
Chapter 11

Making it Easier to Give Evidence

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INTRODUCTION

I was the first witness. I said I didn't want to go in there and give evidence—they said I had to because I'd been subpoenaed so I had to. I hadn't seen him at all since the assault. That was the first time I saw him. I had panic attacks and anxiety attacks as soon as I saw him. I was assaulted two week[s] before my baby was born. It was really, really difficult for me. I was crying and shaking in court. It was terrible. Really, really hard.¹³⁶⁰

11.1 The outcome of an application for an intervention order or a criminal prosecution for family violence will depend largely on what evidence is presented to the court. The main source of evidence in both kinds of proceedings is usually the victim's testimony. Giving evidence can be one of the most intimidating and distressing aspects of the legal system for people who have been subject to family violence. Their evidence may include testimony about their experiences of sexual abuse, physical assault or other ways they have been humiliated, verbally abused or controlled. The dynamics of family violence, and the way it is seen by many in the community, mean that people who have been subjected to it often feel ashamed about, and responsible for, the abuse they have endured. In this section we address ways that giving evidence can be made less distressing for the applicant and other witnesses and the types of evidence that are available to the court.

ALTERNATIVE WAYS OF GIVING EVIDENCE

Video conferencing—that was a huge help. I knew they would be asking me very horrible questions and very arrogantly ... I was anxious and it was awful. But the video conferencing made a huge, huge difference ... On a few occasions [the defendant] moved into the screen. I saw that, and was scared. I asked the court officer to get him to move ... I would have still done it [without the video], but it would have been incredibly hard. It was the one thing that made me feel okay about being cross-examined. Also I was allowed to have a support person with me.¹³⁶¹

11.2 Alternative methods for giving evidence have been proposed that seek to reduce the trauma in family violence cases. The Family Violence Division of the Magistrates' Court at Ballarat and Heidelberg has specific provisions that allow evidence to be given by alternative means. These provisions provide that the following alternative arrangements may be used for any witness:

1360 Young (2000) above n 415, 70.

1361 Ibid 72.

- evidence being given from a place other than a courtroom by means of CCTV or other facilities;
- using screens to remove the defendant from the witness's direct line of vision;
- permitting a support person to be beside witnesses while they are giving evidence, for the purpose of providing emotional support;¹³⁶²
- requiring lawyers to be seated while examining or cross-examining witnesses;
- permitting only people specified by the family violence court to be present while the witness is giving evidence; or
- any other alternative arrangements the court considers appropriate.¹³⁶³

11.3 If the witness is aged under 18 years, the family violence court must make a direction that at least one of these methods be used, unless it considers it is not appropriate having regard to the wishes of the witness, the age and maturity of the witness and any other relevant matters.¹³⁶⁴ In the case of an adult witness, the court may make arrangements for one or more of these options on its own initiative, or on the application of a party to the proceeding.¹³⁶⁵ These provisions only apply to the family violence courts in Ballarat and Heidelberg.

11.4 These sorts of provisions are also common in legislation concerning evidence in sexual offence cases.¹³⁶⁶ In Victoria, the *Evidence Act 1958* includes similar provisions to those that apply in the family violence courts;¹³⁶⁷ however, some of these measures are rarely used.¹³⁶⁸ The commission has previously recommended that the provisions about sexual assault evidence be extended to provide for routine use of CCTV for all complainants in sexual assault cases unless:

- the court is satisfied that the complainant is aware of her or his right to give evidence by CCTV and is willing and able to give evidence in the courtroom; or

1362 This is also included in the New South Wales apprehended violence order provisions: *Crimes Act 1958* (NSW) s 562ND.

1363 *Magistrates' Court Act 1989* s 4K.

1364 *Magistrates' Court Act 1989* s 4K(3).

1365 *Magistrates' Court Act 1989* s 4K(2).

1366 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 43; *Evidence Act 1939* (NT) s 21A; *Evidence Act 1977* (Qld) ss 21A, AA–AD, AI–AZC; *Evidence Act 1929* (SA) s 13; *Evidence (Children and Special Witnesses) Act 2001* (Tas) ss 6, 8; *Evidence Act 1906* (WA) ss 106N, 106R; *Evidence (Children) Act 1997* (NSW) s 18.

1367 *Evidence Act 1958* s 37C.

1368 Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003); Victorian Law Reform Commission, *Sexual Offences: Law and Procedure: Final Report* (2004) paras 4.8–4.14.

- it is not practically possible to access CCTV facilities, in which case a screen should be used to remove the defendant from the complainant's direct line of vision.¹³⁶⁹

11.5 The government has adopted this recommendation for child witnesses and witnesses with a cognitive impairment in the Crimes (Sexual Offences) Bill 2005.¹³⁷⁰

VIEWS FROM SUBMISSIONS

11.6 Submissions received by the commission were concerned that alternative arrangements for giving evidence are rarely used in family violence matters.¹³⁷¹ Women's Legal Service Victoria, which has provided a duty lawyer service for intervention order applicants at the Melbourne Magistrates' Court for 15 years, told the commission it was aware of a support person being used only once and CCTV only twice. The Magistrates' Court noted that alternative ways of giving evidence are infrequently requested.

11.7 Submissions were overwhelmingly concerned about appropriate ways of giving evidence being available for people who have experienced family violence.¹³⁷² Submissions expressed particular support for the use of CCTV as an alternative to being in the courtroom.¹³⁷³ Submissions emphasised the need to offer adult witnesses an informed choice about the way they can give evidence.¹³⁷⁴ The availability of these mechanisms would be particularly relevant for applicants who decide not to apply for

1369 Recommendation 64: Victorian Law Reform Commission (2004) above n 1368, 196. The commission recommended the routine use of CCTV only for the complainant. It also recommended that existing provisions, which enable alternative arrangements to be ordered by the court on application or on its own initiative, should be retained for other witnesses in sexual offence cases.

