, for example, in dealing with breaches of intervention orders by minors. The advantage of diversion was said to be that it focuses on rehabilitation of offenders by requiring them to attend appropriate counselling or treatment. If the defendant does not comply with the diversion conditions set by the court, the matter can be returned to court and the defendant sentenced in the usual way.

10.94 As the system currently exists, diversion is not a well-established option, and many submissions reflected a lack of knowledge about the issue. For example, one submission stated, ‘our tentative view is that diversion is likely to be appropriate in only very rare circumstances’, and called for more research on the issue.¹³⁵³ Another submission pointed out that it might be helpful in Indigenous communities:

We acknowledge that there may be a place for diversion in regard to breaches of intervention orders and it may be a better option for indigenous communities though we don’t feel qualified to speak authoritatively on this issue.¹³⁵⁴

Another submission said it may be appropriate for juvenile offenders.¹³⁵⁵

10.95 Of the submissions in support of diversion programs there was also recognition that more programs needed to be developed and more information on the success of this approach was necessary if it was to be used more widely.

In order to accord with the proposed principles of a family violence system, diversion may be an appropriate way for the court to deal with breaches of an IO in certain circumstances or communities where it will work to make the defendant accountable for their behaviour ... If diversion is to be made available in family violence matters, significantly more appropriate diversion programs need to be developed and made available to refer offenders to. This is especially the case in rural and regional areas.¹³⁵⁶

1353 Submission 74 (Women’s Legal Service Victoria).

1354 Submission 30 (Violence Against Women Integrated Services).

1355 Submission 41 (Victoria Legal Aid).

1356 Submission 64 (Federation of Community Legal Centres (Vic)).

10.96 However, some submissions were also concerned that diversion would be considered a ‘soft touch’ by offenders, victims and broader society, and did not see it as appropriate for dealing with family violence matters:

Dealing with breaches of intervention orders through diversion may undermine the perceived gravity of the issue and perpetuate the notion that family violence ... breaches ... are not as serious as other matters. The introduction of diversion as a way to deal with a breach of an IO has the potential to undermine the other significant reforms in the area of family violence which are currently underway.¹³⁵⁷

Diversion as it has so far been implemented in courts in Victoria is much looser than this, and [is] not appropriate for family violence cases.¹³⁵⁸

Victoria Police does not support diversion for a charge of ‘breach of an intervention order’...¹³⁵⁹

10.97 We recommend that more information is sought on diversion before it is treated as a major sentencing option.

! RECOMMENDATION

138. When more information on diversion is available, diversion should be considered as a sentencing option for a breach of an order in appropriate circumstances. These may include, but should not be limited to, circumstances where Indigenous offenders live in a community where diversion programs are provided or where a diversion program is available for juvenile offenders.

A QUICKER COURT RESPONSE TO BREACHES

10.98 Finally, many submissions pointed out that the response by courts to breaches is particularly slow and can involve a wait longer than six months. By that time, they said, there have often been several breaches. Clearly, for the intervention order system to work effectively, and particularly for the recommendations about breaches to have their full effect, breaches must be responded to in a timely manner by the courts. Protected people also find such delays particularly difficult when they have to give

1357 Submission 69 (Victorian Community Council Against Violence).

1358 Submission 54 (Andrew Compton).

1359 Submission 72 (Victoria Police).

evidence in court and relive their experiences of violence. This can simply stall the recovery process for victims moving on from family violence.



RECOMMENDATION

139. Every effort should be made by the courts to ensure matters about the breach of an intervention order are heard as quickly as possible.