1370 Crimes (Sexual Offences) Bill 2005 inserting a new s 41E in the *Evidence Act 1958*.

1371 Submissions 30 (Violence Against Women Integrated Services), 61 (Broadmeadows Community Legal Service), 64 (Federation of Community Legal Centres (Vic)), 74 (Women's Legal Service Victoria).

1372 Submissions 8 (Werribee Legal Service), 23 (Zonta Club of Frankston), 25 (Barbara Roberts), 27 (Robinson House BBWR), 30 (Violence Against Women Integrated Services), 44 (Anonymous), 49 (Domestic Violence and Incest Resource Centre), 53 (Women's Electoral Lobby, Victoria), 61 (Broadmeadows Community Legal Service), 62 (Eastern Community Legal Centre), 64 (Federation of Community Legal Centres (Vic)), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)), 77 (Anonymous), 79 (Department of Victorian Communities).

1373 Submissions 8 (Werribee Legal Service), 23 (Zonta Club of Frankston), 25 (Barbara Roberts), 30 (Violence Against Women Integrated Services), 44 (Anonymous), 45 (Rochelle Campbell, Women's Health Resource Worker), 46 (Royal Children's Hospital), 57 (Victorian Aboriginal Legal Service), 62 (Eastern Community Legal Centre), 77 (Anonymous).

1374 Submissions 45 (Rochelle Campbell, Women's Health Resource Worker), 61 (Broadmeadows Community Legal Service), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)).

an intervention order when they discover they will need to face the perpetrator in court to make an application.¹³⁷⁵ One woman who had experienced family violence told the commission:

I believe that I would have felt much safer in this situation [using CCTV] than the one which actually occurred. I also believe I may have been more coherent had the respondent not been in visual contact at the time of giving evidence, as the moment your eyes gain contact, he will try to gain control over you once again, a severely frightening prospect to anyone who has experienced family violence.¹³⁷⁶

11.8 Submissions were also concerned that the ways children give evidence should be strictly regulated, including routine use of CCTV for child witnesses.¹³⁷⁷ The only submission opposed to routine use of CCTV for child witnesses was Victoria Legal Aid, which believed that remote witness facilities are not always child friendly and may be intimidating for some children.

11.9 The Domestic Violence and Incest Resource Centre and Women's Legal Service Victoria expressed support for the provisions outlined that apply in the family violence courts. The centre noted that these provisions should apply in all family violence matters, not only those heard in the family violence courts. Community legal centres also highlighted the need for training of magistrates, so they use alternative arrangements whenever they are appropriate.¹³⁷⁸

COMMISSION'S RECOMMENDATIONS

11.10 The commission agrees that providing alternative ways of giving evidence is essential to an accessible intervention order system. The commission believes that the legislative provisions that apply in the family violence courts are an appropriate way to provide alternatives, and should be extended to apply to all family violence hearings. This should include criminal charges arising from family violence as well as

1375 Submissions 30 (Violence Against Women Integrated Services), 61 (Broadmeadows Community Legal Service).

1376 Submission 44 (Anonymous).

1377 Submissions 23 (Zonta Club of Frankston), 25 (Barbara Roberts), 30 (Violence Against Women Integrated Services), 45 (Rochelle Campbell, Women's Health Resource Worker), 46 (Royal Children's Hospital), 61 (Broadmeadows Community Legal Service), 62 (Eastern Community Legal Centre), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)).

1378 Submissions 61 (Broadmeadows Community Legal Service), 64 (Federation of Community Legal Centres (Vic)), 74 (Women's Legal Service Victoria).

intervention order hearings.¹³⁷⁹ These provisions, along with a specialist list for family violence matters with trained magistrates, should ensure that alternative arrangements are used much more frequently in family violence matters than is currently the case.

11.11 The commission also recommends that necessary facilities to enable evidence to be given by alternative means be provided. While some of the alternative measures do not require additional facilities, such as the requirement that lawyers remain seated while questioning the witness, the use of CCTV and screens is hampered by a lack of appropriate facilities in some courts. In 2002, the commission conducted a survey of all Victorian Magistrates' Court locations to determine the availability of CCTV and screens, in connection with the commission's work on sex offences. This survey found that CCTV facilities were provided at 20 out of the 30 responding Magistrates' Courts. This has increased to 21 courts since the survey. Screens were available in only eight of the 31 Magistrates' Court locations that responded to this question.¹³⁸⁰ Therefore, every effort should be made to provide screens and install CCTV facilities in all courts where family violence matters are held.¹³⁸¹

! RECOMMENDATION(S)
140. The provisions relating to alternative ways of giving evidence in the Family Violence Court Division should apply to all family violence matters, not only those heard in the division. This should include criminal cases involving acts of family violence.
141. Every effort should be made to provide screens and install appropriate CCTV facilities in all courts where family violence matters are held.

1379 These provisions currently apply to family violence charges that involve a sexual assault, or an indictable assault where the witness is a person of impaired mental functioning or is aged under 18 years: *Evidence Act 1958 s 37C(2)*.

1380 Victorian Law Reform Commission (2003) above n 1368, Appendix 3.

1381 The commission has previously recommended that efforts be made to ensure that CCTV is installed in all courts where sexual offence matters are heard: Victorian Law Reform Commission (2004) above n 1368, Recommendation 61.

MAGISTRATES' ABILITY TO CLOSE THE COURT

11.12 Most intervention order proceedings in both the Magistrates' Court and the Children's Court are dealt with in open court. Members of the public and people waiting for their matters to be heard may be in the courtroom, as may people who have attended court to support one of the parties to the proceeding. The *Magistrates' Court Act 1989* gives magistrates the power to close the court in any proceeding before them if they believe it is necessary to ensure someone's physical safety or prevent undue distress or embarrassment to a complainant in a sexual offence case only.¹³⁸² The Family Violence Court Division also provides that the pilot courts can allow only specified persons to remain while a person gives evidence. This power is limited to the family violence courts in Ballarat and Heidelberg and does not apply to the whole hearing, but only when a person is giving evidence.¹³⁸³

OTHER JURISDICTIONS

11.13 Other Australian jurisdictions adopt a variety of approaches to whether the court should be closed during family violence proceedings. In Queensland, the court is not to be open to the public,¹³⁸⁴ whereas in Tasmania the application is 'to be heard and determined in open court'.¹³⁸⁵ In the Northern Territory, the court has a discretion to decide whether the court should be open or closed. The legislation states, 'the court may, if it thinks fit, order that all or any persons (except the parties) shall go and remain outside and beyond the hearing of the court'.¹³⁸⁶ In the ACT, hearings must be in public unless the magistrate is satisfied that it is in the public interest or the interests of justice to direct that the hearing occur in private.¹³⁸⁷

1382 *Magistrates' Court Act 1989* ss 126(1)(c),(d).

1383 *Magistrates' Court Act 1989* s 4K(1)(e).

1384 *Domestic and Family Violence Protection Act 1989* (Qld) s 81. The New Zealand legislation also states that only people involved in the proceedings may be present during the hearing: *Domestic Violence Act 1995* (NZ) s 83.

1385 *Family Violence Act 2004* (Tas) s 31.

1386 *Domestic Violence Act 1992* (NT) s 13.

1387 *Domestic Violence and Protection Order Regulations 2002* (ACT) regs 10–12.

VIEWS FROM SUBMISSIONS

11.14 Submissions contained mixed views on whether the court should be routinely closed during intervention order proceedings. Some submissions felt that the court should be routinely closed in these cases.¹³⁸⁸ Benefits were said to include:

- preventing the victim being intimidated by associates of the perpetrator and members of the public;¹³⁸⁹
- making it easier to discuss the intimate details and give full disclosure of relevant information;¹³⁹⁰
- reducing the shame felt by applicants, particularly Indigenous Australians¹³⁹¹ and people from culturally and linguistically diverse communities;¹³⁹²
- providing a measure of respect for the privacy of the victim;¹³⁹³
- encouraging more people to make applications.¹³⁹⁴

11.15 The Broadmeadows Community Legal Service told the commission that it is not uncommon for an applicant to enter the court and find it full of schoolchildren on an excursion. Discussing intimate details of violence within the family is obviously very traumatic in this situation.¹³⁹⁵

11.16 Other submissions felt the routine closure of the court is not appropriate.¹³⁹⁶ Benefits of having hearings in open court include: public acknowledgment of the wrong the perpetrator has committed and therefore some level of vindication for the victim;¹³⁹⁷ the ability of other potential applicants and respondents to watch cases and

1388 Submissions 25 (Barbara Roberts), 27 (Robinson House BBWR), 49 (Domestic Violence and Incest Resource Centre), 61 (Broadmeadows Community Legal Service).

1389 Submission 27 (Robinson House BBWR).

1390 Submissions 44 (Anonymous), 61 (Broadmeadows Community Legal Service).

1391 Submission 57 (Victorian Aboriginal Legal Service).

1392 Submission 64 (Federation of Community Legal Centres (Vic)).

1393 Submissions 64 (Federation of Community Legal Centres (Vic)), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)).

1394 Submission 64 (Federation of Community Legal Centres (Vic)).

1395 Submission 74 (Women's Legal Service Victoria).

1396 Submissions 30 (Violence Against Women Integrated Services), 41 (Victoria Legal Aid), 65 (Associate Professor John Willis, La Trobe University), 74 (Women's Legal Service Victoria), 86 (Magistrates' Court of Victoria).

1397 Submissions 25 (Barbara Roberts), 44 (Anonymous), 64 (Federation of Community Legal Centres (Vic)), 74 (Women's Legal Service Victoria).

see how the system works;¹³⁹⁸ and the ability of citizens to see that justice is being done in an open and transparent system.¹³⁹⁹ Violence Against Women Integrated Services told the commission:

Family violence is currently not dealt with appropriately in our community because it is largely perpetrated in private and is seen by many members of the community as a private matter. Closed court rooms would perpetuate the myth that family violence is a private matter between two parties rather than a social problem of men's violence.

A woman who had experienced family violence told the commission:

People being present in the court room was an issue because I didn't know who they were. However, I don't think a closed court is the answer because it is helpful to know how these matters proceed in court.¹⁴⁰⁰

11.17 Victoria Legal Aid, the Domestic Violence and Incest Resource Centre, the Aboriginal Family Violence Prevention Legal Service and Women's Legal Service Victoria supported magistrates having a power to close courts in cases where they feel it is appropriate, taking into account the views of the applicant. Women's Legal Service Victoria noted that magistrates who are educated about family violence will have the ability to make appropriate judgments about whether the court should be closed. The Magistrates' Court believed courts should be open to the public except as determined by a magistrate. The court noted that a legislative provision may help to ensure the circumstances where the court may be closed were clear to all parties.

COMMISSION'S RECOMMENDATIONS

11.18 The commission agrees that there are benefits in some cases in holding a hearing in closed court. In particular, a closed court may significantly reduce the stress of having unidentified people hearing intimate details about the parties' family circumstances. However, the commission also acknowledges the benefits of open hearings in family violence cases. It is important that our courts do not reinforce the view that family violence is a private matter and that the system is open to public scrutiny. To ensure a fair intervention order system it is important that magistrates have a power to close the court if they consider it appropriate.

1398 Submissions 64 (Federation of Community Legal Centres (Vic)), 77 (Anonymous), 86 (Magistrates' Court of Victoria).

1399 Submissions 41 (Victoria Legal Aid), 64 (Federation of Community Legal Centres (Vic)), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)).

1400 Submission 77 (Anonymous).

11.19 The commission recommends that a power to close the court for the entire hearing, not just while a person is giving evidence, should be added to the list of ‘alternative arrangements for giving evidence’ that are currently included in the Magistrates’ Court Act. This power should apply to all family violence hearings, not only those occurring in the Family Violence Court Division. When considering whether to exercise this power, the magistrate should take into account the views of the parties. The power that the division has to allow only certain people to remain in the court while a person gives evidence should also be available in all locations of the Magistrates’ Court.

! RECOMMENDATION(S)

142. The court should have the power to order that the court be closed for a family violence proceeding, including a criminal prosecution involving acts of family violence. This power should be used at the magistrate’s discretion, taking into account the views of the parties.

PREVENTING CROSS-EXAMINATION BY RESPONDENTS

She [VLA lawyer] said I had two options, either go on the stand and, because he was representing himself, have him ask me questions and go at me, or I could just agree to me having an order against him and him having one against me, [so I agreed to mutual orders]. That was horrible. I just watched him and his wife leave and they were laughing. I didn’t feel on the day like there was any justice, even after seven years. It was probably the lowest point.¹⁴⁰¹

11.20 In proceedings for an intervention order or for breach of an intervention order, the respondent has the right to be represented by a lawyer. However, respondents may also represent themselves. Many applicants and respondents do represent themselves in intervention order proceedings, mainly due to the difficulties in obtaining legal representation (see Chapter 6). If respondents represent themselves, they have the right to cross-examine any witnesses in person. This will nearly always include cross-examining applicants or their friends and family, and respondents may therefore use this opportunity to further harass and intimidate victims.

1401 Interview with Lucy, 4 May 2005.

11.21 The commission has previously addressed this issue for criminal trials for sexual offences. We noted that other jurisdictions have restricted the right of an accused person in sexual offence cases who is not represented by a lawyer to cross-examine certain types of witnesses.¹⁴⁰² We recommended that the accused in criminal proceedings for a sexual offence be prevented from personally cross-examining the complainant or a protected witness.¹⁴⁰³ We also recommended:

- The court must advise the accused that legal representation is required in sexual offence cases if the complainant or a protected witness is to be cross-examined and that the accused may not cross-examine the complainant or protected witness personally.
- The accused must be invited to arrange legal representation and be given an opportunity to do so.
- If the accused refuses representation, the court must direct Victoria Legal Aid to provide legal assistance for the purpose of cross-examination. The court-appointed lawyer has the same obligations as a lawyer engaged by the accused, though if the accused refuses to provide instructions, the lawyer must act in the best interests of the accused.¹⁴⁰⁴

11.22 The government has adopted these recommendations in the Crimes (Sexual Offences) Bill 2005. This Bill provides that the complainant in a sexual offence case, family members of the complainant or accused, and any other witness the court declares protected, cannot be personally cross-examined by the accused. The court must give the accused the opportunity to obtain legal representation for the purpose of

1402 Victorian Law Reform Commission (2004) above n 1368, 234–236. Jurisdictions that impose restrictions include: *Evidence Act 1977* (Qld) ss 21M–S (applies to witnesses under 16, witnesses who are intellectually impaired and alleged victims of sexual offences—the court arranges for a legal aid lawyer for the purposes of cross-examination of the protected witness); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5 (applies to complainants in sexual offences cases—questions are put by the judge or a person appointed by the court); *Youth Justice and Criminal Evidence Act 1999* (Eng) ss 34, 35 (applies to complainants in sexual offence cases or witnesses under 17—the court can also prohibit cross-examination by the accused of other witnesses); *Evidence Act 1908* (NZ) s 23F (applies to a child complainant or a mentally impaired complainant in a sexual offence case).

1403 The report recommends that protected witnesses include people aged under 18 years, a person who is a complainant in other sexual offence charges brought against the accused, and persons with impaired mental functioning; see Victorian Law Reform Commission (2004) above n 1368, 245–248, recommendations 94–102.

1404 Ibid 245, Recommendation 97.

cross-examination. If the accused refuses, the judge can direct Victoria Legal Aid to provide representation for this purpose.¹⁴⁰⁵

OTHER JURISDICTIONS

11.23 Other Australian jurisdictions have also enacted limits on cross-examination by unrepresented respondents in family violence matters. These provisions recognise that the same issues of intimidation, harassment and control arise in family violence cases as in sexual offence cases.

11.24 In the Northern Territory, the *Domestic Violence Act 1992* enables the court to order that unrepresented respondents may not cross-examine a person with whom they are in a domestic relationship. Instead, the court may order that the respondent:

shall put any question to the person who is in a domestic relationship with him or her by stating the question to the Court or another person authorised by the Court, and the Court or the authorised person is to repeat the question accurately to the person.¹⁴⁰⁶

11.25 In Western Australia, unrepresented respondents cannot directly cross-examine a person with whom they are in a family and domestic relationship. Instead, they must put any question to a judicial officer or person approved by the court and that person must repeat the question to the witness.¹⁴⁰⁷ This does not apply if the person to be questioned requests that this procedure not be followed and the court considers it is appropriate not to make the order.¹⁴⁰⁸ The limit on cross-examination by unrepresented people also applies if witnesses are children, whether or not they are in a domestic relationship with the unrepresented person.¹⁴⁰⁹ There is no capacity for children to say they do not want this procedure to be followed and be cross-examined in the normal way.

VIEWS FROM SUBMISSIONS

11.26 Submissions were concerned that personal cross-examination by unrepresented respondents is stressful for applicants and can be used by respondents as a further form

1405 Crimes (Sexual Offences) Bill 2005, inserting s 37CA into the *Evidence Act 1958*.

1406 *Domestic Violence Act 1992* (NT) s 20AD.

1407 *Restraining Orders Act 1997* (WA) s 44C(1).

1408 *Restraining Orders Act 1997* (WA) s 44C(2).

1409 *Restraining Orders Act 1997* (WA) s 53D.

of abuse and intimidation.¹⁴¹⁰ Lengthy personal cross-examination can also be used by the respondent to create large costs for the applicant where the applicant is represented and is paying a lawyer for the hours spent in court.¹⁴¹¹ The majority of submissions believed that unrepresented respondents should be prohibited from personally cross-examining applicants.¹⁴¹²

11.27 One woman who had experienced family violence told the commission:

I have experienced this [personal cross-examination by the respondent] firsthand, and can say that to be cross examined by the respondent and to have to cross-examine the respondent myself, is not a position I would wish on anyone. I was unprepared, overwhelmed and scared of the prospect of having to look at this man, little less have to talk to him and ask/answer questions ... It took me weeks to recover physically (in controlling the physical reactions to flashbacks, panic attacks, nightmares and triggering effects) from this experience, and yet it was given no reference in any way to the court proceedings or my healing after this day ... This does not form part of protecting the applicant in my opinion, once again revealing another contradiction in our current system.¹⁴¹³

11.28 Some submissions thought that respondents should be provided with lawyers if they wish to cross-examine the applicant,¹⁴¹⁴ while others favoured the Western Australian model where the questions are put by the magistrate or another person appointed by the court.¹⁴¹⁵ Villamanta Legal Service noted that a ban on personal cross-examination by the respondent would be a positive step for applicants with

1410 Submissions 20 (Mrs EF Belsten), 27 (Robinson House BBWR), 39 (Royal Women's Hospital), 44 (Anonymous), 51 (Villamanta Legal Service), 77 (Anonymous).

1411 Submissions 27 (Robinson House BBWR), 77 (Anonymous).

1412 Submissions 8 (Werribee Legal Service), 20 (Mrs EF Belsten), 30 (Violence Against Women Integrated Services), 39 (Royal Women's Hospital), 40 (Whittlesea Domestic Violence Network), 46 (Royal Children's Hospital), 49 (Domestic Violence and Incest Resource Centre), 51 (Villamanta Legal Service), 53 (Women's Electoral Lobby, Victoria), 59 (Royal Women's Hospital), 61 (Broadmeadows Community Legal Service), 62 (Eastern Community Legal Centre), 64 (Federation of Community Legal Centres (Vic)), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)), 69 (Victorian Community Council Against Violence), 78 (Department for Victorian Communities), 79 (Department of Human Services).

1413 Submission 44 (Anonymous).

1414 Submissions 25 (Barbara Roberts), 27 (Robinson House BBWR), 61 (Broadmeadows Community Legal Service), 62 (Eastern Community Legal Centre), 64 (Federation of Community Legal Centres (Vic), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)), 86 (Magistrates' Court of Victoria).

1415 Submissions 30 (Violence Against Women Integrated Services), 49 (Domestic Violence and Incest Resource Centre), 78 (Department for Victorian Communities).

particular disabilities who may be easily intimidated by personal questioning. Submissions also wanted a prohibition on personal cross-examination to also apply to any child witnesses,¹⁴¹⁶ family and friends of the applicant¹⁴¹⁷ or any other witnesses in the proceedings.¹⁴¹⁸

11.29 Two submissions were not in favour of an overall prohibition on personal cross-examination by unrepresented respondents.¹⁴¹⁹ Victoria Legal Aid was concerned that some respondents are currently not eligible for legal aid to defend an intervention order application. Therefore, these respondents would be prohibited from cross-examining key witnesses, which would be unjust. Legal Aid suggested that this issue could be dealt with by magistrates exercising their existing powers to prevent unrepresented respondents from harassing witnesses during cross-examination.

11.30 Women's Legal Service Victoria's view was that magistrates should have the capacity to order that an unrepresented respondent not personally cross-examine the applicant. Their tentative view was that magistrates should have discretion to decide when cross-examination by the respondent is appropriate. The service noted that some applicants actually want to face the respondent and the decision to do so should not be taken out of their hands. The service also had concerns about the possible mechanisms necessary to protect the rights of a respondent. They noted that the requirement that the respondent have a lawyer to ask questions might be too costly and therefore unworkable, and that a process of asking questions through an officer of the court could be time consuming and of limited benefit to the applicant.

COMMISSION'S RECOMMENDATIONS

11.31 The commission agrees with the majority of submissions that cross-examination by unrepresented respondents places unnecessary stress and pressure on applicants for intervention orders. This is also the case in family violence criminal cases. This is an example of the legal system not recognising and responding to the dynamics of power and control in family violence situations. Therefore, the

1416 Submissions 30 (Violence Against Women Integrated Legal Service), 62 (Eastern Community Legal Centre), 64 (Federation of Community Legal Centres (Vic)), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)), 79 (Department of Human Services).

1417 Submissions 30 (Violence Against Women Integrated Services), 49 (Domestic Violence and Incest Resource Centre), 61 (Broadmeadows Community Legal Service), 64 (Federation of Community Legal Centres (Vic)).

1418 Submissions 27 (Robinson House BBWR), 44 (Anonymous), 79 (Department of Human Services).

1419 Submissions 41 (Victoria Legal Aid), 65 (Associate Professor John Willis, La Trobe University).

commission supports a restriction on cross-examination of applicants by unrepresented respondents.

11.32 The commission believes that providing legal representation to the unrepresented person for cross-examination is more appropriate than putting questions through the magistrate or other court-appointed person. Although the commission recognises that there are resource implications of this system, especially considering the large number of unrepresented respondents in intervention order matters, we do not think a system where the magistrate puts the questions to the witness is appropriate.¹⁴²⁰ This system may place the magistrate in a difficult position when needing to decide whether a question is admissible or relevant and may create an appearance of bias.¹⁴²¹ This approach has also been rejected by a number of other policy making and law reform bodies.¹⁴²² The commission recommends greater access to legal advice and representation for all applicants and respondents at recommendations 39–41.

11.33 This prohibition should also apply to other witnesses, as covered by the recent sex offences legislation. This includes family members of the victim or perpetrator, including children, and any other witness the court declares to be protected.¹⁴²³ This protection should be extended to criminal family violence proceedings as well as intervention order applications.

11.34 To implement this recommendation in civil cases, the commission recommends using the ‘notice of intention to defend’ system, discussed at paragraphs 8.66–8.80. On the notice, respondents should be required to indicate not only whether they intend to defend the application, but whether they intend to defend the application with a lawyer representing them. The notice should inform respondents that if they do not intend to be represented by a lawyer, they will not be able to question the applicant or other family members. If they wish to question the applicant

1420 This view was outlined in: Victorian Law Reform Commission (2004) above n 1368, 240–241. The Magistrates’ Court has told the commission ‘it would not be opposed to a position similar to that proposed by the commission with respect to sexual offences’: submission 86.

1421 Ibid 241.

1422 Ibid; Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report 55, Part 2 (2000) 291–292; Home Office, *Speaking Up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (1998) para 9.50; Scottish Executive, *Redressing the Balance: Cross-Examination in Rape and Sexual Offence Trials: A Pre-Legislative Consultation Document* (2000) para 52.

1423 Crimes (Sexual Offences) Bill 2005, inserting a new s 37CA(2) into the *Evidence Act 1958*.

or other family members, they must inform the court and the court will arrange a Legal Aid lawyer to attend court on the return date to cross-examine witnesses.

!	RECOMMENDATION(S)
	<p>143. In any family violence proceeding the respondent should not be able to personally cross-examine:</p> <ul style="list-style-type: none">• the applicant or complainant;• any family member of the parties;• any other person the court declares a protected witness.
	<p>144. The prohibition on respondents personally cross-examining certain witnesses should apply to criminal prosecution involving an act or acts of family violence and in intervention order applications.</p>
	<p>145. The magistrate must inform respondents in person that if they want to cross-examine the applicant or complainant or a person mentioned in Recommendation 143, they must arrange to be legally represented for this purpose. If the respondent refuses, or cannot access legal representation, the magistrate must instruct Victoria Legal Aid to provide legal assistance for the purpose of cross-examination.</p>
	<p>146. The notice that is served on respondents should include a statement informing them that if they intend to defend an intervention order in person, they must inform the court. The registrar should then liaise with Victoria Legal Aid to ensure that legal representation is available on the return date, for the purpose of cross-examination.</p>

TYPES OF EVIDENCE IN INTERVENTION ORDER CASES

11.35 Evidence in intervention order matters is usually given orally by the applicant, and sometimes this is the only evidence available to support the application. As we have discussed, giving oral evidence can be traumatic. We have already discussed in Chapter 5 how improved evidence gathering by police at family violence situations and increased applications by police on behalf of victims can help to reduce reliance on

evidence of the victim alone. The commission's Consultation Paper also outlined three other possible ways to reduce the reliance on oral evidence. These were:

- increased use of expert or 'social framework' evidence about the dynamics and characteristics of family violence;
- increased use of written evidence, such as evidence by affidavit;
- admission of out-of-court statements made by the victim to other people (which are currently inadmissible under the hearsay rule).

EXPERT EVIDENCE

11.36 'Social framework' or opinion evidence is admissible in court when the evidence relates to matters which cannot be considered 'common knowledge' and the evidence is given by people who are experts in the area, based on their qualifications, training and expertise.¹⁴²⁴ Some submissions thought this type of evidence may be useful in family violence matters, to explain particular behaviour or reactions of either party according to the known dynamics of family violence.¹⁴²⁵ Others felt that this is a matter for education and training of magistrates and that it would be practically difficult to make expert evidence available in family violence matters, particularly considering the small amount of time currently allocated to intervention order hearings.¹⁴²⁶ The introduction of a definition of family violence, as well as purposes and principles of the Act, could also assist in providing a framework for decisions under the Act.¹⁴²⁷

11.37 The commission agrees that inappropriate decisions by magistrates must be addressed through thorough training and specialisation, as discussed at recommendations 37 and 38 and paragraphs 6.21–6.41. The commission therefore does not recommend increased use of expert evidence in intervention order proceedings. Parties can of course call expert evidence in their case if the magistrate decides it is relevant.

1424 For a detailed discussion of these rules see Ian Freckelton and Hugh Selby (eds), *Expert Evidence: Law, Practice, Procedure and Advocacy* (2nd ed, 2002) ch 4.

1425 Submissions 20 (Mrs EF Belston), 27 (Robinson House BBWR), 33 (Women's Domestic Violence Crisis Service), 40 (Whittlesea Domestic Violence Network), 44 (Anonymous), 45 (Rochelle Campbell, women's health resource worker), 48 (Coburg Brunswick Community Legal and Financial Counselling Centre), 49 (Domestic Violence and Incest Resource Centre), 57 (Victorian Aboriginal Legal Service).

1426 Submissions 46 (Royal Children's Hospital), 64 (Federation of Community Legal Centres (Vic)), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)), 72 (Victoria Police), 74 (Women's Legal Service Victoria), 79 (Department of Human Services).

1427 Submission 40 (Whittlesea Domestic Violence Network).

WRITTEN EVIDENCE

11.38 The Crimes (Family Violence) Act has been recently amended to provide that the court may admit affidavit evidence in intervention order proceedings. A party to the proceeding may request the leave of the court to require the person who gave evidence by affidavit to attend the hearing to be cross-examined on the evidence given in it.¹⁴²⁸ Some submissions thought that a wider range of written evidence should be available to the court, such as sworn complaints or police statements.¹⁴²⁹ The commission recommends removing the rules of evidence at Recommendation 147. This recommendation will mean that other written forms of evidence such as sworn complaints and police statements could be considered by the court.

OUT-OF-COURT STATEMENTS

11.39 An out-of-court statement refers to a statement made by victims to another person, such as a friend or family member, about the violence they have experienced. The courts' rule against hearsay usually prevents evidence of these statements being admitted when the object of the evidence is to establish that the content of the statement is true.¹⁴³⁰ This can be seen as a major barrier to the admission of relevant evidence in family violence matters, as often there are no direct witnesses to the violence. Evidence from friends, family members or police could assist in most instances. The Act currently provides that the court may inform itself on a matter as it thinks fit, despite any rules of evidence to the contrary, if:

- the person on whose behalf an intervention order is sought is a child; or
- the hearing is an application for an interim order and the applicant is someone other than the person in need of protection, such as a member of Victoria Police.¹⁴³¹

In these limited situations, a magistrate may dispense with the ordinary rules of evidence and allow evidence of out-of-court statements to be given.

OTHER JURISDICTIONS

11.40 Other jurisdictions have a less restrictive approach to the admission of other forms of evidence in family violence matters. In Queensland, the court is not bound

1428 *Crimes (Family Violence) Act 1987* s 21A.

1429 Submissions 25 (Barbara Roberts), 83 (Anonymous).

1430 JD Heydon, *Cross on Evidence* (6th ed, 2000) 846–847.

1431 *Crimes (Family Violence) Act 1987* ss 13A(1), (2).

by the rules of evidence in any proceeding that relates to the making, varying or revocation of an order.¹⁴³² This means that written evidence and out-of-court statements can be considered if the court considers it appropriate. The ACT also provides that the court ‘may inform itself in any way it considers appropriate in a particular proceeding’.¹⁴³³ In New Zealand the court has a broad discretion to admit evidence as it thinks fit, regardless of the rules of evidence, in any protection order proceeding other than criminal proceedings.¹⁴³⁴ The Domestic Violence Legislation Working Group considered various exceptions to the hearsay rule when developing the Model Domestic Violence Laws. The model laws provide that a court ‘may admit and act on hearsay evidence unless the interests of justice require otherwise’.¹⁴³⁵

11.41 Some Australian jurisdictions have adopted model uniform evidence legislation (known as the Uniform Evidence Act).¹⁴³⁶ These jurisdictions provide a number of exceptions to the hearsay rule¹⁴³⁷ and reflect a trend towards relaxing the rule. The commission is currently considering how the Uniform Evidence Act can be implemented in Victoria. This implementation will most likely include the relaxation of the hearsay rule for civil and criminal cases in Victoria.

VIEWS FROM SUBMISSIONS

11.42 On the issue of affidavit evidence, submissions were generally supportive of the recent changes to allow its use in intervention order proceedings.¹⁴³⁸ They supported a change to allow hearsay evidence in civil intervention order proceedings¹⁴³⁹ and

1432 *Domestic and Family Violence Protection Act 1989* (Qld) s 84(2).

1433 *Protection Orders Regulations 2002* (ACT) reg 21.

1434 *Domestic Violence Act 1995* (NZ) s 84.

1435 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws*, Report (1999) 134–137.

1436 *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas). *Evidence Act 1995* (Cth) ss 4(1), 8(4)(a) apply the Commonwealth Act provisions in proceedings in ACT courts except to the extent that they are excluded by regulation.

1437 *Evidence Act 1995* (NSW) ss 60, 65, 66; *Evidence Act 2001* (Tas) ss 60, 65, 66; *Evidence Act 1995* (Cth) ss 60, 65, 66. The Commonwealth Act also applies to proceedings in the ACT.

1438 Submissions 27 (Robinson House BBWR), 44 (Anonymous), 45 (Rochelle Campbell, women’s health resource worker), 49 (Domestic Violence and Incest Resource Centre), 51 (Villamanta Legal Service), 74 (Women’s Legal Service Victoria), 78 (Department for Victorian Communities). Victoria Legal Aid (submission 41) thought that parties should be able to cross-examine witnesses without the leave of the court being required (as is currently provided in the Act). John Willis (submission 65) thought that all applicants should be required to attend court and give oral evidence.

1439 Submissions 27 (Robinson House BBWR), 30 (Violence Against Women Integrated Services), 33 (Women’s Domestic Violence Crisis Service), 40 (Whittlesea Domestic Violence Network), 49 (Domestic

pointed out that it may be particularly relevant to intervention order applications because there are unlikely to be other direct witnesses to the violence.¹⁴⁴⁰ Evidence from family or friends who may have witnessed injuries or provided shelter after a violent incident; police officers who have attended previous incidents; professionals such as counsellors, health or support workers who have had contact with the victim; and neighbours who have called the police were all seen as relevant and appropriate sources of evidence for the court.¹⁴⁴¹ These people may give evidence of incidents they had directly witnessed, but are not able to give evidence of what the victim told them had happened, to prove the truth of what the victim claims.

11.43 The Women's Legal Service Victoria thought that the court should be able to 'inform itself in any way it thinks appropriate' in all intervention order proceedings. The Department of Victorian Communities and the Department of Human Services thought that the court should be able to admit hearsay evidence 'unless the interests of justice require otherwise'. The Magistrates' Court supported a discretion for magistrates to relax the rules of evidence for intervention order matters with respect to the 'justice of the case'. The Magistrates' Court told the commission:

Commonly, one or both parties in a contested matter are unrepresented. It is frequently confusing, time consuming and quite artificial to explain to unrepresented litigants the exclusionary rules of evidence, particularly given the purpose and intent of the legislation.

11.44 Some submissions, however, were opposed to the use of hearsay evidence in intervention order proceedings.¹⁴⁴² Victoria Legal Aid stated that hearsay evidence is unreliable as the truthfulness and accuracy of the third party cannot be tested by cross-examination:

Courts should be loath to admit hearsay evidence in intervention order cases (particularly breach proceedings) unless it falls within one of the exceptions that are currently recognised.

Violence and Incest Resource Centre), 74 (Women's Legal Service Victoria), 78 (Department for Victorian Communities), 79 (Department of Human Services), 86 (Magistrates' Court of Victoria).

1440 Submissions 27 (Robinson House BBWR), 49 (Domestic Violence and Incest Resource Centre), 78 (Department for Victorian Communities).

1441 Submissions 27 (Robinson House BBWR), 40 (Whittlesea Domestic Violence Network), 45 (Rochelle Campbell, women's health resource worker), 49 (Domestic Violence and Incest Resource Centre), 78 (Department for Victorian Communities).

1442 Submissions 38 (Emergency Accommodation Support Enterprise, EASE), 41 (Victoria Legal Aid), 65 (Associate Professor John Willis, La Trobe University), 83 (Anonymous).

Submissions were generally not in favour of allowing a wide range of hearsay evidence in criminal proceedings, including those for breach of an intervention order.¹⁴⁴³ However, the Women's Legal Service Victoria noted that in criminal matters Victoria should consider the relevant provisions of the Uniform Evidence Act for criminal family violence matters. As noted, the commission is currently conducting a review of how the Uniform Evidence Act can be implemented in Victoria.

COMMISSION'S RECOMMENDATIONS

11.45 The commission wants all relevant information to be presented to the court when it is considering whether to make, vary or revoke a family violence intervention order. The current Act is more restrictive about the admission of evidence than most other Australian jurisdictions.

11.46 The commission acknowledges that the implementation of the Uniform Evidence Act in Victoria will increase the types of evidence available in intervention order hearings. However, the commission is concerned that using the exceptions to the hearsay rule contained in the new evidence rules will be too complicated for unrepresented parties. As many applicants and respondents are not legally represented, it will be difficult for them to argue over whether particular information is admissible. As intervention order matters are heard by a magistrate rather than a jury, the commission believes it is appropriate for the court to have a wide power to hear and consider evidence from any relevant source.

11.47 Therefore, the commission recommends that the new family violence legislation provide that 'the court may inform itself in any way it thinks appropriate, despite any rules of evidence to the contrary' in civil intervention order proceedings. This provision is similar to those in Queensland, the ACT and New Zealand family violence legislation. Similar provisions also apply in various Victorian courts and tribunals for specific issues.¹⁴⁴⁴ This provision will allow the court to consider the admission of hearsay evidence, as well as written evidence such as police reports or sworn statements.

1443 Submissions 27 (Robinson House BBWR), 41 (Victoria Legal Aid), 74 (Women's Legal Service Victoria), 86 (Magistrates' Court of Victoria).

1444 See, eg: *Accident Compensation Act 1985* s 44(1) ('In proceedings under this Act or the *Workers Compensation Act 1958*, the County Court is not bound by the rules or practice as to evidence, but may inform itself in any manner it thinks fit ...'); *Food Act 1984* s 42(2)(b) (the court is directed to hear 'any relevant evidence'); *Victims of Crime Assistance Act 1996* s 38(1) (the tribunal is not bound by rules or practice as to evidence 'but may inform itself in relation to the matter in any matter it thinks fit').

! RECOMMENDATION(S)

147. The new Family Violence Act should provide that a court hearing an intervention order application, variation or revocation proceeding may inform itself 'in any way it thinks appropriate, despite any rules of evidence to the contrary'.

WITNESS COMPELLABILITY IN INTERVENTION ORDER APPLICATIONS

11.48 In Chapter 5 we explained that the commission has reviewed the Uniform Evidence Act with a view to implementing it in Victoria. The review considers the rules which determine whether people should be required to give evidence in criminal proceedings against their spouse or other family member.¹⁴⁴⁵ For this reason we have not discussed compellability in criminal prosecutions for offences relating to family violence in this report. However, it is necessary to consider whether changes should be made to the rules governing the compellability of spouses and domestic partners in intervention order proceedings.

11.49 In this report we argue that the justice system should respect the choices of adult victims of family violence and recommend that police should not obtain a final intervention order against the wishes of the victim.¹⁴⁴⁶ We also support the provisions of the Victoria Police Code of Practice, which guides police to use a case conferencing system for reluctant victims. We recommend that assistance be given to witnesses to support them to give evidence against a perpetrator.¹⁴⁴⁷ In these circumstances it is unlikely that the court would have to address the issue of compellability of an adult victim in an application for an intervention order. However, a situation could arise where the compellability of an adult witness needs to be considered by a court considering whether to make an intervention order to protect a child.

1445 Under the *Evidence Act 1995* (NSW) s 12 (the Uniform Evidence Act) everyone is compellable to give evidence, but under s 18 the spouse, de facto spouse, parent or child of a defendant can object to giving evidence in criminal proceedings and the court then exercises a discretion about whether to compel the family member to give evidence. In doing so the court considers whether the nature and extent of the harm which is likely to be caused by the witness giving evidence is outweighed by the desirability of having the evidence given. Under s 19 the right to object does not apply in some proceedings. The proposed reforms are discussed in Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law*, Report (2005) chs 4, 2.

1446 Recommendation 29.

1447 We discuss these aspects of the Police Code of Practice in Chapter 5.

11.50 Where police apply for an intervention order on behalf of a victim and/or victim's child, a problem may arise if the adult victim refuses to give evidence which may be necessary to secure an intervention order on behalf of the child. Police would be expected to notify the Department of Human Services of their protective concerns and this may result in action being taken in the Children's Court for the protection of the child. However, if the most appropriate action is to obtain an intervention order for the child but an adult family member (eg the mother of the child) refuses to give evidence, then the issue of compellability could arise.

11.51 In Victoria all witnesses are compellable in civil proceedings, and the *Evidence Act 1958* clarifies that spouses are compellable.¹⁴⁴⁸ A similar principle will apply if the Uniform Evidence Act is enacted in Victoria as the Act provides that a person who is competent to give evidence is compellable to give evidence.¹⁴⁴⁹

11.52 Whether under section 24 of the Evidence Act or the provisions of the Uniform Evidence Act, all witnesses will be compellable in intervention order proceedings. In practice, however, this issue is only likely to arise in exceptional circumstances.

11.53 The issue of spouse or witness compellability in civil applications for intervention orders was not raised with us and we have not heard of instances where it has caused problems in obtaining an intervention order. It does not appear that at this stage there is a need for reform of the Crimes (Family Violence) Act to include specific provisions regarding this issue.

1448 *Evidence Act 1958* s 24.

1449 Uniform Evidence Act s 12.

